

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**  
**JUSTICE**

TRIAL/IAS PART 20

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KEVIN BELLERA, X

Plaintiff,

Index No.: 005506/07  
Motion Sequence...09, 10, 11  
Motion Date... 07/20/10

-against-

RECOVERY RACING, LLC, d/b/a MERCEDES-  
BENZ OF MASSAPEQUA and LISA H.  
LEASING, LLC,

Defendants.

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RECOVERY RACING, LLC, d/b/a MERCEDES-  
BENZ OF MASSAPEQUA and LISA H. X  
LEASING, LLC,

Third-Party Plaintiffs,

-against-

FRANK W. BELLERA,

Third-Party Defendant.

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X

Papers Submitted:

- Notice of Motion (Mot. Seq. 09).....x
- Notice of Cross-Motion (Mot. Seq. 10).....x
- Notice of Cross-Motion (Mot. Seq. 11).....x
- Affirmation in Opposition.....x
- Affirmation in Opposition and Reply.....x
- Reply Affirmation.....x
- Reply Affirmation.....x

Upon the foregoing papers, the motion (Mot. Seq. 09) by the Plaintiff, KEVIN

BELLERA (hereinafter referred to as “Kevin”), the Cross-motion (Mot. Seq. 10) by the Defendants/Third-Party Plaintiffs, RECOVERY RACING, LLC, d/b/a MERCEDES-BENZ OF MASSAPEQUA and LISA H. LEASING, LLC (hereinafter referred to as “Recovery”), and the Cross-motion (Mot. Seq. 11) by the Third-Party Defendant, FRANK W. BELLERA (hereinafter referred to as “Frank”), each seeking an Order granting them summary judgment, pursuant to CPLR § 3212, is decided as provided herein.

This instant action involves a motor vehicle accident, which occurred on February 5, 2007 at approximately 9:44 p.m., on the Long Island Expressway eastbound at or near the Lakeville Road Exit. The vehicle driven by Frank, which was owned by Recovery, was allegedly struck by an unidentified hit-and-run vehicle. This caused the vehicle driven by Frank to strike crash barrels and a guardrail located at or near the exit ramp.

The Plaintiff, KEVIN BELLERA, was a passenger in the vehicle driven by his brother, Frank. Kevin alleges that as a result of the accident, he sustained a serious injury, pursuant to Insurance Law § 5102 (d). He also claims that he sustained economic loss greater than basic economic loss as the term is used in the New York State Insurance Law § 5102 et. seq.

In his motion for summary judgment, the Plaintiff’s counsel alleges that Frank W. Bellera was negligent in causing the accident and as a result, Recovery, as the owner of the vehicle, is liable for his injuries pursuant to VTL § 388. In support of his contention that Frank was negligent in causing the accident, the Plaintiff’s counsel includes a copy of an

affidavit purportedly signed by Frank on May 2, 2007. In the affidavit, Frank states that he saw the hit-and-run vehicle weaving in and out of traffic behind him. As it came up behind him, the vehicle tried to pass him on his right. Frank states, in the affidavit, that he moved to the right to prevent the hit-and-run vehicle from passing him and the cars bumped side-to-side. Frank states that he lost control of his vehicle and struck the crash cushions and guardrail. He states he gave a different version of what occurred to the police at the scene of the accident because he did not want to tell the policeman that he had been driving aggressively. Based upon the affidavit of Frank W. Bellera, the Plaintiff's counsel avers that it is "incontrovertible that Bellera's operation of the Defendant's vehicle at the time of the incident was negligent and that such operation contributed to the happening of the incident". (Affirmation of John P. Gianfortune dated August 13, 2009 at ¶ 16)

Counsel for Recovery opposes the Plaintiff's motion for summary judgment and moves for summary judgment in favor of Recovery. Counsel for Recovery contends that Frank was not negligent in causing the accident. He argues that the driver of the hit-and-run vehicle was solely responsible for causing the accident. In support of this contention, counsel for Recovery relies on the testimony of the Plaintiff at his Examination Before Trial. Counsel for Recovery contends that the Plaintiff testified that the vehicle he was riding in moved from the middle lane to the right lane in a normal manner. He further testified that after 5 to 10 seconds, the vehicle was struck in the rear by the hit-and-run vehicle. However, after a brief recess, the Plaintiff modified his testimony alleging he was confused and nervous and stated that the car he was in was in the right lane for a second before it was

struck by the hit-and-run vehicle. Counsel for Recovery argues that the Plaintiff's testimony fails to establish any negligence on the part of Frank. As such, he contends, Recovery cannot be held liable for the Plaintiff's injuries. Counsel for Recovery also seeks to exclude the affidavit of Frank W. Bellera as it was never provided to the Defendant's counsel as an adverse party statement in the course of discovery.

Counsel for Frank W. Bellera also cross-moves for an Order granting Frank summary judgment. He too relies on the Plaintiff's testimony at his examination before trial as well as the unsworn statement of an independent eyewitness and the police report which he contends corroborates the Plaintiff's testimony.

Summary judgment is a drastic remedy and should only be granted when there are no triable issues of fact. *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). The goal of summary judgment is to issue find, rather than issue determine. *Hantz v. Fleischman*, 155 A.D.2d 415 (2nd Dept. 1989). On a motion for summary judgment, the Court's function is to decide whether there is a material factual issue to be tried, not to resolve it. *Sillman v Twentieth Century Fox Films Corp.*, 3 N.Y.2d 395, 404. A prima facie showing of a right to judgment is required before summary judgment can be granted to a movant. *Alvarez v Prospect Hospital*, 66 N.Y.2d 320; *Winegrad v New York University Medical Center*, 64 N.Y.2d 851; *Fox v Wyeth Laboratories, Inc.*, 129 A.D.2d 611; *Royal v Brooklyn Union Gas Co.*, 122 A.D.2d 133.

The Court shall initially determine the issue concerning the admissibility of the affidavit of Frank W. Bellera. No proof has been tendered to establish that the affidavit was

ever served upon counsel for the Defendants prior to its inclusion as an exhibit in support of the Plaintiff's motion for summary judgment. Additionally, there is no explanation as to why the original affidavit has not been provided. The Court deems the affidavit to have been improperly utilized and should be precluded as not having been exchanged as an adverse party statement. Additionally, the affidavit is not an original containing original signatures and therefore is not proof in admissible form.

The Court now turns to the branches of the parties' motions which seek summary judgment. The Plaintiff has failed to establish a prima facie entitlement to summary judgment. The Plaintiff has failed to provide the Court with conclusive proof that the driver of the vehicle in which the Plaintiff was a passenger was negligent. As such, the Plaintiff's motion is **DENIED**.

Reviewing the transcript of the Plaintiff's testimony at his examination before trial in its totality, which parenthetically is the only proof submitted by anyone which is in admissible form, the Court concludes that there are indeed issues of fact as to how the accident occurred. The Plaintiff's testimony, although somewhat suspect after having changed his description of the length of time the car was in the right lane to a second, after having taken a brief recess, does create a question of fact as to whether the driver contributed to the accident and as such is for the trier of fact to determine.

Accordingly, it is hereby

**ORDERED**, that the Cross-motion (Mot. Seq. 10) submitted by the Defendants/Third-Party Plaintiffs, RECOVERY RACING, LLC, d/b/a MERCEDES-BENZ

OF MASSAPEQUA and LISA H. LEASING, LLC and the Cross-motion (Mot. Seq. 11) submitted by the Third-Party Defendant, FRANK W. BELLERA for summary judgment, pursuant to CPLR § 3212, on the issue of liability, are **DENIED**.

All applications not specifically addressed herein are **DENIED**.

This decision constitutes the order of the court.

DATED: Mineola, New York  
September 3, 2010



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Hon. Randy Sue Marber, J.S.C.

**ENTERED**  
SEP 09 2010  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE