

**DiLorenzo v Felberbaum**

2011 NY Slip Op 32347(U)

August 25, 2011

Supreme Court, Nassau County

Docket Number: 17305/10

Judge: Anthony L. Parga

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SHORT FORM ORDER

SUPREME COURT-NEW YORK STATE-NASSAU COUNTY  
PRESENT:

HON. ANTHONY L. PARGA  
JUSTICE

-----X PART 8  
RICHARD A. DILORENZO,

Plaintiff, Action #1  
INDEX NO. 17305/10  
-against-

ROBERT FELBERBAUM and SAMUEL FELBERBAUM,  
Defendants. MOTION DATE: 07/08/11  
SEQUENCE NO. 02, 03, 04

-----X  
TRACY COWIT,

Plaintiff, Action #2  
INDEX NO. 20555/10  
-against-

ROBERT E. FELBERBAUM, SUSAN FELBERBAUM,  
and SAMUEL FELBERBAUM,  
Defendants.

-----X

KRISTEN GREEN, deceased, by JOANNE GREEN  
and MICHAEL GREEN, Administrators of the  
Estate of Kristen Green, and JOANNE GREEN and  
MICHAEL GREEN, Individually,  
Plaintiffs, Action #3  
INDEX NO. 2919/11  
-against-

ROBERT FELBERBAUM, SAMUEL FELBERBAUM,  
and SUSAN FELBERBAUM,  
Defendants.

-----X

Notice of Motion, Affs. & Exs.....	<u>1</u>
Notice of Motion, Affs. & Exs.....	<u>2</u>
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Affirmation in Opposition.....	<u>4</u>
Reply Affirmation.....	<u>5</u>
Reply Affirmation.....	<u>6</u>

Upon the foregoing papers, it is ordered that the motions by plaintiff in Action #1, RICHARD DILORENZO, plaintiff in Action #2, TRACY COWIT, and plaintiffs in Action #3, KRISTIN GREEN by Joanne Green and Michael Green as Administrators of the Estate of Kristen Green, and Joanne Green and Michael Green, Individually, for partial summary judgment on liability grounds, pursuant to CPLR §3212, are granted as against defendants ROBERT FELBERBAUM and SAMUEL FELBERBAUM.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

The within joined actions were brought by plaintiffs to recover for personal injuries and wrongful death arising from a one-car motor vehicle accident which took place on August 24, 2010 on I-76, also known as the Pennsylvania Turnpike, at or near mile marker 295.6, in Caernarvon Township, Berks County, Pennsylvania. Defendant Robert Felberbaum was the operator of the vehicle in which plaintiffs, Richard A. DiLorenzo, Tracy Cowit, and Kristen Green, were passengers, and defendant Samuel Felberbaum was the owner of said vehicle. It is alleged by the plaintiffs that the operator of the vehicle, defendant Robert Felberbaum, fell asleep while driving and failed to navigate a curve, causing the vehicle to drive off of the roadway and make contact with a tree. Summary judgment was previously granted to defendant Susan Felberbaum, by order of this Court dated June 15, 2011, on the grounds that she was neither the owner nor the operator of the vehicle involved in the collision.

In support of their motions for partial summary judgment on liability grounds, the plaintiffs rely upon an affidavit submitted by plaintiff Tracy Cowit. Ms. Cowit attests that she was a rear-seat passenger, seated behind the driver, defendant Robert Felberbaum, at the time of the accident. She attests that there were two other passengers in the vehicle, deceased plaintiff Kristen Green and plaintiff Richard DiLorenzo. Ms. Cowit attests that approximately 15-20 minutes before the collision, she observed the driver, Robert Felberbaum, "and his eyes appeared to be heavy and sleepy." She attests that she advised him to pull over and take a break. She also states that she offered him a drink. Ms. Cowit attests that defendant Robert Felberbaum assured her that he was capable of driving, so she told him that she was going to nap. Ms. Cowit attests that shortly thereafter, their vehicle "veered off the roadway into an embankment and collided

into a tree.” She attests that there were no other vehicles involved in the collision and attests that she did not observe Robert Felberbaum take any evasive measures to avoid the collision, nor did she feel the vehicle slowing down as it left the roadway to the point of the collision. In addition, she did not hear the screeching of brakes at any time prior to the collision. Ms. Cowit attests that she “believe[s] that Robert Felberbaum did fall asleep while operating the motor vehicle and thus caused the collision.”

The plaintiffs also submit an uncertified copy of the “Police Crash Report,” which concludes that the operator of the vehicle fell asleep, failed to negotiate a curve and drove off the roadway into a tree. The plaintiffs note that the report was based upon an investigation which included the interviews of two eyewitnesses, and a collision analysis and reconstruction report. While the statements of the witnesses are inadmissible hearsay, the diagram and other entries in the accident report showing the position of the vehicle and the path of travel are admissible summary judgment evidence, as the reporting officer could make those determinations himself when he arrived at the scene. (*See, Scott v. Kass*, 48 A.D.3d 785, 851 N.Y.S.2d 649 (2d Dept. 2008); *see also, Bailey v. Reid*, 82 A.D.3d 809, 918 N.Y.S.2d 364 (2d Dept. 2011)).

Contrary to defendants contentions, even without considering the “Police Crash Report,” the plaintiffs have made a prima facie showing of entitlement to summary judgment on liability grounds. The affidavit of plaintiff Tracy Cowit establishes that the negligence of defendant Robert Felberbaum was the proximate cause of the accident. Ms. Cowit’s affidavit demonstrates that during this one vehicle accident, the defendants’ vehicle, in which the plaintiffs were passengers, veered off of the roadway and collided with a tree. Ms. Cowit also attested that she did not feel the vehicle slow as it left the roadway and that the defendant driver took no evasive measures to avoid the collision. Accordingly, the plaintiffs made a prima facie showing of entitlement to summary judgment on liability grounds by submitting evidence that the vehicle left the roadway and struck a tree. (*See, Dudley v. Ford Credit Titling Trust*, 307 A.D.2d 911, 762 N.Y.S.2d 905 (2d Dept. 2003)(plaintiffs made a prima facie showing of negligence on the part of the defendant by proof that the car suddenly accelerated, left the paved road, and struck a tree); *Cebula v. Bonime*, 92 A.D.2d 856, 459 N.Y.S.2d 847 (2d Dept. 1983)(plaintiffs granted summary judgment under the doctrine of *res ipsa locuitur* where they established that the vehicle

in question left the paved surface of the roadway, mounted the center divider, and collided with a tree); See, *Pfaffenbach v. White Plains Express Corp.*, 17 N.Y.2d 132, 216 N.E.2d 324 (1966); *Abbott v. Page Airways, Inc.*, 23 N.Y.2d 502, 245 N.E.2d 388 (1969)).

The proponent of a summary judgement motion “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (Ct. of App. 1986)). Once the movant has demonstrated a prima facie showing of entitlement to judgement, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of a fact which require a trial of the action. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 (Ct. of App. 1980)).

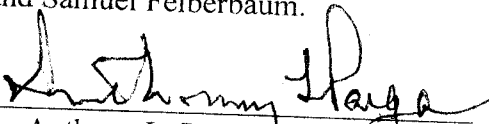
In opposition, the defendants argue, *inter alia*, that plaintiff Tracy Cowit’s affidavit is contradicted by her statement to police, as recorded in the police accident report, because the police accident report notes that Ms. Cowit stated that she did not observe defendant Robert Felberbaum fall asleep. The Court notes, however, that Ms. Cowit attests in her affidavit only that she “believes” that the driver fell asleep at the time of the accident. Regardless of same, even if the defendant did not fall asleep at the wheel, his vehicle left the roadway and hit into a tree, which was sufficiently established by the plaintiffs through admissible evidence. Defendant Robert Felberbaum has not submitted an affidavit in opposition to plaintiffs’ motions, has not offered any non-negligent explanation for the happening of the accident, and has not raised a triable issue of fact sufficient to defeat plaintiffs’ prima facie showing of entitlement to summary judgment. The defendants’ attorney’s affirmation, which is devoid of evidentiary matter, is insufficient to defeat the plaintiff’s prima facie showing. (*Cebula v. Bonime*, 92 A.D.2d 856, 459 N.Y.S.2d 847 (2d Dept. 1983); *Pfaffenbach v. White Plains Express Corp.*, 17 N.Y.2d 132, 216 N.E.2d 324 (1966)).

In addition, defendants contend that the within motions are premature, as the depositions of the parties and non-party witnesses have not yet been held. The defendants have failed, however, to offer an evidentiary basis to show that discovery may lead to relevant evidence and that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiffs. (*Cavitch v. Mateo*, 58 A.D.3d 592, 871 N.Y.S.2d 372 (2d Dept.

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2009); *Woodard v. Thomas*, 77 A.D.3d 738, 913 N.Y.S.2d 103 (2d Dept. 2010)). It is well settled that the “mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered” by further discovery is an insufficient basis for denying the motion. (*Woodard v. Thomas*, 77 A.D.3d 738, 913 N.Y.S.2d 103 (2d Dept. 2010); *Simpson v. New York City Transit Authority*, 44 A.D.3d 930, 844 N.Y.S.2d 108 (2d Dept. 2007); *Lightfoot v. City of New York*, 279 A.D.2d 457, 719 N.Y.S.2d 99 (2d Dept. 2001); *Lopez v. WS Distribution, Inc.*, 34 A.D.3d 759, 825 N.Y.S.2d 516 (2d Dept. 2006)).

Accordingly, the plaintiffs in all three actions are granted partial summary judgment, on liability grounds, against defendants Robert Felberbaum and Samuel Felberbaum.

Dated: August 25, 2011

  
Anthony L. Parga, J.S.C.

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**ENTERED**  
AUG 29 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE