SHORT-FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HON. PHYLLIS ORLIKOFF FLUG, IA Part 9
Justice

ANTHONY PINILLA, AS ADMINISTRATOR OF THE ESTATE OF YVETTE M. VILLALBA, Plaintiff, -against- CITY OF NEW YORK, THE PUBLIC ADMINISTRATOR, AS TEMPORARY ADMINISTRATOR OF THE ESTATE OF MARTIN CADENA, MURTOSA & VEIROS INC. D/B/A SANGRIA TAPAS BAR & RESTAURANT, Defendant.	Index Number..7902/10 Motion Date...11/27/12 Motion Cal. Number.....2 & 3 Sequence No...3 & 4

The following papers numbered 1 to 47 read on this motion

Notice of Motion	1 - 8
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The motion by the City of New York for summary judgment in its favor pursuant to CPLR 3212; and motion by Murtosa & Veiros Inc., d/b/a Sangria Tapas Bar & Restaurant (herein "Sangria"), for summary judgment in its favor pursuant to CPLR 3212 are determined as follows:

This wrongful death action arises out of an automobile accident that occurred on April 16, 2009, at approximately 2:30 a.m., on the Van Wyck Expressway near the Roosevelt Avenue overpass and the Northern Boulevard Exit (13), in Queens, New York. An SUV drove into the rear of a City-owned Mack Dump Truck, while it was stopped or stopping in the left lane of the Van Wyck Expressway. Marvin Murphy was the driver of the Mack dump truck. The driver of the SUV, Martin Cadena and the passenger his wife, Yvette Villalba, both died as a result of the accident. The record reveals that Cadena has a .26% blood alcohol level upon his demise.

The City moves for summary judgment in its favor dismissing

all claims and cross claims against it on the ground that Cadena was the sole proximate cause of the accident. Sangria moves for summary judgment in its favor dismissing plaintiff's claims based on the Dram Shop statute. Plaintiff opposes the motions.

Facts

The deposition of the various parties reveal the following: On April 15, 2009, sometime between the hours of 9 and 10 p.m., Cadena went to Sangria to celebrate the end of tax day. The celebration was for the employees and spouses of the Cadena Accounting Firm, of which Cadena was an owner. Ten to fourteen peopled attended the celebration. Arnaldo Coutinho, an owner of Sangria, and Julia Arevalo, a waitress at Sangria who served drinks to the Cadena party, were also present. The record reveals that the celebrants ate appetizers and drank alcohol throughout the night. Prior to arriving at Sangria, Cadena drank a beer at his office. After arriving at Sangria, Cadena continued to drink alcohol. Specifically, Julia Arevalo indicates that Cadena was served approximately six Grey Goose vodka and cranberry cocktails. Also, a complimentary bottle of Aguardiente Antioqueno (Columbian and or Portugues moonshine alcohol), was served to the party. Typically, a bottle of Aguardiente Antioqueno has an alcohol content of 29%. Arnaldo Coutinho and Nancy Cadena testified that Cadena took at least one shot of the Aguardiente on the night in question. Marie Cadena testified that around 1:00 a.m., Cadena appeared intoxicated. Villabla attended the celebration as Cadena's designated driver, however Villabla took shots of Aguardiente, drank vodka and cranberry cocktails and also appeared to become intoxicated. While the testimony as to when Cadena and Villabla left is inconsistent, based upon the time of the accident, it appears the two left around 1:00 a.m.

Marvin Murphy testified as follows: He was transporting RAP (broken up asphalt) from the Q-Loop yard in Queens to the Peckham yard in the Bronx. Prior to starting this task, Murphy performed a 20 to 25 minute inspection of the Mack truck. Specifically, he examined the interior and exterior of the vehicle and checked under the truck's hood. Murphy determined that the lights on the vehicle were in satisfactory condition, the tires did not have physical damage and had a satisfactory tread depth and pressure, the wheels and rims of the vehicle were in satisfactory condition, the New York State inspection was current, the steering was in satisfactory condition and there was no overdue preventive maintenance required on the vehicle. Murphy completed 3 trips from the Q-Loop to Peckham and back prior to the subject accident.

At 2:19 a.m., Murphy left the Q-Loop yard again with a load of RAP in the Mack truck. He was traveling at approximately 35 to 40 miles per hour in the middle lane of the Van Wyck Expressway on his way to Peckham when he heard a very loud pop that sounded to him like his rear tire had blown out. Suddenly,

the vehicle began to pull to the left with "a good amount of force". At that instant, Murphy concluded that if he tried to fight the pull of the truck, it might tip over, spilling its contents onto the roadway. Therefore, Murphy lightly applied the brakes and veered into the left lane. Murphy testified that seconds after the tire blew, he called his dispatcher via a blue tooth device to let him know about the blown tire and his location. Murphy activated the call by simply saying "Call Job". He testified that the call lasted only a few seconds. He was in the left lane "less than a minute" when Cadena's vehicle drove into the rear of the Mack truck. Murphy testified that he was driving approximately 10 to 15 mph when he was struck by Cadena's SUV. Murphy testified that he was unsure of how much time elapsed between the time the tire blew out and the time Cadena's vehicle struck the rear of the truck. Murphy testified that he had on his headlights, four way flashers, flickering lights and warning lights at the time of impact.

Weiguo Qu witnessed Cadena's vehicle drive into the rear of the Mack truck at approximately 2:30 a.m., on April 16, 2009. Qu was driving from Queens to Westchester in a Lincoln town car on the night of the accident. He recalled the weather conditions were "regular" and that it was not snowing or raining. Qu entered the Van Wyck Expressway at Booth Memorial Blvd., and immediately moved to the middle of the three lanes. He did not notice any defects or objects on the road and estimated he was traveling at about 50 mph. On the Van Wyck he saw only two vehicles, an SUV and a Mack truck. He observed that the SUV was over 500 feet from the Mack truck at the time he observed it. Qu initially testified that after driving on the Van Wyck for five seconds, he saw a "construction truck" that appeared to be stopped in the left lane over 500 feet ahead of him. He then saw the SUV in the left lane traveling at 55-60 mph that was approximately 600 feet from the truck. Qu estimated that approximately 10 seconds elapsed from the time he saw the SUV to the time of the accident. After seeing both vehicles, Qu slowed down to 20 mph to allow the SUV to pass him and move over to the middle lane. However, Cadena's SUV continued to travel in the left lane towards the truck at 55-60 mph. The SUV passed Qu's car approximately 400 feet from the truck and Qu testified he did not observe the SUV attempt to slow down, brake or stop prior to the accident. He also did not see the SUV attempt to swerve to avoid the collision. Incidentally, the Accident Investigation Squad also did not find any skid marks from Cadena's vehicle at the site of the accident. Qu was 200 feet in front of the accident when it occurred and drove by the incident site at approximately 5 mph. He further testified that the lighting in the area enabled him to see the Mack truck when he was about 500 feet from the City vehicle. The Mack truck was observable from the street lights on the Van Wyck Expressway, the headlights from Qu's town car and the headlights from Cadena's SUV. Finally, Qu testified that there were no objects or vehicles in the left lane that could have blocked Cadena's view of the Mack truck.

A medical examiner performed an autopsy on Cadena and discovered that Cadena had a blood alcohol level of .26%, which is over three times the legal driving limit.

