

Vallejo v Diament

2015 NY Slip Op 31666(U)

January 22, 2015

Supreme Court, Bronx County

Docket Number: 381785/14

Judge: Mark Friedlander

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NEW YORK SUPREME COURT-COUNTY OF BRONX
PART IA-25

KATHLEEN BELLITA VALLEJO,

Plaintiff,

-against

**MEMORANDUM
DECISION/ORDER**
Index No.: 381785/14

ALFRED M. DIAMENT, BRACHA DIAMENT
and YU JIANG,

Defendants.

HON. MARK FRIEDLANDER

Defendant, Yu Jiang (“Jiang”), moves for an order, pursuant to CPLR§3212, granting summary judgment to Jiang, dismissing plaintiff’s complaint and all cross-claims against Jiang. The motion is decided as hereinafter indicated.

This is an action by plaintiff to recover monetary damages for serious injuries allegedly sustained by her on October 7, 2013, in a three-car accident.

In support of the motion, defendant Jiang submits a copy of the pleadings, his affidavit, and a certified copy of the Police Accident Report (“PAR”).

Jiang states in his affidavit that, on October 7, 2013, he was the owner and operator of a 2013 Toyota Avalon, bearing New York State License Plate Number T476838C. He worked for Vital Transportation, a car service company. He reported for work at approximately 12:00 P.M., and was assigned to pick up a passenger from 25 Broadway, New York, New York, and take the passenger to LaGuardia Airport. At approximately 1:00 P.M., he arrived at his pick-up location, picked up his passenger and started to go to LaGuardia Airport. The weather was clear and the roads were dry.

His vehicle was traveling north on the FDR Drive. The traffic was slow, stop and go. As his vehicle reached 6th Street, he came to a stop because there was traffic in front of him. The FDR Drive at this point, goes north and south, and is separated by a cement barrier. There are three lanes, separated by broken lanes. There are no traffic lights or signs and vehicles enter and exit the highway from ramps on the right. While his vehicle was stopped in traffic, he noticed a 2010 Honda Odyssey, bearing New York State License Plate Number EAH2980, stopped behind his vehicle, waiting in traffic. He then observed a 2002 Suzuki, bearing New York State License Plate Number GEX4545, hit the Honda in the rear, which caused the Honda to hit his vehicle in the rear. He believes the Suzuki was traveling too fast for the prevailing traffic conditions. After the Suzuki hit the Honda, he observed it veer off rightward into the middle lane, coming to a stop next to his vehicle, as Jiang's vehicle had been traveling in the left lane. This showing having been made, it is well accepted that the operator of the vehicle that comes into contact with the rear of another motor vehicle must come up with a non-negligent excuse for the collision.

In "partial opposition" to the motion, defendants, Alfred M. Diamant ("Alfred") and Bracha Diamant ("Bracha"), submit the affidavit of Alfred.

Alfred states in his affidavit that his wife, Bracha, was the owner of the aforementioned Honda and he operated it on October 4 (*sic*), 2013, with Bracha's permission. He was operating the Honda northbound in the left lane of the FDR. It was drizzling and traffic was medium to heavy. He was traveling at a speed of approximately 20-30 miles an hour, when saw the vehicle in front of him come to a stop. He believes that vehicle was stopped ahead of him because of traffic, and Alfred brought his vehicle to a gradual stop. Alfred's vehicle was stopped for approximately 1-2 seconds, when it was

heavily impacted in the rear by plaintiff's vehicle. The rear passenger side of his vehicle was contacted by the front driver's side of plaintiff's vehicle. As a result of this contact, Alfred's vehicle was propelled forward less than one car length into the Jiang vehicle which was directly in front of his vehicle. There were two contacts, the first when Alfred's vehicle was struck in the rear by plaintiff's vehicle, and the second when his vehicle was propelled forward into the Alfred's vehicle in from of his vehicle.

Based upon the affidavits of Jiang and Alfred, defendants Alfred and Bracha assert that they were not liable for the subject accident. Although they have not moved or cross-moved for summary judgment, they ask the Court to search the record and grant them summary judgment on the issue of liability.

