

SCAN

SHORT FORM ORDER  
SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present:

HON. ANTHONY L. PARGA

Justice

-----X PART 11

LEON BIDDY and LISA MARIE BIDDY,

Plaintiffs,

INDEX NO. 2556/06  
[ACTION NO. 1]

-against-

DOMINIQUE LAWRENCE E. VANMALTKE  
ALAMO FINANCING L.P., ALEXANDER D.  
JERBO, WERNER ENTERPRISES, INC.,  
JULIAN A. SCHWARTZ and ELLEN  
SCHWARTZ,

MOTION DATE:; 4/30/08  
SEQUENCE NOS. 05,06,07,08

Defendants.

-----X  
WERNER ENTRPRISES, INC.,

Plaintiff,

-against-

INDEX NO. 4175/07  
[ACTION NO. 2]

LEON BIDY, LISA MARIE BIDDY,  
DOMINIQUE LAWRENCE E. VANMALTKE,  
ALAMO FINANCING, LP, BRAUN'S  
EXPRESS, JULIAN A. SCHWARTZ and  
ELLEN SCHWARTZ,

Defendants.

-----X

Notice of Motion, Affs. & Exs.....	<u>1</u>
3-Notices of Cross- Motion, Affs. & Exs.....	<u>2-4</u>
Affirmations In Opposition & Exs.....	<u>5-7</u>
Reply Affirmation & Exs.....	<u>8-11</u>



Upon the foregoing papers, it is ordered that the motion by defendants Julian Schwartz and Ellen Schwartz for an order dismissing Action No.1 against them is denied; the cross-motion by defendants Dominique Lawrence E. VanMaltke and Alamo Financing, LLP for an order dismissing Action No. 1 against them is denied; the cross-motion by defendant Alexander Jerbo and Werner Enterprises, Inc. for an order dismissing Action No. 1 against them is denied; and the cross-motion by plaintiffs for an order granting summary judgment against defendants Alexander Jerbo and Werner Enterprises in Action No. 1 is denied.

The facts in Action No. 1 as gleaned from the pleadings are that on May 1, 2004 on the Cross Bronx Expressway, four vehicles were involved in an accident. Plaintiff Leon Biddy was driving a tractor trailer owned by non-party Braun Express. Defendant Dominique VanMaltke was driving a rented minivan owned by defendant Alamo. Defendant Julian Schwartz was driving a car owned by defendant Ellen Schwartz. Defendant Jerbo was driving a tractor trailer owned by defendant Werner. Allegedly VanMaltke struck Biddy; Biddy then struck Schwartz; Jerbo hit Biddy.

Plaintiff Leon Biddy's injuries as described in the Bill of Particulars include right bicep rupture, right rotator cuff tears, shoulder surgery in January 2005 and permanent limitation of motion of right shoulder and neck. Leon Biddy was confined to bed for six weeks and is unable to work as a truck driver due to this partial disability.

In support of their motion to dismiss or for summary judgment defendants Schwartz refer to sworn testimony of all parties. Testimony indicates that Biddy was hit first by VanMaltke and after Biddy hit Schwartz, Biddy was hit by Jerbo. Schwartz conclude that the Schwartz car was hit by Biddy sending their car off the cement divider and their car did not hit any other car.

Plaintiff opposes this application by defendants Schwartz by reference to Mr. Schwartz' deposition wherein he described what he remembers seeing as the traffic pattern just before the accident and the description of the truck that hit his car. Plaintiff demonstrates factual differences between defendant Julian Schwartz' recollection of accident details and the testimony of other parties with respect to the sequence of car collisions and details thereto.

In support of their cross-motion to dismiss or for summary judgment defendants VanMaltke and Alamo refer to the "unknown white 'town car'" that allegedly started the chain of vehicle collisions. Movant VanMaltke seeks to invoke the emergency doctrine as a defense to liability to plaintiff. Specifically, VanMaltke contends that in an effort to avoid hitting the white town car, VanMaltke suddenly veered left into the middle lane and came in contact with the right front while of plaintiff's truck.

Plaintiff opposes VanMaltke's application by directing the Court's attention to VanMaltke's lack of a New York license (he had a valid German license). Plaintiffs argue that his unfamiliarity with New York driving rules for merging on to a highway raises an issue of fact to defeat VanMaltke's motion.

VanMaltke and Alamo have not demonstrated evidence to support their contention that the white Town car merging into VanMaltke's lane was a sudden and unforeseen emergency absolving VanMaltke of any liability to plaintiffs (*Jacobellis v. NY State Thruway Auth.*, 2008 NY Slip Op (2<sup>nd</sup> Dept., 2008)).

In support of their cross-motion to dismiss, Alexander Jerbo and Werner Enterprises offer the report of Steven Richard, an accident reconstruction expert. Richard concludes that "Mr. Biddy's unsafe (steering/lane change) response following

his collision with the VanMaltke's minivan, led to the collision that resulted in his injury".

In support of plaintiffs' motion for an order granting judgment on liability against defendants Jerbo and Werner, the sworn testimony of Alexander Jerbo and Leon Biddy are quoted. Specifically, Jerbo's testimony indicates his truck may have been in violation of Vehicle & Traffic Law as to weight, commercial license suspension, driving history and having an unauthorized passenger, his girlfriend. Biddy, in his sworn statement, describes the aforementioned collisions as the reason for slowing down before being hit in the rear by Jerbo/ Werner.

After carefully reviewing all the submitted deposition testimony, reports of experts and memoranda of law, the Court concludes that plaintiffs' Complaint states causes of action against all defendants.

Significant in the assessment of any vehicle negligence case is the application of the statutory principles enunciated in both VTL §1180(a) and in Pattern Jury Instruction 2:77:

"It was the duty of each of the drivers to operate (his, her) automobile with reasonable care taking into account the actual and potential dangers existing from weather, road, traffic and other conditions.

"Each of these drivers were under a duty:

"To maintain a reasonably safe rate of speed.

"To have (his, her) automobile under reasonable control.

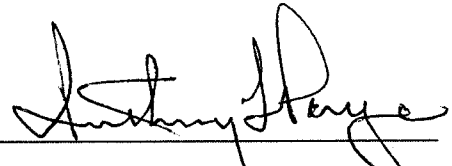
"To keep a proper lookout under the circumstances then existing to see and be aware of what was in (his, her) view.

"To use reasonable care to avoid an accident."

The facts as presented also demonstrate questions of fact as to liability on the part of all parties (*DeFalco v. Parker*, 271 AD2d 635 (2<sup>nd</sup> Dept. 2000)).

There was conflicting testimony as to the sequence of the collisions, the speeds at which the parties were driving and factors that may have contributed to this multi-vehicle, chain-reaction accident (*Vavoulis v. Adler*, 43AD3d 1154 (2<sup>n</sup> Dept., 2007)).

Dated: July 1, 2008.



Anthony L. Parga, J. S. C.

**ENTERED**

JUL 03 2008

**NASSAU COUNTY**  
COUNTY CLERK'S OFFICE