Perkowski v Ali
2021 NY Slip Op 33225(U)
April 7, 2021
Supreme Court, Orange County
Docket Number: Index No. EF007273-2017
Judge: Sandra B. Sciortino
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To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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GABRIEL PERKOWSKI,
Plaintiff,

-against-

KOOSHIN D. ALI, EXCEL TRUCKING, LLC, RAYMOND N. RYDER, STACY I. RYDER, KATHERINE E. YOUNG AND JAMES H. YOUNG,
Defendants.

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KATHERINE E. YOUNG AND JAMES H. YOUNG,
Third-Party Plaintiffs,

-against-

EDWARD J. GROOVER, JAMES E. GROOVER, MARIANA MARTINEZ, JOHN A. LOPEZ, ROBERT E. STONE, SWIFT TRANSPORTATION CO. OF ARIZONA, LLC, BRIAN K. REED, STEVEN P. BURNS, JEFFREY D. ERICKSON, FBF LEASING, INC., TERRANCE D. TARVER, A.D. EQUIPMENT, INC., EDWARD T. POOLE, RDF LOGISTICS, INC., GREGORY A. CORSON, HOGAN TRUCK LEASING, INC., DONNA M. STEINARD, GIULIO A. IMBROGNO, NICHOLAS A. BARONE, MATTHEW S. BASZTURA, "JOHN DOE 1" AND "JOHN DOE 2",
Third-Party Defendants.

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KOOSHIN D. ALI AND EXCEL TRUCKING, LLC,
Second Third-Party Plaintiffs,

-against-

ROBERT STONE, SWIFT TRANSPORTATION COMPANY OF ARIZONA, LLC, MARIANA A. MARTINEZ, JOHN A. LOPEZ, EDWARD J. GROOVER AND JAMES E. GROOVER,
Second Third-Party Defendants.

DECISION AND ORDER

INDEX NO.: EF007273-2017
Motion Date: 1/8/21

Sequence Nos. 1 - 7

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RAYMOND N. RYDER and STACY L. RYDER,
Third Third-Party Plaintiffs,

-against-

EDWARD J. GROOVER, JAMES E. GROOVER, MARIANA MARTINEZ, JOHN A. LOPEZ, ROBERT E. STONE, SWIFT TRANSPORTATION COMPANY OF ARIZONA, LLC, BRIAN K. REED, STEVEN P. BURNS, JEFFREY D. ERICKSON, FBF LEASING, INC., EDWARD T. POOLE, RDF LOGISTICS, INC., GREGORY A. CORSON, HOME TRUCK LEASING, INC.,
Third Third-Party Defendants.

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SCIORTINO, J.

Because of the extreme numbers of documents and exhibits submitted in connection with these motions, the Court will not list each document here[1]. Every document submitted by the parties in connection with these motions for summary judgment pursuant to Civil Practice Law & Rules 3212 has been considered.

Background and Procedural History

These actions to recover damages for personal injuries all arise out of a multi-vehicle accident or accidents which took place on March 4, 2015 along the westbound lanes of Interstate 84 in Greenville, New York. Plaintiff Gabriel Perkowski commenced this action by e-filing a summons and complaint on September 12, 2017. In the complaint, the plaintiff asserts that, on March 4, 2015, the vehicles owned and/or operated by the named defendants were in contact with a 2011 Mack dump truck he was operating in connection with his work for the New York State Department of

[1]When necessary, references to documents or exhibits will be made to the NYSCEF document number.

Transportation, causing him to sustain serious personal injuries. Between September 28 and December 8, 2017, defendants filed Answers with Cross-claims. On November 25, 2019, the Young defendants filed an Amended Answer, asserting an additional affirmative defense.

The Young defendants filed a third-party summons and complaint on February 21, 2020, asserting causes of action for contribution and indemnification against defendants not named in the original suit: Edward and James Groover; Mariana Martinez and John Lopez; Robert Stone and Swift Transportation Co. of Arizona; Brian Reed; Steven Burns; Jeffrey Erickson and FBF Leasing, Inc.; Terrence Tarver and A.D. Equipment, Inc.; Edward Poole and RDF Logistics, Inc.; Gregory Corson and Hogan Truck Leasing, Inc.; Donna Steinard; Giulio Imbrogno and Nicholas Barone; Matthew Basztura, and two John Doe defendants representing two unknown owners and/or operators of tractor-trailer vehicles involved in the accident.

Defendants Ali and Excel Trucking filed a second third-party summons and complaint on February 24, 2020. Between June 9 and September 30, 2020, third-party defendants Reed; Basztura; Burns; Tarver/A.D.; Poole/EDF; Steinard; Corson/Hogan, and Swift[2] filed answers to the third-party complaints. As of the date of this Decision, it appears that third-party defendants Groover; Martinez/Lopez, and Imbrogno/Barone are in default of the Young third-party complaint. The second third-party defendants Groover and Martinez/Lopez defendants are also in default of the Ali third-party complaint. Stone is in default of all of the third-party complaints.

On November 6, 2020, the Ryder defendants filed a third third-party complaint for the same relief. Only third third-party defendants Ryder, Tarver and A.D. Transport have answered.

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[2]Swift did not appear on behalf of the purported operator of its vehicle, Stone. Stone has not otherwise answered or appeared.

Although paper discovery has been ongoing, the only party deposed to date is plaintiff Gabriel Perkowski.

Police Reports

All of the motions reference the police reports made on the day of the accidents, but they are referenced by different names. They are summarized here for ease of understanding.

Report A (Also referred to as Accident 1, the "Ali Report" or the "Spenjian (the reporting Trooper) Report" Report A references seven (7) drivers:

V-1 Kooshin Ali, driving a 2007 tractor trailer (Excel);

V-2 Edward Groover, driving a 2015 Ford pickup, pulling a trailer with two cars;

V-3 Raymond Ryder, driving a 2002 Volkswagen sedan;

V-4 Plaintiff Gabriel Perkowski, driving a Mack dump truck;

V-5 Katherine Young, driving a 1998 Dodge sedan;

V-6 Mariana Martinez, driving a 2001 Nissan sedan; and

V-7 Robert Stone, driving a 2014 tractor trailer (Swift).

"A multiple vehicle accident occurred on Interstate 84 westbound, with heavy fog and icy roads present. "Event 1: [Ali] observed a NYS DOT truck [plaintiff] up ahead in left lane with flashing emergency lights. [Ali] attempts to slow down...loses control of vehicle and collides into guide rail on northern shoulder. [Groover] traveling same and behind [Ali] observes [Ali] losing control. [Groover] unsuccessfully attempts evasive maneuvers and collides into same guide rail on northern shoulder, as well as colliding with [Ali]. Event 2: [Young] traveling same, [Ryder] stated to have observed a DOT truck [plaintiff] in left lane, as well as [Ali] and [Groover] stopped and involved in a vehicle accident up ahead. [Ryder] unsuccessfully attempts evasive maneuvers

subsequently brushing against [plaintiff] before colliding with [Ali]. [Plaintiff] (DOT) traveling westbound on I-84 and in left lane attempting to salt highway due to icy road conditions. [Young] traveling same and behind [Ryder] collides against [plaintiff] before colliding into the passenger side rear bumper of [Ryder]. [Young] subsequently rotates as a result of the accident and faces the southern shoulder. [Martinez] driving same and behind [Young] attempts evasive maneuvers unsuccessfully, subsequently collides with [Ali] and [Groover]. [Stone] traveling same and behind [Martinez]. [Stone] attempts evasive maneuvers unsuccessfully and subsequently collides with [Groover][Martinez] and [Ali]. [Young] incurs collision by a vehicle [identified by VIN] and rotates further facing eastbound."

Report B (Also referred to as Accident 2, or the "Reed Report," or the "Mannix (reporting Trooper) Report". Report B references six drivers:

V-1: Brian Reed, driving a 2003 Ford SUV;

V-2 Steven Burns, driving a 2005 Ford SUV;

V-3 Jeffrey Eckerson, driving a 2013 tractor trailer (FBF LSG);

V-4 Terrence Tarver, driving a 2013 tractor trailer (AD Equipment);

V-5 Edward Poole, driving a 2015 tractor trailer (RDF logistics);

V-6 Gregory Corson, driving a 2013 tractor trailer (Hogan)

"A multi vehicle accident occurred on Interstate 84 westbound in the area of mile marker 3.8 just over a hill crest. Heavy fog and icy roads are present. Event 1: [Reed] is traveling west on I84 in right lane. [Reed] observes the multi car accident ahead of him and attempts to take evasive maneuvers. [Reed] loses control of vehicle. [Reed] veers right and collides with the side of a trailer involved in the above stated accident. Event 2: [Burns] is traveling west on I84 and [Burns] reacts

to multi car accident. [Burns] brushes up against the side of [Reed]. A maroon Dodge Intrepid is stopped in the middle of the roadway with the front of the car facing south (a result of the above stated accident). [Burns] collides with the Dodge Intrepid causing the Intrepid to rotate 45 degrees and again collide with the side of [Burns]. The Intrepid now faces oncoming traffic. Event 3: [Erickson] is traveling west and observes the multi vehicle accident and Events 1 and 2. [Erickson] attempts to stop but is unable to. [Erickson] collides with the maroon Dodge Intrepid, [Burns] and a NYS DOT plow truck. Due to this collision, [Burns] is sent into the side of the same trailer as [Reed]. Event 4: [Tarver] is traveling west on I84 and observes the multi vehicle accident as well as events 1-3. [Tarver] attempts to stop vehicle but is unable to. [Tarver] rear ends [Erickson]. Event 5: [Poole] is traveling west on I84 and observes [Tarver] stopped. [Tarver] (sic) is able to successfully stop the vehicle just behind [Tarver]. Event 6: [Corson] is traveling west on I84 and observes [Poole] stopped. [Corson] attempts to take evasive maneuvers and veers to the right but is unsuccessful. [Corson] rear ends [Pool] which causes [Poole] to rear end [Tarver]. This report follows the events of [Accident A]."

Report C (Also referred to as Accident 3 or the "Steinard Report," also prepared by Trooper Mannix. Report C references three drivers:

V-1 Donna Steinard, driving a 2013 Honda;

V-2 Giulio Imbrogno, driving a 1996 Nissan;

V-3 Matthew Basztura, driving a 2013 BMW SUV.

"[Steinard] is traveling west on Interstate 84 in right lane. [Imbrogno] is behind [Steinard]. [Basztura] is behind [Imbrogno]. A layer of fog and icy pavement has caused a multi-vehicle accident in front of [Steinard, Imbrogno and Basztura]. [Steinard] takes evasive maneuvers and veers

to the left. [Steinard] travels across roadway and comes to a stop on the shoulder. [Imbrogno] follows [Steinard] and veers left. [Imbrogno] comes to a stop behind [Steinard]. [Basztura] follows [Imbrogna] and veers left. [Basztura] rear ends [Imbrogna] which causes [Imbrogna] to rear end [Steinard]. All none (sic) labeled vehicles (on the diagram) are part of the multi-vehicle accident."

Deposition Testimony

Plaintiff was deposed by defendants Ali and Excel Trucking on March 11, 2019 (Doc. 83) and by the remaining defendants on November 7, 2019. (Doc. 84) Both depositions took place prior to the filing of the third-party actions.

