SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

MARK MATIASH,

Plaintiff,

- against -

CHRISTOPHER J. SCHWARZE, INFINITE GLASS AND METAL INC., SAMUEL R. RA, JOSE P. RA,

Defendants.

- x

CHRISTOPHER J. SCHWARZE and INFINITE GLASS AND METAL, INC.,

Third-Party Plaintiffs,

- against -

JOSEPH R. DiVENCENZO,

Third-Party Defendant.

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Index No.: 22014/2011

Motion Date: 05/10/12

Motion No.: 9

Motion Seq.: 1

The following papers numbered 1 to 13 were read on this motion by defendants, SAMUEL R. RA and JOSE P. RA, for an order pursuant to CPLR 3212(b) granting summary judgment in favor of said defendants and dismissing the plaintiff's complaint and all cross-claims against them:

	Papers Numbered
Notice of Motion-Exhibits	1 - 5
Affirmation in Opposition	6 - 10
Reply Affirmation	11 - 13

In this negligence action, the plaintiff, MARK MATIASH, seeks to recover damages for personal injuries he sustained as a result of a multi-vehicle accident that occurred on September 22, 2009. The four-car, chain reaction accident took place on the westbound lanes of Route 4 in Bergen County, New Jersey. Defendants SAMUEL R. RA and JOSE P. RA ("the Ra defendants"), move, prior to completion of discovery, for an order dismissing the plaintiff's complaint against them: (1) pursuant to CPLR 3211 (a)(8) on the ground that the court lacks personal jurisdiction over Samuel R. Ra, a resident of the State of New Jersey;(2) pursuant to CPLR 3211(a)(10) on the ground that the action should not proceed in the absence of necessary parties; (3)pursuant to CPLR 327 on the ground of forum non conviens and (4) pursuant to 3212(b) on the ground that the Ra defendants are entitled to summary judgment on the issue of liability.

Plaintiff, Mark Matiash, commenced this action by filing a summons and complaint on September 21, 2011. Issue was joined by service of Ra's verified answer with cross-claim dated January 10, 2012. In their answer, the Ra defendants assert three affirmative defenses, lack of personal jurisdiction over Samuel Ra, lack of subject matter jurisdiction and forum non conviens.

In support of the motion for summary judgment, counsel for the Ra defendants, Kathleen E. Fioretti, Esq. submits her own affirmation, as well as a copy of the pleadings, an affidavit of fact from defendant Samuel R. Ra; and a copy of the police accident report (MV-104).

Mr. Samuel R. Ra states in his affidavit dated January 9, 2012, that on the date of the accident he was a resident of Queens County, New York, but moved to Palisades Park, New Jersey in December 2009, prior to the commencement of the action. He states that on September 22, 2009, at approximately 3:15 p.m., he was involved in a motor vehicle accident. At that time he was operating a 2007 Lexus owned by his brother Jose P. Ra, traveling in heavy traffic in the westbound lanes of Route 4 in Teaneck, New Jersey. As he approached the exit for Teaneck Road, he slowed his vehicle and brought it to a gradual stop. His vehicle then came to a complete stop and he also noticed the vehicle behind him came to a complete stop. The vehicle behind him was a 2009 Acura operated by the plaintiff, Mark Matiash, a resident of Englewood, New Jersey. He states that he learned that the third vehicle in the chain which was behind the plaintiff's vehicle was a GMC van owned by Infinite Glass and Metal Inc., and operated by Christopher J. Schwarze, a resident of Orange County, New York. Behind the van was the motor vehicle owned and operated by Joseph R. DiVicenzo. Ra states that while his vehicle was at a complete

stop his vehicle was struck in the rear by the vehicle behind him. He then felt a second impact to the rear of his vehicle.

The police accident report, which is based upon the statements of the parties, indicates that the chain reaction collision started when Vehicle No. 3 (Infinite/Schwarze) rear-ended vehicle No. 2 (plaintiff Matiash) and pushed vehicle No. 2 into vehicle No. 1 (Ra). Vehicle No. 4 (DiVencenzo), rear-ended vehicle No. 3, starting the chain reaction over again. According to the police report, the driver of vehicle No. 3 (Infinite/Schwarze) stated that he was unable to brake his vehicle in enough time and he struck the plaintiff's vehicle. DiVencenzo, the operator of vehicle No. 4 reported that he was also unable to brake his vehicle in enough time and he struck the rear of vehicle No. 3.

Ms. Fioretti, states in her affirmation that the plaintiff failed to name Mr. DiVencenzo as a party-defendant because DiVencenzo lives in New Jersey and the New York courts have no jurisdiction over him. She also asserts that the Ra defendants are entitled to summary judgment dismissing the complaint against them on the ground that they were not liable for the causation of the accident. Counsel claims that Ra was the lead vehicle in the four car chain and was at a complete stop when plaintiff's vehicle, behind him, was propelled into his vehicle. Counsel claims that the evidence submitted in support of the motion for summary judgment demonstrates that Ra's vehicle, which was two cars in front of the moving vehicle, was lawfully stopped in traffic when his car was rear-ended by plaintiff's vehicle, which had been propelled into his car by the Infinite/Schwarze vehicle.

