Ruiz v Brohan
2017 NY Slip Op 30883(U)
May 2, 2017
Supreme Court, Suffolk County
Docket Number: 14-14789
Judge: James Hudson
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SHORT FORM ORDER

INDEX No. 14-14789
CAL. No. 16-00937MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XL - SUFFOLK COUNTY

PRESENT:

Hon. JAMES HUDSON
Acting Justice of the Supreme Court

MOTION DATE 10-20-16
ADJ. DATE 11-30-16
Mot. Seq. # 002 - MG

RAMON RUIZ,

Plaintiff,

- against -

CONNOR P. BROHAN and PATRICK M. BROHAN,

Defendants.

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Upon the following papers numbered 1 to 14 read on this motion for partial summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 11 - 12; Replying Affidavits and supporting papers 13 - 14; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the plaintiff for an order pursuant to CPLR 3212 granting summary judgment in his favor as to the defendants' liability is granted.

The plaintiff commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred on June 14, 2013 at the intersection of Montauk Highway and Maple Avenue (the intersection) in the Town of Islip, New York. It is undisputed that Montauk Highway is also known as Route 27A and Main Street in the area where this accident occurred, and that Maple Avenue becomes 4th Avenue as it crosses north over Montauk Highway at that location. The accident allegedly happened when the vehicle driven owned by the defendant Patrick M. Brohan and operated by the defendant Connor P. Brohan (Brohan) ran a red light and struck the plaintiff's vehicle.

The plaintiff now moves for partial summary judgment as to the defendants' liability. 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 issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

In support of his motion, the plaintiff submits the pleadings, the transcripts of the deposition testimony of the parties, the statement of a nonparty witness, and an unauthenticated copy of a police accident report, Form MV-104A, regarding this incident. The police accident report record relied on by the plaintiff is plainly inadmissible and has not been considered by the Court in making this determination (*see* CPLR 4518 [c]; ***Cover v Cohen***, 61 NY2d 261, 473 NYS2d 378 [1984]; ***Cheul Soo Kang v Violante***, 60 AD3d 991, 877 NYS2d 354 [2d Dept 2009]).

At his deposition, the plaintiff testified that he was traveling northbound on Maple Avenue prior to his accident, that he stopped for a red light at the intersection, and that he waited approximately two minutes before the traffic light turned green. He stated that his vehicle was the first in the lane waiting at the traffic light, that he observed at least one vehicle waiting behind his vehicle, and that Maple Avenue runs north and south with one lane of travel in each direction. He indicated that, when the traffic light turned green, he went to "cross over" the intersection, that he was "not going at a high rate of speed," and that his vehicle was struck in the rear passenger side. The plaintiff further testified that he did not see the other vehicle involved in this accident before the collision, and that he did not hear that vehicle sound its horn or the sound of screeching tires on the roadway.

Brohan testified that he was traveling westbound on Montauk Highway prior to this accident, that the vehicle he was operating was owned by his father, the defendant Patrick M. Brohan (Mr. Brohan), and that he had his father's permission to use the vehicle. He stated that Montauk Highway runs east and west with of one lane of travel in each direction, that the intersection is controlled by a traffic light, and that he first saw the traffic light approximately two blocks away from the intersection. He indicated that the traffic light was green at that time, that he "heard an ambulance" and looked in his rear view mirror, and that he did not keep the traffic light at the intersection under his observation. Brohan further testified that he saw the plaintiff's vehicle "crossing in front of me" coming from his left, that he was approximately 30 feet from the intersection when he first saw the plaintiff's vehicle, and that he "stepped" on the brakes of his vehicle to avoid a collision. He stated that the plaintiff's vehicle was traveling at five to ten miles per hour at the time of the collision, that it had been traveling eastbound on Montauk Highway prior to the accident, and that he first saw the plaintiff's vehicle as it was making a turn onto a "side street." He indicated that the impact occurred in the middle of the intersection, and that the middle of the front grille of his vehicle struck the rear passenger side of the plaintiff's vehicle. Brohan further testified that he never saw the traffic light at the intersection change color, that a police officer was already at the accident scene when he exited his vehicle, and that the police "just saw it happen" as they were passing by on Montauk Highway. He indicated that he spoke with the police after

the accident, that he gave them his license information, and that he never told the police officer that he "ran" a red light at the intersection.

Although not considered in total, the Court has considered the statement of a witness to the accident contained within the police accident report. It has been held that statements by eyewitnesses, verified pursuant to Penal Law § 210.45, are the equivalent of statements made under oath (*see* ***People v Sullivan***, 56 NY2d 378, 452 NYS2d 373 [1982]; ***Antaki v Mateo***, 100 AD3d 579, 954 NYS2d 540 [2d Dept 2012]; ***Moore v County of Suffolk***, 11 AD3d 591, 783 NYS2d 72 [2d Dept 2004]; ***People v McCulloch***, 226 AD2d 848, 640 NYS2d 914 [3d Dept 1996]; *see e.g.* ***People v McCann***, 85 NY2d 951, 26 NYS2d 1006 [1995]; *but see* ***Sam v Town of Rotterdam***, 248 AD2d 850, 670 NYS2d 62 [3d Dept 1998]). Penal Law § 210.45 entitled "Making a punishable false written statement" provides:

> A person is guilty of making a punishable false written statement when he knowingly makes a false statement, which he does not believe to be true, in a written instrument bearing a legally authorized form notice to the effect that false statements made therein are punishable.
>
> Making a punishable false written statement is a class A misdemeanor.

Here, the subject statement contains the signature of the witness directly under a warning in bold type that false statements are punishable as a class "A" misdemeanor pursuant to Penal Law § 210.45. Under the circumstances, the Court finds that the subject statement is admissible evidence in support of the plaintiffs' motion for partial summary judgment. In his statement dated June 14, 2013, Raymond Boucher (Boucher) states that he was heading north on Maple Avenue he "observed [the defendants' vehicle] heading west on Montauk Highway strike [the plaintiff's vehicle] on the rear passenger side." Boucher indicates that Brohan's vehicle "went through a red light."

Here, the plaintiff has established his entitlement to summary judgment as to the defendants' liability. The conduct of motorists at an intersection controlled by traffic signals is subject to the provisions of Vehicle and Traffic Law § 1111 and not the more general provisions of the Vehicle and Traffic Law such as those set forth in §§ 1140 or 1141, which govern the conduct of drivers at intersections that are not controlled by traffic lights (*see* ***Dicke v Anci,*** 31 AD3d 696, 821 NYS2d 93 [2d Dept 2006]; ***Saggio v Ladone***, 21 AD3d 407, 799 NYS2d 586 [2d Dept 2005]; ***Rudolph v Kahn***, 4 AD3d 408, 771 NYS2d 370 [2d Dept 2004]). Section 1111 of the Vehicle and Traffic Law permits motorists approaching an intersection with a green traffic signal to proceed through the intersection provided they yield to vehicles lawfully within the intersection and exercise reasonable care under the circumstances (*see* ***Shea v Judson***, 283 NY 393 28 NE2d 885 [1940]). A motorist facing a green traffic signal thus has the right to assume that the light is red for cross traffic and that such traffic will obey the law by stopping for the red light and remaining stationary until the light has changed to green (*see* ***Baughman v Libasci***, 30 AD2d 696, 292 NYS2d 588 [2d Dept 1968]). It has been recognized that a driver with the right of way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision (*see* ***Yelder v Walters***, 64 AD3d 762, 883 NYS2d 290 [2d Dept 2009]; ***Jenkins v Alexander***, 9 AD3d 286, 780 NYS2d 133 [1st Dept 2004]). However, a motorist proceeding under a green light is not authorized to blindly and wantonly enter the

intersection without keeping a proper lookout or employing a reasonable speed (*see* ***Nuziale v Paper Transp. of Green Bay Inc.***, 39 AD3d 833, 835 NYS2d 316 [2d Dept 2007]).

The adduced evidence establishes that the plaintiff was proceeding through the intersection with a green light. The plaintiff's testimony to that effect, along with the unescapable inference created by the statement of Boucher that Brohan "went through a red light," establishes that northbound traffic of Maple Avene was faced with a green light at the intersection at the time of this accident. However, Boucher's statement does not establish that Brohan went through a red light at the intersection, as he has no personal knowledge of that fact. There is no evidence that Boucher was able to observe the color of the subject traffic light for those traveling on Montauk Highway.

Viewing the evidence in the light most favorable to the defendants, even if Brohan also had a green light at the time he entered the intersection, whether due to a malfunction or otherwise, his failure to yield the right-of-way to the plaintiff was the sole proximate cause of this accident. The evidence reveals that the plaintiff's vehicle was already in the intersection, and well passe the mid-point of the intersection when the impact occurred.

In addition, Vehicle and Traffic Law § 388 provides that the owner of a vehicle is vicariously liable to third parties for injuries resulting from the "use and operation" of such vehicle by any person using it with permission. The statute creates a strong presumption of permissive use which can be rebutted only with substantial evidence showing that the driver of the vehicle was not operating it with the owner's express or implied permission (*see* ***Murdza v Zimmerman***, 99 NY2d 375, 756 NYS2d 505 [2003]; ***Amex Assur. Co. v Kulka***, 67 AD3d 614, 888 NYS2d 577 [2d Dept 2009]; ***Talat v Thompson***, 47 AD3d 705, 850 NYS2d 486 [2d Dept 2008]). The presumption can be rebutted by evidence that the driver exceeded restrictions placed on his or her use of the vehicle by the owner (***Murdza v Zimmerman***, *supra*; Walls v Zuvic, 113 AD2d 936, 493 NYS2d 628 [2d Dept 1985]; ***Aetna Casualty & Surety Co. v Brice***, 72 AD2d 927, 422 NYS2d 203 [1979] *affd* 50 NY2d 958, 431 NYS2d 528 [1980]), thereby exonerating the owner from vicarious liability under the statute. Here, neither defendant disputes that Brohan was operating the subject vehicle with the permission of its owner. Thus, the plaintiff has established his prima facie entitlement to summary judgment as to the defendants's liability herein.

The plaintiff, having established his entitlement to partial summary judgment, it is incumbent upon the defendants to produce evidence in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, *supra*; ***Rebecchi v Whitmore***, *supra*; ***O'Neill v Fishkill***, *supra*). While the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]), it remains true that mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]; ***Rebecchi v Whitmore,*** *supra*).

In opposition to the plaintiff's motion, the defendants submit the affirmation of their attorney. In said affidavit, counsel contends, among other things, that there is an issue of fact requiring a trial of this action regarding the plaintiff's comparative negligence. The sole basis for this argument is that the

plaintiff testified that he did not see Brohan's vehicle before this accident. However, the defendants do not submit any evidence to rebut the adduced evidence that the plaintiff's vehicle was well through the intersection and had mostly passed through Brohan's lane of travel when the collision occurred. The affirmation of an attorney who has no personal knowledge of the facts herein, is insufficient to raise an issue of fact on a motion for summary judgment (***Sanbria v Paduch***, 61 AD3d 839, 876 NYS2d 874 [2d Dept 2009]; ***Warrington v Ryder Truck Rental, Inc.***, 35 AD3d 455, 826 NYS2d 152 [2d Dept 2006]; ***9394, LLC v Farris***, 10 AD3d 708, 782 NYS2d 281 [2d Dept 2004]; ***Deronde Prods., Inc. v. Steve Gen. Contr., Inc.***, 302 AD2d 989, 755 NYS2d 152 [4th Dept 2003]). In addition, said contention is, at best, conclusory and fails to show the existence of any genuine issues of material fact as to whether the plaintiff was comparatively negligent or whether he could have avoided the collision (***Maliza v Puerto-Rican Transp. Corp.***, 50 AD3d 650, 854 NYS2d 763 [2d Dept 2008]; ***Messana v Rallo***, 48 AD3d 523, 852 NYS2d 245 [2d Dept 2008]). Accordingly, the plaintiff's motion for partial summary judgment is granted.

Dated: May 22, 2017

A.J.S.C.
HON. JAMES HUDSON

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**