SHORT FORM ORDER

INDEX No. 09-24149
CAL No. 12-02306MV

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 48 - SUFFOLK COUNTY

PRESENT:

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE 1-25-13 (#002 & #003)
MOTION DATE 4-9-13 (#004)
ADJ. DATE 7-16-13
Mot. Seq. # 002 - MD
003 - MD
004 - MotD; CASEDISP

LAURA J. LINTON,

Plaintiff,

- against -

EV AUTO REPAIR INC. and ERIC VANDERWATER,

Defendants.

SIMON & GILMAN, LLP
Attorney for Plaintiff
91-31 Queens Boulevard, Suite 411
Elmhurst, New York 11373

CASCONE & KLUEPFEL, LLP
Attorney for Defendants/Third-Party Plaintiffs
1399 Franklin Avenue, Suite 302
Garden City, New York 11530

EV AUTO REPAIR INC. and ERIC VANDERWATER,

Third-Party Plaintiffs,

- against -

MICHELE FIENGA-MILAZZO and ANTHONY J. SMITH,

Third-Party Defendants.

RUSSO, APOZNANSKI & TAMBASCO
Attorney for Third-Party Defendant Fienga-Milazzo
875 Merrick Avenue
Westbury, New York 11590

ROBERT P. TUSA, ESQ.
Attorney for Third-Party Defendant Smith
898 Veterans Memorial Highway, Suite 320
Hauppauge, New York 11788

Upon the following papers numbered 1 to 54 read on these motions for summary judgment and preclusion ; Notice of Motion/ Order to Show Cause (002) and supporting papers 1 - 11 ; Notice of Cross Motion and supporting papers ___; Notice of Motion/ Order to Show Cause and supporting papers 12 - 23 ; Notice of Motion/ Order to Show Cause and supporting papers 24 - 39 ; Answering Affidavits and supporting papers 40 - 48 ; Replying Affidavits and supporting papers 49 - 53; Other (Stipulation of Discontinuance) 54 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

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ORDERED that the motion (002) by third-party defendant Michele Fienga-Milazzo for an order pursuant to CPLR 3126 (a) and 22 NYCRR 202.21 (e), the motion (003) by third-party defendant Michele Fienga-Milazzo for an order pursuant to CPLR 3212, and the motion (004) by defendants/third-party plaintiffs EV Auto Repair Inc. and Eric Vanderwater for an order pursuant to CPLR 3212 and 22 NYCRR 130-1.1 (a) and CPLR 8303 (a), are consolidated for the purposes of this determination; and, it is further

ORDERED that the motion (002) by third-party defendant Michele Fienga-Milazzo for an order pursuant to CPLR 3126 (a) precluding plaintiff from offering evidence regarding her injuries for failing to provide discovery, and pursuant to 22 NYCRR 202.21 (e) vacating plaintiff's note of issue is denied as moot; and, it is further

ORDERED that the motion (003) by third-party defendant Michele Fienga-Milazzo for an order pursuant to CPLR 3212 granting summary judgment dismissing the third-party complaint is denied as moot; and, it is further

ORDERED that the portion of the motion (004) by defendants/third-party plaintiffs EV Auto Repair Inc. and Eric Vanderwater for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted, and the portion of the motion requesting counsel fees pursuant to 22 NYCRR 130-1.1 (a) and CPLR 8303 (a) is denied.

This is an action to recover for personal injuries sustained by plaintiff as a result of a motor vehicle accident which occurred on May 1, 2008 on Middle Country Road ("Route 25") in the Town of Brookhaven, New York. Plaintiff was a front seat passenger in an automobile driven by her daughter, third-party defendant Michele Fienga-Milazzo ("Fienga-Milazzo"), when it was in a head-on collision with a vehicle driven by third-party defendant Anthony J. Smith ("Smith"). All parties agree that third-party defendant Smith, who was traveling along Route 25 in an eastbound direction, crossed over double yellow lines and collided head-on with the Fienga-Milazzo vehicle which was heading in a westbound direction along Route 25. Third-party defendant Smith alleges that because his brakes failed, he turned to the left and crossed into oncoming traffic in an attempt to go into an open field. Unfortunately, he was unable to "get on the open field before the westbound traffic [came]" and while traveling at approximately 40 miles per hour his car and plaintiff's collided. Plaintiff settled a Nassau County action, with prejudice, against third-party defendant Smith in connection with the injuries she sustained in the accident. She brings the instant action against defendants EV Auto Repair Inc. and Eric Vanderwater alleging that they negligently repaired the brakes in the automobile driven by third-party defendant Smith which caused the brake failure he maintains caused him to cross over into the westbound traffic on Route 25.

Defendants brought a third-party action against third-party defendants Fienga-Milazzo and Smith alleging that they were negligent in the operation, maintenance, and control of their motor vehicles. Thus, defendants maintain that if plaintiff is successful in her suit against them, some liability arose out of the negligence of third-party defendants and defendants/third-party plaintiffs demand an apportionment of the responsibility in negligence among the parties. Third-party defendant Fienga-Milazzo counterclaimed against third-party plaintiffs and cross-claimed against third-party defendant Smith. Third-party defendant Smith cross-claimed against third-party defendant Fienga-Milazzo but interposed no counterclaim against third-party plaintiff. Thereafter, third-party plaintiff and third-party defendant Fienga-Milazzo discontinued

their actions against each other by stipulation of discontinuance dated January 24, 2013.

Defendants third-party plaintiffs move for summary judgment dismissing plaintiff's complaint on the ground that plaintiff has failed to offer any evidence to show that they negligently repaired the brakes on third-party defendant Smith's vehicle. Additionally, they move for an award of counsel fees alleging that the within action was frivolous and without merit. In support of their motion defendants include, *inter alia*, copies of examination before trial transcripts of third-party defendants Smith and Fienga-Milazzo and plaintiff. The testimony of third-party defendant Smith reveals that he did not experience problems with the braking system of his vehicle for a six month period prior to the accident, nor did he experience any problems with the brakes on the morning of the accident prior to turning onto Route 25 (he had driven it over 50 miles from his place of employment in Queens and had stopped the car for traffic conditions). The vehicle had a valid NYS inspection sticker affixed to it at the time of the collision, although third-party defendant Smith did not recall when the vehicle had been inspected and stated that it had not been inspected at defendants' repair shop. Third-party defendant Smith claims that his "brakes gave out," that he "couldn't pull over to the right" because of a parked tractor-trailer on the shoulder of the road, but on the left he "saw an open field. [He] figured maybe, [he could] cross those lines and get on the open field before the westbound traffic comes." Thus, third-party defendant Smith turned to the left in front of the vehicle driven by third-party defendant Fienga-Milazzo in which plaintiff was a passenger, without signaling or activating his horn. While his vehicle was completely within the westbound lane of traffic and within a second or two of turning to his left, the vehicles of the third-party defendants collided head on.

In connection with repair work done to his automobile, third-party defendant Smith, testified that he had no receipts from work done on the car, but that prior to the accident only defendants' repair shop performed work on it. Additionally, he recalled having brake work performed on the vehicle by defendant in February 2007 and that he did not experience any problem with the brakes after leaving the shop on February 14, 2007 or at any point from February 14, 2007 to May 1, 2008 (except for the brake failure at the time of the collision). Third-party defendant Smith did not recall testifying at an earlier deposition (in connection with plaintiff's lawsuit against him) that he had brought his vehicle to defendants' repair shop for brake service four months prior to the accident. At his April 24, 2009 deposition (the transcript was submitted by plaintiff in opposition to the motion), third-party defendant Smith testified that defendants serviced the brakes approximately 4 months prior to the collision and that no other repairs where done to the vehicle within 6 months of the accident. Additionally, he stated that aside from replacing brake pads 4 months prior to the accident, "[he] couldn't tell you ... but [he] would say" that the last time the brakes were worked on was "maybe about a year before, eight months before." Finally, third-party defendant Smith claimed that he had no mechanical problems with the vehicle within 3 months prior to, nor on the day of the accident before it occurred.

During her pre-trial deposition, third-party defendant Fienga-Milazzo testified that when she first observed the vehicle of third-party defendant Smith, it was facing her in her lane of traffic and that only a car length or two separated the vehicles. She stated that she had been looking straight ahead prior to observing the vehicle completely within her westbound lane of traffic coming toward her and that "maybe a second passed" from the time she first observed the other vehicle until the impact with her car. The plaintiff did not observe third-party defendant Smith's vehicle at any time prior to the collision.

Defendant Eric Vanderwater avers that he last performed brake service to third-party defendant Smith's vehicle in February 2007 and that he always prepared a receipt/invoice for work he performed and that his records reflect that no other work was done to the brakes on the vehicle subsequent to that date.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see, **Rotuba Extruders, Inc. v Ceppos***, 46 NY2d 223, 413 NYS2d 141[1978]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797,799 [2d Dept 1988]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see **Alvarez v Prospect Hosp.***, *supra*).

Here, where plaintiff has failed to offer any evidence to show that brake work was done by defendants to third-party defendant Smith's vehicle at any time within a four month period prior to the accident and where defendants come forth with some evidence that the work on the brakes was performed over one year prior to the collision, no triable issue of fact exists (*see **Tufano v Nor-Heights Service Center, Inc.***, 15 AD3d 470, 790 NYS2d 486 [2d Dept 2005]; ***Krolak v Dubicki, Inc.***, 1 AD3d 318, 766 NYS2d 590 [2d Dept 2003]; ***Breslin v Rij***, 259 AD2d 458, 686 NYS2d 91 [2d Dept 1999]; ***Williams v Healy International Corp.***, 240 AD2d 403, 658 NYS2d 117 [2d Dept 1997]). All evidence indicates that third-party defendant Smith experienced no problems with the braking system on the vehicle prior to the time of the collision and that the brakes were functioning adequately for at least several months prior to the time of the accident. No evidence, aside from speculation, has been offered to show that a defect in the brakes was caused by or should have been discovered by defendants, or that defendants negligently repaired the brakes.

Accordingly, the motion of defendants for an order granting summary judgment dismissing plaintiff's complaint is granted. However, insofar as the testimony of third-party defendant Smith indicated that he experienced brake failure at the time of the collision and that defendants had performed work on the braking system, the court determines that the action was not frivolous and attorney's fees are not awarded.

The principal action having been dismissed herein above, the motions of third-party defendant Fienga-Milazzo are denied as moot. Nevertheless, the court notes that third-party defendant Fienga-Milazzo was confronted with an emergency situation when the vehicle operated by third-party defendant Smith crossed over the yellow lines and collided head-on with the vehicle she was operating. The emergency doctrine recognizes that when a driver is confronted with an emergency situation which leaves little or no time for thought, deliberation or consideration, he or she may not be negligent if the actions taken were reasonable and prudent in the emergency context (***Lowhar-Lewis v Metropolitan Transp. Auth.***, 97 AD3d 728, 948 NYS2d 667 [2d Dept 2012]; ***Jacobellis v New York State Thruway Auth.***, 51 AD3d 976, 858

NYS2d 786 [2d Dept 2008]). Under the circumstances of this case and based upon the testimony of the third-party defendants, third-party defendant Fienga-Milazzo had no time to avoid the collision and was not negligent in the face of the emergency. Thus, her motion for summary judgment dismissing the complaint and all cross-claims would have been granted.

The foregoing constitutes the Order of this Court.

Dated: September 30, 2013
Riverhead, NY

HON. HECTOR D. LASALLE, J.S.C.

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION