SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LISA S. HEADLEY** **PART** **IAS MOTION 22**

Justice

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JOSELITO ARIAS,

Plaintiff,

- v -

FLOYD HALL, BENNETT TRUCK TRANSPORT, LLC., CARL SALAMON, GERSTON & SON, LLC., GERSTON & SONS, INC.,

Defendant.

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INDEX NO. 151832/2018

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents and for the reasons stated herein, it is ORDERED that defendants, Carl Salamon, Gerster & Son, LLC and Gerster & Sons, Inc.'s, motion for summary judgment to dismiss the action pursuant to *CPLR §3212* is GRANTED. And it is further ORDERED that plaintiff's cross-motion for summary judgment on the issue of liability against defendants, Floyd Hall and Bennett Truck Transport, LLC, only is GRANTED.

The subject accident occurred on April 6, 2017. Plaintiff, Joselito Arias, alleges that while he was driving on Interstate 81, co-defendant, Floyd Hall, was hauling a mobile home when the wheel from his trailer dislodged, hit the guardrail and impacted the truck operated by co-defendant Salamon, which caused the wheel to bounce in front of the plaintiff's vehicle. As a result, plaintiff Joselito Arias alleges that he suffered injuries due to the negligence of the defendants.

Defendants, Carl Salamon, Gerster & Son, LLC and Gerster & Sons, Inc.'s Motion for Summary Judgment to Dismiss

In their motion, movant-defendants, Carl Salamon, Gerster & Son, LLC and Gerster & Sons, Inc., argue that they have no proximate cause to the accident. Defendants contend that plaintiff testified and acknowledged that plaintiff's vehicle never came into contact with the defendants' vehicle. Specifically, defendant Salamon testified that while he was operating his truck, he heard yelling over a "CB radio" that a tire from another vehicle was flying off, and when he saw the object, he took his foot off the gas, but did not press the brake. Defendant Salamon testified that he moved his truck as far left as he could, and he was unaware that the dislodged tire from the other truck struck any other vehicles.

Plaintiff submitted limited opposition to the motion to dismiss filed by defendants, Carl Salamon, Gerster & Son, LLC and Gerster & Sons, Inc**.** Plaintiff argues that the movant-defendants failed to submit an affidavit of someone with actual knowledge to establish their freedom from negligence and instead submitted an affidavit of Phillip R. Gerster, the president of defendant-company Gerster & Son, LLC, who was not present at the time of the accident. However, the motion to dismiss was supported by the examination before trial (EBT) testimony of Carl Salamon, the driver who was present at the accident.

Defendants, Carl Salamon, Gerster & Son, LLC and Gerster & Sons, Inc. filed a reply affirmation. Defendants argue that the affidavit submitted by the President of Gerster & Son, LLC and Gerster & Sons, Inc. was proffered to authenticate the dashcam video that filmed the accident. Further, defendant Salamon, who was present at the time of the accident, testified at his EBT that the dashcam recording accurately depicted the accident.

"A defendant moving for summary judgment in a negligence action has the burden of establishing, *prima facie,* that he or she was not at fault in the happening of the subject accident."

S*ee, Boulos v. Lerner–Harrington,* 124 A.D.3d 709, 2 N.Y.S.3d 526 (2d Dep't 2015). There can be more than one proximate cause of an accident (*see, Lukyanovich v. H.L. General Contrs., Inc.,* 141 A.D.3d 693, 35 N.Y.S.3d 463; *Cox v. Nunez,* 23 A.D.3d 427, 805 N.Y.S.2d 604), and "[g]enerally, it is for the trier of fact to determine the issue of proximate cause." *Kalland v. Hungry Harbor Assoc., LLC,* 84 A.D.3d 889, 889, 922 N.Y.S.2d 550; *see, Howard v. Poseidon Pools,* 72 N.Y.2d 972, 974, 534 N.Y.Sg.2d 360, 530 N.E.2d 1280), *citing*, *Hurst v. Belomme*, 142 A.D.3d 642, 642, 36 N.Y.S.3d 735, 736 (2016).

