Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE FREDERICK D.R. SAMPSON IA Part 31
Justice

JOSE RODRIGUEZ and VIVIAN RUIZ, x

Plaintiffs,

-against-

EXXONMOBIL OIL CORPORATION, CLAUDETTE DASIL DASILVA, MICHELE LIVORSI and MICHAEL S. PUFFER,

Defendants.
x

Index Number 30783 2010

Motion Date November 29, 2012

Motion Cal. Number 17, 18, 19, 20

Motion Seq. No. 4,5,6,7

The following papers numbered 1 to 53 read on this motion by defendant Exxon Mobil Oil Corporation, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims; on the motion by defendant Michael S. Puffer, pursuant to CPLR 3212, for summary judgment dismissing the complaint; on the motion by defendant Michele Livorsi pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims;and on the motion by defendant Claudette DaSilva pursuant to CPLR 3212 for summary judgment dismissing the complaint and any and all cross-claims, and upon this cross-motion by Plaintiff for an order, pursuant to CPLR § 3126: 1) striking the Answer of defendant EXXONMOBIL OIL CORPORATION; or 2) compelling defendant EXXONMOBIL OIL CORPORATION to produce a knowledgeable witness for deposition.

	Papers Numbered
Notices of Motion - Affidavits - Exhibits.....	1-16
Notice of Cross Motion - Affidavits - Exhibits...	17-20
Answering Affidavits - Exhibits.....	21-39
Reply Affidavits.....	40-53

Upon the foregoing papers it is ordered that the motions and cross motion are determined as follows:

This is a negligence action to recover money damages for injuries allegedly suffered as a result of a motor vehicle accident. The accident occurred on August 8, 2010, at an Exxon Mobile gas station on the Hutchinson River Parkway, White Plains, New York.

Plaintiff Jose Rodriguez testified at an examination before trial. He testified that he was at the gas station along the Hutchinson River Parkway, White Plains, New York when the accident occurred. He testified that he had parked alongside the median separating the gas station from the northbound parkway as the station was very crowded. He then walked into the convenience store and bought something to eat. After walking back toward his car to throw some trash into a nearby garbage can, he observed smoke rising from a canopy covering the gas pumps on the southbound side of the station. He then saw other customers begin running from the southbound gas pumps and rushing into their vehicles to leave the station. As he sat down in his vehicle, a powdery flame retardant came down from the canopy above the northbound gas pumps. He testified that the flame retardant coated the area underneath and adjacent to the canopy, including his vehicle. The flame retardant completely obstructed the view of the cars around him. He stated that before he could close the door to his vehicle and while his left leg was outside the vehicle, another vehicle struck the driver's side of his vehicle crushing his left leg and ankle. He said that because of the flame retardant he could not see the vehicle that struck him.

Defendant Michael Puffer testified at an examination before trial. He testified that he was stopped at the subject gas station to collect gas and for his wife to use the restroom. He testified that after waiting in line for about two minutes he noticed that cars were rushing about around him. He then noticed that a gas pump on the other side of the gas station was on fire. He waited about another minute for his wife to come out of the restroom. After she did not come out he began to move his vehicle away from the pump that was on fire. He testified that he was moving at a very slow rate of speed due to the fire suppression foam that had been activated and that limited his visibility. As he was moving his vehicle his vehicle was struck in the rear by another motor vehicle. He testified that he could not see the vehicle that came into contact with his vehicle. He stated he continued to move his vehicle to get out of the flame retardant and to move away from the fire. He testified that he believed that the vehicle driven by defendant Michelle Livorsi was directly behind his vehicle at impact. He stated that after the accident he observed a moderate dent in both the right and left front of the vehicle driven by the defendant Livorsi.

Defendant Livorsi testified at an examination before trial. She testified that she pulled into the subject gas station with the intention to use the restroom and get something to drink. As she proceeded into the station she found the station to be very crowded. She testified that even before she turned off the engine of her vehicle she observed a car drive into a gas pump on the southbound side of the gas station. She testified that she then attempted to drive her vehicle out of the gas station. She testified that as she was attempting to leave the flame retardant material was dispersed. She stated that the flame retardant was white powder and she could not see through it. She testified that she was going slowly because there was gridlock as everyone was trying to leave the station. She further testified that as she was driving she felt two impacts to her vehicle, one on her driver's side and one on her passenger's side.

