

Rieders v Kahn

2012 NY Slip Op 32117(U)

August 1, 2012

Sup Ct, Nassau County

Docket Number: 14142/10

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

SYLVIA RIEDERS,

Plaintiff,

- against -

TRIAL/IAS PART 31
NASSAU COUNTY

Index No.: 14142/10
Motion Seq. Nos.: 05, 06
Motion Dates: 05/07/12
05/07/12

CYRUS I. KAHN, BRETT L. BONDI,
PARKING SYSTEMS, INC., PARKING SYSTEMS, INC.
d/b/a PARKING SYSTEMS, PREFERRED PAYMENT
SYSTEMS CORP. d/b/a PARKING SYSTEMS,
BURTON & DOYLE RESTAURANT,
BURTON & DOYLE RESTAURANT, INC.,
PATRICIA WAGLAND, PATRICIA CRAIG WAGLAND
DELANEY and ISLAND VALET SERVICES, INC.
d/b/a PARKING SYSTEMS VALET SERVICE,

Defendants.

The following papers have been read on these motions:

	Papers Numbered
<u>Notice of Motion (Seq. No. 05), Affirmation, Affidavit and Exhibits</u>	<u>1</u>
<u>Notice of Cross-Motion (Seq. No. 06), Affirmation and Exhibits</u>	<u>2</u>
<u>Affirmation in Opposition, Affidavit and Exhibit</u>	<u>3</u>
<u>Affirmation in Reply and Exhibit</u>	<u>4</u>

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendants Brett L. Bondi, Parking Systems Inc., Parking Systems Inc. d/b/a Parking Systems, Preferred Payment Systems Corp. d/b/a Parking Systems, and Island Valet Services,

Inc., d/b/a Parking Systems Valet Service (hereinafter the “Bondi defendants”) collectively move (Seq. No. 05), pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff’s Complaint as to liability. Plaintiff opposes the motion.

Defendant Cyrus I. Kahn M.D. s/h/a Cyrus I. Kahn (“Kahn”), cross-moves (Seq. No. 06), pursuant to CPLR § 3212, and requests that, in the event this Court grants summary judgment in favor of the Bondi defendants, this Court also grant summary judgment dismissing plaintiff’s Complaint as is asserted against him, together with any and all cross-claims. Plaintiff opposes the motion.

The underlying action was commenced by plaintiff to recover for personal injuries she sustained on October 31, 2009, while exiting the right rear passenger door of a vehicle owned by her son-in-law, defendant Kahn, and operated by defendant Brett L. Bondi, who was then employed by defendant Parking Systems. *See* Bondi Defendants’ Affirmation in Support Exhibit A ¶¶ 92, 93. On the date in issue,¹ plaintiff, who was then ninety-four (94) years of age, was traveling to the Burton and Doyle Steakhouse with defendant Kahn, as well as her daughter, non-party witness Susan Kahn. *See id.* at ¶ 92; Bondi Defendants’ Affirmation in Support Exhibit G p.13; Bondi Defendants’ Affirmation in Support Exhibit I p.5. Upon arriving at the restaurant, defendant Kahn stopped at the valet stand with his vehicle facing north. *See* Bondi Defendants’ Affirmation in Support Exhibit G pp. 16, 17, 18, 26, 27; Bondi Defendants Affidavit in Support ¶ 5; Plaintiff’s Affidavit in Opposition ¶ 7. After bringing his vehicle to a stop at the valet stand, which was located on the right/eastbound side of his vehicle, defendant Kahn exited the vehicle

¹ The Court notes that while plaintiff was deposed, she was unable to recall any circumstances surrounding the subject accident and, accordingly, the facts as recited herein are based upon the depositions of defendants Khan and Brett L. Bondi, as well as that of non-party witness Susan Kahn.

and turned operation thereof over to defendant Brett L. Bondi, one of the valets on duty. *See* Bondi Defendants' Affirmation in Support Exhibit G pp. 16, 17, 18, 26, 27. Immediately thereafter, defendant Kahn began to walk around the back of his vehicle to assist plaintiff in exiting from the right rear passenger door and, as he "rounded the car," it "started to move forward" in a northward direction. *See id.* at pp.18, 19, 27; Bondi Defendants' Affidavit in Support ¶ 5; Plaintiff's Affidavit in Opposition ¶ 7. Defendant Kahn states that, as the vehicle began to move, plaintiff's door "was still open" at which point he heard plaintiff "scream" and then observed her "down on the ground" lying on her right side. *See* Bondi Defendants' Affirmation in Support Exhibit G pp.19, 20.

