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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

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PILAR RAMIREZ, YEDMY BATISTA PERALTA and DELIO POLANCO, as administrator of the estate of PAULINA CORTORREAL HICIANO,

Plaintiffs,

- against -

JOSE ELIAS-TEJADA, MICHAEL P. THOMAS and PAUL CHARLES YOVINO,

Defendants.

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DECISION AND ORDER

Action #1

Index No. 300174/2012

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JOSE A. CORCHADO,

Plaintiff,

- against -

MICHAEL P. THOMAS and PAUL CHARLES YOVINO,

Defendants.

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Action #2

Index No. 300885/2013

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PAUL CHARLES YOVINO,

Third-Party Plaintiff,

- against -

JOSE ELIAS-TEJADA,

Third-Party Defendant.

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Third-Party Index No. 83861/2013

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JOSE ELIAS TEJADA,

Plaintiff,

- against -

MICHAEL P. THOMAS and PAUL CHARLES YOVINO,

Defendants.

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Action #3

Index No. 21702/2013E



PRESENT: Hon. Lucindo Suarez

Upon the notice of motion dated October 3, 2016 of defendant Paul Charles Yovino and the affirmation, exhibits and memorandum of law submitted in support thereof; the affirmation in

opposition dated November 9, 2016 of defendant Michael P. Thomas and the exhibit submitted therewith; the affirmation in opposition dated November 15, 2016 of plaintiff Jose A. Corchado; movant's affirmation in reply dated November 22, 2016; the affirmation in opposition dated January 27, 2017 of plaintiff Delio Polanco; the affirmation in opposition dated March 7, 2017 of plaintiffs Pilar Ramirez and Yedmy Batista Peralta and the exhibits submitted therewith; and due deliberation; the court finds:

Defendant and third-party plaintiff Paul Charles Yovino, the rear-most driver in the subject three-vehicle chain-reaction rear-end motor vehicle accident, moves for summary judgment on the ground that he did not breach any duty owed to the plaintiffs, passengers in the front-most vehicle driven by third-party defendant Jose Elias-Tejada. The Tejada vehicle was stalled on a highway when it was struck from behind by the Volkswagen Jetta driven by defendant Michael P. Thomas. Yovino attempted to evade the Thomas vehicle but clipped the left rear corner of the Thomas vehicle while moving to the adjacent lane. The occupants of the Tejada vehicle testified to feeling, if at all, a single impact; those who were able to recall the accident testified that they fell unconscious after said impact. Yovino testified that he saw the Thomas vehicle make contact with the front vehicle. He attempted to avoid the Thomas vehicle but made light contact with it. This was the only impact involving his vehicle. Thomas testified that he had no idea his vehicle had been struck from behind and neither heard nor felt any such impact. The only impact of which he was aware was that between his vehicle and the Tejada vehicle.

Thomas and the plaintiffs oppose on the ground that the trier of fact could conclude that the Yovino/Thomas contact was so close in time or simultaneous with the Thomas/Tejada contact such that both could be found responsible for the accident, an argument rejected in *Corchado v. Thomas*, Index No. 300885/2013 and *Elias-Tejada v. Thomas*, Index No. 21702/2013E, in which Yovino has already been granted summary judgment. Regardless of the proximity in time of the two impacts,



Polanco also argues that Thomas claimed that the force of the contact with Yovino's vehicle

Thomas testified repeatedly that he neither heard nor felt any impact from the rear and had no idea that the Yovino vehicle had made any contact with his vehicle until Yovino told him later. The opposition offers no evidence as to how Yovino's contact with the Thomas vehicle, imperceptible to Thomas, that did not affect Thomas's operation of his vehicle, could have contributed to the accident with the Tejada vehicle. There is no testimony or other evidence that the impact from Yovino's vehicle propelled Thomas's vehicle into the Tejada vehicle, and indeed no testimony or other evidence that the operation of Thomas's vehicle was affected by any outside force other than the front impact with the Tejada vehicle.

Contrary to Polanco's opposition, there is no conflicting testimony from Thomas and Yovino regarding the number of impacts. Given Thomas's testimony that he did know that Yovino's vehicle had made contact with this and that he struck the Tejada vehicle only once, and the fact that no occupant of the Tejada vehicle testified to perceiving more than one impact, any question regarding the sequence or temporal proximity of the two impacts does not raise a material issue of fact. *Cf. Passos v. MTA Bus Co.*, 129 A.D.3d 481, 13 N.Y.S.3d 4 (1st Dep't 2015).