Counsel contends that summary judgment should be awarded to Ra dismissing the plaintiff's complaint and all cross-claims against them because the evidence demonstrated that Ra was completely stopped in traffic at the time of the accident and the sole proximate cause of the accident was the negligence of both Divencenzo and Infinite/Schwarze in rear-ending the vehicles stopped in front of them and that there is no evidence in the record that Ra, who was stopped in front of the plaintiff's vehicle was negligent in any manner (see Cortes v Whelan, 83 AD3d 736 [2d Dept. 2011]; Staton v Ilic, 69 AD3d 606, [2d Dept. 2010]; Ferguson v Honda, 34 AD3d 356 [1st Dept. 2006]; Mustafaj v Driscoll, 5 AD3d 139 [1st Dept. 2004]; McNulty v DePetro, 298 AD2d 566 [2d Dept. 2002]; Harris v Ryder, 292 AD2d 499 [2d Dept. 2002]; Cerda v Paisley, 273 AD2d 339 [2d Dept. 2000]).

Counsel also moves to dismiss the complaint on the ground that the court lacks personal jurisdiction over Samuel R. Ra. Plaintiff designated Queens County as the proper venue on the grounds that Ra defendants lived at the address in Bayside that was provided to the police at the scene. Samuel R. Ra and Jose P. Ra were personally served at the Bayside address pursuant to CPLR 308 by service upon a person of suitable age and discretion. Defense counsel claims, however, that said service was insufficient to confer personal jurisdiction over Samuel Ra as he resided in New Jersey on the date the action was commenced. Further, counsel contends that as the accident occurred in New Jersey and neither the plaintiff nor Samuel Ra resides in New York, this Court does not have long arm jurisdiction under CPLR 302 (4)(a). Counsel also claims that Divencenzo, the driver of vehicle No. 4 is a necessary party and as he was not named in the action, the action must be dismissed pursuant to CPLR 3211(a)(10). Lastly, the plaintiff claims that the action should be dismissed on the ground of forum non conviens as the accident occurred in New Jersey, the plaintiff resides in New Jersey, the police officers from Bergen County responded to the scene, Ra is a resident of New Jersey and DiVencenzo, the last car in the chain reaction accident also resides in New Jersey.

In opposition, Elliot Katsnelson, Esq. counsel for the plaintiff, states that the court has obtained personal jurisdiction over the defendant as he was personally served at the address listed on his New York State drivers license. Counsel submits a copy of a DMV record expansion abstract indicating that on September 21, 2011, Samuel Ra's address was listed as 206-23 46th Avenue Bayside, New York, the address where he was served on December 9, 2011. Counsel asserts that the courts have held that where a party fails to comply with VTL § 505(5) by failing to report a change of address to the DMV, the party is estopped from raising jurisdictional defenses (citing McNeil v Tomlin, 82 ad 2d 825 [2d Dept. 1981]).

With respect to the motion for summary judgment counsel states that Ra's affidavit raises a triable issue of fact as it conflicts with the statements in the police accident report. In addition, counsel claims that the motion is premature as there are several witnesses who could shed light on responsiblity for the accident.

With respect to the motion to dismiss for failure to join a necessary party, plaintiff states that DiVencenzo has recently been joined via a third-party complaint. As to forum non-conviens counsel states that defendant has failed to make a sufficient showing of any factor militating against New York being a proper forum.

Defendants Infinite Glass and Metal Inc. and Christopher J. Schwarze have not opposed the motion.

Upon review and consideration of the defendants' motion, plaintiff's affirmation in opposition and defendants' reply thereto, this Court finds as follows:

JURISDICTION

As stated above, Samuel R. Ra was served in New York on December 9, 2011 at the address designated on his New York State driver's license. Although defendant claims that he was a resident of New Jersey on that date, he did not change his address with the New York State Commissioner of Motor Vehicles as required by VTL §505(5).

Generally, under these circumstances, the defendant would be estopped from contesting the validity of service based upon personal service that was made at the address listed with the DMV pursuant to CPLR 308(2)(see Wauchope v Williams, 71 AD3d 876 [2d Dept. 2010]; Velasquez v. Gallelli, 44 AD3d 934 [2d Dept. 2007]; Choudhry v. Edward, 300 AD2d 529[2d Dept. 2002]). However, under the circumstances of this case, the defendant is not estopped from contesting personal jurisdiction because here the Court lacks a jurisdictional basis to obtain personal service over defendant Samuel R. Ra. Thus, with respect to long arm jurisdiction pursuant to CPLR 302(a)(2), this Court finds that the Court has no jurisdiction over defendant Samuel Ra as he was not domiciled in New York at the time plaintiff commenced the action and the alleged tortious act occurred in New Jersey (see Johnson v Ward, 4 NY3d 516 [2005]; Keane v Kamin, 94 NY2d 263 [1999]; Bookstaver v Saintfort, 10 AD3d 514 [1st Dept. 2004]; Mitchell v Cunningham, 281 AD2d 192 [1st Dept. 2001]).