In opposition to the motion, plaintiff submits her affidavit. In her affidavit, plaintiff states that, on October 7, 2013, she was operating her vehicle in the left northbound lane of the FDR Drive, when she noticed a Toyota sedan stopped for no apparent reason. Plaintiff asserts there was moving traffic that did not impede north bound vehicular flow. Plaintiff states that "In an attempt to avoid the stopped vehicle and the defendant vehicle driven by Alfred Diamant, I entered the middle lane of traffic, since there was no traffic obstructing northbound flow, I was able to enter the middle lane as it was unoccupied."

Plaintiff's claim that Jiang's vehicle was stopped for no apparent reason is insufficient to rebut the presumption of negligence on the part of a following vehicle. *Cabrera v. Rodriguez*, 72 A.D.3d 553 (1st Dept. 2010); *Dattilo v. Best Trans. Inc.*, 79 A.D.3d 432 (1st Dept. 2010). Plaintiff provided no evidence or testimony as to why a safe distance could not be maintained between the vehicles herein. *Cabrera v. Rodriguez*; *supra*; *Dattilo v. Best Trans. Inc.*, *supra*.

Plaintiff further claims that the PAR is inconsistent with the affidavits of Jiang and Alfred, thus creating issues of fact precluding summary judgment. The Court disagrees. The PAR states, in relevant part, as follows:

“At T/P/O Oper of Veh #1 (Diament) was inattentive to veh #2 (Jiang) being stopped and did rear- end veh #1. Oper of veh #3 (Vallejo) did attempt to avoid striking veh #1 but was unable to stop due to slippery road conditions and did rear-end veh #1.”

Notwithstanding that the PAR is certified, it is inadmissible as it is not based upon the police officer's personal observation and/or made by a witness with a business duty to make it or otherwise admissible as a hearsay exception. *Johnson v. Lutz*, 253 N.Y. 124 (1930); *Holliday v. Hudson Armored Car & Courier Service, Inc.*, 301 A.D.2d 392, 753 N.Y.S.2d 470 (1st Dep't 2003). Furthermore, assuming argendo that the Police Officer's statement that Diament was “inattentive” to Jiang's stopped vehicle, constituted an admission by Diament, it does not establish any negligent conduct on the part of Diament with respect to plaintiff's hitting Diament's vehicle in the rear.

Based upon the foregoing, the Court finds that Jiang is not liable for the subject accident. Jiang's motion for summary judgment is granted. Plaintiff's complaint against Jiang is dismissed.

CPLR 3212 (b) provides, *inter alia*, that “[i]f it shall appear that any other party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion.” “Recognizing that ‘[a] motion for summary judgment must be addressed to one or more specific causes of action or defenses’, the Appellate Divisions have uniformly held that a court may search the record and grant summary judgment in favor of a nonmoving party only with respect to a cause of action or issue that is the subject of the motions before the court.” *Dunham v. Hilco Construction Co., Inc.*, 89 N.Y.2d 425, 429 (1996), quoting *Conroy v Swartout*, 135 AD.2d

945, 947 (*citations omitted*); *DCA Adver., Inc. v. Fox Group, Inc.*, 2 A.D.3d 173 (1st Dept. 2003).

The Court, upon searching the record, finds that Diament was not liable for the subject accident, with respect to plaintiff's striking Diament's vehicle in the rear. Assuming arguendo that Diament's vehicle struck Jiang's vehicle in the rear, prior to being hit by plaintiff's vehicle, it does not impute liability to Diament for plaintiff's accident and injuries. Accordingly, summary judgement is granted to defendants Alfred and Bracha Diament and plaintiff's complaint against Alfred and Bracha is also dismissed. This Court make no determination as to whether Alfred and Bracha bear any responsibility for the accident between Jiang and the Diaments.

The foregoing constitutes the Decision and Order of the Court.

Dated: 1/22/15



MARK FRIEDLANDER, J.S.C.