

SCA

**SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK**

Present:

HON. F. DANA WINSLOW,

**Justice
TRIAL/JAS, PART 6**

ASHWANI CHOPRA and NEETU CHOPRA,

Plaintiffs,

**INDEX NO.: 6378/08
MOTION DATE: 09/24/09**

-against-

MOTION SEQ. NO.: 001

**RADHY SHAM CHOPRA, ROBERT LOPEZ, and
BARBARA O'BRIEN,**

Defendants.

Motion by Defendant for an order pursuant to CPLR § 3212 granting him partial summary judgment on the issue of liability is decided as follows.

This is an action to recover damages for physical injuries allegedly sustained by Plaintiff Ashwani Chopra (hereinafter "Ashwani") as the result of a motor vehicle accident on December 10, 2007. The following account of the accident stems from the account of Defendant Radhy Sham Chopra (hereinafter "Radhy Sham"), most of which is not disputed by the non-movants.

Radhy Sham and his two brothers, Ashwani and Japinder Chopra, were heading home after work (deposition of Radhy Sham at 15-16). The brothers were passengers in Radhy Sham's Mercedes Benz E320. *Id.* at 15. Japinder sat in the front passenger seat and Ashwani sat in the rear of the car. *Id.* Radhy Sham was driving his vehicle southbound on the Cross Island Parkway. *Id.* at 12, 18. There were three southbound lanes on that highway. *Id.* at 19. As Radhy Sham traveled through the center lane at "around 50, 52 miles per hour," the "driving seat-side" of a white Toyota struck the rear of Radhy Sham's car. *Id.* at 22, 24-26. However, according to Defendant Robert Lopez, the driver of the white Toyota, he struck the "front right fender" of the Mercedes Benz (deposition of Lopez at 32, 34). As soon as he felt the impact, Radhy Sham held his steering wheel straight and applied the brake "[a]ll the way down" (deposition of Radhy Sham at 30-31). As a result, his car veered into the right lane and spun to the left across the southbound lanes. *Id.* at 35. The car ultimately struck the center barrier. *Id.* When the car came to a complete stop, it faced the northbound direction, but remained on the southbound side of the highway. *Id.* at 35-36. Ashwani sustained a bleeding cut in his face, as well as pain in his knee and shoulder. *Id.* at 40, 45.

Radhy Sham now moves for summary judgment on the issue of liability pursuant to CPLR § 3212. Ashwani, Defendant Lopez, Defendant Barbara O' Brien, the owner of the white Toyota, oppose Radhy Sham's motion.

A party seeking summary judgment must establish a prima facie case sufficient to warrant the court to direct judgment in his or her favor as a matter of law, offering evidence to demonstrate the absence of material issues of fact. Zuckerman v. City of New York, 49 NY2d 557, 562 (N.Y. 1980). The burden of proof then shifts to the opponent to submit admissible evidence sufficient to raise a genuine issue of material fact. Id. Mere conclusions or unsubstantiated assertions do not suffice. Id. In evaluating the sufficiency of a motion for summary judgment, the evidence submitted by the non-moving party must be accepted as true and a decision on the motion must be made on the version of the facts most favorable to the non-moving party. Marine Midland Bank, N.A. v. Dino & Artie's Automatic Transmission Co., 168 AD2d 610, 610 (2d Dept 1990). While negligence cases are not typically resolved by a motion for summary judgment, a motion will be granted where the facts evince the negligence of one party absent fault by the other party. Morowitz v. Naughton, 150 AD2d 536, 537 (2d Dept 1989).

In his motion for summary judgment, Radhy Sham claims that he is not liable for this accident because Defendant Lopez lost control of his vehicle and struck Radhy Sham's car (Radhy Sham's affirmation in support at 6). Moreover, Radhy Sham asserts that the emergency doctrine vitiates his obligation to exercise his best judgment and maintain control of his car "immediately following the unanticipated impact" (Radhy Sham's reply affirmation at 3). Ashwani, as well as Defendants Lopez and O'Brien, oppose this motion, contending that Radhy Sham was negligent because he exceeded the posted speed limit and, consequently, lost control of his car (Ashwani's affirmation in opposition at 3; Lopez and O'Brien's affirmation in opposition at 3). Defendants Lopez and O'Brien also oppose the motion based upon the differences in testimony regarding the points of impact (Lopez and O'Brien's affirmation in opposition at 2). The Court's determination turns on the following three issues:

1. Does the emergency doctrine absolve any culpability on Radhy Sham's part?

An emergency situation is a sudden and unforeseen occurrence not of one's own making. Smith v. Brennan, 245 AD2d 596, 597, 1997 NY Slip Op 10375 (3d Dept 1997). Accordingly, under the emergency doctrine, a driver faced with an emergency is not obliged to exercise best judgment and any lapse in judgment does not support a finding of negligence. Velez v. Diaz, 227 AD2d 615, 616 (2d Dept 1996).

Here, Ashwani asserts that his injuries were partly caused by Radhy Sham's failure

to attempt to turn the steering wheel and maintain control of the Mercedes Benz after Defendant Lopez initially collided into it (Ashwani's affirmation in opposition at 2). On the other hand, Radhy Sham states that the steering wheel was jammed, despite admitting that he never tried to turn it after the initial impact (deposition of Radhy Sham at 40-42). Nevertheless, under the foregoing exigent circumstances, Radhy Sham cannot be held culpable for his inaction. It is unreasonable to expect Radhy Sham, whose car was spinning across three lanes after it was suddenly struck by Defendant Lopez's vehicle, to take split-second measures that may minimize damages while an accident is unfolding. Therefore, Radhy Sham is not liable for negligence on the basis of his actions or inaction following the initial collision.

2. Is a de minimis increase of the posted speed limit evidence of negligence?

Vehicle and Traffic Law § 1180 (a) imposes a duty upon drivers to obey the posted speed limit: "No person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing." Speed in excess of the prescribed speed limit may be evidence of negligent operation. See Evers v. Carroll, Jr., 17 AD3d 629, 630 (2d Dept 2005) (asserting that the New York Supreme Court properly instructed the jury on the statutory obligation of Vehicle and Traffic Law § 1180 (a) after plaintiff conceded that he was driving 45 miles per hour despite seeing a warning sign that reduced the speed limit to 20 miles per hour). Courts, however, have determined that a motorist's de minimis excess of the speed limit does not warrant a finding of proximate cause of an accident where the other motorist is clearly culpable. Payne v. Rodriguez, 288 AD2d 280, 218 (2d Dept 2001); Galvin v. Zacholl, 302 AD2d 965, 966 (4th Dept 2003).

In this case, Ashwani and Defendants Lopez and O'Brien argue that Radhy Sham negligently operated his car because he exceeded the posted speed limit on the Cross Island Parkway, which is 50 miles per hour. Radhy Sham asserts that he was driving between 50 and 52 miles per hour. There is no evidence to the contrary. Further, there is no evidence that the negligible speed increase of two miles per hour proximately caused the motor vehicle accident at issue. Moreover, this Court finds no evidence that Radhy Sham could have averted the collision had he driven his vehicle at a rate of 50 miles per hour instead of 51 or 52 miles per hour. See Galvin at 966 (asserting that defendant could not have avoided the collision had she been driving at the posted speed limit of 45 miles per hour as opposed to 49 miles per hour). Thus, Radhy Sham's slight exceeding of the posted speed limit is not proof of negligence sufficient to sustain the non-movants' burden of proof under Zuckerman.

3. Is a difference in testimony regarding the points of impact a material issue of fact sufficient to defeat a motion for summary judgment?

Defendants Lopez and O'Brien allege that there is a triable issue of fact concerning the differences between Lopez's account and Radhy Sham's account regarding the parts of the Mercedes Benz and the white Toyota that were involved in the accident. Defendant Lopez claims that he struck the front of Radhy Sham's car, where as Radhy Sham asserts that the rear of his vehicle sustained the impact (Lopez and O'Brien's affirmation in opposition at 2). In order to overcome a motion for summary judgment, the opponent must a material issue of fact. Zuckerman at 562. Here, Lopez and O'Brien have failed to show that the disagreement regarding the points of impact is material to the question of Radhy Sham's negligence. There is no evidence that Radhy Sham would be more culpable if his car had been struck at one location instead of another.

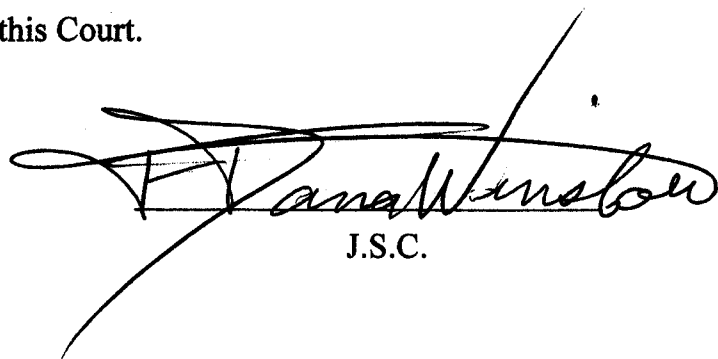
Based upon the foregoing, the Court finds that there are no triable issues of fact warranting a trial on the issue of Radhy Sham's liability.

Accordingly, it is

ORDERED, that Radhy Sham's motion for partial summary judgment is **granted**. The action is dismissed as against Radhy Sham only, but not as against Defendants Lopez and O'Brien.

The foregoing constitutes the Order of this Court.

Dated: 12/17/09


J.S.C.

ENTERED
DEC 28 2009
NASSAU COUNTY
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