| **Levy v Braman Motorcars** |
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| 2012 NY Slip Op 33721(U) |
| December 7, 2012 |
| Supreme Court, Queens County |
| Docket Number: 15306/10 |
| Judge: Bernice D. Siegal |
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Short Form Order

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**NEW YORK STATE SUPREME COURT – QUEENS COUNTY**

Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

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Marlon O. Levy,

Plaintiff,

-against-

Braman Motorcars and Dennis C. Newby,

Defendants.

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Index No.: 15306/10
Motion Date: 10/26/12
Motion Cal. No.: 40
Motion Seq. No.: 3

2012 DEC 17 PM 12: 20

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The following papers numbered 1 to 12 read on this motion for an order pursuant to CPLR §3212 granting summary judgment due to the plaintiff's failure to prove a *prima facie* case of liability against the moving defendant, Dennis C. Newby.

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion - Affidavits-Exhibits..... | 1 - 4 |
| Affirmation in Opposition..... | 5 - 9 |
| Reply..... | 10 - 12 |

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Defendant, Dennis Newby ("Newby") moves for an order pursuant to CPLR §3212 granting summary judgment as against the plaintiff Marlon Levy ("Levy") on the ground that there are no issues of fact with respect to the issue of liability.

**Facts**

Plaintiff brought the within action to recover personal injuries allegedly sustained from a motor vehicle accident which occurred on December 2, 2009. The subject vehicle was operated by

Newby and Levy was a passenger in the vehicle. According to the testimony of Levy, Newby was driving on a highway when a "truck swerved over in Mr. Newby's lane" and that the truck was "coming toward Mr. Newby" and the truck "almost hit Mr. Newby." Levy went on to testify that Newby, in attempt to take "evasive action to avoid hitting the truck" he "left the roadway" and the car flipped causing plaintiff's alleged injuries.

**Discussion**

It is well established that summary judgment should be granted when there is no doubt as to the absence of triable issues. (*See Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 [1978].) As such, the function of the court on the instant motion is issue finding and not issue determination. (*See D.B.D. Nominee, Inc., v. 814 10th Ave. Corp.*, 109 A.D.2d 668, 669 [2nd Dept. 1985].) The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. (*See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980].) If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. (*See* Zuckerman v. City of New York, supra.)

**Emergency Doctrine as an Affirmative Defense**

Defendant, Newby contends that the emergency situation Newby faced is a non-negligent explanation for the subject accident. "The emergency doctrine recognizes that when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the

actions taken are reasonable and prudent in the emergency context." (*Jacobellis v. New York State Thruway Authority*, 51 A.D.3d 976, 977 [2nd Dept 2008] quoting *Rivera v. New York City Transit Authority*, 77 N.Y.2d 322 [1991].) "Although the existence of an emergency and the reasonableness of a party's response to it will ordinarily present questions of fact they may in appropriate circumstances be determined as a matter of law." (*Bello v. Transit Authority of New York City*, 12 A.D.3d 58, 60 [2nd Dept 2004] citing Morgan v. Ski Roundtop Inc., 290 A.D.2d 618 [3rd Dept 2002].)

Here, invoking the emergency doctrine, the defendant established its prima facie entitlement to judgment as a matter of law by demonstrating, via plaintiff's own deposition testimony, that a truck swerved into Newby's lane forcing Newby to maneuver out of the way. In opposition, the plaintiff failed to raise a triable issue of fact as to the driver's negligence.

Initially, plaintiff argues that a defendant cannot utilize the emergency doctrine if the defendant failed to plead the emergency doctrine as an affirmative defense in its answer. CPLR §3018(b) provides that "[a] party shall plead all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading." "Applying that rule, the question whether the emergency doctrine must be pleaded as an affirmative defense necessarily turns on the particular circumstances of each case." (*Bello v. Transit Authority of New York City*, 12 A.D.3d 58, 60 [2nd Dept 2004].) However, "where the facts relating to the existence of the emergency are known to the adverse party and would not raise new issues of fact not appearing on the face of the prior pleadings, the party seeking to rely on the emergency doctrine would not have to raise it as an affirmative defense."(Id. at 61; (*Franco v. G. Michael Cab Corp.*, 71 A.D.3d 1082 [2nd Dept 2010].) Here, plaintiff, himself, testified that Newby swerved to

avoid hitting the truck that had swerved into Newby's lane. Therefore, plaintiff cannot now claim unfair surprise arising from the defendant's failure to plead those facts in it's answer. (*See Bello v. Transit Authority of New York City*, 12 A.D.3d 58, 60 [2nd Dept 2004].)

The court will next address plaintiff's contention that the emergency doctrine is not applicable in this matter. Plaintiff contends that Newby "could or should have anticipated the condition or events which precipitated the accident." Plaintiff argues that Newby may have been traveling too fast considering the conditions. Plaintiff contends that the court requires a deposition of Newby to determine what Newby observed prior to the accident. However, plaintiff's own deposition testimony indicates that a truck nearly struck Newby forcing Newby to take evasive action. Moreover, mere speculation that Newby's response to the situation was unreasonable and whether Newby was going too fast under circumstances is totally inadequate to raise a question of fact. (See *Tsai v. Zong-Ling Duh*, 79 A.D.3d 1020 [2nd Dept 2010]; *Koenig v. Lee*, 53 A.D.3d 567 [2nd Dept 2008].)

Accordingly, the plaintiff failed to raise a triable issue of fact as to whether Newby's reaction to the emergency was unreasonable, or whether any negligence on his part contributed to the bringing about of the emergency.

**Conclusion**

For the reasons set forth above, Defendant Dennis Newby's motion pursuant to CPLR 3212 for summary judgment on the issue of liability is granted and the complaint is dismissed as to Dennis Newby.

Dated: November 7, 2012

Bernice D. Siegal, J. S. C.



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