Manaris v Shaw
2021 NY Slip Op 33169(U)
November 5, 2021
Supreme Court, Bronx County
Docket Number: Index No. 800600/2021e
Judge: Veronica G. Hummel
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IAS PART 31

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ANASTASIOS MANARIS and ELENA MANARIS,

Plaintiffs,

-against -

PATRICK JC SHAW, CHRISTOPHER LAWRENCE KENNEDY, ATHONY R. LISSKE, GEICO CORPORATION[1], and ROMAN GELEVAN, Defendants.

Index No. 800600/2021e
DECISION/ORDER
Motion Seq. Nos. 2 and 3

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VERONICA G. HUMMEL, A.S.C.J.

In accordance with CPLR 2219 (a), the decision herein is made upon consideration of all papers filed by the parties in NYSCEF regarding: the motion [Mot. Seq.2] of defendants PATRICK JC SHAW and CHRISTOPHER LAWRENCE KENNEDY (the Kennedy defendants), made pursuant CPLR 3212, for an order granting the Kennedy defendants summary judgment dismissing the complaint and all cross-claims against them; and the motion [Mot. Seq. 3] by defendant ROMAN GELEVAN (defendant Gelevan), made pursuant to CPLR 3126(3), seeking an order dismissing the complaint based on plaintiffs ANASTASIOS MANARIS' and ELENA MANARIS' failure to comply with the demand for a verified bill of particulars, omnibus discovery demands, demand for collateral sources, demand for Medicare and Medicaid lien information, and demand for taxes and W-2 Statements or, in the alternative, precluding plaintiffs from offering any evidence in support of their claims of proximate cause and damages at the time of trial based on the failure to provide said discovery or, in the alternative, issuing a self-executing conditional order pursuant to CPLR 3042 and CPLR 3124 compelling plaintiffs to comply with said discovery demands.

[1] It appears that defendant GEICO has not appeared in the action to date.

This is a personal injury action arising out of a multi-car, rear-end, chain reaction accident that occurred on February 8, 2018, northbound on I-95 (the Accident). Movant Kennedy was driving defendant Shaw's car (the Kennedy Vehicle) in the left hand lane of the highway. The Kennedy Vehicle was the first vehicle in the chain. Plaintiffs' Vehicle was behind the Kennedy Vehicle in the second position. Co-defendant Lisske's car (the Lisske Vehicle) was in the third position behind the Plaintiffs' Vehicle, and defendant Genevan was driving the vehicle behind the Lisske Vehicle and was the last car involved in the collision (the Gelevan Vehicle).

Motion 2-Summary Judgment

As the lead car in the chain-reaction accident, the Kennedy defendants move for summary judgment dismissing the complaint and all cross-claim against them. In support of the motion, movants submit an affidavit by defendant Kennedy, an attorney's affirmation, and a certified copy of the police report.

Defendant Kennedy avers that, prior to the Accident, his vehicle was travelling northbound in the left lane of the highway for several minutes. As he approached the Baychester Avenue Exit, an unidentified vehicle (the Unidentified Vehicle) suddenly came from the right lane over into the left lane to use the Baychester Avenue Exit. Defendant Kennedy braked to avoid hitting the Unidentified Vehicle, and as the Kennedy Vehicle slowed, it did not hit the Unidentified Vehicle. Plaintiffs' Vehicle then hit the Kennedy Vehicle in the rear, and this was the only contact to the Kennedy Vehicle. There was nothing he could do to avoid being struck by the Plaintiffs' Vehicle.

Only defendant Gelevan opposes the motion. In opposition, defendant Gelevan submits an attorney's affirmation arguing that the movants' evidence is not competent and the motion is premature as depositions have not been completed.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact . . ." (*Winegrad v New York Univ. Med Ctr.*, 64 NY2d 851 [1985]). The moving party is entitled to summary judgment only if it tenders evidence

sufficient to eliminate all material issues of fact from the case (*Winegrad v New York University Medical Center*, *supra; Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]) If a party makes a *prima facie* showing of its entitlement to summary judgment, the opposing party bears the burden of establishing the existence of a triable issue of fact (*Zuckerman v City of New York, supra*). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Casper v Cushman & Wakefield*, 74 AD3d 669 [1st Dept 2010]; *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227 [1st Dept (2006)]).