Defendant Claudette DaSilva submitted an affidavit in support of her summary judgment motion. In her affidavit she stated that she was on the southbound side of the gas station when the accident occurred and was not involved with plaintiff's vehicle and alleges that she did not cause his injury.

After the accident occurred, defendant Exxon undertook an investigation to determine the cause of the gas pump explosion. The first report that was drafted denotes that a possible cause of the fire and gas explosion was an equipment failure. The report stated that a possible cause of the explosion was the failure of a flex hose or pipe under the shear valve that did not break. Furthermore a third-party investigation of the accident included pictures of equipment, which bear the caption that the shear valve may have caused damage.

On a motion for summary judgment, the movant must offer sufficient evidence to establish its prima facie entitlement to judgment as a matter of law (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). The plaintiff's argument that all the summary judgment motions must be stayed pending further discovery is without merit. The plaintiff cannot claim that the motion should be held in abeyance pending discovery, as he did not demonstrate that facts essential to justify opposition are in the exclusive possession of the defendant (CPLR 3212[f]; *see Morris v. Hochman*, 296 AD2d 481 [2d Dept 2002]; *Drug Guild Distribs. v. 3-9 Drugs*, 277 AD2d 197 [2d Dept 2000]; *Thomas v. Woodmere Health Care Ctr*, 258 AD2d 516 [2d Dept 1999]). The mere hope that sufficient evidence to defeat the motion will be found through disclosure does not warrant denial of the motion (*see Piltser v. Donna Lee Mgt. Corp.*, 29 AD3d 973 [2d Dept 2006]).

Defendant Exxon argues that summary judgment is warranted as it did not breach any duty owed to plaintiff. For a defendant to be held liable for negligence it must be shown that the defendant owed a duty to the plaintiff (*see DiPonzio v.* Riorda, 89 NY2d 578 [1997]; *Chahales v. Westchester Joint Water Works*, 47 AD3d 610 [2d Dept 2008]; *Ocera v. Zito*, 212 AD2d 681 [2d Dept 1995]). The duty of care is defined as "[t]he risk reasonable to be perceived" (*Palsgraf v. Long Is. R.R. Co.*, 248 NY 330 [1928]). When making such a determination regarding the scope of a duty owed, one deciding factor is whether the accident was reasonably foreseeable (*Lynfatt v. Escobar*, 71 AD3d 743 [2d Dept 2010]). Here, there is an issue of fact as to whether defendant Exxon breached a duty to plaintiff in the maintenance and operation of the gas. There are issues of fact as to whether there was a defective condition at the gas pump, including a shear valve, that allowed an explosion and fire to erupt after the gas pump was struck by the vehicle driven by defendant DaSilva. Furthermore, the evidence in the record is sufficient to raise an issue of fact as to whether the reduced visibility from the flame retardant, which came about due to the gas pump explosion, was a proximate cause of the accident which caused plaintiff's injuries. Thus, there is an issue of fact as to whether the defective condition was a proximate cause of the accident.

Defendant Puffer has established his prima facie entitlement to summary judgment. Defendant Puffer's testimony was that he was struck in the rear, but that his car did not strike any other vehicle. The evidence submitted by defendant Puffer established that his car did not come into contact with plaintiff's vehicle. The opponent of a summary judgment motion must present admissible evidence that is sufficient to raise an issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). In opposition, plaintiff failed to raise an issue of fact that would warrant denial of the summary judgment motion.

Defendant Livorsi has not established her right to summary judgment. As a general rule, a party does not carry its burden in moving for summary judgment by pointing to its opponent's proof, but must affirmatively demonstrate the merit of its defense (*Strough v. Incorporated Vil. of W. Hampton Dunes*, 98 AD3d 607 [2d Dept 2012]; *Calderone v. Town of Cortlandt*, 15 AD3d 602 [2d Dept 2005]). Here, the defendant Livorsi argues that summary judgment is warranted because there is no evidence that her vehicle came into contact with plaintiff's vehicle. However, she does not submit any evidence the demonstrated that she was not the vehicle that struck plaintiff. Here, there is an issue of fact as to whether the vehicle driven by defendant Livorsi, which was involved

in two collisions, was the vehicle that came into contact with plaintiff's vehicle.