Motion by the City

The motion by the City for summary judgment in its favor is granted. The operator of a motor vehicle approaching another motor vehicle from the rear is obligated to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (*see Chepel v Meyers*, 306 AD2d 235, 236 [2003]; *Power v Hupart*, 260 AD2d 458 [1999]; *see also* Vehicle and Traffic Law § 1129 [a]). "A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence against the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision" (*Volpe v Limoncelli*, 74 AD3d 795, 795 [2010] [internal quotation marks omitted]; *see Parra v Hughes*, 79 AD3d 1113 [2010]; *DeLouise v S.K.I. Wholesale Beer Corp.*, 75 AD3d 489, 490 [2010]; *Staton v Ilic*, 69 AD3d 606 [2010]; *Lampkin v Chan*, 68 AD3d 727 [2009]; *Klopchin v Masri*, 45 AD3d 737, 737 [2007]). If the operator of the moving vehicle cannot come forward with evidence to rebut the inference of negligence, the operator of the stopped or stopping vehicle is entitled to summary judgment on the issue of liability (*see Staton v Ilic*, 69 AD3d 606 [2010]; *Kimyagarov v Nixon Taxi Corp.*, 45 AD3d 736 [2007]; *Piltser v Donna Lee Mgt. Corp.*, 29 AD3d 973 [2006]). Here, the City established its prima facie entitlement to judgment as a matter of law by submitting evidence that the Mack truck was stopped or stopping when struck in the rear by the vehicle operated by Cadena (*see Cortes v Whelan*, 83 AD3d 763, 763-764 [2011]; *Gross v Marc*, 2 AD3d 681 [2003]).

In opposition, the plaintiff contends that the City's vehicle was illegally stopped in the left lane without any warning lights. However, assuming, *arguendo*, that the City's vehicle was illegally stopped, and that its warning lights were not on, this conduct cannot be deemed a proximate cause of this rear-end collision (*see, Lectora v Gundrum*, 225 AD2d 738 [1996]; *Barile v Lazzarini*, 222 AD2d 635 [1995]; *Metzler v Brawley*, 209 AD2d 487 [1994]; *Bradley v State of New York*, 132 AD2d 816 [1987]). Thus even if there were no brake lights or any other illumination on the City's vehicle before the collision, this would not adequately rebut the inference of negligence (*see Macauley v ELRAC, Inc.*, 6 AD3d 584, 585 [2004]; *Gross v Marc*, 2 AD3d 681 [2003]; *Waters v City of New York*, 278 AD2d 408, 409 [2000]; *Barile v Lazzarini*, 222 AD2d 635 [1995]). Furthermore, the fact that Cadena was found to have had a .26 blood/alcohol level, no doubt significantly impaired his ability to operate and navigate his vehicle at the time of the accident as well as establishes his negligence per se (VTL 1192[2]). The issue the Court is left to decide regarding the conduct of Cadena is

whether his violation of Vehicle and Traffic Law § 1192(2) was the sole proximate cause of the happening of the accident (*see, Sewar v Gagliardi Bros. Service*, 69 AD2d 281 [4th Dept. 1979], *affd*. 51 NY2d 752 [1980]). This Court finds that it was.

The court notes that the operator of the City vehicle was faced with an emergency when he stopped or was stopping in the left lane on the highway, namely, that his tire blew out (*cf., Hendrickson v Philbor Motors, Inc.*, 101 AD3d 812 [2012])). Vehicle and Traffic Law § 1202(a)(1)(j) prohibits stopping, standing, or parking "a vehicle on a state expressway highway or state interstate route highway except in an emergency" (*see* N.Y. High. Law §§ 340-a, 340-c; VTL §§ 145-a, 145-b; *Dowling v Consolidated Carriers Corp.*, 103 AD2d 675, 676 [1984], *aff'd*, 65 NY2d 799, 801 [1985]). "Although the existence of an emergency and the reasonableness of the response to it generally present issues of fact (*see Makagon v Toyota Motor Credit Corp.*, 23 AD3d 443, 444 [2005]), those issues 'may in appropriate circumstances be determined as a matter of law' " (*Vitale v Levine*, 44 AD3d at 936, quoting *Bello v Transit Auth. of N.Y. City*, 12 AD3d 58, 60 [2004]). Under the circumstances described herein where the tires of the City's vehicle blew out and an attempt to steer the vehicle to the right side of the road risked the vehicle turning over with loads of debris spilling onto the roadway further endangering motorists, the court finds that the actions of the City's driver were reasonable and prudent in the context of the emergency, and that the actions of Cadena were the sole proximate cause of the subject accident.

