Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

DIOCOIDE VAZQUEZ,
Plaintiff(s),

- against -

GLOBAL TOCHE CHAUFFEURED SERVICE LLC, et ano.,
Defendant(s).

Index
No. 13483 2013

Motion
Dates Nov 24, 2015 & Feb 5, 2016

Motion
Cal Nos. 196 & 138

Motion
Seq. Nos. 6 & 7

Conference/Oral Argument
Date March 7, 2016

The following papers numbered 1 to 17 read on this motion by plaintiff for an order granting him summary judgment in his favor and against defendants; and on this separate motion by plaintiff seeking identical relief.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	1-4, 10-14
Answering Affirmation - Exhibits.....	5-7, 15-17
Reply.....	8-9

By prior order dated December 21, 2015, this court held plaintiff's motion, made under sequence no. 6, in abeyance for 20 days from the entry date of the order[1] pending the re-submission by plaintiff's counsel, directly to the Clerk of this Part, of an identical copy of the motion papers, which were to be submitted in proper form, as the original papers contained Confidential Personal Information (CPI) and also had writing on both sides of the

1. The order was entered on January 7, 2016.

papers. As per the recitation of papers used on the motion (CPLR 2219), plaintiff's reply affirmation, together with affidavit of service of same, was received by this court from the Centralized Motion Part after the motion was marked fully submitted therein on November 24, 2015.

In an apparent misinterpretation of the court's order, plaintiff's counsel filed a second – and nearly identical – motion seeking the same relief, made under sequence no. 7. Defendant Global Chauffeured Services i/s/h/a Global Toche Chauffeured Service LLC (defendant Global), served a nearly identical opposition to the second motion. No reply papers were submitted in connection with sequence no. 7.

Due to the apparent confusion, by order dated February 17, 2016, this court set the matter down for conference/oral argument to be held on March 7, 2016. After a discussion held on the record on that date, and considering the mechanics of plaintiff having brought two identical motions, the court determined that it would consolidate both motions so as to render a single disposition, and would also consider plaintiff's reply affirmation as part of the papers.

Turning to the substantive issues raised, plaintiff commenced this action to recover damages for personal injuries alleged to have been sustained as a result of a motor vehicle accident which occurred on December 4, 2012, on Roosevelt Avenue at or near its intersection with Warren Street, County of Queens, City and State of New York. Plaintiff testified that he was stopped at a red traffic light on Roosevelt Avenue for approximately 40 seconds when defendants' vehicle struck him in the rear. Plaintiff further stated that he first saw the opposing vehicle when it passed him so as to flee the scene; plaintiff, nevertheless, was able to obtain the vehicle's license plate number and wrote it down on a card. Plaintiff also indicated that, while he was waiting inside the ambulance, the police officer who responded to the scene told him that the subject vehicle was parked at or near the scene. Plaintiff was never able to identify the driver of the vehicle.

Defendant Global produced Edilson Forero for deposition. The witness was a consultant for defendant Global, a now-defunct car service company; he was asked to help organize the insurance premiums for the company. He testified that all the vehicles used by defendant Global were owned by the drivers and that defendant Global provided automobile insurance and registration; as such, defendant Global was listed as the registered owner of all the vehicles it insured on or before the date of the accident. Mr. Forero also stated that, though he could not recall the specific plate number at issue, he stated: "I'm sure it was registered to Globaltoche . . . ." Aside from these facts, this witness had no personal knowledge of the accident.

In support of the motion, plaintiff avers that he is entitled to summary judgment on the issue of liability inasmuch as his vehicle was stopped at a red light when it was struck in the rear by defendants' vehicle. In opposition to the motion, defendant Global contends that plaintiff's motion should be denied on the grounds that: (1) there is an issue as to whether plaintiff came to a sudden and unexplained stop; (2) the manner in which the accident occurred is within the sole knowledge of plaintiff, whose testimony is not credible; (3) the motion is premature, as discovery is ongoing; and (4) plaintiff failed to join a necessary party, to wit: the title owner and operator.

It is well-settled that "[a] rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability with respect to the operator of the moving vehicle and imposes a duty on that operator to rebut the inference of negligence to provide a non-negligent explanation for the collision" (*Rainford v Sung S. Han*, 18 AD3d 638 [2005]; *see Malak v Wynder*, 56 AD3d 622 [2008]; *Katz v Masada II Car & Limo Serv., Inc.*, 43 AD3d 876 [2007]).