Defendant Livorsi next argues that the emergency doctrine requires dismissal of the complaint. Under the emergency doctrine 'when an actor is faced with a sudden and unexpected circumstance which leaves little to no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context'" (*Vitale v. Levine*, 44 AD3d 935 [2d Dept 2007]). An emergency situation, however, does not automatically absolve one from liability for his or her conduct. The standard still remains that of a reasonable person in the particular situation. Both the existence of an emergency and the reasonableness of the party's response to the emergency is ordinarily a question of fact. (*Hendrickson v. Philbor Motors, Inc.*, 101 AD3d 812 [2d Dept 2012]; *Lopez v. Wook Ko Young*, 96 AD3d 724 [2d Dept 2012]; *Marks v. Robb*, 90 AD3d 863 [2011].) In this case, it cannot be said as a matter of law that the steps taken by defendant Livorsi to accelerate her vehicle when she could not see in front of her in a gas station that she knew was very crowded were reasonable as a matter of law. Therefore, defendant Livorsi failed to establish as a matter of law her prima facie entitlement to summary judgment.

Defendant DaSilva has failed to establish her prima facie entitlement to summary judgment. Defendant DaSilva does not deny that she crashed into the gas pump, causing the fire at the gas station. She argues that since plaintiff does not know how he was injured his complaint must be dismissed. This argument is without merit. The record demonstrates that plaintiff was allegedly injured when he was struck by a motor vehicle at the subject gas station after a gas pump exploded when defendant DaSilva backed her vehicle into the pump. A defendant is liable for all normal and foreseeable consequences of their acts. It is not necessary for a plaintiff to demonstrate that the precise manner in which the injury occurred was foreseeable, it is sufficient to demonstrate that the risk of some injury was foreseeable from the defendant's conduct. (*Gordon v. Eastern Ry. Supply*, 82 NY2d 555 [1993].) Furthermore, there exists an issue of fact as to whether the negligence of defendant DaSilva backing her vehicle into a gas pump was the proximate cause of plaintiff's injuries. Therefore, the motion by defendant DaSilva for summary judgment is denied.

Finally, the Court turns to the cross motion by the plaintiff to strike the answer of the defendant Exxon. The drastic remedy of sanctions including striking of the answer pursuant to CPLR 3126

is not appropriate in this case as plaintiff has not shown that defendant Exxon's failure to comply with the discovery demands was willful, contumacious or in bad faith (*see Kesar v. Green Ridge Enters.*, 30 AD3d 471 [2d Dept 2006]; *Denoyelles v. Gallagher*, 30 AD3d 367 [2d Dept 2006]; *Foncette v. LA Express*, 295 AD2d 471 [2d Dept 2002]). Additionally, in a stipulation entered into by the parties withdrawing motions to vacate the note of issue, depositions were to take place on or before June 6, 2012. After depositions were scheduled, plaintiff requested the rescheduling of the depositions due to a conflict. Plaintiff then had to again reschedule the depositions. While plaintiff's counsel was unavailable, he could have provided an attorney from his office to appear for the scheduled depositions. However, the deposition of Exxon never occurred. Plaintiff is entitled to take the deposition of defendant Exxon. Therefore, the branch of the cross motion compelling defendant Exxon to produce a witness for deposition is granted.

Accordingly, the motion by the defendant Michael S. Puffer for summary judgment dismissing the complaint is granted and this complaint is dismissed against the defendant Michael S. Puffer.

The respective motion by defendant Exxon, defendant Michele Livorsi and defendant Claudette DaSilva for summary judgment, are denied.

Lastly, the branch of the cross motion by plaintiff to strike the answer of the defendant Exxon is denied. The branch of the motion by plaintiff compelling defendant Exxon to produce a witness is granted and defendant Exxon is ordered to produce a witness for a deposition at a time and place to be determined by the parties no later than June 7, 2013.

Dated: April 15, 2013

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J.S.C.