

**Lynch v Baker**

2014 NY Slip Op 31149(U)

April 21, 2014

Supreme Court, Suffolk County

Docket Number: 10-35497

Judge: Peter H. Mayer

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**ORDERED** that the motion (#003) by defendant Robert Baker, the motion (#004) by defendants Hertz Vehicles, LLC, and Robert Wenig, and the cross motion (#005) by plaintiff are consolidated for purposes of this determination; and it is

**ORDERED** that the motion by defendant Robert Baker for summary judgment dismissing the complaint against him is denied; and it is

**ORDERED** that the motion by defendants Hertz Vehicles, LLC, and Robert Wenig for summary judgment dismissing the complaint as against them is granted; and it is further

**ORDERED** that the cross motion by plaintiff for leave to serve the proposed amended bill of particulars is denied.

Plaintiff Michael Lynch, a Suffolk County police officer, commenced this action to recover damages for personal injuries he allegedly suffered as the result of a motor vehicle accident that occurred in the early morning of October 8, 2010, while he was working a tour of duty. The collision allegedly happened during a high-speed chase of a vehicle driven by defendant Robert Baker, which began after plaintiff, who was on duty, activated the emergency lights on the police vehicle he was driving and attempted to effectuate a traffic stop. Rather than pulling to the side of the road, Baker allegedly drove at a high rate of speed through a residential neighborhood in the Village of Lindenhurst, and then abruptly stopped when the roadway ended at a seawall. The police vehicle driven by plaintiff allegedly collided with the rear of the stopped vehicle, which was owned by defendant Hertz Vehicles, LLC, and rented using a credit card issued to Baker's grandfather, defendant Robert Wenig. Following the initial impact, the vehicle driven by Baker allegedly spun around and struck the police vehicle. Baker, then, allegedly exited the vehicle he was driving and attempted to flee on foot.

Baker testified at a deposition that, approximately two weeks prior to the accident, Wenig rented a vehicle from a Hertz facility located in the King O'Rourke car dealership in Smithtown to use while his vehicle was being serviced at the dealership. Baker allegedly accompanied Wenig to the dealership when he rented the first car. Baker testified that the day before the subject accident, he returned to the same Hertz facility and rented a different car, which was paid for using Wenig's credit card. It is undisputed that the Hertz agent did not ask Baker for his identification before entrusting the rental car to him. Wenig denies that Baker had his permission to rent or operate the Hertz rental car, and both Hertz Vehicles and Wenig have asserted cross claims against Baker.

Plaintiff's amended complaint alleges, in part, that defendants were negligent in failing to operate the vehicle in a safe manner, in failing to inspect and service the braking and steering mechanisms on the vehicle, and in failing to comply with Vehicle and Traffic Law §§ 511 (3)(a), 1100, 1101, 1102, 1110, 1142, 1143, 1163, 1180, and 1212, and Penal Law §270.25. It further alleges defendants' negligence was the sole proximate cause of the accident, and that plaintiff sustained serious injury within the meaning of Insurance Law § 5102 (d) as a result of such collision. According to the Court's computerized records, a note of issue and certificate of readiness were filed in this action on April 9, 2013.

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Baker now moves for an order granting summary judgment in his favor, arguing that plaintiff rammed the police vehicle into the rear of the vehicle he was driving after it had stopped at the end of a dead end street. Hertz Vehicles, LLC, and Wenig move for an order granting summary judgment in their favor on the complaint. Movants argue, among other things, that, pursuant to 49 USC § 30106, Hertz Vehicles is entitled to judgment dismissing the complaint against it, as there is no evidence it was negligent in leasing the vehicle. They further argue that Wenig is entitled to summary judgment, as the evidence shows Wenig did not give Baker permission to rent the vehicle under his name or to use his credit card. Movants' submissions in support of the motion include copies of the pleadings and the bill of particulars served in response to Baker's demand, a copy of the Hertz car rental agreement, an affidavit of Wenig, and excerpts from Wenig's deposition testimony.

Plaintiff opposes Baker's motion on the ground he failed to prove as a matter of law that he did not come to an abrupt stop prior to the collision. Further, plaintiff asserts, among other things, that the Court should not consider Baker's supporting affidavit, since, under the terms of a so-ordered stipulation, he is precluded from presenting evidence for failing to appear for a deposition. Plaintiff also opposes the branch of the motion seeking dismissal of the claim against Hertz Vehicles, arguing that a triable issue exists as to whether it was negligent in renting a vehicle to Baker without requiring him to give identification or confirming he had Wenig's permission to rent the vehicle in Wenig's name and to pay for the rental with Wenig's credit card.

Plaintiff cross-moves for an order granting him leave to serve an amended bill of particulars that includes an allegation that defendants violated Vehicle and Traffic Law § 511-a. Hertz Vehicles and Wenig oppose the cross motion, arguing the proposed amendment is devoid of merit, as the operation of a motor vehicle without a license does not constitute negligence per se, and Vehicle and Traffic Law § 511-a imposes only criminal liability. In addition, they argue there is no proof the subject accident is causally related to the allegedly violation of Vehicle and Traffic Law § 511-a, particularly as the accident occurred when the vehicle driven by plaintiff collided with the rear of the vehicle driven by Baker after it had stopped. Baker also opposes the cross motion, asserting that plaintiff failed to provide a reasonable excuse for his delay in asserting the claim under Vehicle and Traffic Law § 511-a, and that he failed to demonstrate the merit of the proposed amendment.

As to plaintiff's cross motion, the function of a bill of particulars is to "explain and make definite the allegations set forth in the complaint," thereby limiting the proof that may be offered at the trial (*see Harmon v Peats Co.*, 243 NY 473, 476, 243 NYS 473 [1926]; *see Jones v LeFrance Leasing Ltd. Partnership*, 61 AD3d 824, 877 NYS2d 424 [2d Dept 2009]; *Valentine v Armor El. Co.*, 155 AD2d 597, 547 NYS2d 656 [2d Dept 1989]). A bill of particulars is not a pleading (*see Osgood v KDM Dev. Corp.*, 92 AD3d 1222, 938 NYS2d 397 [4th Dept 2012]; *Linker v County of Westchester*, 214 AD2d 652, 625 NYS2d 289 [2d Dept 1995]), and may not be employed to supply essential allegations of a cause of action that are missing from the complaint (*see Sullivan v St. Francis Hosp.*, 45 AD3d 833, 846 NYS2d 228 [2d Dept 2007]; *Willinger v Greenburgh*, 169 AD2d 715, 564 NYS2d 466 [2d Dept 1991]; *Melino v Tougher Heating & Plumbing Co.*, 23 AD2d 616, 256 NYS2d 885 [2d Dept 1965]). Moreover, it may not be used to add or substitute a new theory or cause of action not asserted in the complaint (*see Darrisaw v Strong Mem. Hosp.*, 74 AD3d 1769, 902 NYS2d 286 [4th Dept 2010], *affd* 16 NY3d 729, 917 NYS2d 95 [2011]; *Bairon v City of New York*, 5 AD3d 708, 773 NYS2d 574 [2d

Dept 2004]; *Linker v County of Westchester*, 214 AD2d 652, 625 NYS2d 289).

Motions to amend or supplement a bill of particulars are governed by the same standards applied to motions to amend pleadings (*Scarangelo v State of New York*, 111 AD2d 798, 798, 490 NYS2d 781 [2d Dept 1985]). Generally, leave to amend a leading or bill of particulars supplement a pleading “shall be freely given” (CPLR 3025 [b]), unless the proposed amendment is palpably insufficient or patently devoid of merit, or where a delay in seeking the amendment would cause prejudice or surprise the opposing party (see *Rogers v New York City Tr. Auth.*, 109 AD3d 535, 970 NYS2d 572 [2d Dept 2013]; *Trystate Mech., Inc. v Macy’s Retail Holdings, Inc.*, 94 AD3d 1095, 943 NYS2d 158 [2d Dept 2012]; *Daly-Caffrey v Licausi*, 70 AD3d 884, 895 NYS2d 197 [2d Dept 2010]; *Lucido v Mancuso*, 49 AD3d 220, 851 NYS2d 238 [2d Dept 2008]; *G.K. Alan Assoc., Inc. v Lazzari*, 44 AD3d 95, 99, 840 NYS2d 378 [2d Dept 2007], *affd* 10 NY3d 941, 862 NYS2d 855 [2008]; *Surgical Design Corp. v Correa*, 31 AD3d 744, 819 NYS2d 542 [2d Dept 2006]). However, when an amendment to a bill of particulars is sought after the action has been certified as ready for trial, “judicial discretion in allowing such amendments should be discrete, circumspect, prudent and cautious” (*Clarkin v Staten Is. Univ. Hosp.*, 242 AD2d 552, 552, 662 NYS2d 91 [2d Dept 1997]; see *Rodgers v New York City Tr. Auth.*, 109 AD2d 535, 970 NYS2d 572; *Schreiber-Cross v State of New York*, 57 AD3d 881, 870 NYS2d 438 [2d Dept 2008]). When leave to amend is sought on the eve of trial, judicial discretion in allowing such an amendment should be exercised “sparingly” (*Morris v Queens Long Is. Med. Group, P.C.*, 49 AD3d 827, 828, 854 NYS2d 222 [2d Dept 2008]; *Cohen v Ho*, 38 AD3d 705, 705-706, 833 NYS2d 542 [2d Dept 2007]; *Glickman v Beth Israel Med. Ctr.- Kings Hwy. Div.*, 309 AD2d 846, 846, 766 NYS2d 67 [2d Dept 2003]; see *American Cleaners, Inc. v American Intl. Specialty Lines Ins. Co.*, 68 AD3d 792, 691 NYS2d 127 [2d Dept 2009]). Further, in exercising its discretion, a court should consider how long the party seeking the amendment was aware of the facts upon which the motion is based, whether a reasonable excuse for the delay was offered, and whether prejudice resulted from such delay (*American Cleaners, Inc. v American Intl. Specialty Lines Ins. Co.*, 68 AD3d 792, 794, 891 NYS2d 127; *Cohen v Ho*, 38 AD3d 705, 706, 833 NYS2d 542; see *Sunrise Harbor Realty, LLC v 35th Sunrise Corp.*, 86 AD3d 562, 927 NYS2d 145 [2d Dept 2011]; *Al-Khilewi v Turman*, 82 AD3d 1021, 919 NYS2d 361 [2d Dept 2011]; *Sampson v Contillo*, 55 AD3d 591, 865 NYS2d 137 [2d Dept 2008]; *Glickman v Beth Israel Med. Ctr. Kings Hwy. Div.*, 309 AD2d 846, 766 NYS2d 67).

