

**Christian v Porcaro**

2013 NY Slip Op 32048(U)

August 29, 2013

Supreme Court, Suffolk County

Docket Number: 11-3280

Judge: Peter H. Mayer

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 17 - SUFFOLK COUNTY

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**PRESENT:**

Hon. PETER H. MAYER  
Justice of the Supreme Court

MOTION DATE 6-18-13  
ADJ. DATE 7-16-13  
Mot. Seq. # 001 - MG

-----X		
LORIANN CHRISTIAN,		JACK STUART BEIGE & ASSOCIATES, PC
	Plaintiff,	Attorney for Plaintiff
		119 West Main Street.
		Smithtown, New York 11787
- against -		RUSSO, APOZNANSKI & TAMBASCO
		Attorney for Defendants Porcaro
		875 Merrick Avenue
		Westbury, New York 11590
ANTHONY PORCARO, CATHI PORCARO,		CUOMO LLC
CHRISTOPHER BARONE and MICHAEL		Attorney for Defendants Barone and Lustig
LUSTIG,		9 East 38 <sup>th</sup> Street
	Defendant.	New York, New York 10016
-----X		

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendants Barone and Lustig, dated 5-20-13, and supporting papers 1-12; (2) Notice of Cross Motion by the , dated , supporting papers; (3) Affirmation in Opposition by the defendants Porcaro, dated 6-10-13, and supporting papers 13-14; Affirmation in Opposition by plaintiffs, dated 6-17-13; (4) Reply Affirmation by the defendants Barone and Lustig, dated 7-15-13, and supporting papers 15-16; (5) Other \_\_\_\_ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

**ORDERED** that motion (001) by defendants, Christopher Barone and Michael Lustig, pursuant to CPLR 3212 for summary judgment in their favor on the issue of liability is granted, and the complaint and cross claims asserted against them by the Porcaro defendants are dismissed.

In this negligence action, the plaintiff, Loriann Christian seeks damages for personal injuries she alleges she sustained in an automobile accident on February 1, 2008, at the intersection of Montauk Highway and Nicholls Road, in the Town of Islip, New York, when her vehicle was involved in a collision with the vehicle operated by Christopher Barone and owned by Michael Lustig, and the vehicle owned and

operated by Anthony Porcaro. Christopher Barone and Michael Lustig now seek summary judgment dismissing the complaint on the basis that they bear no liability for the occurrence of this accident which created an emergency situation which could not be avoided. Although defendant Barone has submitted various medical reports concerning the plaintiff's injuries, neither the notice of motion nor the attorney's affirmation seeks summary judgment on the issue of serious injury Insurance Law § 5102 (d).

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 from the case (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). To grant summary case judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

In support of this motion, the defendants have submitted, inter alia, an attorney's affirmation, copies of the summons and complaint, answer of defendants Barone and Lustig with cross claim asserted against defendants Anthony Porcaro and Cathi Porcaro for judgment over for contribution/indemnification, demands, answer of Anthony Porcaro and Cathi Porcaro with cross claim for judgment over for contribution/ indemnification, demands; unsigned but certified copies of the transcripts of the plaintiff's examination before trial dated October 9, 2012, and Anthony Porcaro dated December 17, 2012 which are considered (*see Zalot v Zieba*, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]); unsigned but certified transcript of the examinations before trial of the moving defendant, Christopher Barone dated December 28, 2012, which is considered by this court (*see Ashif v Won Ok Lee*, 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]); three copies of the sworn report of C.M. Sharma, M.D. concerning the independent neurology examination of the plaintiff on November 29, 2012; and an uncertified copy of the MV104 Police Accident Report which report constitutes hearsay and is inadmissible (*see Lacagnino v Gonzalez*, 306 AD2d 250, 760 NYS2d 533 [2d Dept 2003]; *Hegy v Coller*, 262 AD2d 606, 692 NYS2d 463 [2d Dept 1999]).

Loriann Christian testified to the extent that she was involved in a car accident on February 1, 2008 while driving her 2000 Acura MDX in an eastbound direction on Montauk Highway. She came to a stop for a red light behind two cars in the left turn lane at the intersection with Nicolls Road. She described eastbound Montauk Highway as having two eastbound travel lanes and a left turn lane at that point. It was her intention to make a left turn at the traffic light onto Nicolls Road. The light was red for all lanes of travel in the eastbound direction, then turned green so traffic started to go, but the turn arrow was still red. A gray car traveling south from Nicolls Road was in the right turning lane to go west on Montauk Highway and, instead of turning, continued straight ahead over the triangle and straight dividers, and hit her car with the front of his, pushing her stopped car about a foot into the left eastbound lane. Seconds passed from the time she saw that grey car until it struck her, leaving her no time to take evasive action, she stated. Then,

almost simultaneously, a red truck traveling in the left eastbound lane on Montauk Highway, struck the panel by the wheel of her car, with a heavy impact, causing her to move. The red truck then maneuvered off her car and left the scene, but did not return. It was later found by the police.

Christopher Barone testified to the extent that he was involved in a motor vehicle accident on February 1, 2008, between 5:00 and 6:00 p.m., while driving a red F 150 Ford pickup truck which was owned by Michael Lustig, who had given him permission to use it. He was heading east on Montauk Highway, which he described as having two eastbound travel lanes and a turning lane. The road was flat and level. He was in the far right lane, and the plaintiff's van was alongside his vehicle, in the left lane. When the impact occurred, the light had just turned green, and his truck was moving about two miles per hour. There were no vehicles directly in front of his vehicle. He heard the screeching of tires and brakes to his left, and about a second, two heartbeats later, the impact occurred between his truck and the plaintiff's van when the front of the plaintiff's passenger side of her vehicle caught his left rear/left rear tire. His vehicle came to a stop, still touching with the plaintiff's vehicle. His truck was still in the right eastbound travel lane of Montauk Highway. He thought maybe his truck moved a half foot to the right from the impact. The plaintiff's right front bumper was stuck to the rim of his rear tire. He had a flat tire and a punctured rim on the driver's side rear. He knew a third vehicle had been involved in the accident, but he did not see the damage. He left the scene of the accident, and about five or ten minutes after the accident, the police came to his house and asked him if he was involved in an accident. He responded, "Yes." He was issued a ticket for leaving the scene of an accident and paid a fine. He did not have a driver's license at the time of the accident, and paid a fine for that ticket also. At the time of the impact with the minivan, he was looking to his left.

Anthony Porcaro testified to the extent that he was involved in the accident on February 1, 2008, in the evening, while he was driving a Mazda 6, which he owned. He was traveling about fifteen to twenty miles per hour in the right travel lane in a southbound direction on Nicolls Road, which he described as having two southbound travel lanes. It was his intention to make a right turn onto Montauk Highway at the intersection which was controlled by a traffic light. The first time he saw the traffic light, it was green, and it did not change color at any time until the accident occurred. He testified that he had been cut off by a vehicle traveling in the left southbound travel lane of Nicolls Road when it cut in front of his vehicle and made a right turn onto Montauk Highway. He did not know if it was a car, a truck, a SUV, or a bus. There was no contact between his vehicle and that vehicle which he stated cut him off. When he was cut off by the other vehicle, his vehicle hit two street signs which were in the median by the intersection, causing his air bags to deploy. His vehicle exited the median, and struck the plaintiff's silver vehicle which was stopped at the intersection on Montauk Highway in the eastbound travel lane. He stated that he was traveling about five miles per hour at the time of impact, and that the contact was very light. His vehicle came to a stop facing in a southerly direction in a travel lane on Montauk Highway. His right front passenger side bumper made contact with the plaintiff's vehicle on the driver's side fender. He did not remember if any of the three witnesses from the Sage Café got the license number of the vehicle which cut him off.

As set forth in *Bello v Transit Authority of New York City*, 12 AD3d 58, 783 NYS2d 648 [2d Dept 2004], "[N]egligence involves the failure to exercise the degree of care that a reasonably prudent person would exercise in the same situation. It is not a fixed concept, but is shaped by time, place, and circumstance. The common-law emergency doctrine does not define an exception to those principles but

rather fits neatly within their framework. The doctrine recognizes that, faced with an emergency, even a reasonable person might choose a course of action which, in hindsight, proves to have been mistaken or ill-advised.”

The emergency doctrine holds that those faced with sudden and unexpected circumstance, not of their own making, that leaves them with little or no time for reflection or reasonably causes them to be so disturbed that they are compelled to make a quick decision without weighing alternative courses of conduct, may not be negligent if their actions are reasonable and prudent in the context of the emergency (*Pickering v Woolley*, 2010 NY Slip OP 30417(U) [Sup Ct, Nassau County]). This is not to say that an emergency automatically absolves one from liability for his conduct (*Waldenmayer v Shechter*, 2008 NY Slip Op 30376 (U) (Sup Ct, Queens County)). The emergency doctrine does not apply to a driver who created the emergency (*Marcinkowski v Capra*, 2011 NY Slip Op 31319(U) [Sup Ct, Queens County]). Although the existence of an emergency and the reasonableness of a party’s response to it will ordinarily present questions of fact, they may in appropriate circumstances be determined as a matter of law (*Bello v Transit Authority of New York City*, *supra*).

