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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:
WILLIAM B. REBOLINI
Justice

Dwayne Alcala,	Index No.: 16523/2010
Plaintiff,	Motion Sequence No.: 008; MG Motion Date: 4/8/13
-against-	Submitted: 4/8/13
William P. Roth, Shea Trucking Corp., All Corporate Transport, Ismael Diaz, Universal Shielding and Karl E. Thompson,	Attorneys [See Rider Annexed]
Defendants.	

Upon the following papers numbered 1 to 32 read upon this motion to reargue: Notice of Motion and supporting papers, 1 - 24; Answering Affidavits and supporting papers, 25 - 27; Replying Affidavits and supporting papers, 28 - 32; it is

ORDERED that the motion by the defendants Ismael Diaz and Universal Shielding Corp. for leave to renew and reargue their prior motion is granted; and it is further

ORDERED that, upon renewal, the motion by the defendants Ismael Diaz and Universal Shielding Corp. seeking summary judgment in their favor on the ground that they were not liable for the accident's occurrence is granted.

The plaintiff Dwayne Alcala commenced this action to recover damages for injuries he allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Pine Aire Drive and Madison Avenue in the Town of Islip on September 22, 2008. The defendants Ismael Diaz and Universal Shielding Corp., s/h/a Universal Shielding (hereinafter collectively referred to as the "Diaz defendants"), moved for summary judgment dismissing the plaintiff's complaint on the basis that the plaintiff did not sustain a "serious injury" within the meaning of § 5102(d) of the Insurance Law. The Diaz defendants also moved for summary judgment dismissing

the plaintiff's complaint on the basis that they were not the proximate cause of the subject accident, because Ismael Diaz was faced with an emergency situation not of his own making. By order, dated July 9, 2012, this Court denied the Diaz defendants' motion for summary judgment on the ground that they failed to demonstrate the plaintiff did not sustain a serious injury as a result of the subject collision. Thereafter, by order, dated January 2, 2013, this Court denied, without prejudice, the Diaz defendants' motion for summary judgment in their favor on the issue of liability on the ground they failed to include the affidavit of service attesting to their timely service of the motion papers with their moving papers.

The Diaz defendants now move for leave to renew and reargue their prior motion seeking summary judgment in their favor on the issue of liability, which was denied on the basis that they failed to submit the affidavit of service. The Diaz defendants assert that Ismael Diaz was faced with an emergency situation not of his own making when the subject collision occurred and, therefore, plaintiff is unable to establish a prima facie case of negligence against them for the accident's occurrence. Plaintiff opposes the motion on the grounds that there are material triable issues of fact as to whether Ismael Diaz was faced with an emergency situation at the time of the subject collision, and as to whether his actions were reasonable in response to the emergency situation.

The Court considers the Diaz defendants' request pursuant to CPLR 2221 and grants the Diaz defendants leave to renew their prior motion. Upon renewal, the Court grants the Diaz defendants' motion for summary judgment in their favor on the issue of liability.

When one is confronted with a sudden and unexpected event or combination of events that leaves little or no time for reflection or deliberate judgment, such circumstance should enter into the determination as to whether the person acted reasonably in the situation (***Ferrer v Harris***, 55 NY2d 285, 292, 449 NYS2d 162 [1982]; *see* ***Caristo v Sanzone***, 96 NY2d 172, 726 NYS2d 334 [2001]). Thus, 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" (***Jablonski v Jakaitis***, 85 AD3d 969, 970, 926 NYS2d 137 [2d Dept 2011] *quoting* ***Rivera v New York City Tr. Auth.***, 77 NY2d 322, 327, 567 NYS2d 629 [1991]; *see* ***Evans v Bosl***, 75 AD3d 491, 905 NYS2d 254 [2d Dept 2010]; ***Palma v Garcia***, 52 AD3d 795, 861 NYS2d 113 [2d Dept 2008]; ***Gajjar v Smith***, 31 AD3d 377, 817 NYS2d 653 [2d Dept 2006]). However, an emergency does not automatically absolve one from liability for his or her conduct, and a defendant may still be found negligent if, notwithstanding the emergency, the choice of action pursued is found to be unreasonable (*see* ***Bello v Transit Auth. of N. Y. City***, 12 AD3d 58, 783 NYS2d 648 [2d Dept 2004]; ***Pawlukiewicz v Boisson***, 275 AD2d 446, 712 NYS2d 634 [2d Dept 2000]; ***Raposo v Raposo***, 250 AD2d 420, 673 NYS2d 92 [1st Dept 1992]). Further, a defendant will not be insulated from liability if it was his or her prior conduct that brought about the emergency situation, even though he or she acted reasonably during the emergency (*see* ***Stewart v Ellison***, 28 AD2d 252, 813 NYS2d 397 [1st Dept 2006]; ***Foster v Sanchez***, 17 AD3d 312, 792 NYS2d 579 [2d Dept 2005]; ***Mead v Marino***, 205 AD2d 669, 613 NYS2d 650 [2d Dept 1994]). Although the

existence of an emergency and the reasonableness of the response to it generally present issues of fact, those issues may, in appropriate circumstances, be determined as a matter of law (*see* ***Lonergan v Almo***, 74 AD3d 902, 904 NYS2d 86 [2d Dept 2010]; ***Vitale v Levine***, 44 AD3d 935, 844 NYS2d 105 [2d Dept 2007]).