Plaintiff’s cross motion for leave to serve the proposed amended bill of particulars is denied. Here, plaintiff failed to include copies of Hertz Vehicle’s demand for particulars and the original bill of particulars served in response, leaving the Court unable to assess whether the only change was the allegation that defendant violated Vehicle and Traffic Law § 511-a. Further, assuming, arguendo, that the only amendment to the bill of particulars is the allegation defendants violated Vehicle and Traffic Law § 511-a, plaintiff failed to offer any reason for failing to assert such a claim until nearly six months after his filing of the note of issue, particularly in view of the fact that, following the subject accident, Baker was charged with and pled guilty to driving with a suspended license in violation of Vehicle and Traffic Law § 511 (see *Salgado v Town Sports Intl.*, 73 AD3d 898, 901 NYS2d 325 [2d Dept 2010]; *Surgical Design Corp. v Correa*, 31 AD3d 744, 819 NYS2d 542), and Hertz Vehicles would be prejudiced if plaintiff’s new theory of liability, which is in the nature of a negligent entrustment claim, was asserted for the first time after the case was placed on the trial calendar.

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Moreover, the proposed amendment is devoid of merit. Vehicle and Traffic Law § 511-a, which makes it an offense to facilitate the aggravated unlicensed use of a motor vehicle, requires proof that the alleged facilitator knew or had reason to know the operator of the vehicle had his or her license suspended or revoked or otherwise withdrawn by the Commissioner of Motor Vehicles. While an unexcused violation of the standards of care imposed on motorists and pedestrians by the Vehicle and Traffic Law constitutes negligence per se (see *Barbiei v Vokoun*, 72 AD3d 853, 900 NYS2d 315 [2d Dept 2010]; *Dalal v City of New York*, 262 AD2d 596, 692 NYS2d 468 [2d Dept 1999]), the absence of a driver's license is not even presumptive evidence of negligence, as it relates only to the authority to operate a vehicle and not its manner of operation (see *Bready v CSX Transp., Inc.*, 89 AD3d 1386, 933 NYS2d 787 [4th Dept 2011], *affd* 19 NY3d 834, 946 YS2d 93 [2012]; *Almonte v Marsha Operating Corp.*, 265 AD2d 357, 696 NYS2d 484 [2d Dept 1999]; *Hanley v Albano*, 20 AD2d 644, 246 NYS2d 380 [2d Dept 1964]). Thus, a violation of Vehicle and Traffic Law § 511-a, which creates criminal liability on the part of the owner of a motor vehicle, is not a basis for a finding of negligence per se on the part of Hertz Vehicles.

The branch of defendants' motion seeking summary judgment in favor of Wenig is granted. Plaintiff, who did not oppose this application, concedes in his opposition papers that there is no evidence Wenig gave Baker permission to rent the car involved in the accident from Hertz Vehicles.

The branch of the defendants' motion seeking summary judgment in favor of Hertz Vehicles also is granted. General Municipal Law § 205-e creates a statutory cause of action for police officers injured by another person's failure "to comply with the requirements of any statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments or of any and all of their departments, divisions and bureaus." Despite the broad language of the statute, a police officer seeking recovery must demonstrate his or her injury resulted from the defendant's "noncompliance with a requirement found in a well-developed body of law and regulation that imposes clear duties," such as provisions of the Vehicle and Traffic Law and the Penal Law (*Williams v City of New York*, 2 NY3d 352, 364, 779 NYS2d 449 [2004]; see *Gonzalez v Iocovello*, 93 NY2d 539, 693 NYS2d 486 [1999]; *Balsamo v City of New York*, 287 AD2d 22, 26, 733 NYS2d 431 [2d Dept 2001]). Further, to establish liability under General Municipal Law § 205-a, a police officer must specify the statute or regulation with which the defendant failed to comply, describe the manner in which the injury occurred, and demonstrate a reasonable or practical connection between the statutory or regulatory violation and the claimed injury (see *Williams v City of New York*, 2 NY3d 352, 779 NYS2d 449; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 760 NYS2d 397 [2003]; *Galapo v City of New York*, 95 NY2d 568, 721 NYS2d 857 [2000]; *Campbell v City of New York*, 31 AD3d 594, 819 NYS2d 294 [2d Dept 2006]; *Balsamo v City of New York*, 287 AD2d 22, 733 NYS2d 431).

The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), a comprehensive transportation bill that includes the Graves Amendment and is codified at 49 USC § 30106 (*Graham v Dunkley*, 50 AD3d 55, 57-58, 852 NYS2d 169 [2d Dept 2008], *appeal dismissed* 10 NY3d 835, 859 NYS2d 607 [2008]), provides as follows:

(a) In general. An owner of a motor vehicle that rents or leases the vehicle to a person (or an affiliate of the owner) shall not be liable

under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner), for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if

(1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and

(2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner)

(49 USC § 30106 [a]; *see e.g. Ballatore v Hub Truck Rental Corp.*, 83 AD3d 978, 922 NYS2d 180 [2d Dept 2011]). “The section applies to all actions commenced on or after August 10, 2005 (*see* 49 USC § 30106 [c]), and has been enforced as preempting the vicarious liability imposed on commercial lessors by Vehicle and Traffic Law § 388” (*Graham v Dunkley*, 50 AD3d at 58, 852 NYS2d 169).

Here, Hertz Vehicles established a prima facie case of entitlement to summary judgment as a matter of law with evidence that it is engaged in the business of renting vehicles, and that the accident was not caused by its violation of one of the sections of the Vehicle and Traffic Law alleged in the complaint and bill of particulars (*see Bravo v Vargas*, 113 AD3d 579, 978 NYS2d 307 [2d Dept 2014]; *Ballatore v Hub Truck Rental Corp.*, 83 AD3d 978, 922 NYS2d 180; *Byrne v Collins*, 77 AD3d 782, 910 NYS2d 449 [2d Dept 2010], *lv denied* 17 NY3d 702, 929 NYS2d 92 [2011]; *see also Gluck v Nebgen*, 72 AD3d 1023, 898 NYS2d 881 [2d Dept 2010], *lv denied* 16 NY3d 703, 919 NYS2d 118 [2011]). In opposition, plaintiff failed to raise a triable issue of fact as to whether Hertz Vehicles violated one of the Vehicle and Traffic Law statutes at issue. Accordingly, the motion by defendants Hertz Vehicles and Wenig for summary judgment in their favor is granted.

Finally, the motion by Baker for summary judgment dismissing the complaint is denied. Initially, the Court rejects plaintiff’s argument that Baker’s affidavit should not be considered in the determination of his summary judgment motion. Although the parties’ attorneys executed a stipulation, dated April 24, 2012 and so-ordered by this Court, such stipulation does not bar Baker from presenting any evidence in defense of the claims against him. Rather, the stipulation states, in relevant part, that Baker is “to be produced for a deposition [within] 60 days after plaintiff’s filing of the note of issue and if not produced [within] 60 days is precluded on the liability phase.” According to the Court’s computerized records, the note of issue was filed in this action on April 9, 2013. While a stipulation generally is binding on parties “that have legal capacity to negotiate, do in fact freely negotiate their agreement and either reduce their stipulation to a properly subscribed writing or enter the stipulation orally on the record in open court,” it will not be summarily enforced by a court when the language used

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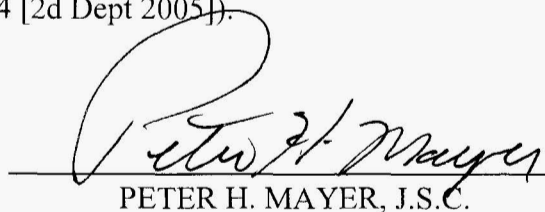
is ambiguous (*McCoy v Feinman*, 99 NY2d 295, 302, 755 NYS2d 693 [2002]; see *Baumis v General Motors Corp.*, 102 AD2d 961, 477 NYS2d 827 [3d Dept 1984]). Moreover, as mentioned above, Baker did, in fact, give testimony at a deposition conducted on May 29, 2013.