Polanco claims that a "conflict" in testimony as to Yovino's speed creates a material issue of fact. There is no such conflict, Yovino's counsel's recitation of facts being supported by Yovino's deposition. Yovino testified that he was traveling at 50 miles per hour prior to the accident. He also testified that upon seeing Thomas's vehicle and applying his brakes, he was probably traveling approximately 30 miles per hour at the time of impact with Thomas's vehicle. Given the lack of proof that Yovino's contact with Thomas affected Thomas's operation of his vehicle in any way, any discrepancy in testimony as to Yovino's speed, or, indeed the very fact that he may have been speeding, does not present an issue material to his liability. *See e.g. Ohlhausen v. City of New York*, 73 A.D.3d 89, 898 N.Y.S.2d 120 (1st Dep't 2010).

Polanco also argues that Thomas claimed that the force of the contact with Yovino's vehicle

is what propelled him into Tejada's vehicle; however, there is no reference to any proof to support such a proposition. Opposition to summary judgment must be supported by evidence in admissible form, *see Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980), and may not be speculative or conclusory, *see Reale v. Tsoukas*, 146 A.D.3d 833, 45 N.Y.S.3d 148 (2d Dep't 2017).

Polanco also argues that the motion should be denied because of the conflicting testimony regarding whether Tejada's emergency lights were operating at time of accident. The conflict, if at all, is between Thomas and Tejada, as Yovino testified that he was unable to view Tejada's vehicle because it was obscured by Thomas's vehicle, thus rendering, the "conflict" immaterial to the issue of Yovino's liability. *See e.g. Emery v. New York City Tr. Auth.*, 78 A.D.3d 416, 914 N.Y.S.2d 1 (1st Dep't 2010). Not every factual dispute requires denial of summary judgment; the dispute must relate to a material issue relevant to the subject claim. *See Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 819 N.E.2d 998, 786 N.Y.S.2d 382 (2004); *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 385 N.E.2d 1068, 413 N.Y.S.2d 141 (1978).

Ramirez and Peralta additionally argue that Yovino is collaterally estopped from contesting his liability, given a Department of Motor Vehicles ("DMV") finding on the subject in suspending his driver's license. Their argument, however, is premised solely upon Yovino's testimony regarding his interpretation of the resolution of the DMV hearing. This is obviously hearsay. Yovino testified not that he received a written decision of an Administrative Law Judge of the DMV but that he received notification of decision by a letter, and all he knew was that his license was suspended. It was questioning counsel who opted to call this letter a "decision." Even were his testimony probative, it did not establish that his fault in contributing to the accident was established at the hearing, as he specifically testified that he did not know if it was a finding of the ALJ that either of his moving violations contributed to the accident.

To preclude an issue by collateral estoppel, "[i]t is required that an issue in the present proceeding be identical to that necessarily decided in a prior proceeding, and that in the prior proceeding the party against whom preclusion is sought was accorded a full and fair opportunity to contest the issue." *Allied Chemical v. Niagara Mohawk Power Corp.*, 72 N.Y.2d 271, 276, 528 N.E.2d 153, 155, 532 N.Y.S.2d 230, 232 (1988), *cert. denied*, 488 U.S. 1005, 109 S. Ct. 785 (1989). The quasi-judicial determinations of administrative agencies, including the DMV, *see Alamo v. McDaniel*, 44 A.D.3d 149, 841 N.Y.S.2d 477 (1st Dep't 2007), may provide the basis for collateral estoppel. *See Newsday, Inc. v. Ross*, 80 A.D.2d 1, 437 N.Y.S.2d 376 (2d Dep't 1981); *Allied Chemical*, *supra*. It is the burden of the proponent of the doctrine "to demonstrate the identicality and decisiveness of the issue." *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 501, 467 N.E.2d 487, 491, 478 N.Y.S.2d 823, 827 (1984). Plaintiffs' resort to hearsay did not accomplish this.

Thus, the opposition did not raise a question of fact as to whether Yovino's negligence substantially contributed to plaintiffs' injuries.

Accordingly, it is

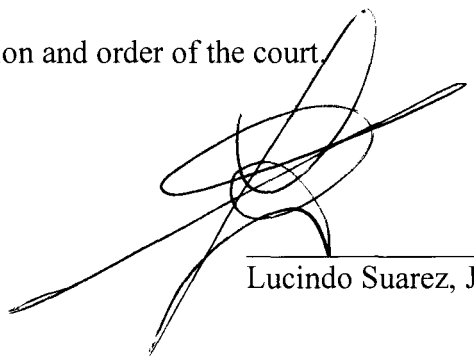
ORDERED, that the motion of defendant Paul Charles Yovino for summary judgment is granted; and it is further

ORDERED, that the consolidated complaint against defendant Paul Charles Yovino is dismissed; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendant Paul Charles Yovino dismissing the complaint insofar as asserted against him.

This constitutes the decision and order of the court.

Dated: April 27, 2017



Lucindo Suarez, J.S.C.