Finally, while plaintiff is correct that there is a lower standard of proof in wrongful death actions, and the plaintiff is entitled to every inference that can reasonably be drawn from the evidence in determining whether a prima facie case is made (*see Noseworthy v City of New York*, 298 NY 76 [1948]), the plaintiff is still obligated "to provide some proof from which negligence can reasonably be inferred" (*Dubi v Jericho Fire Dist.*, 22 AD3d 631, 632 [2005]; *see also Smith v Stark*, 67 NY2d 693, 694-695 [1986]; *Coughlin v Bartnick*, 293 AD2d 509, 510 [2002]). The mere speculation that Marvin Murphy, the operator of the City vehicle, could have moved the vehicle to the right side or otherwise done *something* to minimize the likelihood of an accident, is insufficient to defeat the motion for summary judgment (*see Eichenwald v Chaudhry*, 17 AD3d 403 [2005]). Accordingly, the motion by the City for summary judgment in its favor is granted.

Motion by Sangria

The motion by Sangria for summary judgment in its favor is denied. Sangria failed to satisfy its initial burden of negating the possibility that it served alcohol to a visibly intoxicated person (*see Darwish v City of New York*, 287 AD2d 407 [2001]). The affidavit of its bartender, that she did not serve alcohol to a visibly intoxicated man on the night in question, does not

mention a second bartender who worked that night (*see Duran v Poggio*, 244 AD2d 162 [1997]; *Cole v O'Tooles of Utica*, 222 AD2d 88, 92-93 [1996]).

Furthermore, proof of visible intoxication can be shown by circumstantial evidence, including expert and eyewitness testimony (*see Adamy v Ziriakus*, 92 NY2d 396 [1998]; *Romano v Stanley*, 90 NY2d 444 [1997]). Here, the affidavit of Julia Arevalo indicates that she served Cadena at least six vodka drinks between the hours of 10:30 p.m. and 1:00 a.m. There is also evidence in the record that Cadena consumed at least one shot of free "Aguardiente moonshine", coupled with evidence that Cadena had a blood alcohol level of .26%, upon his demise.

The branches of the motion by Sangria which are to dismiss plaintiff's claims for conscious pain and suffering and pre-impact terror, are granted. Without legally sufficient proof of consciousness following an accident, a claim for conscious pain and suffering must be dismissed (*see Blunt v Zinni*, 32 AD2d 882 [4th Dept.1969], *affd.* 27 NY2d 521 [1970]). Submitted in support of the Sangria motion is the MV104 Report prepared by Police Officer Seeger, which states that the time of the accident was 2:35 a.m. The sworn testimony by Officer Seeger is that he arrived at the scene at 3:20 a.m., quite some time after the collision and when the decedent had already been declared dead by the EMS. Further, the affirmation of Dr. Gerard Catanese, a forensic pathologist, indicates that given the type and extent of injuries sustained by Villabla, her death occurred upon impact. Therefore, the branch of the motion which seeks to dismiss the conscious pain and suffering claims, is granted.

Further, there was no evidence that the decedent experienced "pre-impact terror" (*see Kevra v Vladagin*, 95 AD3d 803 [2012]; *Phiri v. Joseph*, 32 AD3d 922 [2006]; *Anderson v Rowe*, 73 AD2d 1030, 1031 [1980]; *Carlson v Porter*, 53 AD3d 1129 [, 861 N.Y.S.2d 907; *cf. Lang v Bouju*, 245 AD2d 1000, 1001 [1997]).

Finally, General Obligations Law § 11-101 (the Dram Shop statute), does not permit the recovery of damages for loss of services and loss of consortium (*see Valicenti v Valenze*, 68 NY2d 826, 829 [1986]; *Dunphy v J & I Sports Enters.*, 297 AD2d 23 [2002]; *Bongiorno v D.I.G.I., Inc.*, 138 AD2d 120 [1988]). Thus, the branch of the motion which seeks to dismiss the claims for loss of services and loss of consortium, is granted.

Conclusion

The motion by the City for summary judgment in its favor is granted. The branch of the motion by Sangria which is for summary judgment in its favor is denied. The branches of the motion which are for summary judgment dismissing the conscious pain and suffering claims and the pre-impact terror claim, in the alternative, are granted. The branch of the motion which seeks

to dismiss the claims for loss of services and loss of consortium, is granted.

March 19, 2013

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J.S.C.