Since there can be more than one proximate cause of an accident, a defendant moving for summary judgment is required to make a prima facie showing that he or she is free from fault *(see Harrigan v Sow*, 165 AD3d 463 [1st Dept 2018]; *Hilago v Vasquez*, 187 AD3d 683 [1st Dept 2020]*).* In order for a defendant driver to establish entitlement to summary judgment on the issue of liability in a motor vehicle collision case, therefore, the driver must demonstrate, *prima facie*, that he or she kept the proper lookout, or that his or her alleged negligence, if any, did not contribute to the accident *(see Harrigan v Sow, supra; Hilago v Vasquez, supra*).

In terms of presumptions of liability, it is well settled that a rear-end collision with a stationary vehicle creates a *prima facie* case of negligence requiring judgment in favor of the stationary vehicle unless the non-movant party proffers a non-neglect explanation for the failure to maintain a safe distance (*Matos v Sanchez*, 147 AD3d 585 [1st Dept 2017]; *see Perdomo v Llanos*, 158 AD3d 580 [1st Dept 2018]). A driver is expected to drive at a sufficiently safe speed and to maintain enough distance between himself and cars ahead of him as to avoid collisions with stopped vehicles taking into account weather and road conditions (*La Masa v Bachman*, 56 AD3d 340 [1st Dept 2008]; *see Smyth v Murphy*, 177 AD3d 492 [1st Dept 2019]). The happening of a rear-end collision with a vehicle itself a *prima facie* case of negligence of the rearmost driver (*Chang v Rodriguez*, 57 AD3d 295 [1st Dept 2008];*Vasquez v Chimborazo,* 155 AD3d 432 [1st Dept 2017]; *see Smyth v Murphy, supra*; *Corrigan v Porter Cab Corp*., 101 AD3d 471 [1st Dept 2012]; *LaMasa v Bachman*, 56 AD3d 340 [1st Dept 2008]). Furthermore, “[i]n a chain reaction collision,

responsibility presumptively rests with the rearmost driver" (*Mustafaj v Driscoll*, 5 AD3d 138 [1st Dept 2004]).

On this motion, the Kennedy defendants establish *prima facie* entitlement to judgment as a matter of law by submitting evidence that defendant Kennedy was driving safely when his vehicle, the first in the chain, was struck in the rear by the Plaintiffs' Vehicle (*Vasquez v Chimborazo, supra; Smyth v Murphy*, *supra*; *Corrigan v Porter Cab Corp*., *supra; LaMasa v Bachman*, *supra*; *see Martinez v Kuhl*, 165 AD3d 774 [2d Dept 2018]). [2] Furthermore, the Kennedy defendants prove that their actions were not negligent, particularly as the distance between the Kennedy Vehicle and the Unidentified Vehicle was such that the Kennedy Vehicle stopped safely, without colliding with the Unidentified Vehicle. The moving papers therefore demonstrate that the movant defendants acted without negligence and their actions did not contribute to causing the Accident. Only defendant Gelevan opposes the motion.

In opposition, defendant Gelevan fails to generate an issue of fact warranting the denial of the motion. Defendant Gelevan declines to submit a personal affidavit and the affirmation in opposition submitted by his attorney is not based on personal knowledge, and therefore fails to generate an issue of fact as to the cause of the accident as the affirmation has no probative value (*Thompson v Pizzaro*, 155 AD3d 423 [1st Dept 2017]).

To the extent that defendant Gelevan argues that the Kennedy Affidavit is not competent evidence as it lacks a certificate of conformity, the absence of a certificate of conformity is a mere irregularity, not a fatal defect, which can be disregarded in the absence of a showing of actual prejudice (see CPLR 2001; *Christiana Trust v McCobb*, 187 AD3d 981 [2d Dept 2020]). Thus, even if the certificate of conformity is inadequate or missing, no substantial right of defendant Gelevan is prejudiced here, and the affidavit may be considered (*see Christiana Trust v McCobb*, *supra*).