Here, defendants, Carl Salamon, Gerster & Son, LLC and Gerster & Sons, Inc.'s motion is granted as there is no issue of fact as to whether their negligence or actions caused the accident. In fact, based on the facts presented, defendants Carl Salamon, Gerster & Son, LLC and Gerster & Sons, Inc. were also hit by the flying object, which bounced off defendants' vehicle. Plaintiff claims that the movants did not proffer an affidavit of personal knowledge, however the defendant-driver, Salamon's EBT, described defendant's account of the accident and corroborates the affidavit in support of the motion. The plaintiff's claim of negligence cannot be sustained as defendants were not the proximate cause of the accident because plaintiff also testified that movant-defendants' vehicle did not come into contact with his vehicle. As such, the defendants' motion for summary judgment to dismiss is granted and the cause of action is dismissed against Carl Salamon, Gerster & Son, LLC and Gerster & Sons, Inc., **only**.

Plaintiff's Cross-Motion for Summary Judgment for Liability against Defendants Floyd Hall and Bennett Truck Transport, LLC

Plaintiff, Joselito Arias, filed a cross-motion for summary judgment on the issue of liability against co-defendants, Floyd Hall and Bennett Truck Transport, LLC, only. Plaintiff argues, *inter alia*, that here, the doctrine of *res ipsa loquitur* applies because the dislodged tire was in the

exclusive control of co-defendants, Floyd Hall and Bennett Truck Transport, LLC and the *res ipsa loquitur* doctrine is routinely applied by the courts where personal injury is suffered as a result of an object falling off a vehicle. Plaintiff also cross-moves to strike defendants' 1st and 5th affirmative defenses for contributory negligence, and defendants' 7th affirmative defense alleging negligence of persons other than the defendant. Lastly, plaintiff moves to set the matter down for damages at trial.

"In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility." *Garcia v. J.C. Duggan, Inc.*, 180 A.D.2d 579, 580 (1st Dep't 1992), citing, *Dauman Displays, Inc. v Masturzo*, 168 A.D.2d 204 (1st Dep't 1990). As such, summary judgment is rarely granted in negligence actions unless there is no conflict at all in the evidence. *See, Ugarriza v. Schmieder*, 46 NY2d 471, 475-476 (1979). In opposition to plaintiff's cross-motion, Defendants Floyd Hall and Bennett Truck Transport, LLC, argue, *inter alia*, that the *res ipsa loquitur* doctrine is not applicable and if it were, it is a question that would be left for the jury.

The doctrine of *res ipsa loquitur* creates a permissible inference of negligence and causation from an occurrence which does not ordinarily happen without negligence. *Nesbit v. New York_City Transit Auth.*, 170 A.D.2d 92, 97, 574 N.Y.S.2d 179, 182 (1991). "The theory of *res ipsa loquitur* applies where a plaintiff shows that (1) the event does not usually occur in the absence of negligence, (2) the instrumentality that caused the event was within the exclusive control of the defendant, and (3) the plaintiff did not contribute to the cause of the accident." *See, Dermatossian v. New York City Tr. Auth.,* 67 N.Y.2d 219, 226, 501 N.Y.S.2d 784, 492 N.E.2d 1200; *Ladd v. Hudson Val. Ambulance Service,* 142 A.D.2d 17, 20–21, 534 N.Y.S.2d 816. "It is true that negligence cases do not usually lend themselves to summary judgment." *See, Ugarriza v.*

Schmieder, 46 N.Y.2d 471, 474, 414 N.Y.S.2d 304, 386 N.E.2d 1324. "In general, the doctrine of *res ipsa loquitur* merely gives rise to a permissible inference of negligence and does not justify summary judgment." S*ee, George Foltis, Inc. v. City of New York,* 287 N.Y. 108, 38 N.E.2d 455; *Notice v. Regent Hotel Corp.,* 76 A.D.2d 820, 429 N.Y.S.2d 437. However, even in negligence cases, summary judgment must be granted where the plaintiff's *prima facie* proof is so convincing that the inference of negligence is inescapable if not rebutted by other evidence. *See, Horowitz v. Kevah Konner, Inc.,* 67 A.D.2d 38, 414 N.Y.S.2d 540. Summary judgment has been granted in certain *res ipsa loquitur* cases where the defendant has totally failed to rebut the inescapable inference of negligence. *Id.*

Here, the sworn testimony of defendant, Floyd Hall, *inter alia*, indicates that he had no recollection of ever tightening the lugs prior to the trip on the date of the accident. Hall also testified that there was no loosening of the "lug nuts" from the last inspection prior to the accident. However, co-defendant Hall also testified that he performed all reasonable inspections, including checking the wheels under the mobile home. Here, the sworn testimony of defendant, Floyd Hall, indicates, *inter alia*, that he was driving in adherence with all speed limits, and that he performed all reasonable inspections, including checking the wheels under the mobile home, and that there was no loosening of the "lug nuts" from the last inspection prior to the accident. The testimony of defendant Hall also indicates that he has no recollection of ever tightening the lugs prior to his trip on the date of the accident.

This court finds that defendant Hall was negligent as he acknowledged that he had no recollection of tightening the lugs prior to the accident. Further, the instrumentality that caused the event, the dislodged wheel from defendant's trailer, was within the exclusive control of the defendant, and the plaintiff did not contribute to the cause of the accident, as he demonstrated that

he was driving when the wheel from the defendant's became dislodged and impacted the plaintiff's vehicle. Thus, the plaintiff's cross-motion for liability against co-defendants, Floyd Hall and Bennett Truck Transport, LLC, only is hereby granted. As such, this action is directed to proceed to trial on the sole issue of plaintiff's damages.

Furthermore, plaintiff also motions this court to strike defendant-Hall's affirmative defense alleging the plaintiff's culpable conduct. As stated above, plaintiff has established that he was free from negligence in that he was slowing down in traffic when he was struck by a wheel that dislodged from defendant-Hall's vehicle. Defendant has failed to dispute these facts and failed to offer a non-negligent explanation of the accident. Thus, plaintiff's motion to strike defendant-Hall's affirmative defense is granted.

Accordingly, it is hereby

ORDERED the defendants, Carl Salamon, Gerster & Son, LLC and Gerster & Sons, Inc.'s, motion for summary judgment to dismiss is GRANTED and the cause of action is dismissed against Carl Salamon, Gerster & Son, LLC and Gerster & Sons, Inc., only; and it is further

ORDERED that the plaintiff's cross-motion for liability against co-defendants, Floyd Hall and Bennett Truck Transport, LLC, only is hereby GRANTED; and it is further

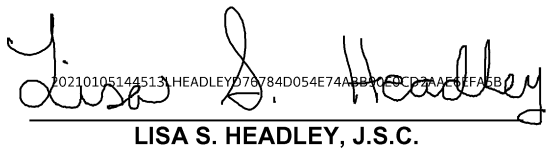
ORDERED the plaintiff's motion to strike co-defendants, Hall and Bennett Truck Transport, LLC, 1st and 5th affirmative defenses for contributory negligence, and defendants' 7th affirmative defense alleging negligence of persons other than the defendant is GRANTED and these affirmative defenses are hereby stricken; and it is further

ORDERED that this matter shall be scheduled on the trial calendar on the sole issue of plaintiff's damages as against co-defendants, Floyd Hall and Bennett Truck Transport, LLC, only; and it is further

ORDERED that any relief sought not expressly addressed herein has nonetheless been considered; and it is further

ORDERED that within 30 days of entry, movant-defendants shall serve a copy of this decision/order upon plaintiff and co-defendants with notice of entry.

This constitutes the Decision and Order of the Court.



1/5/2021
DATE

LISA S. HEADLEY, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
	X	GRANTED	☐ DENIED		GRANTED IN PART	☐	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT	☐	REFERENCE