

**Levison v Guerrero**

2017 NY Slip Op 31830(U)

September 1, 2017

Supreme Court, New York County

Docket Number: 150089/14

Judge: Paul A. Goetz

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 22

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SAMUEL LEVISON,

Plaintiff,

Index No.: 150089/14  
DECISION/ORDER

-against-

WILLIAM GUERRERO, SHA HUANG, MODERN  
CAB CORP., RYDER TRUCK RENTAL INC. and  
PARTY RENTAL LTD.,

Defendants.  
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GEICO GENERAL INSURANCE COMPANY as  
Subrogee of LIXUN LIU,

Plaintiff,

-against-

MODERN CAB CORP., RYDER TRUCK RENTAL LT  
and WILLIAM GUERRERO,

Defendants.  
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**HON. PAUL A. GOETZ, J.S.C.:**

In this personal injury/negligence action and joined insurance subrogation action, two sets of defendants move separately for summary judgment to dismiss the complaint, while plaintiff Samuel Levison (Levison) cross-moves for summary judgment on the complaint (motion sequence numbers 005 and 006). These motions and cross motions are disposed of in accordance with the following decision.

**BACKGROUND**

The underlying personal injury action herein arose when Levison sustained injuries in an automobile accident that occurred on June 7, 2013, at approximately 1:00 AM at the intersection of 10<sup>th</sup> Avenue and West 41<sup>st</sup> Street in the County, City and State of New York. At that time,

Levison was a passenger riding in the back seat of a taxi cab owned by defendant Modern Cab Corp. (Modern Cab), and driven by codefendant Sha Huang (Huang). That taxi cab was struck from the rear by a truck owned by defendant Ryder Truck Rental Inc. (Ryder)<sup>1</sup> and driven by codefendant William Guerrero (Guerrero), an employee of codefendant Party Rental Ltd. (Party Rental).

During the accident, the back window of the taxi cab shattered, and Levison suffered lacerations to the left side of his face. At his deposition on August 26, 2015, Levison stated that he was taken to a hospital emergency room after the accident, where Dr. Kenneth Rose, MD (Dr. Rose) diagnosed his facial lacerations and gave him between 40 and 50 stitches. *See* notice of motion (motion sequence number 005), exhibit B at 33-36. Levison also stated that he returned to the hospital a few weeks later and Dr. Rose removed the stitches. *Id.* at 38-39. Defendants have provided copies of Levison's June 7, 2013 emergency room report, which contains the diagnosis of lacerations. *Id.*, exhibit D. Levison next stated that, afterward, he visited dermatologist Dr. Macrene Alexiades, MD (Dr. Alexiades) on three occasions for treatment of the scars that had formed on his face. *Id.*, exhibit B at 39-41. These visits took place on August 26, 2013, October 11, 2013 and November 23, 2016. *Id.*, Cannata affirmation, ¶ 11. Levison has presented treatment records and an expert's affidavit from Dr. Alexiades, in which she diagnosed him with "multiple atrophic, hypopigmented and polymorphic scars" with skin distortion, which she opines are "visible, unattractive, objectionable, permanent in nature, and are causally related

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<sup>1</sup> Defendants' papers do not make clear to what extent "Ryder Truck Rental Inc." (Ryder) and "Ryder Truck Rental LT" (Ryder LT) are separate entities. However, inasmuch as all of the parties except Huang and Modern Cab executed a stipulation of discontinuance against both of these entities on June 2, 2016, that question is now largely irrelevant. For the sake of convenience, this decision refers to both entities as "Ryder" except where indicated.

to the June 7, 2013 motor vehicle accident.” *Id.*, exhibit 1, ¶¶ 6, 9; exhibit 8. Levison has also presented a quantity of (undated) photographs of his face that, evidently, depict his face at the time of the accident and during various stages of the healing process afterwards. *Id.*, exhibits 2-6.

For their part, comovants Huang and Modern Cab have presented experts’ affidavits from plastic surgeon Dr. Barbara Freeman, MD (Dr. Freeman) and orthopedist Dr. Gary Bromley, MD (Dr. Bromley), both of whom examined Levison. *See* notice of motion (motion sequence number 005), Seldin affirmation, exhibits E, F. The former saw Levison on September 28, 2015, observed “facial scarring,” and issued a professional medical opinion that said scarring “may be improved with further reconstructive surgery.” *Id.*, exhibit E. The latter examined Levison on April 29, 2016, and issued a report regarding his orthopedic condition, which is not at issue in this action. *Id.*, exhibit F. In their separate motion, codefendants Guerrero, Ryder and Party Rental rely on the same expert opinions. *See* notice of motion (motion sequence number 006), Belmonte affirmation, exhibits G, H. At issue in this action are the nature and extent of Levison’s injuries.