March 11, 2019 (Doc. 83)

On March 4, 2015, plaintiff was working for the New York State Department of Transportation as a highway maintenance worker/equipment operator. His job duties included plowing. (9) That day, plaintiff was driving a tandem (2 rear axles) double-wing plow truck with a salter apparatus in the rear. (19-20) His "plow beat" stretched from the Pennsylvania state line to Exit 2 on I-84, both eastbound and westbound, including ramps. (24) I-84 at that point had two lanes of travel in each direction. (37) Plaintiff was traveling in the left lane at about 30 miles per hour. His "partner," non-party Robert Fuller, was traveling in the right lane in a single-wing tandem truck about a truck-length behind the plaintiff. (35, 46) Both trucks had lights flashing. (39) Plaintiff did not see a lot of snow, but there was a sleet storm and a coating of slushy sleet and ice on the surface of the road. (48, 53) His plow blades were removing some sleet, but some slush remained on the road, which he salted. (54) Although he had heard over the radio reports of other accidents nearer to Middletown and between Exits 2 and 3, he did not see any vehicles that had slid off the road on his route. (67)

The accident in this matter took place at approximately mile marker 4 in the westbound direction. (27) Plaintiff had just gone over a rise and was starting downhill. (30-31) Going up the rise, he saw a bank of fog, increasingly heavy as the highway went up. (76) At the top of the rise, he did not see any taillights or vehicles ahead of him on the road. (79) The roadway was slushy and icy. (80) Between one-eighth and one-quarter mile from the crest of the hill, plaintiff saw black tires across the road, all the way across the right lane and part way into the left lane, 25-30 yards away from him. (81-82) He braked gradually and steered straight ahead. His truck did not skid. Within ten seconds of his braking, he felt an impact on the right rear of his truck. (88) Five or six seconds later, the force of the impact pushed his now-skidding truck into the left guardrail; the front plow hit the rail first. (92, 95) The guardrail was about 4 feet from the "fog line" at the left side of the road. (97) The guardrail pushed him back toward the right. When that happened, the left wing blade also hit the rail, pushing him further to the right. (98-99)

After the impact, the truck came to rest on the guardrail, turned slightly to the left. (110) The front plow and left wing plow blades were touching the rail. At that point, he felt, but did not see, another truck hit the tractor-trailer that hit him; he described as "in him." (113-114) The second impact was lighter than the first. (118) He recalls three impacts total: impact to the rear of his truck; impact with the guardrail, and impact wehn the truck behind him was impacted. (119-120)

The plaintiff could see tractor-trailer wheels across the roadway, level with the height of his truck. He could see the whole truck, down to the cab. (137) When his truck stopped, the rear of a tractor-trailer was directly to the right of his passenger window. (138) Plaintiff remembered a Jeep coming into that area, that hit another vehicle but he did not know what vehicle it hit. The Jeep stopped just before the rear of the tractor-trailer next to plaintiff's truck, about 20 feet away. A small

red car came along and took off the Jeep on the driver's side. (141, 144) He saw a pickup truck on the other side of the road, which went into the ditch and stopped near where the cab of the tractor-trailer was. (146)

Fuller, the plaintiff's partner came to his truck to see how he was doing. (126) Plaintiff told him he was hurt and to call the office and tell them about the accident. He told Fuller to tell them to shut down the road because cars were "just crashing left and right." (126-27) Plaintiff left the scene in an ambulance. (131) Later, he told his supervisor, Howard Gillian, and the State Police that, as he was salting the road, a tractor-trailer "clipped him" in the rear and took him into the rail. After that it was "just cars, after cars, after cars." (134)

At the deposition, plaintiff was shown the diagram in a police accident report marked as Defendant's Exhibit A (PAR). (151) (The Court's Report A) He identified Vehicle 4 as his truck and Vehicle 1 as the truck he saw first, but testified that Vehicle 1 was on its side at some point. He did not see the Vehicle 1 fall over. (155-58) He could not remember a tractor-trailer to the right, with the cab slightly ahead of his truck, or any impact between his truck and that tractor-trailer. (161) He identified Vehicle 3 as the Jeep and Vehicle 5 as the red car. He did not recall any vehicle striking the side of his truck. (163, 167)

Plaintiff recognized a Swift tractor-trailer truck in a photograph marked as Defendant's Exhibit B2. He could not say, however, whether it was involved in the accident. (176-77)

He identified a truck shown in a photograph marked as Defendant's Exhibit C as the tractor-trailer that his partner told him had hit him. (187-89) Another truck in that photograph hit the truck that hit him. He identified other cars in other photographs, but could not say what involvement any of them had in the accident. (202-206)

November 7, 2019 (Doc. 84)

Plaintiff was again shown the photograph marked as Defendant's Exhibit C from the March 11, 2019 deposition. The photograph was taken by Robert Fuller, his partner. Plaintiff's truck was not in the photo, but if it were, it would have been off to the left.

The plaintiff testified to two major impacts to his vehicle, the first from a tractor-trailer which struck the right plow wing of his truck, and the second from a truck that hit the truck that hit him. (He did not remember testifying earlier that the impact was to the rear of the truck.) (420, 424-25) Except for Fuller, plaintiff never spoke to any of the other drivers. (428) Although he saw some of the other accidents, he did not know what vehicles struck what other vehicles, except that he knew the two red cars were close to his vehicle. (430) When he was shown Defendant's Exhibit B-2, he believed that the vehicles had been moved from the positions they were in when they came to rest after the accident, because the shoulder of the road was clear in that photograph. (431)

Plaintiff again testified to observing a fog bank as he approached the crest of the hill, and two sets of black tires that appeared to be in the air at eye level in his truck. (433-34, 436) He saw the tires out the right side of his windshield on the line dividing the right and left lanes, in the center of the road. (435, 437) From the time he first saw the tires until the first impact, maybe 10-15 seconds elapsed. (434) When he saw the tires, he instinctively braked, intending to pick up the driver's side wing and try to get past the truck. (439, 474) He did not observe the white trailer in the fog, and first saw it after the accident, a minute or two later after all the impacts. (437)

At the time of the first impact, his truck was still moving forward. (472) The driver's side wing had only lifted up a couple of inches. (474) Plaintiff did not see the truck that impacted his before the accident and did not remember seeing any vehicles behind him from the time he entered

the westbound lanes from the turnaround. (444) He did not hear the sound of oncoming vehicles, and did not hear air brakes, skidding, air horns or anything else. (476)

Plaintiff was shown the photograph marked as Defendant's B-6 from the earlier deposition and again recognized the Swift truck and one of the state trucks, but he did not know whether it was his. (446-47) He also reviewed new photographs marked as Defendant's F-U. He identified Exhibit U as showing a place close to where the tires were when he first saw them. (464) That site was near a mile marker visible on the right side of the roadway on the other side of the guardrail. (464) It was foggy and he could not see past the tires down I-84 until 5 or 10 minutes later when the fog lifted. (468) By that point, the accident was over. (469) He was able to see the lane markings faintly, under the sleet. (470) When he braked, the truck slid, but he did not lose control until he was hit. (471) His front plow was on the tarmac at that time. (473) After his truck was hit, he hit a guide wire on the left-hand side of the roadway visible in Exhibit U. (467)

