

SCW

SHORT FORM ORDER

MOD

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

RAJAI FAKHOURI,

TRIAL/IAS PART 15

Plaintiff(s),

INDEX NO. 10172/02

- against -

**MOTION SEQUENCE
NO. 6**

**KAUSHIKBHAI N. PATEL, CHASE MANHATTAN
AUTOMOTIVE FINANCE CORP. AND BIREN K. PATEL,**

**MOTION SUBMISSION
DATE: August 4, 2004**

Defendant(s).

The following papers read on this motion:

Notice of Motion	X
Reply Affirmation	X
Affirmation in Opposition	X

Upon the foregoing papers, the motion by plaintiff, for an Order pursuant to CPLR Rule 3212, granting the plaintiff partial summary judgment against the defendants on the issue of liability, is determined as hereinafter provided:

This personal injury action arises out of a one car motor vehicle accident that occurred on October 11, 2002 at approximately 2:15 a.m. on Route 690 westbound, 500 feet east of the Solvay Exit No. 7, Geddes, New York. At that time, the plaintiff was a passenger in a 2001 Nissan Maxima operated by the defendant Biren K. Patel, registered to the defendant Kaushikbhai N. Patel and owned by the defendant Chase Manhattan Automotive Finance Corp. As a result of the accident in issue, the plaintiff suffered physical injuries and was rendered a quadriplegic.

As a result of the accident, there were certain criminal charges brought against the defendant Biren K. Patel. By prior order dated May 14, 2004, the Court denied the defendant Chase Manhattan Automotive Finance Corp's application for a stay of the instant civil action pending a disposition of the defendant Biren K. Patel's criminal proceeding. The Court observes that on May 26, 2004, the deposition of the defendant Biren K. Patel was held and said defendant asserted his Fifth Amendment privilege against self incrimination to certain questions asked regarding the motor vehicle accident in issue.

The Court observes that the defendants Biren K. Patel and Kaushikbhai offer no opposition to the requested relief. The Court further observes that although the plaintiff contends that the defendant Biren K. Patel has pled guilty to certain criminal charges as a result of this accident, no copy of the proceedings, plea or allocation has been submitted in support of said contention.

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in **Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc.**, 207 AD2d 880, 616 NYS2d 650, 651 (Second Dept., 1994):

"It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Zuckerman v. City of New York*, *supra*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718)."

In support of the instant application, the plaintiff, amongst other things, submits the sworn statements of Shawn C. Arnold, Robert Endenburg; John A. Busco; and Jeffrey M. O'Neill. The plaintiff, Rajai Fakhouri, submits an affidavit in support, which, amongst other things, states:

"3. I state that on October 11, 2002 at approximately 2:15 a.m., I was a passenger in a Nissan Maxima bearing license plate number ADC2106 which was involved in a one-car accident on Route 690 westbound, 500 feet east of the Solvay Exit No. 7, Geddes, Onondaga County, New York due to the negligence of the defendants. The vehicle was operated by defendant, Biren K. Patel, registered to defendant, Kaushikbhai N. Patel, and owned by defendant, Chase Manhattan Automotive Finance Corp. There were two other passengers in the vehicle, Damien Rodolfo and Nishi Kapoor. As a result of the accident, I was rendered a quadriplegic.

4. The Nissan Maxima operated by defendant, Biren K. Patel, was traveling westbound on Route 690 westbound at a high rate of speed in excess of the speed limit. Furthermore, defendant, Biren K. Patel was driving in an aggressive manner passing motorists in various lanes. At one point, defendant, Biren K. Patel was in the left lane and attempted to change lanes losing control of the Nissan.

5. The defendant, Biren K. Patel, lost control of the vehicle in the left lane and slid across the center lane and the right lane. Afterwards, the Nissan proceeded off the roadway, through a fence, skidded across the ground sideways, and overturned. I was then ejected from the vehicle. The vehicle

then struck a culvert opening, a tree, and then landed in Onondaga Lake upside down."

The defendant Chase Manhattan Automotive Finance Corp. as owner of the vehicle drive by the defendant Biren K. Patel is responsible for the acts of said defendant pursuant to §388 of the Vehicle and Traffic Law. The defendant Chase Manhattan Automotive Finance Corp. does not offer any evidence in admissible form to contradict the requested relief requested by the plaintiff but rather again seeks a stay of the instant application to allow for a further deposition of Biren Patel as to the mechanism of injury. Said request is, as set forth by this Court in its prior Order in the sound discretion of the Court and the defendant Chase Manhattan Automotive Finance Corp's request for a stay herein, is **denied** (see, Matter of Knopf, 169 AD2d 428; 564 NYS2d 149 (First Dept., 1991). Even though the defendant, Biren K. Patel asserted his Fifth Amendment privilege, the assertion of said privilege is not a basis to defeat an application for summary judgment in a civil proceeding (see, Roth v Parish, 281 AD2d 612, 722 NYS2d 566 (Second Dept., 2001).

Based on all of the foregoing, the plaintiff's application for an Order pursuant to CPLR Rule 3212, granting the plaintiff partial summary judgment against the defendants on the issue of liability, is **granted**.

SO ORDERED.

DATED:

10/12/2004


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J.S.C.

ENTERED

OCT 14 2004

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**