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SHORT FORM ORDER

COPY

INDEX No. 09-6189
CAL. No. 11-02504MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 4-26-12
ADJ. DATE 6-19-12
Mot. Seq. # 004 - MG

MARGARET WHEELER, Plaintiff, - against - DANNY PESANTEZ, ALEX PESANTEZ, LOUIS PICANO AND GENERAL MOTORS CORPORATION, Defendants.	TED J. TANENBAUM & ASSOCIATES, P.C. Attorney for Plaintiff One Old Country Road, Suite 318 Carle Place, New York 11514 PICCIANO & SCAHILL Attorney for Defendants Pesantez 900 Merchants Concourse, Suite 310 Westbury, New York 11590 MONTFORT, HEALY, McGUIRE & SALLEY Attorney for Defendant Picano 840 Franklin Avenue, P.O. Box 7677 Garden City, New York 11530-7677

Upon the following papers numbered 1 to 32 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 17 - 21, 22 - 23; Replying Affidavits and supporting papers 24 - 32; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the defendant Louis Picano for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against him is granted.

The plaintiff commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred on November 22, 2008, on the Long Island Expressway near Exit 32 in Lake Success, New York. The accident allegedly happened when the vehicle in which the plaintiff was riding as a passenger was traveling eastbound in the right lane of said roadway. The plaintiff's vehicle struck a guardrail to its right, and careened left across three lanes of travel into the high occupancy vehicle (HOV) lane where it struck the vehicle owned and operated by the defendant Louis Picano (Picano).

Picano now moves for summary judgment on the ground that the negligence of defendant Danny Pesantez (Pesantez), the driver of the vehicle in which the plaintiff was a passenger, was the sole

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proximate cause of this accident. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]). However, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]; ***Rebecchi v Whitmore,*** *supra*).

In support of his motion, Picano submits, among other things, the pleadings, his deposition transcript, the deposition transcripts of the plaintiff, Pesantez, and a nonparty witness, and a copy of the police accident report regarding the accident. Initially, the Court notes that the police accident report record relied on by Picano is plainly inadmissible and has not been considered by the Court in making this determination (*see* CPLR 4518 [c]; ***Cover v Cohen***, 61 NY2d 261, 473 NYS2d 378 [1984]; ***Cheul Soo Kang v Violante***, 60 AD3d 991, 877 NYS2d 354 [2d Dept 2009]; ***Mooney v Osowiecky***, 235 AD2d 603, 651 NYS2d 713 [3d Dept 1997]; ***Szymanski v Robinson***, 234 AD2d 992, 651 NYS2d 826 [4th Dept 1996]; ***Aetna Cas. & Sur. Co. v Island Transp. Corp.***, 233 AD2d 157, 649 NYS2d 675 [1st Dept 1996]; ***Cadieux v D.B. Interiors***, 214 AD2d 323, 624 NYS2d 582 [1st Dept 1995]). In addition, a review of the record reveals that the deposition transcripts submitted by Picano exhibit various alleged deficiencies relative to their admissibility as evidence herein. The attorneys for the nonmoving parties contend that the Court cannot consider the transcripts in deciding the motion.

The Court notes that the deposition of Pesantz is certified but unsigned, and that Picano has failed to submit proof that the transcript was forwarded to the witness for his review (*see* CPLR 3116 [a]). Despite the objections raised, the Court may consider Pesantz's unsigned deposition transcript submitted in support of Picano's motion (CPLR 3117 [a][2]; ***Ashif v Won Ok Lee***, 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]; ***Wojtas v Fifth Ave. Coach Corp.***, 23 AD2d 685, 257 NYS2d 404 [2d Dept 1965]; *see also* ***Morchik v Trinity School***, 257 AD2d 534, 684 NYS2d 534 [1st Dept 1999]; ***R.M. Newell Co. v Rice***, 236 AD2d 843, 653 NYS2d 1004 [4th Dept 1997]). In addition, the Court will consider the unsigned and uncertified transcript of Picano's deposition testimony as it has been adopted by the party deponent (***Rodriguez v Ryder Truck, Inc.***, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]; ***Ashif v Won Ok Lee***, *supra*; ***Wojtas v Fifth Ave. Coach Corp.***, *supra*). In any event, Picano has submitted the signature page and the certification for his deposition in his reply papers, and this late submission does not prejudice the nonmoving parties (***Rodriguez v Ryder Truck, Inc.***, *supra*).

The record reveals that the attorneys for Picano requested a copy of the signature page for the plaintiff's deposition in a letter dated August 26, 2010. The attorneys for the plaintiff did not forward that page as requested. Under the circumstances, the Court may consider the plaintiff's unsigned deposition transcript submitted in support of the motion as the plaintiff has not raised any challenges to

its accuracy (***Rodriguez v Ryder Truck, Inc.***, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]; ***Zalot v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]; *see also* ***Bennet v Berger***, 283 AD2d 374, 726 NYS2d 22 [1st Dept 2001]; ***Zabari v City of New York***, 242 AD2d 15, 672 NYS2d 332 [1st Dept 1998]).