"After everything cleared," he saw the tractor was in the ditch facing east, and the trailer was across the roadway's center line. (465-66)

Motions for Summary Judgment

The following third-party defendants filed motions for summary judgment:

Motion 1:	(Doc. 62)	Steinard	August 21, 2020
Motion 2:	(Doc. 104)	Basztura	October 29, 2020
Motion 3:	(Doc. 169)	Burns	December 4, 2020
Motion 4:	(Doc. 196)	Corson & Hogan	December 4, 2020
Motion 5:	(Doc. 224)	Tarver & A.D.	December 4, 2020
Motion 6:	(Doc. 239)	Third-Party/Second	

		Third-party defendant Swift	December 4, 2020
Motion 7:	(Doc. 252)	Poole & RDF	December 4, 2020

Motion 1

Third-party defendant Donna Steinard claims that, on March 4, 2015, there were three entirely separate motor vehicle accidents, which she categorizes as A, B and C, that occurred on I-84. She appends to her moving papers the PAR for Accidents A and C. (Docs. 64-65) Steinard argues that she can have no liability to plaintiff because he was involved exclusively with Accident A, while she was involved exclusively with Accident C. She notes that the PAR for Accident C lists only three vehicles: her Honda sedan, a Nissan sedan operated by Imbrogno and owned by Barone; and a BMW suburban operated by Basztura. No other vehicle is mentioned in the accident description, which was made by a different police officer than the one who authored the PAR for Accident A. The PARs demonstrate that there was no contact between Steinard and the vehicle belonging to the Young defendants/third-party plaintiffs.

Steinard avers (Doc. 75) that she was driving in the right lane of I-84 when she saw a person on the right shoulder waving and observed fog and black ice on the roadway. She could see multiple vehicles stopped in the roadway where an accident had occurred. She braked and brought her vehicle to a stop on the left shoulder without contacting any other vehicles. Ten seconds later, she was rear-ended, but did not strike any other cars ahead of hers. The front end of her car was not damaged. (See Docs. 76-77) Since she came to a complete stop, she cannot be liable for her rear-end accident, as a matter of law. Neither of the two vehicles behind Steinard's had any contact with any vehicle involved in Accident A.

Further, Steinard, faced with an emergency situation, took reasonable actions in the circumstances to bring her vehicle to a stop. Therefore, there is no possibility that any action or inaction of Steinard's was the proximate cause of any of the accidents that resulted in plaintiff's injuries.

Defendants'[3] opposition includes a procedural objection to Steinard's failure to have included all of the pleadings in her reply. However, most defendants oppose the motion on three grounds: first, the motion (and all of the other motions) is premature as little discovery has taken place. They note that only plaintiff has been deposed and only by the first-party defendants. Third-party defendants have not deposed him.

Second, there are multiple questions of fact. Noting that the PAR reports Steinard "veering" to the left shoulder, questions of fact are raised as to the sequence and timing of her collision relative to the collisions ahead of her and behind her. Additionally, her evasive maneuvers could have caused other drivers, in avoiding her, to become embroiled in the other collisions. Steinard must explain why she moved over two lanes and wound up on the left shoulder.

Finally, defendants note that the Steinard's argument relies chiefly on the PARs, which are inadmissible since neither of the police officers witnessed the accident and the information comes from witnesses who had reason to make self-serving statements. All of these are issues of fact which can only be determined in discovery, especially since much of the information is in the exclusive knowledge of the movant.

In reply, Steinard asserts that the failure to annex pleadings is not fatal to a summary

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[3]Although most of the responding parties are third-party defendants, (except first-party defendant/third-party plaintiff Young), for simplicity, they are referred to as "defendants."

judgment application in an e-filed matter. The certified PARs are admissible as business records since the police officers arrived on the scene and observed the positions of the various vehicles after the accidents. The use of the PARs by other moving parties implicitly stipulates to their admissibility. None of the opposing parties have come forward with admissible evidence to show that Steinard did anything to cause any of the impacts. Conclusory speculation is insufficient to require deposition, when no defendant has shown that Steinard caused or could have caused a collision with that person.

Motion 2

Third-party defendant Matthew Basztura was operating a 2013 BMW motor vehicle when he was involved in a three-car accident in the westbound left shoulder of I-84. There was a slight incline in the area where his accident happened. Neither of the other two vehicles involved in his accident was owned or operated by third-party plaintiffs Young.

Basztura avers (Doc. 124) that, just before his accident, the weather was damp, cold and foggy. He was traveling in the left lane when a tractor-trailer passed him on the right. As he approached the incline in the highway, he saw that the tractor-trailer had jackknifed and portions of it were in the right and left lanes. He gradually moved to the left shoulder to avoid the tractor-trailer, but could not see beyond the tractor-trailer and did not see two vehicles stopped in front of him until he entered the shoulder. He was unable to stop before contacting the 1996 Nissan in front of him. The Nissan then contacted the Steinard vehicle. Although there were other accidents at the scene, they were unrelated to his accident and his vehicle never contacted any other vehicles. Photographs appended to the moving papers (Doc. 125) confirm that there was no contact with plaintiff's truck or any other vehicle. The accident involving plaintiff and defendant/third-party plaintiff Young was

separate and distinct from his, as shown by the PAR and by plaintiff's testimony that the only vehicle which struck his was a tractor-trailer. Basztura could not have been the proximate cause of any injury to plaintiff and there is no nexus to third-party plaintiffs Young.

In opposition, defendants assert that Basztura's motion is also premature. Having admitted that he failed to stop in time to avoid the accident with the Imbrogno/Barone vehicle, Basztura cannot argue there is no issue of fact regarding his negligence. Among other issues, Basztura needs to demonstrate, through deposition testimony, that his actions as he ascended the rise on I-84 did not contribute to the jackknifed tractor-trailer, which affected the vehicles involved in plaintiff's accident. The PAR on which Steinard and Basztura both rely states that the vehicles "veered" across the highway, as opposed to the gradual movement he claims.