Initially, to the extent plaintiff seeks summary judgment against the defendant sued herein as "John Doe," same is denied inasmuch as plaintiff has not established that said individual answered the complaint[2] (CPLR 3212 [a] ["Any party may move for summary judgment in any action, after issue has been joined"]). As far as defendant Global is concerned, plaintiff met his prima facie burden of establishing his entitlement to judgment as a matter of law by demonstrating that he was stopped at a red traffic control signal when his vehicle was struck in the rear by the vehicle of which defendant Global was the registered owner (the latter fact over which there appears to be no dispute).

In opposition to the motion, defendant Global has failed to raise a triable issue of fact. First, contrary to its contention, there is no evidence in the record presented to the court to suggest that plaintiff came to an abrupt stop akin to the circumstances presented in *Mundo v City of Yonkers* (249 AD2d 522 [1998]), to which counsel cites. Indeed, plaintiff has submitted uncontroverted evidence that he was stopped for approximately 40 seconds before he was struck in the rear; even a liberal reading of this testimony does not render an issue as to whether plaintiff came to a "sudden, unexplained stop" (*id.* at 523).

Second, defendant Global contends that summary judgment must be denied since the manner in which the accident occurred is within the exclusive knowledge of plaintiff and said testimony is not credible. To that end, defendant Global makes two points: (1) "**[a] reasonable person reading the Plaintiff's testimony would find it extremely strange that he was stopped at a light, impacted in the rear, the other car fled the scene, and then**

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2. Defendant Global answered only on its own behalf.

within 15 minutes, before the police and ambulance arrived, that car came back to the scene and parked on the same block, presumably within viewing distance of the police" (emphasis in original); and (2) plaintiff perjured himself with respect to his alleged injuries, unequivocally stating that he had no prior neck/back injuries when evidence submitted in opposition points to the contrary.

While it is generally true that, where the movant is the sole witness to the accident, the denial of summary judgment is warranted since the facts are exclusively within the movant's knowledge and his credibility is placed in issue (*see e.g. Woszczyna v BJW Assoc.*, 31 AD3d 754 [2006]; *Hirsch v Greenridge Assoc., LLC*, 26 AD3d 411 [2006]), here, plaintiff is not the sole witness to the accident. While it is unfortunate that the driver of the subject vehicle has never been located and ultimately substituted in place of "John Doe" defendant, that driver, having been involved in this accident, is also a witness to this accident; thus, the proposition advanced by defendant Global is inapplicable in this circumstance. That plaintiff's version of the accident is uncontradicted is not synonymous to his being the sole witness thereto; rather, it simply means that defendant Global cannot offer evidence to call his account into question (*cf. e.g. Mora v Kane is Able, Inc.*, 105 AD3d 1022 [2013]).

Moreover, defendant Global attempts to use plaintiff's testimony as it relates to the issue of damages in order to discredit his testimony regarding the manner in which the accident occurred. However, the issue of damages is not part of this court's consideration, since same is not material to the issue of liability.

Third, to the extent defendant Global argues that the motion should be denied as premature, same is not a valid basis for denying it. The filing of the note of issue on June 24, 2015 signified the completion of discovery in this matter. Though defendant Global made a motion to, *inter alia*, vacate the note of issue, and – in support thereof – cited to the fact that its own witness' deposition held on July 13, 2015 necessitated further discovery on its part in order to locate and secure the deposition of the actual owner of the vehicle, the motion was withdrawn by stipulation and, notably, said stipulation did not include a provision for the conducting of nonparty discovery.

Finally, to the extent defendant argues that plaintiff failed to join necessary parties, the operator of the vehicle need not be named as a party to this action; the naming of the operator merely provides another party against whom a plaintiff may seek redress.[3] As far as plaintiff's failure to name the title owner of the vehicle, his naming of the registered owner

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3. If a plaintiff fails to name the operator, an owner may certainly commence an action against the operator for contribution/indemnification.

thereof was sufficient in this instance (*see* Vehicle and Traffic Law §§ 128, 388; *Elfeld v Burkham Auto Renting Co.*, 299 NY 336 [1949]; *Ferris v Sterling*, 214 NY 249 [1915]).

Accordingly, plaintiff's motion for summary judgment (brought under sequence nos. 6 & 7) is granted. Plaintiff is awarded judgment in his favor on the issue of liability. Given the fact that the motion under sequence no. 6 contains CPI, it will not be filed with the County Clerk (only the Notice of Motion containing the fee stamp will be filed). The remainder of the papers will be submitted for filing.

Dated: March 8, 2016

J.S.C.