In addition to the testimony of defendant Kahn, non-party witness Susan Kahn, testified that, after arriving at the restaurant, defendant Brett L. Bondi approached the vehicle and opened the car doors for both herself, as well as her mother (plaintiff). *See* Bondi Defendants' Affirmation in Support Exhibit I p. 10. After exiting the vehicle, Susan Kahn observed plaintiff emerge from the vehicle and hold onto the "side" of the car. *See id.* at p.16. Thereafter, Susan Kahn proceeded to the entrance of the restaurant after which she "heard" plaintiff scream and subsequently turned "quickly" around and witnessed plaintiff "standing up and as the car moved, she was starting to fall down." *See id.* at pp. 17, 18. Susan Kahn further testified that, in the first moment after turning around, she observed plaintiff "holding onto the side of the car" with her left hand. *See id.* at pp. 19, 23, 24, 25, 26.

As a result of the foregoing, the underlying action was initially commenced by plaintiff on or about July 27, 2010, which was followed by the service of two Amended Complaints, the latter of which is dated November 22, 2011, and asserts negligence on behalf of the named

defendants. *See* Bondi Defendants' Affirmation in Support ¶ 4; Bondi Defendants' Affirmation in Support Exhibit A. The instant applications respectively interposed by the moving defendants herein thereafter ensued and are determined as set forth hereinafter.

The Court initially addresses the application interposed by the Bondi defendants (Motion Seq. No. 05). In support thereof, the Bondi defendants' counsel posits that, given the absence of any competent evidence from which a reasonable inference of negligence may be drawn, summary judgment in favor of the Bondi defendants is warranted. *See* Bondi Defendants' Affirmation in Support ¶¶ 8, 11, 12, 28, 30, 32-34. More specifically, the Bondi defendants' counsel asserts that neither defendant Kahn, nor non-party witness Susan Kahn, testified that they actually observed plaintiff exiting the vehicle as it was being driven forward by defendant Brett L. Bondi. *See id.* at ¶¶ 16, 17, 19, 25, 32, 34, 35, 39. The Bondi defendants' counsel further argues that defendant Brett L. Bondi unequivocally testified that he did not move the subject vehicle until all of the passengers had exited and all of the doors had been shut. *See id.* at ¶ 28.

The Bondi defendants' counsel provides the annexed Affidavit of Robert Genna ("Genna"), an expert in the field of accident reconstruction, who has been employed by the Suffolk County Crime Laboratory for thirty-five (35) years. *See* Bondi Defendants' Affidavit in Support ¶ 1. Genna states that he has reviewed the relevant depositions and pleadings herein, as well as plaintiff's medical records and, based thereon, opines that, "[i]f the movement of the vehicle was northbound, and the plaintiff had just exited the vehicle (eastbound), any influence that the vehicle would have had on the plaintiff would have caused her to fall to her left side, since when a person exits a vehicle their back is usually exposed towards the vehicle." *See id.* at ¶ 8. Genna continues by stating, "[w]hen the vehicle moved forward, and the plaintiff's back was towards the vehicle, the vehicle's forward momentum would have carried the plaintiff's body to

her left, and not towards her right” as is asserted herein. *See id.* at ¶¶ 8, 9. Genna ultimately opines that, “to a reasonable degree of certainty in the field of collision reconstruction analysis,...., the sole cause of the fall was a loss of balance by the plaintiff” and that “the movement of the vehicle did not cause plaintiff to fall to the ground.” *See id.* at ¶ 11.

