

Fuccio v New York City Tr. Auth.

2012 NY Slip Op 31923(U)

July 16, 2012

Supreme Court, New York County

Docket Number: 400353/2009

Judge: Michael D. Stallman

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 21

Index Number : 400353/2009
FUCCIO, LUCIA
vs.
NEW YORK CITY TRANSIT
SEQUENCE NUMBER : 002
PARTIAL SUMMARY JUDGMENT

INDEX NO. 400353/09
MOTION DATE 2/21/12
MOTION SEQ. NO. 002

The following papers, numbered 1 to 4 were read on this motion and cross motion for summary judgment

Notice of Motion; Affirmation — Exhibits A-M _____ | No(s) 1-2
Affirmation In Opposition _____ | No(s) 3
Affirmation In Reply _____ | No(s) 4

Upon the foregoing papers, it is ordered that this motion for summary judgment is decided in accordance with the annexed memorandum decision and order.

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NYS SUPREME COURT - CIVIL

HON. MICHAEL D. STALLMAN

FILED

Dated: 7/16/12
New York, New York

JUL 20 2012  J.S.C.

NEW YORK
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- MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):
- Check one: CASE DISPOSED NON-FINAL DISPOSITION
- Check if appropriate:..... MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. Check if appropriate:..... SETTLE ORDER SUBMIT ORDER
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

-----X
LUCIA FUCCIO,

Plaintiff,

Index No. 400353/2009

- against -

NEW YORK CITY TRANSIT AUTHORITY, BRYAN CHAN,
ROYALE DRAPERIES, INC., CARMELA ABRAHANTE,
349 CAR CORP., YSNOC BAUDUY,

Decision and Order

Defendants.

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JUL 20 2012

HON. MICHAEL D. STALLMAN, J.:

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This action arose of out of an accident involving four motor vehicles that allegedly occurred on November 6, 2007, in southbound lanes of the FDR Drive, near an exit to South Street in Manhattan. The four vehicles involved were: (1) a 2004 Mercedes Benz bearing license plate number CWF5243, allegedly owned and operated by defendant Bryan Chan; (2) a 2005 Jeep Grand Cherokee Laredo bearing license plate number DBH9144, allegedly operated by defendant Carmela Abrahante and allegedly owned by defendant Royale Draperies, Inc; (3) a 2007 Lincoln Town Car bearing license plate number T489011C allegedly operated by defendant Ysnoc Bauduy and allegedly owned by defendant 349 Car Corp; and (4) a bus bearing license plate number K42037, allegedly operated by Walder R. Schubert and allegedly owned by defendant New York City Transit Authority. Plaintiff Lucia Fuccio was allegedly a passenger in Schubert's bus.

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Fuccio moves for partial summary judgment in her favor as to liability against defendants Schubert and the New York City Transit Authority.

BACKGROUND

The multi-vehicle accident spawned this action and twelve others—the other bus passengers commenced nine other actions; Bauduy, Ramirez (a passenger in Bauduy’s vehicle), and Abrahante each commenced their own actions as well. All actions were coordinated for discovery and joined for trial as to liability. In addition, this Court also coordinated any contemplated motions for summary judgment as to liability in the actions.¹ At a conference on June 23, 2011, the parties entered into a so-ordered stipulation dated June 23, 2011 which states, in pertinent part:

“Any motion or cross motion for summary judgment in any of the actions joined for trial based on liability shall be served on counsel in all the joined actions, and every party in each joined action has the right to submit papers to the motion or cross motion, and shall be bound by the court’s decision in each respective action.”

(Gluck Affirm., Ex M.) However, plaintiffs Francine Civello and Michael Wenzler, plaintiff Paul Kadar, and plaintiffs Rosa Ramirez and John Pedulla did not appear at the June 23, 2011 conference, because the notes of issue were filed in their actions

¹ Bauduy and 349 Car Corp. and Abrahante and Royale Draperies, Inc. moved for summary judgment in their favor in *Ramirez v Chan*, Index No. 401704/2008.

Mikhail Yakobson, a bus passenger, moved for summary judgment in his favor as to liability against Schubert and the New York City Transit Authority in *Yakobson v Schubert*, Index No. 400735/2009.

prior to the June 23, 2011 conference. Thus, those plaintiffs did not sign the stipulation.