Even if Basztura did not directly impact plaintiff, the photographic evidence shows that there were subsequent collisions behind the Steinard-Barone-Basztura impacts. Questions therefore arise as to whether that accident was truly a separate event, or whether Basztura's speed, the reasonableness of his efforts to avoid the collisions, or any of his actions caused any of the vehicles behind him to contribute to the overall accident.

Moreover, in this motion, as in the Steinard motion, the PARs do not reflect that the accidents were separate. Rather, each PAR adopts, at least in part, the others. The diagrams in each successive PAR include the same vehicles, with additions. In reality, this is one multi-car pileup, not three separate accidents.

Plaintiff, in his deposition testimony, asserts that the PAR diagrams do not properly show the placement of the involved vehicles. (Doc. 83 at 112-114, 133-135, 161-167) The reliance on the PARs is misplaced, as they are inadmissible hearsay. At the very least, there are issues of fact, within

the exclusive knowledge of each defendant as to the existence or lack of existence of a nexus between each and the plaintiff. Defendants must be entitled to reasonable discovery to provide the complete story of the accident, as well as to question conduct which may be relevant to liability determinations.

Basztura replies that none of the opponents raises any question of fact precluding summary judgment in his favor. None disputes that he had no contact with either plaintiff or Young. The opponents of a summary judgment motion are required to lay bare the evidence they believe creates a question of fact. None has shown how any negligence Basztura may have committed could have proximately caused injury to either plaintiff or Young.

Motion 3

Third-party defendant Burns also asserts (Doc. 193) that there was no contact between his vehicle and the plaintiff's truck or the Youngs' Dodge. Prior to the accident, Burns was in the right lane on westbound I-84. The roads had a layer of ice and sleet, and there was fog. Photographs (Doc. 192)show that he was in the right lane and nowhere near plaintiff's vehicle, which is not even visible in the photos. Burns' vehicle is not listed in the PAR for plaintiff's accident, Accident A. Burns was involved in a completely separate and distinct accident, and had no role in plaintiff's collision. As such, he can have no liability for plaintiff's injuries.

The PAR listing Burns' vehicle (Doc. 195) (Court's Report B) shows that co-defendant Reed observed the multi-car accident in front of him, lost control and collided with a trailer involved in Accident A. Burns' vehicle brushed against the side of the Reed vehicle and collided with a maroon Dodge, making that car rotate 45 degrees, and collide with Burns a second time. Vehicle 3 listed in the PAR also collided with the Dodge, with Burns' car, and with plaintiff's plow truck. That impact

sent Burns' car into the side of the same trailer as Reed struck. Because Burns' vehicle and plaintiff's were never near each other, and plaintiff's truck was behind Burns in the left lane, there is no possibility that Burns' actions could have caused plaintiff's injuries. Moreover, Burns took reasonable precautions, given the weather at the time, and acted in a reasonable manner in trying to avoid the initial accident. He is entitled to the protection of the emergency doctrine.

In opposition, defendants argue that the lack of direct contact between Burns and plaintiff is insufficient to establish a lack of negligence. Burns does not say whether he observed the other accidents or for how long before his own. He does not disclose his speed or what evasive measures he took. In addition, theYoungs' Dodge Intrepid was a vehicle common to both accidents. After Burns struck the Reed vehicle, he came into contact with the Young vehicle twice and the Erickson vehicle once Both eventually struck plaintiff. Burns is unable to eliminate all questions of fact regarding his conduct, or whether he could be one of the proximate causes of plaintiff's injuries. There is a triable issue whether Burns' conduct may have set off a chain of collisions including Erickson's and plaintiff's. There are also multiple versions of the facts set forth by the various parties, raising questions about the conduct of each, and whether any were negligent. The facts necessary to justify the opposition must be fleshed out in discovery and cannot be stated at this point. This motion, like the others, is premature.

Burns reiterates that his accident was separate and distinct from plaintiff's, and the emergency action he took was justified after Reed lost control and pushed him into the Dodge.

Motion 4

Third-party defendants Corson and Hogan echo the assertions of the prior movants that there were three multi-vehicle accidents, involving different vehicles and generating separate PARs.

Corson was not involved in any of the accidents that involved plaintiff and never contacted any vehicle which subsequently contacted plaintiff's. Therefore, neither Corson nor Hogan can be the proximate cause of plaintiff's injury; nor can they have liability to third-party plaintiffs.

Corson avers (Doc. 233) that, on the day of the accident, there was freezing fog and black ice on the road. As he approached the scene, he saw numerous vehicles on and off the road, including a flatbed truck stopped in front of him. He attempted to stop and maneuver around the flatbed, but struck it on the right rear corner of the bed with the left rear portion of his cab and the front left portion of his trailer. By the time of Corson's collision, all accidents involving plaintiff's truck had already occurred.

Corson was involved only in the second of three accidents. His accident involved six vehicles; his was the sixth. After he collided with the Poole flatbed, it was pushed into the Tarver/AD truck. None of those vehicles came into contact with plaintiff. Neither Corson nor plaintiff was involved in the third accident, which involved three vehicles.

The PAR for the second accident (Doc. 220) shows that the two impacts testified to by plaintiff were caused by Erickson, who struck plaintiff's truck first and then again after it was pushed back into plaintiff's truck by Tarver. The PAR makes it clear that all of the impacts to all of the other vehicles, including plaintiff's, took place before he arrived. It is clear from the PARs and plaintiff's testimony that he could not have proximately caused plaintiff's injuries as it is "irrefutable" that all the impacts took place prior to his arrival on the scene.

Defendants argue that this motion, too, is premature. The lack of direct contact is insufficient to establish a lack of negligence. The (inadmissible) PARs show that Corson struck Poole, who struck Tarver, who hit Erickson, who hit both Young and plaintiff. There is a connection between

Corson and plaintiff. A question of fact exists whether Corson's action caused the chain of impacts that led to the impacts to plaintiff and the timing was for each impact.

