

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

.....
STUART FISHKIN and DONNA FISHKIN
Plaintiff,

- against -

Index No. 010510/00
Sequence #009 #010 #011
#012 #013

Part 41
8/23/2006

FIVE STAR COLLISION, INC., WILLIAM GANTE,
AL'S HIGHWAY TOWING & RECOVERY,
ARTIE'S COLLISION, INC. and ARTHUR
VALENTI, AUTONATION, INC. and MAROONE
CHEVROLET, L.L.P., Defendants.

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These motions and cross-motions involve a motor vehicle accident which occurred on June 15, 2000, in which the double right rear wheel tire rims of a 1998 tow truck (Vehicle Identification Number 1GCHC33J5WF058143) flew off and struck plaintiff's automobile causing plaintiff serious physical injury.

Throughout the discovery phase of this action the undersigned has had reason to believe certain parties have not been forthcoming and, therefore, even on a summary judgment motion the Court is not compelled to accept those parts of their testimony that are flatly contradicted by the documentary evidence and other reliable proof.

The first issue raised in these motions is the identify of the owner of the 1998 tow truck involved the accident.

There is no question that defendant William Gante was the driver of the vehicle. Immediately after the accident the police were given information from Gante indicating that the vehicle plate number 1902457, under "insurance code 365." However, on June 15, 2000 (the same date as the accident), the truck was effectively added to the insurance policy of defendant Al's Highway Towing & Recovery with Legion Insurance Company.

According to a handwritten bill of sale from defendant Valenti dated December 8, 1999 on defendant Artie's Collision Inc's. letterhead, the 1998 Chevy truck was sold to defendant Al's Highway Towing & Recovery and the vehicle was received by non-party Gregory DiMaria, owner of both Al's Highway Towing and Recovery and Fuel Star Towing, Inc. Defendant Gante admits to driving the tow truck away after the purpose and, therefore, defendant Valenti no longer had control over the vehicle.

While defendant Valenti acquired title to the vehicle at some point after he paid off the lease with defendant Maroone Chevrolet, LLC dated October 20, 1998, on the date of the accident there is no proof sufficient to establish a *prima facie* case that defendant Valenti and Artie's Collision, Inc. was the owner (Spratt v. Sloan, 280 AD2d 465). Accordingly, their motion to dismiss the complaint and all cross-claims pursuant to CPLR §3212 is granted (Seq. #010). Their request for sanctions is denied.

The motions of defendants William Gante, Al's Highway Towing & Recovery and Five Star Collision for summary judgment are, consequently, denied.

From the deposition testimony before the Court the undersigned is unable to conclude as a matter of law who owned the vehicle. More so than similar actions, credibility of the witnesses will determine the final outcome at trial.

In addition, the Court cannot determine from this record if defendant driver, William Gante, was an employee of defendants Five Star or Al's Highway or even if he was driving the tow truck in his individual capacity.

The remaining motion for summary judgment by Autonation, Inc. and Maroon Chevrolet, LLC (Seq.# 009) is granted and the complaint and all cross-claims against them are dismissed. The only nexus these defendants had with the alleged faulty wheel rims and/or their lug nuts is that prior to delivery of the new vehicle to the lessee/owner Valenti, Maroon Chevrolet installed four

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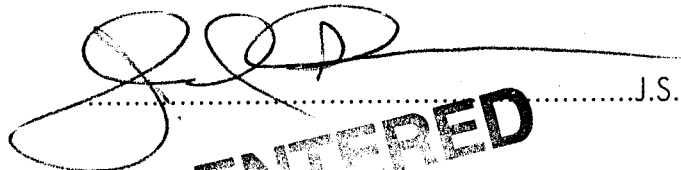
custom after-market rims at Valentis' request. The connection between that installment and the subject accident 21 months later is too remote and speculative for a determination that plaintiff and the other co-defendants have made out a *prima facie* case of negligence (see, e.g., *Rosa v. General Motors*, 226 AD2d 213).

After defendant Valenti took possession from defendant Maroone the truck was modified to have a towing apparatus installed. Additional brake repair work was also performed at a later date before the accident. It is uncontradicted that both procedures require the tires and rims to be removed and the reinstalled.

Because of the dismissal, the Court does not reach defendants Autonation and Maroon's application pursuant to CPLR §3211(8).

The case is ready to proceed to trial on October 12, 2006, the next scheduled trial part date in Calendar Control Part 1. Any application for an adjournment must be made before that presiding Justice.

Dated: September 26, 2006


.....J.S.C.
ENTERED
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NASSAU COUNTY
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