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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GEOFFREY D. WRIGHT PART 62

Justice

RICARDO MENDEZ

Plaintiff

- v -

CITY OF NEW YORK and CARLOS BRIZUELA

Defendant(s)

INDEX NO. 113227/2010

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL.

The following papers, numbered 1 to 4 were read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2,3
Replying Affidavits	4

Cross-Motion: Yes X No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed written decision.

GEOFFREY D. WRIGHT

Dated: July 18, 2012

J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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RICARDO MENDEZ,

Plaintiff,

-against-

THE CITY OF NEW YORK, and
CARLOS BRIZUELA,

Defendants.

----------x

Index # 113227/10

DECISION

Present:
Hon. Geoffrey D. Wright
Acting Justice Supreme Court

RECITATION , AS REQUIRED BY CPLR 2219(A), of the papers considered in the review of this Motion/Order for summary judgment.

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed.....	1
Order to Show Cause and Affidavits Annexed	
Answering Affidavits.....	2,3
Replying Affidavits.....	4
Exhibits.....	
Other.....cross-motion.....	

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Defendant Carlos Brizuela ("Brizuela") moves for summary judgment dismissing the claim of the Plaintiff and the cross-claims of Co-defendant, The City of New York. Plaintiff opposes the motion and Co-defendant, The City of New York, joins and adopts Plaintiffs arguments. The motion is granted as to Co-defendant Brizuela.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law demonstrating the absence of material issues of fact (Alverez v. Prospect Hospital , 68 N.Y.2d 320, 501 N.E.2d 572(1986).

This is a negligence action for personal injuries sustained in a motorcycle accident that occurred on April 30, 2010. Plaintiff claims he was traveling on his motorcycle in the center lane on Bowery Street close to Spring Street. Plaintiff testified that traffic

moved slowly, describing it as bumper to bumper and that he was not going fast. He claims that his motorcycle hit, what he described as a "hole" in the road, which caused him and his motorcycle to fall to the ground. Plaintiff stated he fell to the right side but landed in the center lane and that his body did not move from the center lane to the right lane after hitting the pavement. While lying in the center lane, Plaintiff alleges that a minivan driven by Defendant Brizuela, struck his right shoulder and head, then came to rest with two wheels on the sidewalk. Plaintiff testified approximately one second elapsed between the time he was thrown off the motorcycle and the impact from the minivan. Plaintiff denies being in the right lane when the accident occurred, accuses the Defendant of following him to closely, failing to see what was in front of him and failing to take appropriate action to avoid colliding with the Plaintiff. In addition, Plaintiff denies that the emergency doctrine defense is applicable in this particular case.

Defendant denies that the accident occurred in the center lane and instead alleges the accident occurred in the right lane. The Defendant alleges he entered Bowery from Houston Street, into the center lane, then made a change to the right lane. Defendant testified that traffic was congested and that after passing the intersection of Prince Street, he saw Plaintiff on his motorcycle directly behind him in the right lane. Defendant testified that the Plaintiff then pulled out and began to pass his van on the left side riding between the center and right lanes. When the motorcycle was 5-6 meters in front of the van, the motorcycle either struck what he described as a pothole or attempted to avoid a pothole. The motorcycle and the Plaintiff fell to the ground, between the center and right lanes. Defendant stated that when the motorcycle hit the ground and started spinning the Defendant was traveling less than 10 miles an hour and that he did not make contact with the motorcycle or the Plaintiff. Moreover, Defendant testified that when he saw the motorcycle fall, he drove his minivan onto the sidewalk to the right of Bowery to avoid hitting the Plaintiff. The Defendant claims an affirmative defense under the emergency doctrine.

Under the emergency doctrine, where an actor is confronted by a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor is required to make a speed decision without weighing alternative courses of conduct, the actor may not be negligent if the actions he takes are reasonable and prudent in the context of the emergency. Rivera v. New York city Transit Authority, 77 N.y.2d 322, 567 N.Y.S.2d 629, 569 N.E.2d 432 (1987). While it is often a jury question whether a person's reaction to an emergency was reasonable, summary resolution is appropriate when there is sufficient evidence to support the reasonableness of the individual's actions. Ward v. Cox, 38 A.D. 3d 313, 831 N.Y.S.2d 406 (1st Dept., 2007).

In this case, it is undisputed that the Defendant's minivan did not cause the Plaintiff's motorcycle to fall or did it cause the Plaintiff to be thrown from the

motorcycle. Both Plaintiff and Defendant testified that a "pothole" in the center lane caused the motorcycle and the Plaintiff to fall. Plaintiff testified that traffic was congested and that about one (1) second elapsed between the time he was thrown off the motorcycle and the time he alleges he felt an impact from the van. This bolsters Defendant's argument that this was an emergency situation not of his own making, which provided little or no time to react and is further evidenced since both Defendant and Plaintiff agree that Defendant's minivan ended up on the sidewalk to the right of Bowery. (Vitale v. Levine, 44 A.D.3d 935, 844 N.Y.S.2d 105, 2007 Slip Op. 08065 [2007]). This Court rejects Plaintiff's argument that there was no emergency and that Defendant allegedly struck the Plaintiff with his minivan as a result of following too closely, failing to see what was in front of him and failing to take appropriate action to avoid colliding with the Plaintiff. A driver is not obligated to anticipate a body lying in the roadway, in the direct path of his motor vehicle. "Such an event constitutes a classic emergency situation implicating the emergency doctrine. (Marsch v. Catanzaro, 40 A.D.3d 941, 837 N.Y.S.2d 195, 2007 N.Y. Slip Op. 04458 [2007])

Plaintiff argues in the alternative, that Defendant is barred from raising the emergency doctrine defense because it was not previously raised in Defendant's Answer or prior to conducting depositions and raising it now would be prejudicial to the Plaintiff. This Court does not agree. "A party shall plead all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading." (See CPLR 3018 [b]). Applying that rule, the question whether the emergency doctrine must be pleaded as an affirmative defense necessarily turns on the particular circumstances of each case. Where the facts relating to the existence of an emergency are presumptively known only to the party seeking to invoke the doctrine, it must be pleaded as an affirmative defense lest the adverse party be taken by surprise. Conversely, where the facts relating to the existence of the emergency are known to the adverse party and would not raise new issues of fact not appearing on the face of the prior pleadings, the party seeking to rely on the emergency doctrine would not have to raise it as an affirmative defense. (Bello v. Transit Auth. Of N.Y. City, 12 A.D.3d 58, 783 N.Y.S.2d 648, 2004 N.Y. Slip Op. 07650 [2004]).

As previously noted, it was known and undisputed to both Plaintiff and Defendant, that a pothole or defect in the center lane caused the Plaintiff to fall off of his motorcycle onto the center lane. Additionally, it was known that the Defendant drove his minivan onto the sidewalk to the right of Bowery Street. Thus, there was no unfair surprise to the Plaintiff from the defendant's failure to plead the emergency doctrine as an affirmative defense. Moreover, the Plaintiff was given ample opportunity in his opposition to this summary judgment motion to challenge the application of the emergency doctrine, both procedurally and on the merits (Rogoff v. San Juan Racing Assn. 54 N.Y.2d 883, 429 N.E.2d 418, 444 N.Y.S.2d 911 (N.Y. Oct 15, 1981).

In view of the above, the motion for summary judgment is granted as to Defendant Brizuela.

GEOFFREY D. WRIGHT
A.J.S.C.

Dated: July 17, 2012

JUDGE GEOFFREY D. WRIGHT
Acting Justice of the Supreme Court