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[2] *The Kennedy defendants make a prima facie showing without the consideration of the certified police report.*

Furthermore, contrary to the assertion by the attorney for defendant Gelevan, the motion is not premature since defendant Gelevan could have submitted affidavit attesting to his version of the events surrounding the Accident, and having failed to do so, does not raise an issue of fact which would preclude summary judgment in movant's favor (*see, Avant v Cepin Livery Corp.*, 74 AD3d 533 [1st Dept 2010]). Moreover, the mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny such a motion (*see, Flores v City of New* York, 66 AD3d 599 [1st Dept 2009] ;CPLR 3212[f]; *Rodriguez v Beal*, 191 AD3d 617 [1st Dept 2021]; *Sapienza v Harrison*, 191 AD3d 1028 [2d Dept 2021]). Furthermore, any contention by the opposing attorney that the movant defendants negligently failed to evade the collision is purely speculative (*see Harrigan v Sow, supra*; *Jenkins v Alexander*, 9 AD3d 286, 288 [1st Dept 2018]), and no other evidence was proffered to support the claim that the movant defendants failed to take reasonable steps to avoid the collision (*Hidalgo v Vasquez, supra*). As such, there are no facts showing that the movant defendants' failure to avoid being hit in the rear was negligence (*Harrigan v Sow, supra*; *Gonzalez v Bishop*, 157 AD3d 460 [1st Dept 2018]). The motion by the Kennedy defendants for summary judgment in their favor is therefore appropriately granted.

Motion 3-Discovery

Defendant Gelevant moves [Mot. Seq. 3], pursuant to CPLR 3126(3), for an order dismissing the complaint, precluding plaintiffs from offering any evidence as to proximate cause and damages at trial or issuing a self-executing conditional order pursuant to CPLR 3042 and CPLR 3124 based on plaintiffs' failure to comply with the demand for a verified bill of particulars, omnibus discovery demands, demand for collateral sources, demand for Medicare and Medicaid lien information, and demand for taxes and W-2 Statements. Plaintiffs elected to not oppose the motion.

In light of the young age of this 2021 action, the motion is granted on default to the extent that the Clerk is directed to promptly issue a Preliminary Conference/ Case Management Order.

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motion [Mot. Seq.2] of defendants PATRICK JC SHAW and CHRISTOPHER LAWRENCE KENNEDY, made pursuant CPLR 3212, for an order granting said defendants summary judgment dismissing the complaint and all cross-claims against them is granted; and it is further

ORDERED that the Clerk shall enter judgment dismissing the plaintiffs' complaint and all cross-claims alleged as against defendants PATRICK JC SHAW and CHRISTOPHER LAWRENCE KENNEDY and severing the remaining action ; and it is further

ORDERED that motion [Mot. Seq. 3] by defendant ROMAN GELEVAN, made pursuant to CPLR 3126(3), seeking an order dismissing the complaint based on plaintiffs' failure to comply with the demand for a verified bill of particulars, omnibus discovery demands, demand for collateral sources, demand for Medicare and Medicaid lien information, and demand for taxes and W-2 Statements or, in the alternative, precluding plaintiffs from offering any evidence in support of their claims of proximate cause and damages at the time of trial based on the failure to provide said discovery or, in the alternative, issuing a self-executing conditional order pursuant to CPLR 3042 and CPLR 3124 compelling plaintiffs to comply with said discovery demands is granted, on default, to the extent that the Clerk shall issue a Preliminary Conference/Case Management Order in this action; and it is further

ORDERED that the Clerk is directed to promptly issue a Preliminary Conference/Case Management Order in this action; and it is further

ORDERED that the caption shall be amended accordingly as follows:

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ANASTASIOS MANARIS and ELENA MANARIS,
Plaintiffs, **Index No. 800600/2021e**

-against -

ATHONY R. LISSKE, GEICO CORPORATION, and
ROMAN GELEVAN, Defendants.
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The attorneys are reminded of the Chief Justice's mandate and the new companion court rules (22 NYCRR 202.20) requiring that all attorneys make numerous good faith efforts (via letter, email, and telephone) to resolve any discovery issue before seeking court intervention. The note of issue may not be filed until a stipulation signed by all parties stating that discovery is completed is uploaded to NYSCEF.

The foregoing constitutes the Decision/Order of the court.

Dated: Bronx, New York
November 5 , 2021

E N T E R,

s/Hon. Veronica G. Hummel/signed 11/05/2021
. VERONICA G. HUMMEL, A.J.S.C.

1. CHECK ONE.....	☐ CASE DISPOSED IN ITS ENTIRETY X CASE STILL ACTIVE
2. MOTION IS.....	x GRANTED (mot seq 2) DENIED x GRANTED IN PART(mot. seq. 3) ☐ OTHER
3. CHECK IF APPROPRIATE.....	☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE
	☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT

ISSUE A PRELIMINARY CONFERENCE/CASE MANAGEMENT ORDER