The PAR upon which Corson relies states that plaintiff was impacted only once. Yet Corson's affidavit states that Erickson struck plaintiff twice, raising yet another question of fact. Corson's assertion that he was the last vehicle on the scene is both speculative and self-serving. Corson's version of the facts contradicts not only plaintiff's version, but Erickson's as well, once again underscoring the multiple versions of the events interposed by the various parties.

In reply, Corson argues that there is no admissible evidence to suggest he was negligent, and that the "undisputed chronological order of the collisions" shows that Young's contact with plaintiff's vehicle was complete before Corson arrived.

Motion 5

Third-party defendants Tarver and A.D. Equipment join in Steinard motion (Seq. 1) and move on the same grounds. Like Steinard, Tarver argues that he cannot have liability to plaintiff because plaintiff was involved exclusively with Accident A and the accident involving Tarver was exclusively Accident B. Nor was Tarver involved in Accident C, as confirmed by the fact that Steinard attributes no liability to him.

Tarver avers (Doc. 238) that, prior to the accident, he drove his loaded truck up a "sharp incline." As he approached the top, there was cloud cover and mist in the air. He was traveling about 20 miles per hour because of the road conditions. He noticed a green hauler truck stopped on the right side of the road, about 50-75 feet away, and multiple vehicles including a pickup truck, a Swift truck and cars involved in the first accident. Other cars were stopped on the left side, and appeared to be observing the accident on the right. He slowed down at the crest of the hill and was

able to come to a complete stop five to six feet behind the green truck, on the left side of the highway. He stopped without impacting any vehicles. Two or three minutes later, he was rear-ended by a flatbed, which had been rear-ended by a truck from Hogan Transportation. The rear-end collision sent his truck into the green truck in front of him. Tarver's truck, the green truck, the flatbed and the Hogan truck were the only vehicles involved in that accident. None of those vehicles contacted either plaintiff or the Young vehicle, which were in the first accident ahead of him on the right side of I-84.

Tarver argues that the PAR for the "second" accident (Doc. 227), appended to his papers, clearly demonstrates that he was not involved in Accident A in any way. Therefore, there is no possibility that Tarver's actions were a proximate cause of plaintiff's injuries, especially given the emergency circumstances with which Tarver was faced.

Defendants argue that there can be more than one proximate cause of an accident. Here, there are questions of fact as to whether Tarver caused a chain of impacts that wound up with plaintiff, and whether Tarver's actions were reasonable under the circumstances. Tarver cannot argue that the accidents were separate and distinct when his admitted contact with Erickson led to contact with Young, who then collided with plaintiff. The question of whether the accidents were separate or connected is, in and of itself, a question of fact which requires discovery.

The (inadmissible) PAR on which Tarver relies contradicts his testimony that he was stopped, but all three PARs show that Tarver was in contact with a vehicle that eventually struck plaintiff's. There is a further question of fact regarding the circumstances defendants faced just prior to their collisions and whether the emergency doctrine is applicable. The sequence of the accidents, the conditions of the road, and the causes of the contacts all raise issues of fact that must be

answered in discovery.

Tarver replies that there has been no proffer of evidence which raises any issues regarding his conduct. The hope that discovery may lead to such evidence is insufficient to defeat summary judgment.

Motion 6

Third-party defendant Swift, by counsel, asserts that, while Swift's vehicle was involved in an accident near the same location as plaintiff's, it was a completely separate multi-vehicle accident "cluster". The Swift vehicle neither came into contact with plaintiff's, nor did it cause any vehicle to come into contact with it. Swift's mere proximity to the scene of plaintiff's accident is insufficient to raise any question of Swift's negligence.

There were several distinct accident clusters. The first was identified in the Ali PAR (Doc. 247). Swift argues that the PAR confirms that none of the involved vehicles ever contacted plaintiff's truck or any vehicle which was caused to strike plaintiff's truck. All of these accidents happened to the right of the I-84 westbound lanes. None ever contacted plaintiff's vehicle or any of the multiple other vehicles involved in that accident, all of which occurred to the left of the westbound lanes. The Ali PAR also describes that accident, showing that the Ryder and Young vehicles were the ones that struck plaintiff's vehicle.

Plaintiff's testimony reaffirms that his accident occurred exclusively on the left of the I-84 lanes. The photograph which plaintiff identified as the only tractor-trailer that may have been directly involved in his accident (Doc. 245, Ex. C) does not show a Swift vehicle. Ex. B-2 shows the Swift vehicle jackknifed on the right shoulder and side. In light of the evidence of different accident clusters, there is no genuine issue of fact as to Swift's involvement with plaintiff's accident or his

injuries. Merely furnishing the occasion for an accident does not impose liability. The mere hope or speculation that material facts are within the knowledge of un-deposed parties does not suffice to postpone summary judgment.

Defendants' opposition centers on two arguments. First, no *prima facie* case can be made solely on counsel's interpretation of the PAR and the photographs. Without an affidavit on personal knowledge, the motion must be denied. Even without that consideration, reliance on the inadmissible PAR is again misplaced.

All of the PARs, however, make it clear that this was a multi-car pileup and not successive, separate accidents. The photographs on which counsel relies show the Swift vehicle blocking at least part of the right lane, confirming some of the many conflicting versions of how these accidents took place. Other defendants argue that the Swift truck was blocking not only the right lane, but part of the left. If not for the jackknife, the other accidents may not have happened, but the facts supporting that theory are in the exclusive knowledge of the defendants. The Swift driver needs to testify to his speed, his distance from the accident scene when he came upon it, and the time sequence of each contact. Without discovery, it is impossible to determine if Swift's operator was negligent.

Swift's counsel replies that no evidentiary support was provided to create any factual dispute, and no defendant asserts what evidence discovery will provide. Plaintiff's admission that the Swift vehicle was nowhere near him is sufficient to establish its *prima facie* case.

Motion 7

The motion of third-party defendants Poole and RDF also centers on the claim that plaintiff's injuries arose from a separate and distinct accident from the one in which it was involved. The attorney's affirmation relies on two of the PARs (Docs. 273 and 274), which show, he claims, that

plaintiff was "brushed" by the Ryder tractor-trailer[4] before Young's vehicle collided against plaintiff. (Doc. 273) The PAR for Poole's accident (Doc. 274) shows that Poole was able to successfully bring his vehicle to a stop until he was rear-ended by Corson, which caused him to rear-end Tarver. As the stopped middle vehicle in a three-car rear-end collision, Poole should be entitled to summary judgment, as his actions could not have been the proximate cause of plaintiff's accident.

In further support of the motion, RDF appends the affidavit of George Botoulas, the general manager of RDF. (Doc. 255) Botoulas avers that, on March 4, 2015, Poole, his employee notified him of the accident and told him that he was able to successfully stop his vehicle for about 30 seconds prior to colliding with the vehicles in front of him when he was struck from behind. Counsel argues that the undisputed facts show that Poole had no contact with Young or plaintiff and is entitled to judgment as a matter of law.

In opposition, defendants again argue that the PAR upon which the attorney's affirmation relies, is inadmissible hearsay, as is the Botoulas affidavit. The failure to submit an affidavit on personal knowledge is fatal to a *prima facie* case. All three PARs raise a triable issue of whether the accidents were separate or one multi-vehicle incident. The Reed PAR (Doc. 274) is inaccurate, and contradicts the affirmation of the attorney in this motion, both with regard to the sequence of the incidents, and the chain of collisions. The PAR does not say that Poole stopped, but says that Tarver stopped. The diagram appended to the PAR shows that Corson hit Poole, who then struck Tarver, who struck Erickson, who struck plaintiff. In short, there are multiple versions of the events, making the summary judgment motion premature.

Poole and RDF, through counsel, reply that the PAR is admissible as a certified public record

[4]The referenced PAR actually states that the Ryder vehicle was a Volkswagen sedan.

as it is based on present sense impressions and diagrams showing how the vehicles collided with one another. The Botoulas affidavit is likewise admissible as it contains Botoulas' specific recollections of having been working and having been notified by Poole of an accident. No defendant has demonstrated how discovery could reveal material facts, and mere speculation is insufficient.

DISCUSSION

For the reasons which follow, the motions are denied without prejudice to renew after discovery.

Civil Practice Law & Rules 3212(b) states, in pertinent part, that a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." Section 3212(b) further states that "the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." Summary judgment expedites civil cases by eliminating claims which can properly be resolved as a matter of law. (*Andre v. Pomeroy*, 35 NY 2d 361, 364 [1974]) However, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of material issues of fact and demonstrating its entitlement to judgment as a matter of law." (*Granados v. Cox*, 43 AD3d 391, 392 [2d Dept 2007]; *Blackwell v. Mikevin Mgt. III, LLC,* 88 AD3d 836, 837 [2d Dept 2011]) "Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a material and triable issue of fact." (*Anyanwu v Johnson*, 276 AD2d 572 [2d Dept 2000]) Issue finding, not issue determination, is the key to summary judgment, and the function of the Court. (*Krupp v Aetna Casualty Co.*, 103 AD2d 252 [2d Dept 1984]) In deciding a summary judgment motion, the Court must view the evidence in

the light most favorable to the non-moving parties. (*See*, *Kutkiewicz v Horton*, 83 AD3d 904 [2d Dept 2011])

In this matter, the moving third-party defendants are in the unusual situation of propounding motions, not against the first-party plaintiff, but against the third-party plaintiff and against each other. For many reasons, they have failed to meet their burdens.

Motions 6 and 7

Section 3212(b) provides that a summary judgment motion shall be supported by, *inter alia*, an affidavit by a person having knowledge of the facts. An affidavit by an individual without personal knowledge of the facts does not establish the proponent's *prima facie* burden. (*Saunders v. J.P.Z. Realty, LLC*, 175 AD3d 1163 [1st Dept 2019]) The motions of third-party defendants Swift and Poole/RDF Logistics contain no such affidavits. The affirmations of defendants' attorneys who have no personal knowledge of the facts, without deposition transcripts or other documentary evidence, are insufficient to support summary judgment. (*Caramanica v. State Farm Fire and Cas. Co.*, 110 AD2d 869 [2d Dept 1985])

Swift's attorney argues in reply that "the affirmation of an attorney, even if he has no personal knowledge of the facts, may, of course, serve as the vehicle for the submission of acceptable attachments which do provide evidentiary proof in admissible form," (*United Specialty Insurance v. Columbia Casualty Company*, 186 AD3d 650, 651 [2d Dept 2020], *quoting, Zuckerman v. City of New York*, 49 NY 2d 557, 563 [1980]) Here, however, the submissions by the attorneys, i.e., the PARs in both matters, and the hearsay affidavit of Botoulas in Motion 7, are not in admissible form. (*See infra*) Without admissible evidence, or an affidavit by a person having personal knowledge of

the facts, defendants failed to establish their *prima facie* entitlement to judgment as a matter of law. The motions are denied.

Motions 1-5

The motions by the remaining third-party defendants are likewise denied, albeit for different reasons. As a preliminary statement, the failure to attach pleadings, while required by Civil Practice Law & Rules 3212(b), is not fatal to the applications. The pleadings in this matter were electronically filed as required by the 9th Judicial District protocols. As such, they are available to the parties and to the Court. No opposing party has asserted any prejudice by the omission of additional copies of the pleadings in what is already a massive set of papers. Under the circumstances, the omission, if it is one, may be overlooked by the Court in accordance with Civil Practice Law & Rules 2001. (*Sensible Choice Contracting, LLC v. Rodgers*, 164 AD3d 705, 705-06 [2d Dept 2018])

However, a review of the pleadings and the moving papers leads to the inevitable conclusion that these motions are simply premature. It is axiomatic that a party should be permitted a reasonable opportunity for disclosure prior to the determination of a motion for summary judgment. (*Urcan v. Cocarelli*, 234 AD2d 537, 537-538 [2d Dept 1996]) Where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant, summary judgment may be denied, especially where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion. (*Baron v. Incorporated Vil. of Freeport*, 143 AD2d 792, 793 [2d Dept 1988]) Even in those cases where "the facts are conceded there is often a question as to whether the [party] acted reasonably under the circumstances. This can rarely be decided as a matter of law." (*Ugarizza v. Schmeider*, 46 NY 2d 471, 475-6 [1979], *quoting, Andre*

v. Pomeroy, 35 NY 2d 361, 364 [1974]) Here, the facts are hardly conceded. Issues of fact abound in almost every movant's affidavit; including, but not limited to these:

