

Guang Chen v Voelpel
2007 NY Slip Op 32863(U)
September 6, 2007
Supreme Court, New York County
Docket Number: 0104869/2006
Judge: Deborah A. Kaplan
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. DEBORAH A. KAPLAN
Justice

PART 22

GUANG CHEN and YAN ZHU LIN

INDEX NO. 104869-2006

MOTION DATE 8/1/07

MOTION SEQ. NO. 002

MOTION CAL. NO. 17

- v -

JOSEPH A. VOELPEL, JUDLAU CONTRACTING INC. and MANCO EQUIPMENT RENTAL CO. INC.

The following papers, numbered 1 to 3 were read on this motion by defendants plaintiffs Guang Chen and Yan Zhu Lin for Summary Judgment on the issue of liability.

FILED
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NEW YORK
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	1	2	3
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...			
Answering Affidavits — Exhibits (Memo)			
Replying Affidavits (Reply Memo)			

Cross-Motion: Yes No

This is an action for damages for injuries allegedly sustained as a result of a motor vehicle accident which occurred on east Broadway near Market Street, New York, New York on August 23, 2005 at approximately 3:30 a.m., plaintiffs Guang Chen and yan Zhu Lin have moved pursuant to CPLR §3212 for summary judgment on the issue of liability. In support of their motion the movants aver that the vehicle driven by Chen and owned by Lin was fully stopped when it was struck from behind by a backhoe owned by Manco Equipment Rental Co. Inc, leased by Judlau Contracting and driven by Joseph A. Voelpel. In support of their motion, plaintiff proffers the pleadings in the case, the New York City Police report filled out in conjunction with this accident, as well as his own affidavit. Chen claims that as he was driving down East Broadway he noticed some pedestrians in the middle of the block and stopped to avoid hitting them. He avers that his vehicle was then struck in the rear by the backhoe.

Defendants oppose the relief sought, offering the affidavit of Joseph A. Voelpel and a copy of the preliminary conference order. Voelpel offers a different version of the events leading up to the collision. He asserts that Chen stopped mid-block to talk with a male friend in a parked car and that there were no pedestrians in the street. He argues that Chen without warning, made an abrupt stop for the purpose of chatting with another man, not to avoid hitting any pedestrians causing the impact.

To prevail on a summary judgment motion, the moving party must produce evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor GTF Mtkg, Inc. v Colonial Aluminum Sales, Inc., 66 NY2d 965, 967 (1985). Issue finding rather than issue determination is its function Sillman v Twentieth Century Fox Film Corp., 3 NY2d 395 (1957). The evidence will be construed in the light most favorable to the one moved against Weiss v Garfield, 21 AD2d 156 (3rd Dept 1964). Once the moving party has met its burden, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial Kosson v Algaze, 84 NY2d 1019 (1995). A party opposing summary judgment must lay bare its proofs so that the matters raised in the pleadings are shown to be real and capable of being established upon trial W.W. Norton & Co. v Roslyn Targ Literary Agency, Inc., 81 AD2d 798 (1st Dept. 1981). Bare conclusory allegations are insufficient to defeat a motion for summary judgment. See, Thanasoulis v. National Assn. for the Specialty Foods Trade, Inc., 226 AD2d 227 (1st Dept 1996); Lee v Weinstein, 116 AD2d 700 (2d Dept 1986), lv denied 68 NY2d 601 (1986).

It is well settled law that the driver of a motor vehicle must maintain a safe distance between his vehicle and the one in front of him, and that a rear end collision with a stopped vehicle establishes a prima facie case of negligence on the part of the driver who strikes the vehicle in front unless the operator of the vehicle can come forth with an adequate, non-negligent explanation for the collision. See Mariano v New York City Transit Authority, et. al., 2007 NY Slip Op 1806, 2007 N.Y. App. Div. Lexis 2532 (1st Dept. 2007); Francisco v Schoepfer, 30 AD3d 275 (1st Dept. 2006); Garcia v Bakemark Ingredients (East), 19 AD3d 244 (1st Dept. 2005). By offering the police report in support of his application, Chen is relying upon the narrative section of the report which describes the circumstances of the

accident and which indicates that both drivers they were traveling eastbound on East Broadway when Chen stopped and was struck by Voelpel. This statement is contained in the report prepared by a police officer who responded to the scene but did not himself witness the collision. However, this statement constitutes hearsay and, thus is not proof in admissible form.

Police reports may be admissible as business records (CPLR 4518) but only if the report is made based on the officer's personal observations and while carrying out his or her police duties. See Holiday v Hudson Armored Car & Courier Service Inc., 301 AD2d 392 (1st Dept. 2003); Yeargans v Yeargans, 24 AD2d 280, 282 (1st Dept. 1956); see also Mooney v Osoweicky, 235 AD2d 603, 604 (3rd Dept. 1997). Where as here, the information contained in the report comes from witnesses not engaged in the police business in the course of which the report was made, or from a witness who had no duty to report the information, the report is not admissible. See Johnson v Lutz, 226 App Div 772 (2d Dept. 1929); Holliday v Hudson Armored Car & Courier Service Inc., *supra*; Yeargans v Yeargans, *supra*; see also State Farm Mutual Automobile Insurance Co. v Langan, 18 Ad3d (2d Dept. 2005); Conners v Duck's Cesspool Service, Ltd., 155 AD2d 329 (2d Dept. 1988); Casey v Tierno, 127 AD2d 727 (2d Dept. 1987). A driver has no duty to report the circumstances or the causes of an automobile accident. See Hatton v Gassler, 219 AD2d 697 (1st Dept. 1195); cf. Lopez v Ford Motor Credit Company, 238 AD2d 211 (1st Dept. 1997). Furthermore, the First Department has made it clear that a police report which contains hearsay statements regarding the ultimate issues of fact may not be admitted into evidence for the purposes of establishing the cause of the accident. See Figueroa v Luna, 281 AD2d 204 (1st Dept. 2001); Aetna Casualty & Surety Co. v Island Transportation, 233 AD2d 157 (1st Dept. 1996); Sanservere v United Parcel Service, Inc., 181 AD2d 521 (1st Dept. 1992); Kajoshaj v Greenspan, 88 AD2d 538 (1st Dept. 1982).

Here, the plaintiff and the defendants have presented alternative theories as to the conduct of the parties leading up to the accident. As such there are issues of fact for a jury to consider. Accordingly, it is

ORDERED that plaintiff's motion for summary judgment pursuant on the issue of liability is denied, and it is further

ORDERED that the parties are to appear for their scheduled compliance conference on November 19, 2007, 9:30 a.m., DCM- Room 103, 80 Centre Street, New York, New York.

This constitutes the decision and order of this court.

Enter:

Dated: September 6, 2007

Deborah Kaplan

Deborah A. Kaplan
DEBORAH A. KAPLAN
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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