

**McKay v Pagnozzi**

2021 NY Slip Op 33385(U)

August 24, 2021

Supreme Court, Suffolk County

Docket Number: Index No. 625070/2018

Judge: George Nolan

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Short Form Order

Index No. 625070/2018

SUPREME COURT – STATE OF NEW YORK  
PART 55 – SUFFOLK COUNTY

**P R E S E N T:**

**Hon. George Nolan**  
Justice Supreme Court

-----x  
LISA MCKAY

Plaintiff,

-against-

WILLIAM L. PAGNOZZI, LAURIE J.  
VALENZUELA, PETER PELLICANI and  
CURTIS C. HEWITT,

Defendants.  
-----x

Mot. Seq. No. 002 – MD  
Mot. Seq. No. 003 – MD  
Mot. Seq. No. 004 – MD  
Mot. Seq. No. 005 – MD  
Mot. Seq. No. 006 – MD  
Orig. Return Date: 12/15/2020  
Mot. Submit Date: 05/06/2021

**PLAINTIFF’S ATTORNEY**

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Upon the e-filed documents numbered 32 through 47, 50 through 75, 78 through 107 and upon due deliberation and consideration by the Court of the foregoing papers, it is hereby

**ORDERED** that the following motions and cross-motion are consolidated solely for purposes of this decision and order and, as so consolidated, are determined as set forth hereinafter; and it is further

**ORDERED** that the motion by plaintiff Laurie Valenzuela for summary judgment (motion sequence no. 002) in her favor on the issue of defendants' negligence is denied; and it is further

**ORDERED** that the motion by defendant Laurie Valenzuela for summary judgment (motion sequence no. 003) dismissing plaintiff's complaint and all cross-claims asserted against her is denied; and it is further

**ORDERED** that the motion by defendant Peter Pellicani for summary judgment (motion sequence no. 004) dismissing plaintiff's complaint and all cross-claims asserted against him is denied; and it is further

**ORDERED** that the motion by defendant Curtis Hewitt for summary judgment (motion sequence no. 005) dismissing plaintiff's complaint and all cross-claims asserted against him is denied; and it is further

**ORDERED** that the cross-motion by plaintiff Lisa McKay for summary judgment (motion sequence no. 006) in her favor on the issue of defendants' negligence is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff Lisa McKay as a result of a six car accident, which occurred on June 15, 2018, in the left westbound lane of the Long Island Expressway (I-495), approximately one mile east of exit 58, in Islip, New York.

This action has been joined for discovery and trial with four other actions by prior orders of this Court (NOLAN, J.) dated September 12, 2019, December 7, 2020 and August 16, 2021.

Laurie Valenzuela, as plaintiff in one of the related actions, now moves (motion sequence no. 002) under this index number for summary judgment in her favor on the issue of defendants' negligence. However, as these actions were consolidated only for the purposes of joint discovery and trial, they retain their separate identities, and any request for relief must be made by motion in the appropriate action. "An order for joint trial ... leaves the individual actions intact. The captions of the individual complaints remain the same" (CPLR 602; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C602:2). Accordingly, in light of the prior court orders joining these cases for discovery and trial, the court is constrained to deny this motion without prejudice and with leave to refile in the related case under Index No. 602792/2019, if such a motion has not already been filed.

Laurie Valenzuela ("Valenzuela") also moves as a defendant in the within action (motion sequence no. 003) for an order dismissing plaintiff's complaint and all cross-claims asserted against her. In support of her motion, Valenzuela submits *inter alia* the pleadings, an attorney affirmation, her affidavit sworn to on November 13, 2020, plaintiff's deposition transcript and an uncertified police report.

Defendant Valenzuela avers in her affidavit that she was stopped for approximately 10-20 seconds in the left westbound lane of the Long Island Expressway when her vehicle was struck in the rear by defendant William J. Pagnozzi (“Pagnozzi”) and as a result of the impact to her rear, she was pushed into the rear of the vehicle operated by defendant Peter Pellicani (“Pellicani”). According to Valenzuela the front of the Pellicani vehicle then hit the rear of defendant Curtis Hewitt’s (“Hewitt”) vehicle which in turn hit the rear of plaintiff’s vehicle. Plaintiff was then pushed into a vehicle operated by Michelle Lawrence (no longer a party herein).

In opposition, Pagnozzi submits a sworn affidavit in which he admits to hitting the rear of “an older model suburban operated by an African American man” whom he believed to be defendant Hewitt. Pagnozzi denied making contact with Valenzuela’s vehicle.

Defendant Pellicani also moves (motion sequence no. 004) for an order dismissing plaintiff’s complaint and all cross-claims asserted against him. In support of his motion, Pellicani submits the pleadings, an attorney affirmation, and his sworn affidavit dated December 16, 2020.

In his affidavit, Pellicani avers that he was traveling westbound in the left lane of the Long Island Expressway and he brought his vehicle to a “gradual, complete, stop due to traffic.” While stopped he saw the Valenzuela vehicle slowing down behind him and behind it, the Pagnozzi vehicle approaching “at a great rate of speed and not stopping.” According to Pellicani, the Pagnozzi vehicle hit the rear of the Valenzuela vehicle pushing it into the rear of Pellicani’s vehicle. Notably, Pellicani avers that his vehicle was “struck a second time in the rear” by the Valenzuela vehicle.

Defendant Hewitt also moves (motion sequence no. 005) for an order dismissing plaintiff’s complaint and all cross-claims asserted against him. In support of his motion, Hewitt submits an attorney affirmation, the pleadings, a certified copy of the police report, Pellicani’s sworn affidavit and plaintiff’s deposition transcript.

Hewitt’s attorney argues that taken together the Pellicani affidavit, the plaintiff’s deposition testimony and the alleged admissions in the certified police report demonstrate that Hewitt’s vehicle was stopped when hit in the rear by the Pellicani vehicle.

Plaintiff Lisa McKay (“McKay”) cross-moves for an order granting her summary judgment (motion sequence no. 006) on the issue of defendants’ negligence. In support of her motion, McKay submits the pleadings, an attorney’s affirmation, plaintiff’s unsigned deposition transcript and a certified police report.

According to McKay’s deposition testimony, she was traveling in “stop and go” traffic on the Long Island Expressway when she was hit in the rear and then pushed forward into the rear of a jeep driven by non-party Michelle Lawrence.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (see *Alvarez v Prospect Hosp.*, 68 NY2d 320,

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508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 87 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Once the movant demonstrates a prima facie entitlement to judgment as a matter of law, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557; 427 NYS2d 595 [1980]; *see also* CPLR 3212 [b]). The failure to make a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, *supra*). In deciding the motion, the court must view all evidence in the light most favorable to the nonmoving party (*see Matter of New York City Asbestos Litig.*, 33 NY3d 20, 99 NYS3d 734 [2019]; *Vega v Restani Constr. Corp.*, *supra*).

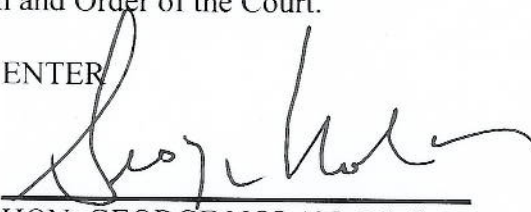
At the outset, the Court notes that the deposition transcript of plaintiff McKay is unsigned. However, it was considered in the determination of this motion as it was submitted by the party deponent and is therefore deemed to be accurate and admissible (*see Pavane v Marte*, 109 AD3d 970, 971 NYS2d 646 [2d Dept 2013]; *Rodriguez v Ryder Truck Inc.*, 91 AD3d935, 937 NYS2d 601 [2d Dept 2012]).

Reviewing all the evidence submitted in connection with the foregoing motions, the court is unable to grant summary judgment as the various affidavits and evidence submitted in opposition create triable issues of fact that cannot be resolved at this juncture. Although at first blush this appears to be a simple chain collision accident initiated by Pagnozzi, the Pagnozzi affidavit, in which he denies hitting the vehicle directly in front of him and instead claims to have struck the Hewitt vehicle, creates questions of fact as to each driver's actions and precludes summary judgment at this time.

The parties are reminded that a compliance conference is schedule to be held before the undersigned on September 30, 2021.

The foregoing constitutes the decision and Order of the Court.

DATE: August 24, 2021  
Riverhead, NY

ENTER  
  
HON. GEORGE NOLAN, J.S.C.

FINAL DISPOSITION

NON-FINAL DISPOSITION