Waqar v Crivello
2014 NY Slip Op 32111(U)
July 20, 2014
Sup Ct, Suffolk County
Docket Number: 16985/2011
Judge: Ralph T. Gazzillo
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SHORT FORM ORDER

Index No: 16985/2011

Supreme Court - State of New York
IAS PART 6 - SUFFOLK COUNTY

Amended
Mot. Seq.: 012 MG

Hon. RALPH T. GAZZILLO
A.J.S.C.

Ishrat Waqar,

Plaintiff(s),

- against -

Christopher Crivello, Theresa Crivello and the Town of Huntington,

Defendant(s),

Upon the following papers numbered 1 to 20 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-17 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 18-20 ; Replying Affidavits and supporting papers ___; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Theresa Crivello ("the moving defendant") for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint and all cross-claims insofar as asserted against her is granted.

This is an action for personal injuries allegedly suffered by the plaintiff Ishrat Waqar ("Waqar") as a result of a pedestrian/motor vehicle accident which occurred on March 31, 2010, at or near the intersection of Larkfield Road and Cedar Road, in the Town of Huntington, County of Suffolk. It is alleged that defendant Christopher Crivello ("C. Crivello"), while operating a 2004 Hyundai Sonata motor vehicle, owned by the moving defendant, did so in a negligent manner, and struck the plaintiff, who was a pedestrian, causing serious physical injuries. The alleged basis for the moving defendant's liability is that she allowed the defendant C. Crivello to operate her motor vehicle with her permission and consent.

Defendant Theresa Crivello now moves summary judgment in her favor, on the grounds that she did not permit or authorize the defendant C. Crivello to operate her 2004 Hyundai Sonata motor vehicle prior to the accident which is the subject of this action. Movant submits,

inter alia, her attorney's affirmation, a copy of the pleadings, the affidavit of the moving defendant, sworn to July 31, 2012, the affidavit of Stephen Crivello, sworn to July 31, 2012, a certified copy of certificate of disposition and a copy of a court transcript with regard to People v Christopher Crivello, Docket Number 2010-SU020830, dated May 18, 2010. In opposition, defendant C. Crivello submits his attorney's affirmation, copies of discovery demands and automobile insurance coverage documents related to the moving defendant. The plaintiff also opposes the application.

The affidavit of the moving defendant states that on March 31, 2010, she was the owner of the 2004 Hyundai Sonata motor vehicle which was involved in the subject accident. On that date, her son C. Crivello operated said vehicle without the permission or consent of herself or that of her husband Stephen Crivello. On that date, C. Crivello was not a member of their household. However, on March 29, 2010, they allowed him to stay at their residence. At that time, both she and her husband specifically and affirmatively told him that he could not use or operate the subject vehicle. In the early morning hours of March 31, 2010, C. Crivello stole the keys to the subject vehicle. He took and drove the subject vehicle without advising the moving defendant or her husband. He did not receive her consent or her husband's consent to drive the vehicle. On March 31, 2010, as a result of her complaint to the Suffolk County Police, C. Crivello was arrested for taking and operating the subject vehicle without permission or consent. On May 18, 2010, C. Crivello pleaded guilty to unauthorized use of the subject vehicle pursuant to Penal Law Section 165.05. The affidavit of Stephen Crivello, a nonparty, reiterates the facts set forth in the moving defendant's affidavit. These include the fact that neither he or his wife ever gave permission to C. Crivello to operate the subject vehicle; that he had been affirmatively told by both of them that he did not have permission to operate the vehicle; that during the early morning hours of March 31, 2010, C. Crivello stole the keys to the subject vehicle, and took and drove the subject vehicle without advising the moving defendant or her husband and did not receive her consent or his consent to drive the vehicle. Finally, as a result of his wife's complaint, C. Crivello was arrested for taking and operating the subject vehicle without permission or consent, and on May 18, 2010, he pleaded guilty to unauthorized use of the subject use pursuant to Penal Law Section 165.05.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts

alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

Vehicle and Traffic Law § 388(1) "makes every owner of a vehicle liable for injuries resulting from negligence 'in the use or operation of such vehicle ... by any person using or operating the same with the permission, express or implied, of such owner' " (***Murdza v Zimmerman***, 99 NY2d 375, 379, 756 NYS2d 505, [2003], quoting Vehicle and Traffic Law § 388(1)). Under this statute, there is a presumption that the operator of a vehicle operates it with the owner's permission (*see* ***Murdza v Zimmerman***, *id*; ***Ellis v Witsell***, 114 AD3d 636, 979 NYS2d 826 [2d Dept 2014]; ***Diaz v Tumbiolo***, 111 AD3d 877, 975 NYS2d 761[2d Dept 2013]; ***Vinueza v Tarar***, 100 AD3d 742, 743, 954 NYS2d 160 [2d Dept 2012.) The presumption may be rebutted by substantial evidence that the owner did not give the operator consent (*see* ***Murdza v Zimmerman***, *supra*; ***Ellis v Witsell***, *supra*; ***Diaz v Tumbiolo***, *supra).*

The opposing papers are correct to the extent that they allege that the transcript of C. Crivello's guilty plea is inadmissible. The declaration against penal interest exception to the hearsay rule has four components: (1) the declarant must be unavailable to testify by reason of death, absence from the jurisdiction or refusal to testify on constitutional grounds; (2) the declarant must be aware at the time the statement is made that it is contrary to penal interest; (3) the declarant must have competent knowledge of the underlying facts; and (4) there must be sufficient proof independent of the utterance to assure its reliability (***People v Shabazz***, 22NY3d 896, 77 NYS2d 141 [2013]; ***People v Settles***,46 Ny2d 154, 412 NYS2d 874 [1978]). Here, since the moving defendant has not established that C. Crivello will not be available for trial, the transcript of his plea is inadmissible.

However, based on the affidavit of moving defendant, the affidavit of Stephen Crivello, the certificate of disposition with regard to C. Crivello's guilty plea for unauthorized use of the subject vehicle, and the documentation submitted, the moving defendant has carried the burden of rebutting the presumption that he was operating the vehicle with the owner's permission. A prior plea of guilty represents an admission, it is not obnoxious to the hearsay rule. Herein, defendant C. Crivello pleaded guilty to unauthorized use of the subject motor vehicle in connection with this accident. This guilty plea, as an admission that he committed the act charged, constituted some evidence of negligence (*see* ***Ando v Woodberry***, 8 NY2d 165, 168–169, 203 NYS2d 74, 168 NE2d 520 [1960]; ***McGraw v. Ranieri***, 202 AD2d 725, 726, 608 NYS2d 577 [3d Dept1994]; *see also* ***Miszko III v Luma***, 284 AD2d 641, 725 NYS2d 459 [3d Dept 2001]; ***Decker v Rassaert***, 311 AD2d 626, 516 NYS2d 710 [2d Dept 1987). A defendant is generally given an opportunity to explain the circumstances surrounding a guilty plea to a traffic infraction, but defendant herein failed to offer any explanation for his plea in response to the moving defendant's motion (*see* ***Ando v Woodberry***, *supra*; ***McGraw v. Ranieri***, *supra*). The affidavits submitted confirm the lack of permission to use, the subject vehicle, the arrest based upon the moving defendant's immediate complaint to the police, and their personal knowledge of C. Crivello's guilty plea to unauthorized use of the motor vehicle.

Affording the defendant C. Crivello the benefit of every favorable inference as required on a motion for summary judgment, he has failed to raise a genuine factual issue warranting denial of the motion. The affirmation from an attorney having no personal knowledge of the facts is without evidentiary value and, thus, is insufficient to raise a triable issue of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Hubbard v County of Madison***, 93 AD3d 939, 939 NYS2d 619 [3d Dept 2012]; ***Sanabria v Paduch***, 61 AD3d 839, 876 NYS2d 874 [2d Dept 2009]; ***Prince v Accardo***, 54 AD3d 837, 863 NYS2d 819 [2d Dept 2008]). The opposing defendant's attorney's affirmation merely alleges that there are issues of fact and that discovery is needed.

The failure to raise any factual issues as to the liability of the moving defendant, defeats the need for discovery (*see* ***Monteleone v Jung Pyo Hong***,79 AD3d 988, 913 NYS2d 755 [2d Dept 2010]; ***Niyazov v Bradford***, 13 AD3d 501, 786 NYS2d 852 [2d Dept 2004]; ***Johnson v Phillips***, 261 AD2d 269, 690 NYS2d 545 [1st Dept 1999]).

Accordingly, the moving defendant's motion for summary judgment dismissing the complaint and all cross claims asserted against her is granted.

Dated: 7/24/14
Riverhead, N.Y.

Hon. Ralph T. Gazzillo
A.J.S.C.

Non-Final Disposition

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