Levison initially commenced this action on November 1, 2014, and later filed a supplemental summons and complaint on November 21, 2014 that names all of the instant defendants, and includes causes of action for: 1) damages pursuant to Insurance Law § 5104; and 2) negligence. *See* notice of motion (motion sequence number 005), exhibit A. On December 3, 2014, Huang and Modern Cab filed a joint answer that included a cross-claim for indemnification against Guerrero, Ryder and Party Rental. *Id.* On February 4, 2015, Guerrero, Ryder and Party Rental filed a joint answer that included a cross claim for contribution against

Huang and Modern Cab. *Id.* As was previously mentioned, all of the parties except Huang and Modern Cab stipulated to discontinue the within actions against both of the Ryder defendants on June 2, 2016. Now before the court are the respective motions for summary judgment to dismiss the complaint by Huang and Modern (motion sequence number 005) and Guerrero, Ryder and Party Rental (motion sequence number 006), and Levison's cross motion for summary judgment on the complaint (motion sequence number 006).

#### DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 (1<sup>st</sup> Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 (1<sup>st</sup> Dept 2003).

The first motion under review is Huang's and Modern Cab's request for summary judgment to dismiss the complaint (motion sequence number 005). As was previously observed, Levison's complaint includes causes of action for damages resulting from a "serious injury," as defined in Insurance Law § 5102 (d), and for negligence. Huang's and Modern Cab's motion does not address the second cause of action. As a result, the court denies the motion with respect to that cause of action, and turns its attention to Huang's and Modern Cab's arguments regarding Levison's first claim.

Insurance Law § 5102 (d) provides, as follows:

“‘Serious injury’ means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.”

Of the nine categories of “serious” injury listed in the statute, Levison asserts that his claim constitutes a “significant disfigurement.” *See* Cannata affirmation in opposition, ¶¶ 20-28. In their moving papers, Huang and Modern Cab do not address this category of injury, but instead argue that Levison’s claim must fail because his injuries cannot be deemed “serious” under other categories listed in the statute (i.e., permanent, permanent consequential, significant limitation, etc.). These arguments are inapposite, and the court rejects them on that ground. Huang’s and Modern Cab’s reply papers, however, do address the “significant disfigurement” category of injuries. They first correctly note that the standard for reviewing such injuries is whether “‘a reasonable person would view [the facial discoloration] as unattractive, objectionable, or as the subject of pity or scorn.’” *See Sidibe v Cordero*, 79 AD3d 536, 536 (1<sup>st</sup> Dept 2010); quoting *Hutchinson v Beth Cab Corp.*, 207 AD2d 283, 283 (1<sup>st</sup> Dept 1994). Huang and Modern Cab then argue that Levison has failed to meet his burden of proof that a reasonable person would make such a finding with respect to his injuries. *See* Seldin reply affirmation, ¶¶ 11-23. They particularly object that the photographs of Levison’s face should be excluded from evidence because they are undated, but also assert that they do not depict a condition that would meet the above-quoted legal standard. *Id.* Regarding the latter point, the court notes that the experts’

reports herein are in conflict; Dr. Alexiades concluded that Levison's facial scars were "visible, unattractive, objectionable, [and] permanent in nature," while Dr. Bromley concluded that the same scars "[could] be improved with further reconstructive surgery." See notice of motion (motion sequence number 005), exhibit E; Cannata affirmation in opposition, exhibit 1. These experts' reports present a triable issue of fact that must be resolved by a jury as to whether Levison suffered a "significant disfigurement". In addition, the photographs that Levison presented, albeit undated, depict the left side of his face at various stages of the healing process, both near the time of his accident and some time afterward. The facial scarring in the most recent photographs is more than "barely perceptible" or "hardly visible" and a reasonable person might view these scars as "unattractive" or "objectionable". Cf *Forster v Novic*, 127 AD3d 605 (1<sup>st</sup> Dept 2015) (holding the defendants met their prima facie burden by submitting plastic surgeon's description of the scar as "well healed" and "barely perceptible" and neurologist's description of the scar as "hardly visible"); *Sidibe*, 79 AD3d at 536.

Accordingly, the court finds that there is an issue of fact as to whether Levison suffered a "significant disfigurement," as that term is defined in Insurance Law § 5102 (d), and, consequently, also finds that the portion of Huang's and Modern Cab's motion that seeks summary judgment to dismiss Levison's claim thereunder should be denied.

The joint motion of codefendants Guerrero, Ryder and Party Rental (motion sequence number 006) is similar to Huang's and Modern Cab's motion, in that it raises no argument with respect to Levison's negligence claim, and makes the same assertions with respect to Levison's Insurance Law § 5104 claim. As a result, the court finds that the first branch of this motion should be decided in the same manner, i.e., it should be denied with respect to both causes of

action.

The balance of Guerrero's, Ryder's and Party Rental's motion seeks summary judgment dismissing Huang's and Modern Cab's cross claims against Ryder pursuant to the "Graves Amendment," 49 USC § 30106. That statute provides, in pertinent part, as follows:

"(a) In general. An owner of a motor vehicle that rents or leases the vehicle to a person (or an affiliate of the owner) shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner), for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if

"(1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and

"(2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner)."