- What is the sequence of the collisions? Were the collisions in Accident C separate from the rest as those moving defendants claim? Was this three different accidents, as argued by several of the third-party defendants, or was it one, multi-car pile-up?
- Did Steinard's (Mot. 1) lane change constitute a loss of control? What effect, if any, did that have on the vehicles traveling behind her? The photos appended to her motion show that her car was not entirely on the shoulder. Did that affect the tractor-trailers near her?
- Did Basztura's (Mot. 2) travel in the left lane constitute any cause of the jackknife of the truck that passed him on the right? Was he actually in the right lane, behind Imbrogno and Steinard, as the PAR states? What was his speed? Did he "veer", as the PAR says, or move gradually, as his affidavit claims?
- Corson (Mot. 4) claims his impact with Poole occurred after all other impacts, but Tarver (Mot. 5) asserts that Corson's impact drove Poole into Tarver. There is no affidavit from Poole confirming or denying that.
- What evasive measures did Burns (Mot. 3) take before his impact with Young? Were those measures a proximate cause of Young's collision with plaintiff?
- Tarver claims that the Poole impact drove him into Erickson's Volvo, but Erickson says he was stopped completely before he was struck.

This is by no means an exhaustive list of the factual discrepancies between the parties'

various versions of the events. Where the parties' factual accounts of the accident differ substantially, little discovery has taken place and depositions of the parties have not yet occurred, an award of summary judgment is premature. (*Herrera v. Gargiso*, 140 AD3d 1122, 1123 [2d Dept 2016]; *Morris v. Hochman*, 296 AD2d 481, 482 [2d Dept 2002]) The conflicting accounts as to how the rear-end, chain reaction collisions occurred raise questions of fact as to how all of the accidents happened, and defeat any claim that any third-party defendant is entitled to judgment as a matter of law. (*Hudson v. Cole*, 264 AD2d 439 [2d Dept 1999]; *Mosheyev v. Pilevsky*, 283 AD2d 469 [2d Dept 2001])

Summary judgment is further defeated by the movants' reliance on (at the same time they challenge the admissibility of) the PARs. Police accident reports are admissible as business records so long as the report is made based upon the officer's personal observations while carrying out police duties. (*Holliday v. Hudson Armored Car & Courier Serv., Inc.* 301 AD2d 392, 396 [1st Dept 2003]) However, where the information contained in the reports comes from witnesses not engaged in police business, or where such witnesses had reason to give biased and false reports, the reports are inadmissible to establish the main fact. (*Yeargans v. Yeargans*, 24 AD2d 280, 281 [1st Dept 1965])

In this matter, as in *Holliday*, there is no evidence as to the source of the information in the reports, whether those persons were under a business duty to make them, or whether some other hearsay exception would render the statements admissible. The Court is thus unable to consider the content of the PARs for the purpose of establishing the cause of the accidents. (*Holliday*, 301 AD2d at 396; *Aetna Cas. & Sur. Co.*, 233 AD2d at 158) It may be that the depositions of the police officers are required to establish a foundation for the PARs.

Certain of the moving third-party defendants argue that, having been able to bring their vehicles to a complete stop without contacting any other vehicle, they cannot be considered to have proximately caused any collision between plaintiff and any other vehicle. (*See, Good v. Atkins*, 17 AD3d 315 [2d Dept 2005]; *Ali v. Daily Pita Bakeries, Inc.*, 35 AD3d 330, 331 [2d Dept 2006]) However, it is well-established that there may be more than one proximate cause of an accident, and it generally for the trier of fact to determine the issue of proximate cause. (*Nachamie v. County of Nassau*, 147 AD3d 770, 773 [2d Dept 2017]) Those positions may prove true after discovery, as may defendants' reliance on the protections of the emergency doctrine. But the facts necessary to support those positions are not in evidence at this time.

The movants almost uniformly state in their replies that the opponents have failed to come forward with evidentiary facts which could be gleaned from discovery, but it is evident that "'facts essential to justify opposition may exist, but cannot then be stated', warranting denial of the motion to permit defendants to conduct disclosure." (*Aetna Cas. & Sur. Co. v. Island Transp. Corp.*, 233 AD2d 157, 158 [1st Dept 1996], *quoting,* Civ. Prac. Law & Rules 3212[f], *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 NY 2d 494, 506 [1993]; *Brielmeier v. Leal*, 145 AD3d 753, 754 [2d Dept 2016])

In that almost every opponent sets forth at least one issue raising a question of fact regarding the conduct of co-defendants, it cannot be fairly said that they are acting on the "mere hope....of uncover[ing] evidence that will prove their case." (*See, Kennerly v. Campbell Chain Co.,* 133 AD2d 669, 670 [2d Dept 1987])

The third-party defendants, who have yet to have any opportunity to conduct depositions,

should not be deprived of the opportunity to obtain evidence pertinent to the cause of the accident. (*Rosa v. Colonial Transit, Inc.*, 276 AD2d 781 [2d Dept 2000])

CONCLUSION

For the foregoing reasons, the applications of the third-party defendants for summary judgment on liability grounds are denied, with leave to renew at the completion of depositions.

Any remaining paper discovery shall be completed by May 21, 2021.

This matter is scheduled for virtual conference on June 15, 2021 at 9:30 a.m. A Microsoft Teams link will be provided in advance of the conference date. Parties should confer in advance to conference and should be prepared to discuss a schedule for depositions.

This decision shall constitute the order of the Court.

Dated: April 7, 2021
Goshen, New York

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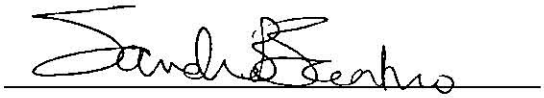

HON. SANDRA B. SCIORTINO, J.S.C.

To: *Counsel of Record via NYSCEF*