When a driver approaches another vehicle from the rear, he or she is bound to maintain a reasonably safe rate of speed, to maintain control of his or her vehicle, and to use reasonable care to avoid colliding with the other vehicle (see *Sayed v Murray*, 109 AD3d 464, 970 NYS2d 279 [2d Dept 2013]; *Martinez v Martinez*, 93 AD3d 767, 941 NYS2d 189 [2d Dept 2012]; *Tutrani v County of Suffolk*, 64 AD3d 53, 878 NYS2d 412 [2d Dept 2009]; *Chepal v Meyers*, 306 AD2d 235, 762 NYS2d 95 [2d Dept 2003]). The occurrence of a rear-end collision with a stopped or stopping vehicle, therefore, creates a prima facie case of negligence on the part of the operator of the following vehicle and imposes a duty on that operator to come forward with a non-negligent explanation for the collision (see *Robayo v Aghaabdul*, 109 AD3d 892, 971 NYS2d 317 [2d Dept 2013]; *Napolitano v Galletta*, 85 AD3d 881, 925 NYS2d 163 [2d Dept 2011]; *Scheker v Brown*, 85 AD3d 1007, 925 NYS2d 528 [2d Dept 2011]; *Cortes v Whelan*, 83 AD3d 763, 922 NYS2d 419 [2d Dept 2011]; *Leal v Wolff*, 224 AD2d 392, 638 NYS2d 110 [2d Dept 1996]). This burden is placed on the driver of the offending vehicle, as he or she is in the best position to explain whether the collision was due to a mechanical failure, a sudden stop of the vehicle ahead, unavoidable skidding on wet pavement, or some other reasonable cause (see *Sayed v Murray*, 109 AD3d 464, 970 NYS2d 279; *Fajardo v City of New York*, 95 AD3d 820, 943 NYS2d 587 [2d Dept 2012]; *Abbott v Picture Cars E., Inc.*, 78 AD3d 869, 911 NYS2d 449 [2d Dept 2010]; *DeLouise v S.K.I. Wholesale Beer Corp.*, 75 AD3d 489, 904 NYS2d 761 [2d Dept 2010]; *Moran v Singh*, 10 AD3d 707, 782 NYS2d 284 [2d Dept 2004]; *Barile v Lazzarini*, 222 AD2d 635, 635 NYS2d 694 [2d Dept 1995]).

Here, Baker admits in his affidavit that the accident occurred during a high-speed police chase, and that his actions created the emergency situation. Further, plaintiff's deposition testimony, included with Baker's submissions in support of his motion, demonstrates issues of fact as to the number of impacts between the two vehicles. There can be more than one proximate cause of a motor vehicle accident, and a party seeking summary judgment in his or her favor on the issue of negligence has the burden of establishing freedom from comparative fault as a matter of law (*Incle v Byrne-Lowell*, \_\_\_ AD3d \_\_\_, 981 NYS2d 617 [2d Dept 2014]; *Spadaro v Parking Sys. Plus, Inc.*, 113 AD3d 833, 835, 979 NYS2d 627 [2d Dept 2014]; *Pollack v Margolin*, 84 AD3d 1341, 1342, 924 NYS2d 282 [2d Dept 2011]; *Graeber-Nagel v Naranjan*, 101 AD3d 1078, 1078, 956 NYS2d 530 [2d Dept 2012]). Thus, Baker's submissions failed to establish as a matter of law that plaintiff's negligence was the sole proximate cause of the accident (see *Graeber-Nagel v Naranjan*, 101 AD3d 1078, 956 NYS2d 530; *Antaki v Mateo*, 100 AD3d 579, 954 NYS2d 540 [2d Dept 2012]; *Pollack v Margolin*, 84 AD3d 1341, 924 NYS2d 282; *Franzese v Consolidated Dairies, Inc.*, 83 AD3d 775, 920 NYS2d 688 [2d Dept 2011]; *Cox v Nunez*, 23 AD3d 427, 805 NYS2d 604 [2d Dept 2005]).

Dated: \_\_\_\_\_

4/21/14

  
 PETER H. MAYER, J.S.C.