49 USC § 30106 (a). Movants argue that Ryder, as a corporation that "is engaged in the trade or business of renting or leasing motor vehicles," and that played no part in Levison's accident, is entitled to avail itself of the protection of the Graves Amendment. *See* notice of motion (motion sequence number 006), Belmonte affirmation, ¶¶ 68-71. They raise the same argument with respect to Ryder LT in the second action herein. *Id.*, ¶ 72. Huang and Modern Cab do not oppose either of these requests in their opposition papers. *See* Seldin affirmation in opposition. There is no doubt that Ryder is a vehicle rental company, and that its employees had no involvement in Levison's accident. Consequently, movants are correct that the Graves Amendment protects Ryder from any claims or cross claims in this action. Therefore, the court finds that the second branch of Guerrero's, Ryder's and Party Rental's motion should be granted, and that all cross claims asserted against either Ryder or Ryder LT should be dismissed.



The final matter to be addressed in this decision is Levison's cross motion for summary judgment on the complaint (motion sequence number 006). In the first branch of his motion, Levison argues that he is entitled to summary judgment on his Insurance Law § 5104 claim because he suffered a "serious injury" consisting of a "significant disfigurement" of his face. *See* notice of cross motion, Cannata-Hendele affirmation, ¶¶ 21-39. However, the court has already reviewed the evidence and considered this argument, and concluded that whether Levison suffered a "significant disfigurement," is a question of fact that must be resolved by a jury. Therefore, the court denies the first branch of Levison's cross motion.

The balance of Levison's cross motion seeks partial summary judgment on the issue of liability on his second cause of action for negligence. *See* notice of cross motion, Cannata-Hendele affirmation, ¶¶ 40-43. Levison cites the decision of the Appellate Division, First Department, in *Mello v Narco Cab Corp.* (105 AD3d 634 [1<sup>st</sup> Dept 2013]) for the proposition that he, "as a rear seat motor vehicle passenger . . . who did nothing to contribute to the accident, is entitled to summary judgment against all of the defendants as a matter of law." *Id.*, ¶ 40. Guerrero, Ryder and Party Rental respond that this argument is "misleading and erroneous," because the case law merely holds that such a passenger "is free from comparative negligence . . . but no court has held that such a holding automatically presumes the defendants were in fact negligent." *See* Belmonte affirmation in opposition, ¶ 26. They are correct. In the recent case of *Guzman v Desantis* (148 AD3d 580 [1<sup>st</sup> Dept 2017]), the First Department reversed such a finding by the trial court, specifically noting that:

"Given that plaintiff expressly sought summary judgment on the issue of liability 'against all defendants,' and that the court granted plaintiff's motion 'on the issue of fault,' it appears that both plaintiff and the court misunderstood this Court's

holdings in *Garcia v Tri-County Ambulette Serv.* (282 AD2d 206 [1<sup>st</sup> Dept 2001]) and *Mello v Narco Cab Corp.* (105 AD3d 634 [1<sup>st</sup> Dept 2013]). In fact, plaintiff, as an innocent back-seat passenger, and in the absence of any finding as a matter of law of the defendants' respective liability, was entitled to summary judgment *only* to the extent of finding no culpable conduct by him on the issue of liability."

148 AD3d at 581 (emphasis added). Therefore, it is clear that Levison's request is too broad. As an innocent back-seat passenger, he is entitled *only* to a finding of no culpable conduct on his part with respect to the issue of liability. Whether, and to what extent (if any), the other parties to the instant accident were negligent is a matter that awaits future resolution. Therefore, the court finds that the second branch of Levison's cross motion should be granted solely to the extent of awarding him summary judgment finding him free of culpable conduct with respect to the issue of liability.

#### DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of defendants Sha Huang and Modern Cab Corp. (motion sequence number 005) is denied; and it is further

ORDERED that the motion, pursuant to CPLR 3212, of defendants William Guerrero, Ryder Truck Rental Inc., Ryder Truck Rental LT and Party Rental Ltd. (motion sequence number 006) is granted to the extent that the supplemental complaint and all cross claims herein are dismissed as against Ryder Truck Rental Inc. and Ryder Truck Rental LT, with costs and disbursements to said defendants as taxed by the Clerk upon the submission of an appropriate bill of costs, and the motion is otherwise denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the cross motion, pursuant to CPLR 3212, of plaintiff Samuel Levnsen

(motion sequence number 006) is granted solely to the extent of awarding said plaintiff a partial summary judgment finding him free of culpable conduct with respect to the issue of liability, and the motion is otherwise denied; and it is further

ORDERED that the balance of this action shall continue.

Dated: New York, New York  
September 1, 2017

ENTER:

  
Hon. Paul A. Goetz, J.S.C.