With respect to the application submitted by defendant Kahn (Cross-Motion Seq. No. 06), defendant Kahn’s counsel argues that, as defendant Kahn can only be held vicariously liable pursuant to VTL § 388, in the event summary judgment is granted in favor of the Bondi defendants, summary judgment should also be granted in favor of defendant Kahn. *See Defendant Kahn’s Affirmation in Support* ¶¶ 11, 12, 13.

In opposing the foregoing applications, counsel for plaintiff asserts that there are unresolved issues of fact with respect to whether the defendants’ actions were the proximate cause of plaintiff’s injuries and, accordingly, defendants Bondi and defendant Kahn’s motions for summary judgment must be denied. *See Plaintiff’s Affirmation in Opposition* ¶¶ 5, 14-18, 29. To this point, plaintiff’s counsel argues that the deposition testimony of both defendant Kahn and non-party witness Susan Kahn clearly establish that while plaintiff was still in the process of exiting from the right rear passenger door of the subject vehicle, said vehicle began to move. *See id.* Plaintiff’s counsel further argues that, given the sharply contrasting versions of events proffered by the various deponents, issues exist with regard to their respective credibility, which can only be resolved by the trier of fact. *See id.* at ¶¶ 19, 21-25.

Plaintiff’s counsel provides the expert Affidavit of Nicholas Bellizzi (“Bellizzi”), “a transportation safety engineer, vehicular accident reconstructionist and licensed professional engineer,” who specializes in vehicular accident investigations and post-accident analysis. *See Plaintiff’s Affidavit in Opposition* at ¶¶ 1, 2, 4. Bellizzi states that he has reviewed the relevant

pleadings, deposition transcripts, plaintiff's medical records, as well as the Affidavit of the Bondi defendants' expert, and, based thereon, concludes that "[the plaintiff's] fall and her resulting injuries were caused by Mr. Bondi's movement of the [subject vehicle] while [the plaintiff] was still in the process of exiting the vehicle...." *See id.* at ¶¶ 5, 16. Bellizzi specifically and directly contradicts the assertion posited by the Bondi defendants' expert that "the plaintiff's back was towards the vehicle" and counters that "[t]here is no evidence to suggest what [the plaintiff's] back position was in when she exited the vehicle." *See id.* at ¶ 14. Bellizzi further opines that, if as was testified to by Susan Kahn, "[the plaintiff's] left hand was providing support for her as she exited the vehicle and she was pushing off the vehicle with her left hand, the loss of that support to her left hand would have caused her to fall to her right." *See id.*

It is well settled that a motion for summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985). To obtain summary judgment, the moving party must establish its claim or defense by tendering admissible proof sufficient to warrant the Court to direct judgment in the movants' favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See CPLR § 3212(b); Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427

N.Y.S.2d 595 (1980); *Winegrad v. New York University Medical Center*, *supra*. “A motion for summary judgment ‘should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility.’” *Baker v. D.J. Stapleton, Inc.*, 43 A.D.3d 839, 841 N.Y.S.2d 382 (2d Dept. 2007) quoting *Scott v. Long Island Power Authority*, 294 A.D.2d 348, 741 N.Y.S.2d 708 (2d Dept. 2002); *Ferrante v. American Lung Assn.*, 90 N.Y.2d 623, 665 N.Y.S.2d 25 (1997). Further, when considering a motion for summary judgment, the function of the court is not to resolve factual issues but rather to determine if any such material issues of fact exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

In the instant matter, the Court has carefully reviewed the submissions proffered by the Bondi defendants and, upon such review, finds that said defendants have failed to demonstrate their entitlement to judgment as a matter of law. *See Winegrad v. New York University Medical Center*, *supra*. In moving for summary judgment, while the Bondi defendants’ counsel argues that the evidence with respect to proximate causation is based upon unsupported and conclusory assertions, this Court finds said argument unavailing.

“Fundamentally, a finding of proximate causation must be based on logical inferences from the record and, in the absence of any evidence as to the actual cause of plaintiff’s fall, the trier of fact would be required to base a finding of proximate cause upon nothing more than speculation.” *Cangro v. Noah Builders, Inc.*, 52 A.D.3d 758, 861 N.Y.S.2d 121 (2d Dept. 2008) quoting *Penovich v. Schoeck*, 252 A.D.2d 799, 676 N.Y.S.2d 253 (3d Dept. 1998). As a general proposition, “a plaintiff’s inability to identify the cause of [his or her] fall is fatal to the cause of action because a finding that the defendant’s negligence, if any, proximately caused the

plaintiff's injuries would be based on speculation." *Patrick v. Costco Wholesale Corp.*, 77 A.D.3d 810, 909 N.Y.S.2d 543 (2d Dept. 2010).

In the matter *sub judice*, while the Court is fully cognizant that the plaintiff was unable to recall any details surrounding her accident, the record includes other competent evidence which establishes the existence of material issues of fact with respect to proximate causation. *Cf. Cangro v. Noah Builders, Inc.*, *supra*. Here, the record contains the sworn deposition testimony of defendant Kahn and non-party witness Susan Kahn, both of whom separately testified that, at the time plaintiff was exiting the vehicle, the right rear passenger door was still open and the vehicle was in motion.² Moreover, the deposition testimony of defendant Brett L. Bondi stands in stark contradiction to that adduced from defendant Kahn and non-party witness Susan Kahn. *See Baker v. D.J. Stapleton, Inc.*, *supra*. As noted above, defendant Brett L. Bondi testified that he did not move the subject vehicle until such time that "[t]here were no passengers inside the car, [and] the doors were shut."³ Thus, given the sharply conflicting deposition testimony of the respective deponents, the record clearly reveals issues of credibility, as well as unresolved factual issues with respect to whether the subject vehicle was in motion at the time plaintiff fell and whether this movement was a proximate cause of plaintiff's injuries. Under these circumstances, summary judgment is not appropriate. *See Sillman v. Twentieth Century-Fox Film Corp.*, *supra*; *Winegrad v. New York University Medical Center*, *supra*. Thus, as the Bondi defendants have failed to make their *prima facie* showing of entitlement to judgment as a matter of law, it is not necessary to consider the sufficiency of plaintiff's opposition papers. *See Scott v. City of New York*, 88 A.D.3d 985, 931 N.Y.S.2d 661 (2d Dept. 2011).

² *See* Bondi Defendants' Affirmation in Support Exhibit G pp. 18, 19; Bondi Defendants' Affirmation in Support Exhibit I pp. 17, 22, 30.

³ *See* Bondi Defendants' Affirmation in Support Exhibit H pp. 27-29.

Based upon the foregoing, defendants Brett L. Bondi, Parking Systems Inc., Parking Systems Inc. d/b/a Parking Systems, Preferred Payment Systems Corp. d/b/a Parking Systems, and Island Valet Services, Inc., d/b/a Parking Systems Valet Service's motion (Seq. No. 05), pursuant to CPLR § 3212, for an order granting summary judgment dismissing plaintiff's Complaint as to liability is hereby **DENIED**.

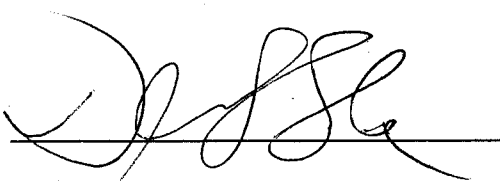
In accordance therewith, defendant Cyrus I. Kahn M.D. s/h/a Cyrus I. Kahn's cross-motion (Seq. No. 06), pursuant to CPLR § 3212, for an order dismissing plaintiff's Complaint, together with any and all cross-claims asserted against him, is also hereby **DENIED**.

All applications not specifically addressed are denied.

All parties shall appear for Trial in Nassau County Supreme Court, Central Jury Part, at 100 Supreme Court Drive, Mineola, New York, on September 4, 2012, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:


DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
August 1, 2012

ENTERED
AUG 03 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE