

Harris v John Doe "A"
2014 NY Slip Op 32637(U)
September 3, 2014
Supreme Court, Bronx County
Docket Number: 301903/2011
Judge: Lucindo Suarez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

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MICHAEL HARRIS, TANASHA DEVALL, and RAS
FRANCIS,

DECISION AND ORDER

Plaintiffs,

Index No. 301903/2011

- against -

JOHN DOE "A", MARCUS ROBINSON, JOSEPHINE
FELICIANO, ROBERTO ESTEVEZ, TARGELIA
TINAJERO, CHRISTOPHER CHAMBERS, PERTIE
CHAMBERS and CARLTON ELLIS,

Defendants.

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PRESENT: Hon. Lucindo Suarez

Upon the notice of motion dated July 8, 2014 of defendant Carlton Ellis and the affirmation and exhibits submitted in support thereof; the affirmation in opposition dated July 29, 2014 of plaintiff Tanasha Devall and the affidavit annexed thereto; the affirmation in opposition dated July 30, 2014 of plaintiff Remona Griffiths in a second action consolidated for joint trial and the exhibits annexed thereto; the affirmation in opposition dated August 11, 2014 of plaintiff Ras Francis and the exhibits annexed thereto; the affirmation in support dated August 14, 2014 of defendant Josephine Feliciano; the reply affirmation dated August 20, 2014 of defendant Carlton Ellis and the exhibits annexed thereto; and due deliberation; the court finds:

This action arises out of two accidents that occurred on November 13, 2010 involving four motor vehicles. Defendant Carlton Ellis ("Ellis") now moves pursuant to CPLR 3212 for summary judgment dismissing plaintiffs' complaint on the ground that plaintiffs cannot establish his liability in causing the second accident. In support of the motion, he annexes the pleadings, various deposition transcripts, the police accident report (MV-104AN), and his own accident report (MV-104). Ellis'

earlier motion for summary judgment on the issue of his liability had been denied without prejudice to renewal upon the completion of discovery.¹

The depositions reveal that the first accident occurred on the East Gun Hill Road exit ramp off the Bronx River Parkway and involved three vehicles. Plaintiffs Michael Harris (“Harris”), Tanasha Devall (“Devall”) and Ras Francis (“Francis”) and non-party Robert Feliciano (“Feliciano”) were all passengers in a Mitsubishi owned by defendant Josephine Feliciano. Defendant Marcus Robinson (“Robinson”) was an occupant of the Mitsubishi, although it is disputed whether he was also its driver. Defendants Targelia Tinajero owned and Roberto Estevez (collectively “Estevez”) operated an Infiniti and defendants Pertie Chambers owned and Christopher Chambers (collectively “Chambers”) operated an Acura. It is not disputed that the Mitsubishi struck the rear of Estevez’s Infiniti when both vehicles were on the exit ramp. While the testimony regarding subsequent events on the exit ramp conflict, it is not disputed that the Mitsubishi left the exit ramp, turned onto East Gun Hill Road and then turned onto White Plains Road. The motion involves the second accident at the intersection of White Plains Road and Burke Avenue involving the Mitsubishi and Ellis’ livery cab.

Ellis testified that the light governing traffic on Burke Avenue was green and in his favor as he approached the intersection. He had looked to his left and right as was his custom, saw no oncoming traffic and proceeded forward. A split second later, he saw a silver object come towards him “like a bat out of hell.” He applied his brakes but was unable to avoid the collision. Ellis regained consciousness as he was tended to by emergency personnel.

Francis testified that he, Harris, Robinson, and Devall were all rear seat passengers in the Mitsubishi driven by “Fabo.” “RJ” sat in the front passenger seat. After leaving the exit ramp, Fabo

¹ Plaintiffs object to the instant motion on the ground that Ellis’ deposition is incomplete. The continuation of Ellis’ deposition appears to be the subject of a separate motion, and the court makes no determination on that application. His testimony is sufficient for purposes of this motion.

drove onto East Gun Hill Road and then White Plains Road. They were traveling between thirty to thirty-five miles per hour when the impact with Ellis' cab occurred. The traffic light governing White Plains Road was green, and Francis was approximately one car length away from the intersection when he made that observation.

Chambers testified that a Mitsubishi rear ended an Infiniti at the top of the exit ramp and caused the Infiniti to rear end Chambers' Acura. The driver of the Mitsubishi exited the vehicle to survey the damage, re-entered that vehicle, and then exited the ramp by driving around the Infiniti and Chambers's car, striking the left front fender of Chambers' Acura as it passed. Chambers then followed the Mitsubishi. Chambers was a "good length" behind the Mitsubishi on White Plains Road when he saw that vehicle run through a red traffic light. Chambers stopped for the same red light and noted that the traffic light up ahead at White Plains Road and Burke Avenue was also red. The Mitsubishi drove around another stopped vehicle and through the intersection at Burke Avenue against the red traffic light. The Mitsubishi struck the livery cab's right side. The driver of the Mitsubishi ran away from the scene.

Feliciano, the front seat passenger in the Mitsubishi, could not recall the color of any of the traffic lights on White Plains Road. Devall recalled feeling a single heavy impact and hearing statements about a chase before he woke up at Jacobi Medical Center several days later. Harris could not recall any details about the accident other than what he had been told by his mother and Francis. Police Officer Jason Soto testified that he completed a police accident report (MV-104AN) but did not witness the accident. Ellis offered no testimony from Robinson or Estevez.

Vehicle and Traffic Law § 1111(d) provides that traffic "shall stop" when faced with a steady circular red signal. Ellis, though, has not dispelled all questions of material fact as to which vehicle had the right of way at the intersection. *See Nevarez v. S.R.M. Mgt. Corp.*, 58 A.D.3d 295, 867 N.Y.S.2d 431 (1st Dep't 2008); *Rosario v. Benmergui*, 6 A.D.3d 311, 775 N.Y.S.2d 133 (1st Dep't 2004). Ellis

stated that the traffic light for Burke Avenue was green and Chambers stated the traffic light for White Plains Road was red. Francis, though, testified repeatedly that all traffic lights on White Plains Road were green and in the Mitsubishi's favor prior to the impact with the livery cab. Whether Francis' recollection was impaired by the alcohol he had consumed prior to both accidents raises a credibility issue which cannot be resolved on a summary judgment motion. *See Medina v. 203 W. 109th St. Realty Corp.*, 16 A.D.3d 220, 790 N.Y.S.2d 663 (1st Dep't 2005).

The accident reports Ellis relies on are also inadmissible. The police accident report (MV-104AN) is not in admissible form and contains inadmissible hearsay. *See Raposo v. Robinson*, 106 A.D.3d 593, 965 N.Y.S.2d 348 (1st Dep't 2013). Although Officer Soto testified to the report, it appears the report may be incomplete as it is missing the name of a witness to the accident. The accident report (MV-104) Ellis signed is not certified. He acknowledged signing the report but admitted that he never read its contents.

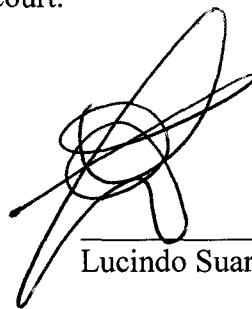
Since Ellis has not met his burden, the court need not look to the sufficiency of the papers submitted in opposition. *See Seleznyov v. New York City Tr. Auth.*, 113 A.D.3d 497, 979 N.Y.S.2d 44 (1st Dep't 2014).

Accordingly, it is

ORDERED, that the motion of defendant Carlton Ellis for summary judgment dismissing plaintiffs' complaint is denied.

This constitutes the decision and order of the court.

Dated: September 3, 2014



Lucindo Suarez, J.S.C.