SUMMARY JUDGMENT

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position (see Zuckerman v. City of New York, 49 NY2d 557[1980]).

It is well established law that a rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence on the part of the driver of the rearmost vehicle, requiring the operator of that vehicle to proffer an adequate, non-negligent explanation for the accident (see Klopchin v Masri, 45 AD3d 737 [2d Dept. 2007]; Hakakian v McCabe, 38 AD3d 493 [2d

Dept. 2007]; Reed v. New York City Transit Authority, 299 AD2 330 [2d Dept. 2002]; Velazquez v Denton Limo, Inc., 7 AD3d787 [2d Dept. 2004].

Here, Ra testified at his deposition that his vehicle was at a complete stop when plaintiff's vehicle was struck from behind by the vehicle driven by Schwarze causing the chain reaction accident. "The rearmost driver in a chain-reaction collision bears a presumption of responsibility" (Ferguson v Honda Lease Trust, 34 AD3d 356 [1st Dept. 2006], quoting De La Cruz v Ock Wee Leong, 16 AD3d 199[1st Dept. 2005]). Evidence that a vehicle was rear-ended and propelled into the stopped vehicle in front of it may provide a sufficient non-negligent explanation (see Katz v Masada II Car & Limo Serv., Inc., 43 AD3d 876 [2d Dept. 2007]). Defendant Ra, who was stopped at the time of the impact, demonstrated that his conduct was not a proximate cause of the rear-end collision between his vehicle and the vehicles behind him (see Abrahamian v Tak Chan, 33 AD3d 947 [2d Dept. 2006]; Calabrese v Kennedy, 8 AD3d 505 [2d Dept. 2006]; Ratner v Petruso, 274 AD2d 566 [2d Dept. 2000]). Thus, defendant Ra satisfied his prima facie burden of establishing entitlement to judgment as a matter of law by demonstrating that his vehicle was stopped at the time it was struck in the rear in a chain reaction which was allegedly commenced by defendant Schwarze and then started again by DiVencenzo.

Having made the requisite prima facie showing of their entitlement to summary judgment, the burden then shifted to the other drivers to raise a triable issue of fact as to whether Ra was also negligent, and if so, whether that negligence contributed to the happening of the accident (see Goemans v County of Suffolk,57 AD3d 478 [2d Dept. 2007]). This court finds that the defendant Infinite/Schwarze, who did not oppose the motion, nor the plaintiff who did not submit an affidavit in opposition to the motion, failed to provide evidence as to a non-negligent explanation for the accident sufficient to raise a triable question of fact (see Lampkin v Chan, 68 AD3d 727 [2d Dept. 2009]; Cavitch v Mateo, 58 AD3d 592 [2d Dept. 2009]; Garner v Chevalier Transp. Corp, 58 AD3d 802 [2d Dept. 2009]; Kimyagarov v Nixon Taxi Corp, 45 AD3d 736 [2d Dept. 2007]; Gomez v Sammy's Transp., Inc., 19 AD3d 544 [2d Dept. 2005][the defendants failed to raise a triable issue of fact by only interposing an affirmation of their attorney who lacked knowledge of the facts]).

Plaintiff's contention that the motion is premature is without merit as he failed to offer an evidentiary basis to suggest that discovery may lead to relevant evidence sufficient to oppose the motion or that facts essential to opposing the motion were exclusively within the knowledge and control of the

defendants (see Kimyagarov v Nixon Taxi Corp., 45 AD3d 736, supra).

Accordingly, as the evidence in the record demonstrates that there are no triable issues of fact as to whether Ra may have borne comparative fault for the causation of the accident, and based on the foregoing, it is

ORDERED, that the branch of defendant's motion for an order dismissing the action against Samuel R. Ra for lack of personal jurisdiction is granted, and it is further,

ORDERED, that the branch of the motion by defendants Samuel R. Ra and Jose P. Ra for summary judgment dismissing the complaint and all cross-claims against them is granted, and it is further,

ORDERED, that the branch of the motion to dismiss the action for failure to join a necessary party is denied as JOSEPH R. DiVENCENZO has been added as a third-party defendant and it is further,

ORDERED that the branch of the motion to dismiss on the ground of forum non conviens is denied as academic, and it is further,

ORDERED and the Clerk of Court is authorized to enter judgment accordingly.

Dated: July 23, 2012
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.