Defendant Ismael Diaz testified at an examination before trial that he was operating a Universal Shielding Corp. ("Universal Shielding") vehicle and that he was traveling westbound on Pine Aire Drive when he observed an All Corporate Transport ("ACT") vehicle traveling on the eastbound shoulder, along the right side of a Shea Trucking Corp. ("Shea Trucking") vehicle. Diaz testified that the rear of the ACT vehicle struck the front of the Shea Trucking vehicle, resulting in the ACT vehicle crossing over the double yellow line into the westbound traffic and striking the front of the Universal Shielding vehicle. Diaz further testified that as result of the impact between the Universal Shielding vehicle and the ACT vehicle, the Universal Shielding vehicle struck the front left side of the vehicle operated by Karl Thompson, in which the plaintiff was riding as a front seat passenger.

Defendant Karl Thompson testified at an examination before trial that he was traveling westbound on Pine Aire Drive when a Universal Shielding vehicle was pushed into his vehicle after it had been struck by an ACT vehicle. Defendant William Roth testified at an examination before trial that he was operating a Shea Trucking vehicle when he observed an ACT vehicle traveling partially on the shoulder and partially on the roadway of Pine Aire Drive, and that, immediately upon noticing the ACT vehicle, he eased his foot off the accelerator, but was unable to prevent the subject collision. He testified that as a result of the collision between the ACT vehicle and the Shea Trucking vehicle, the ACT vehicle "spun 360 degrees" into the oncoming traffic, and then was impacted by a Universal Shielding vehicle. Roth further testified that the accident happened within seconds of him first observing the ACT vehicle.

Nonparty witness Leon Laroche testified at an examination before trial that he was traveling eastbound on Pine Aire Drive and that the accident occurred behind his vehicle. Laroche testified that he looked into his rearview mirror and observed an ACT vehicle traveling along the right side of a Shea Trucking vehicle, on the shoulder of the road, and that it was traveling very fast. Laroche testified that prior to the accident's occurrence, one-third of the ACT vehicle had passed the front portion of the Shea Trucking vehicle, and that the accident occurred when the ACT vehicle's driver "tried to cut in front of the [Shea Trucking vehicle]," in order to avoid hitting a telephone pole.

Here, the Diaz defendants established prima facie their entitlement to judgment as a matter of law that defendant Diaz was not negligent in his operation of the Universal Shielding vehicle, and that he was faced with an emergency situation not of his own making when the accident occurred (*see* ***Parastatdis v Holbrook Rental Ctr., Inc.***, 95 AD3d 975, 943 NYS2d 625 [2d Dept 2012]; ***Tsai v Zong-Ling Duh***, 79 AD3d 1020, 913 NYS2d 748 [2d Dept 2010]; ***Minor v C & J Energy Savers, Inc.***, 65 AD3d 532, 883 NYS2d 587 [2d Dept 2009]; ***Marsch v Catanzaro***, 40 AD3d 941, 837 NYS2d 195 [2d Dept 2007]). The evidence submitted by the Diaz defendants shows that the sole proximate cause of the subject accident was the ACT vehicle's crossing over into oncoming traffic

in violation of § 1126(a) of the Vehicle and Traffic Law, and striking the Universal Shielding vehicle that Ismael Diaz was operating, causing the truck he was driving to strike the Thompson vehicle (*see* ***Barbaruolo v DiFede***, 73 AD3d 957, 900 NYS2d 671 [2d Dept 2010]; ***Scott v Kass***, 48 AD3d 785, 851 NYS2d 649 [2d Dept 2008]). Defendant Diaz, as the driver with the right of way, was not required to anticipate that an automobile traveling in the opposite direction would cross over into oncoming traffic (*see e.g.* ***Ferebee v Amaya***, 83 AD3d 997, 922 NYS2d 472 [2d Dept 2011]; ***Snemyr v Morales-Aparicio***, 47 AD3d 702, 850 NYS2d 489 [2d Dept 2008]; ***Eichnwald v Chaudry***, 17 AD3d 403, 794 NYS2d 391 [2d Dept 2005]). This violation of the Vehicle and Traffic Law constitutes negligence as a matter of law (*see* ***Vainer v DiSalvo***, 79 AD3d 1023, 914 NYS2d 236 [2d Dept 2010]; ***Marsicano v Dealer Stor. Corp.***, 8 AD3d 451, 779 NYS2d 102 [2d Dept 2004]; ***Gadon v Oliva***, 294 AD2d 397, 742 NYS2d 122 [2d Dept 2002]). Therefore, under these circumstances, the Diaz defendants demonstrated that Ismael Diaz was faced with an emergency situation, one in which he reacted to reasonably, and that the accident was unavoidable (*see* ***Lopez v Young***, 96 AD3d 724, 945 NYS2d 728 [2d Dept 2012]; ***Brannan v Korn***, 84 AD3d 1140, 923 NYS2d 345 [2d Dept 2011]; ***Lee v Ratz***, 19 AD3d 552, 798 NYS2d 80 [2d Dept 2005]). In opposition, the plaintiff failed to submit evidence sufficient to raise a triable issue of fact as to whether Ismael Diaz in his operation of the Universal Shielding vehicle contributed to the subject collision by failing to take appropriate evasive actions (*see* ***Kenney v County of Nassau***, 93 AD3d 694, 940 NYS2d 130 [2d Dept 2012]; ***DiSiena v Giammarino***, 72 AD3d 873, 898 NYS2d 664 [2d Dept 2010]; ***Sullivan v Mandato***, 58 AD3d 714, 873 NYS2d 96 [2d Dept 2009]). Accordingly, the motion by the defendants Ismael Diaz and Universal Shielding Corp. seeking summary judgment dismissing the complaint is granted. The action is severed and continued as against the remaining defendants.

Dated: 7/3/2013

William B Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**

RIDER

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Clerk of the Court