In addition, the Court will consider the deposition transcript of the nonparty witness, Dan McKenna (McKenna), a Nassau County police officer who was an eyewitness to this accident. By letter dated May 8, 2012, Picano forwarded the signature page and the certification page from McKenna's deposition to the Court and the nonmoving parties. This was accomplished before the return date of the instant motion. The attorney for Picano points out that McKenna did not sign his deposition before the time that Picano was required by statute to make his motion for summary judgment. A cursory review of said transcript reveals that all of the parties were present at said deposition through their respective attorneys. In addition, this late submission does not prejudice the nonmoving parties (***Rodriguez v Ryder Truck, Inc.***, *supra*), who have not raised any challenges to its accuracy (***Rodriguez v Ryder Truck, Inc.***, *id.*; ***Zalot v Zieba***, *supra*; *see also* ***Bennet v Berger***, *supra*; ***Zabari v City of New York***, *supra*).

At her deposition, the plaintiff testified that she was asleep in the front passenger seat of Pesantez's motor vehicle at the time of this accident. She was awoken by a loud bang, and she remembers the car "flipping over," stopping on its side. She does not remember seeing another car involved in the accident. The plaintiff further testified that "right after the accident happened, the cop was right there."

Pesantez was deposed on October 18, 2011. He testified that he picked the plaintiff up between 7:00 p.m. and 8:00 p.m. on November 21, 2008, and that they went to a party in Long Island City, New York. They stayed at the party until 10:00 or 10:30 p.m., and while at the party he smoked marijuana and consumed five drinks of hard liquor. He then drove the plaintiff to a nightclub where he consumed more alcohol. Pesantez further testified that he and the plaintiff left the nightclub at approximately 3:00 a.m. on November 22, 2008, and that they drove around Manhattan before heading home. As they left Manhattan, the plaintiff fell asleep in the front passenger seat of his car. He stated that he was eastbound in the right lane of the Long Island Expressway (LIE) when "I fell asleep. I hit the guardrail. When I hit the guardrail, I woke up. I cut the wheel left then it went off way to the HOV lane. And when it went to the HOV lane, it did flips." He did not know his speed when he hit the guardrail, whether he sped up or slowed down after he hit the guardrail, or if there were other cars nearby. Pesantez further testified that he did not know if he hit another motor vehicle.

At his deposition, Picano testified that he works at Laguardia Airport, and that he left work at 5:00 a.m. on the morning of the accident. Immediately before the accident, he was traveling eastbound in the HOV lane on the LIE at approximately 50 to 55 miles per hour. As he approached Exit 32, he observed a police car stopped there. He described the exit as having a metal guardrail to the right side of the road. The next thing that he knew glass was hitting him in the face, and he heard a loud boom. Picano further testified that he did not see the Pesantez vehicle hit the guardrail, that he did not hear anything before the collision, and that he did not see the Pesantez vehicle crossing the three lanes of travel on the LIE. He stated that he was a little past the place where the police officer was stopped when

the collision occurred, and that the Pesantez vehicle was behind his vehicle when the accident occurred.

McKenna, a Nassau County police officer, was deposed on June 24, 2011. He testified that he was on duty as a highway patrolman at the time of this accident. He had stopped his patrol car at the entrance ramp from Exit 32 onto the LIE. He described the area as having a metal guardrail along the right side of the LIE and a metal guardrail along the left side of the entrance ramp, which formed a "V" as the ramp merged with the right lane of travel on the LIE. He had stopped his patrol car with his driver's side door up against the guardrail on the ramp, close to where the two guardrails met, facing eastbound. McKenna further testified that he observed "a 1999 Chevy (SUV)[1] ... [strike] the guardrail right next to my [patrol car] ... go up on it's driver's wheels at a forty-five degree angle ... traveling eastbound on the LIE ... for approximately 80 to 100 yards ... [t]he SUV started to overtake the vehicle in the HOV lane ... it then made a very, very hard abrupt left hand turn coming into contact with the vehicle in the HOV lane, [striking] it on the passenger side of the vehicle." He indicated that the impact to the Picano vehicle was "basically at that time a t-bone situation," that the Picano vehicle was slightly ahead of the SUV, and that the SUV "overtook" the Picano vehicle. He stated that, after the impact with the guardrail, the SUV was traveling "above highway speed enough where it was overtaking the vehicle in the HOV lane."

It is well settled that a driver is negligent if he or she makes an unsafe lane change (VTL 1128 [a]; ***Fogel v Rizzo***, 91 AD3d 706, 937 NYS2d 122 [2d Dept 2012]). The Vehicle and Traffic Law provides, in pertinent part:

> § 1128. Driving on roadways laned for traffic
>
> Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules ... shall apply:
>
> (a) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

Furthermore, a driver is not required to anticipate that a vehicle will strike a guardrail, lose control, and subsequently careen across several lanes of travel (***Smit v Phillips***, 74 AD3d 782, 901 NYS2d 705 [2 Dept 2010]; ***Mayard v Wheels, Inc.***, 69 AD3d 907, 894 NYS2d 475 [2d Dept 2010]; ***Rosa v Averso***, 305 AD2d 483, 759 NYS2d 526 [2d Dept 2003]). It has been held that such an event constitutes a classic emergency situation implicating the emergency doctrine (***Smit v Phillips***, *supra*). However, in the instant action the Court finds that the emergency doctrine does not apply. There is no evidence that Picano had any opportunity to take any action, let alone evasive action, to avoid the impact to his vehicle. In any event, assuming that the doctrine does apply, Picano has established the reasonableness of his actions as a matter of law (*see* ***Huggins v Figueroa***, 395 AD2d 460, 762 NYS2d 404 [2003]).

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[1] The record reveals that the Pesantez vehicle was a 1999 Chevy Suburban. McKenna use the term SUV or 1999 Chevy interchangeably to describe said vehicle.

Having established his entitlement to summary judgment dismissing the complaint and all cross claims against him, it is incumbent upon the nonmoving parties to produce evidence in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, *supra*; ***Rebecchi v Whitmore***, *supra*; ***O'Neill v Fishkill***, *supra*). In opposition to the motion, the plaintiff submits the affirmation of her attorney, a copy of Picano's report of motor vehicle accident, the disclosure of her expert witness pursuant to CPLR 3101 (d), and the affidavit of her expert witness. In his affidavit, Robert D. Klingen (Klingen), swears that he is a fully accredited accident reconstruction expert, and that he has reviewed the relevant materials herein. He indicates that he made a site visit to the place of this accident on March 20, 2012. Based on the foregoing, he opines that the impact with the guardrail slowed the Pesantez vehicle , which means that said impact "would have taken place ahead of and within the view of Mr. Picano," and that Picano did not make proper observations of the roadway conditions and the events happening "as he approached the area of impact."

It is well settled that the opinion testimony of an expert "must be based on facts in the record or personally known to the witness" (*see* ***Hambsch v New York City Tr. Auth.***, 63 NY2d 723, 480 NYS2d 195 [1984] citing ***Cassano v Hagstrom***, 5 NY2d 643. 646, 187 NYS2d 1 [1959]; ***Shi Pei Fang v Heng Sang Realty Corp.***, 38 AD3d 520, 835 NYS2d 194 [2d Dept 2007]; ***Santoni v Bertelsmann Property, Inc.***, 21 AD3d 712, 800 NYS2d 676 [1st Dept 2005]). An expert "may not reach a conclusion by assuming material facts not supported by the evidence, and may not guess or speculate in drawing a conclusion" (*see* ***Shi Pei Fang v Heng Sang Realty Corp.***, *supra*). "Speculation, grounded in theory rather than fact, is insufficient to defeat a motion for summary judgment" (*see* ***Zuckerman v City of New York***, *supra*; ***Leggis v Gearhart***, 294 AD2d 543, 743 NYS2d 135 [2d Dept 2002]; ***Levitt v County of Suffolk***, 145 AD2d 414, 535 NYS2d 618 [2d Dept 1988]). Here, the expert opinion of Klingen consisted primarily of theoretical allegations with no independent factual basis and it is therefore speculative, unsubstantiated and conclusory (*see* ***Mestric v Martinez Cleaning Co.***, 306 AD2d 449, 761 NYS2d 504 [2d Dept 2003]). Klingen's expert opinion has failed to raise a triable issue of fact to defeat summary judgment. Moreover, the plaintiff's submission fails to raise a triable issue of fact.

In opposition to the motion, Pesantez submits the affirmation of his attorney, who has no personal knowledge of the facts herein, which does not raise a triable issue of fact, and is insufficient on a motion for summary judgment (***Sanbria v Paduch***, 61 AD3d 839, 876 NYS2d 874 [2d Dept 2009]; ***Warrington v Ryder Truck Rental, Inc.***, 35 AD3d 455, 826 NYS2d 152 [2d Dept 2006]; ***9394, LLC v Farris***, 10 AD3d 708, 782 NYS2d 281 [2d Dept 2004]; ***Deronde Prods., Inc. v. Steve Gen. Contr., Inc.***, 302 AD2d 989, 755 NYS2d 152 [4th Dept 2003]).

Accordingly, Picano's motion for summary judgment dismissing the complaint and all cross claims against him is granted.

Dated: Sept. 28, 2012

W. Gerard Asher
J.S.C.

____ FINAL DISPOSITION ____ NON-FINAL DISPOSITION