Here, it is determined as a matter of law that the emergency doctrine is applicable under the facts and circumstances of this action as the plaintiff’s vehicle was struck by the vehicle operated by defendant Porcaro, causing the plaintiff’s vehicle and the rear wheel of defendant Barone’s vehicle to make contact. Barone heard the screeching of tires and brakes to his left, and about a second, two heartbeats, later the impact occurred between his truck and the plaintiff’s van when the front of the plaintiff’s passenger side of her vehicle caught his left rear tire. His vehicle, which was traveling about two miles per hour, as the light had just changed, came to a stop, still touching with the plaintiff’s vehicle after the impact, still in the eastbound travel lane of Montauk Highway to the plaintiff’s right. The plaintiff’s right front bumper was stuck to the rim of his rear tire.

It is determined as a matter of law that Barone had little or no time to react as the collision between Porcaro’s vehicle and the plaintiff’s vehicle was occurring beside him, leaving him no time to avoid the contact which then occurred between his vehicle and the plaintiff’s vehicle. As the plaintiff testified, seconds passed from the time she saw the Porcaro vehicle until it struck her, leaving her no time to take evasive action, and then, almost simultaneously, the impact occurred between her vehicle and the Barone vehicle.

While the testimony is vague concerning whether Barone’s vehicle was in the right or left eastbound lane of Montauk Highway, it was established that Barone’s vehicle was to the plaintiff’s right. No material issue of fact has been created as this issue does not go to proximate cause. The contact occurred between the front passenger side of the plaintiff’s vehicle and the driver’s side rear wheel of the vehicle operated by Barone after the initial impact between the plaintiff’s vehicle and the Porcaro vehicle, demonstrating that Barone had started moving forward and the plaintiff was still stopped behind two cars which had not begun to move. The adduced testimonies do not establish that there was anything which Barone did or did not do which caused or contributed to the occurrence of the accident. Additionally, whether Barone left the scene of the accident, and whether or not he was a licensed driver at the time of the accident is not a material issue of fact which goes to causation. The adduced testimonies establish that the Porcaro vehicle struck the plaintiff’s vehicle, causing the plaintiff’s vehicle to be pushed to her right into the travel lane located next to the lane in which her vehicle was stopped. The front passenger side of her vehicle then struck driver’s

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side rear tire of the Barone vehicle when her vehicle was pushed by the Porcaro vehicle, as per the adduced testimonies.

Where the manner in which events unfolded leaves open the possibility that a defendant should have seen the other vehicle in enough time to avoid the accident, summary judgment should be denied (*Brooks v New York City Transit Authority*, 19 AD3d 162, 798 NYS2d 381 [1st Dept 2005]). Here, it is determined that the possibility that the Barone vehicle had enough time to avoid the accident has not been left open. The accident did not occur in the intersection. The plaintiff testified that there were two other vehicles stopped ahead of her car in the left turn lane of Montauk Highway, and her vehicle was stopped at the time of the impact from the Porcaro vehicle. Porcaro testified that he crossed over the median and struck the plaintiff's vehicle. He did not enter into the intersection. Thus, whether Barone's vehicle had just started moving forward when his left rear tire was struck by the front passenger side of the plaintiff's vehicle does not go to proximate cause. It was the plaintiff's vehicle which moved from the turning lane into the left eastbound lane of Montauk Highway by the impact from the Porcaro vehicle which caused the contact to the Barone vehicle, as established by the testimonies. Again, the adduced testimonies do not establish that there was anything which Barone did or did not do which caused or contributed to the accident. The adduced testimonies, and the actions by Barone do not establish that Barone was negligent in causing the contact between the plaintiff's vehicle and his vehicle, or that he had a full opportunity to reflect the circumstances as they were quickly unfolding. Neither were Barone's actions unreasonable or imprudent, in light of the emergent circumstances.

Accordingly, motion (002) by defendants Christopher Barone and Michael Lustig for summary judgment in their favor on the issue of liability dismissing the complaint and crossclaims is granted with prejudice.

Dated: \_\_\_\_\_

8/29/13

  
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PETER H. MAYER, J.S.C.