Schubert testified at his deposition that he entered the right lane of the FDR Drive at 23rd Street and changed lanes to the middle lane. (Gluck Affirm., Ex J [Schubert EBT], at 34.) Schubert stated that the traffic conditions at or about the scene of the accident were “Light, extremely light.” (*Id.* at 25.)

According to Schubert, a white car (which he thought was a BMW) entered the FDR Drive from South Street, crossing zebra lines and entering the middle lane of traffic. (*Id.* at 36, 42.) Schubert stated, “The BMW hit the Lincoln in the left lane. He was in the right lane, the Lincoln was in the left lane, but they (indicating). The Lincoln was in its lane.” (*Id.* at 41.) Schubert stated that the white car “seemed to brush against the side of a Lincoln town car” (*id.* at 36.), i.e., “It looked like they just touched sideways.” (*id.* at 99.) Schubert testified that the Lincoln town car then rear-ended an SUV (*id.* at 37), which was also in the left lane, the two vehicles came to a complete stop (*id.* at 57-59), and “the way they hit they took out both lanes.” (*Id.* at 59, 61). Schubert claimed that the front of his bus made a contact with the left rear corner of the Lincoln town car, which Schubert described as a “heavy” impact. (*Id.* at 53-54, 55.) According to Schubert, “I pushed him over the divider of the FDR Drive and partially on the opposite side, the northbound side.” (*Id.* at 55.)

At her deposition, Fuccio testified that she sat on the bus in the “first row,” on the “door side” (as opposed to the driver’s side), “closer to the aisle.” (Gluck Affirm., Ex J, at 12.) Fuccio stated that the bus came into contact with a car, but when asked if she saw the contact between the bus and that car, she answered, “Not exactly, no.” (*Id.* at 17.)

A report from the Office of System Safety of MTA-New York City Transit states, “The B/O gave varying accounts of how the accident occurred, however, as based on the information downloaded from the ECM [electronic control module] of the bus, an analysis of his statements and the physical evidence, a determination was made that he was operating too fast for the conditions (heavy, slow traffic in the right travel lane), while failing to maintain a safe following distance.” (Gluck Affirm., Ex I.)

DISCUSSION

The standards for summary judgment are well settled.

“On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action. The moving party’s failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the

opposing papers.”

(*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012][internal quotation marks, brackets and citations omitted].) “On a motion for summary judgment, issue-finding, rather than issue-determination, is key. Issues of credibility in particular are to be resolved at trial, not by summary judgment.” (*Shapiro v Boulevard Hous. Corp.*, 70 AD3d 474, 475 [1st Dept 2010] [citations omitted].)

Because Schubert’s bus rear-ended Bauduy’s vehicle, Fuccio argues that she should be granted summary judgment in her favor as to liability against Schubert and the New York City Transit Authority. Fuccio cites a report from the Office of System Safety of MTA-New York City Transit, which “determined that the most probable cause of the collision was the auto driver (#1) [Chan] who illegally entered the roadway and collided with auto # 2 [Bauduy’s vehicle]. Contributing was the B/O who operated at a speed not consistent with the flow of traffic while failing to establish a sufficient distance between vehicles to safely stop.” (Gluck Affirm., Ex I.) Fuccio contends that Schubert was operating the bus in excess of the speed limit, based on report, which states, in pertinent part:

“The [time and distance] analysis revealed that approximately 4.5 seconds prior to hard brake, the initial collision between autos #1 and # 2 [between Chan’s vehicle and Bauduy’s vehicle] occurred at which time the bus was moving directly behind auto # 2 [Bauduy’s vehicle], at approximately 41.5 mph, partial acceleration still being applied (less

than 50% throttle). Approximately 2 seconds after the initial collision, the bus collided with the rear section of auto #2 while moving at 37 mph (no acceleration or braking applied).”

(*Id.*)

“It is well settled that a rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle, and imposes a duty on the part of the operator of the moving vehicle to come forward with an adequate nonnegligent explanation for the accident.”

(*Cabrera v Rodriguez*, 72 AD3d 553 [1st Dept 2010]; *Avant v Cepin Livery Corp.*,

74 AD3d 533 [1st Dept 2010].) It is undisputed that Schubert’s bus rear-ended

Bauduy’s vehicle. However,

“in a multiple-vehicle accident, where, as here, there is a question of fact as to the sequence of the collisions, it cannot be said as a matter of law that the negligence of the operator of the last vehicle in the line of vehicles was a proximate cause of the injuries to an occupant of the lead vehicle.”

(*Vavoulis v Adler*, 43 AD3d 1154, 1156 [2d Dept 2007].)

Here, as discussed in decisions of the motions and cross motions in other actions joined for trial, the differing accounts of the multi-vehicle accident raise questions of fact as to the sequence of collisions. According to Bauduy, Chan’s vehicle struck Abrahante’s vehicle, and then Schubert’s bus rear-ended Bauduy’s vehicle. However, according to Schubert, Chan’s vehicle sideswiped Bauduy’s vehicle, Bauduy’s vehicle then rear-ended Abrahante’s vehicle, both vehicles came

to a stop, blocking the southbound lanes of the FDR Drive, and Schubert's bus rear-ended Bauduy's vehicle. Meanwhile, Bauduy's testimony (submitted with the motions and cross motions in the other actions) raises a question as to whether Bauduy was driving in excess of the undisputed 40 mph speed limit of the FDR Drive where the collisions occurred. "These differing versions of how the accident occurred, and the possible contributions by the various defendants, preclude summary disposition." (*DeRosa v Valentino*, 14 AD3d 448, 448 [1st Dept 2005].)

It is not clear from this record whether the portions of the report from the Office of System Safety of MTA-New York City Transit offered on this motion for summary judgment may be considered or must be rejected as inadmissible hearsay. (*Compare Scott v Kass*, 48 AD3d 785 [2d Dept 2008] [diagram and other entries in the police accident report showing where the vehicles struck each other and the position and path of travel of each vehicle is admissible since the reporting officer could make these determinations himself when he arrived on the scene] *with Coleman v Maclas*, 61 AD3d 569, 569 [1st Dept 2009] [court properly disregarded the uncertified police report and unauthenticated photographs as they were inadmissible hearsay].) It is not clear from the record whether the offered conclusions of the OSS reports were based on either "postincident expert analysis of observable physical evidence" or "the hearsay statements of a third party." (*Connors v Duck's Cesspool*

Service, Ltd., 144 AD2d 329, 330 [2d Dept 1988].)

Therefore, Fuccio's motion for summary judgment in her favor as to liability against defendants Schubert and New York City Transit Authority are denied.

Notwithstanding issues of fact as to the sequence of collisions, the Court grants reverse summary judgment dismissing the action as against defendant Abrahante and Royale Draperies, Inc., pursuant to CPLR 3212 (b). As discussed previously, Fuccio agreed in a so-ordered stipulation dated June 23, 2011 that she, like others who executed the stipulation, shall be bound by the Court's decision on any motion or cross motion for summary judgment as to liability made in each respective action. Abrahante and Royale Draperies, Inc. moved for summary judgment dismissing the action as against them in *Ramirez v Chan*, Index No. 401704/2008. Pursuant to the so-ordered stipulation, Fuccio had an opportunity to oppose Abrahante and Royale Draperies Inc.'s motion. The Court has determined that the un rebutted evidence established that defendant Abrahante's operation of Jeep Cherokee Laredo owned by defendant Royale Draperies, Inc. was not negligent as a matter of law.

CONCLUSION

Accordingly, it is hereby ORDERED that plaintiff Lucia Fuccio's motion for summary judgment is denied; and it is further

ORDERED that the Court grants reverse summary judgment to defendants Carmela Abrahante and Royale Draperies, Inc., the complaint is severed and dismissed as against these defendants with costs and disbursements to these defendants as taxed by the Clerk upon the submission of an appropriate bill of costs, and all cross claims by these defendants in this action, and all cross claims against these defendants in this action, are severed and dismissed; and it is further

ORDERED that the remainder of the action shall continue.

Dated: July 16, 2012
New York, New York

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