Sanchez v Childs
2017 NY Slip Op 33395(U)
May 1, 2017
Supreme Court, Westchester County
Docket Number: Index No. 62881/16
Judge: Mary H. Smith
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DECISION AND ORDER

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH
Supreme Court Justice

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DAVID SANCHEZ,

Plaintiff,

MOTION DATE: 4/28/17
INDEX NO.: 62881/16

-against-

JACKSON A. CHILDS and LOIS J. CHILDS,

Defendants.

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The following papers numbered 1 to 7 were read on this motion by plaintiff for partial summary judgment on the issue of liability, etc.

Papers Numbered

Notice of Motion - Affirmation ((Stillman) - Exhs. (A-D)[1] 1-3
Answering Affirmation (Hilcken) - Affidavit (J. Childs) 4-5

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[1]Plaintiff has submitted an uncertified copy of the MV-104A police report. While defendants correctly contend that same generally constitutes inadmissible hearsay, see Chang v. Rodriguez, 57 A.D.3d 295 (2nd Dept. 2008); Bates v. Yasin, 13 A.D.3d 474 (2nd Dept. 2004), nevertheless, party admissions recorded by the responding police officer are admissible as an exception to the hearsay rule. See Gezelter v. Pecora, 129 A.D.3d 1021 (2nd Dept. 2015); Jackson v. Donien Trust, 103 A.D.3d 851 (2nd Dept. 2013); Niyazov v Bradford, 13 A.D.3d 501, 502 (2nd Dept. 2004); Kemenyash v. McGoey, 306 A.D.2d 516 (2nd Dept. 2003); see, also Gezelter v. Pecora, 129 A.D.3d 1021, 1023 (2nd Dept. 2015).

Replying Affirmation (Stillman) - Exhs. (A-E) 6-7

Upon the foregoing papers, it is Ordered that this motion by plaintiff pre-deposition[2] for partial summary judgment on the issue of liability and striking defendants' first affirmative defense alleging plaintiff's comparative negligence at this pre-deposition time is disposed of as follows:

Plaintiff seeks to recover for serious injuries allegedly sustained as a result of an automobile collision occurring, on February 15, 2016, at approximately 3:45 p.m., on Manhattanville Road, in the Town of Harrison. Plaintiff alleges that he had been traveling in the eastbound lane of Manhattanville Road, and that he had brought his vehicle to a complete stop at the stop sign situated at the corner of Manhattanville Road, at its intersection with Purchase Street; both roadways are two-way roadways with one lane of travel in each direction. Plaintiff alleges that defendant Jackson A. Childs, at the time driving a vehicle that had been owned by defendant Lois J. Childs, had been traveling north on Purchase Street, and he had attempted to make a right hand turn from Purchase Street onto Manhattanville Road. Plaintiff further alleges that, while his vehicle had remained at a complete stop, defendant Childs' vehicle, suddenly had slid into plaintiff's traffic lane, striking the front left of plaintiff's vehicle. The foregoing prima facie demonstrates that defendant negligently had operated his vehicle by crossing over into plaintiff's traffic lane, entitling plaintiff to partial summary judgment. Cf. Scott v. Kass, 48 A.D.3d 785 (2nd Dept. 2008); Marsicano v. Dealer Storage Corp., 8 A.D.3d 451 (2nd Dept.

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[2]The Court observes that defendants properly do not contend that plaintiff's motion is premature. See Espada v. City of New York, 74 A.D.3d 1276 (2nd Dept. 2010); Davila v. New York City Transit Authority, 66 A.D.3d 952 (2nd Dept. 2009).

2004).

It thus was incumbent upon defendants to raise a triable issue of fact with respect thereto. See, e.g., Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1990); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980).

Defendants oppose plaintiff's motion, arguing that plaintiff has failed to prima facie demonstrate entitlement to judgment and, in any event, that defendant had acted reasonably and in a non-negligent manner immediately preceding the collision, and had been confronted with an emergency situation not of his own making.

Defendant Jackson Childs submits his opposing affidavit wherein he avers that, immediately prior to the crash, he had been traveling on Purchase Street and, with his foot on the brake and while driving "at most 15 miles per hour," he had begun to turn right onto Manhattanville Road. According to said defendant, at the point where his vehicle had been halfway into the turn, the rear of his vehicle "began to skid and slide on the black ice on the roadway, and then the rest of my car also began to skid and slide." During this time, defendant maintains that he had kept his foot on the brake pedal and had attempted to steer to the right but that his vehicle had continued to skid and slide, ultimately contacting plaintiff's vehicle. Defendant argues that plaintiff's motion should be denied because, at the time of the accident, he had been faced with an unexpected circumstance to which he had acted reasonably, and that he is entitled to a liability trial to determine questions of fact.

Notably, plaintiff's counsel, who lack personal knowledge of the facts, argues in his supporting affirmation that defendant had been driving at an excessive rate of speed given the prevailing snow weather and the icy and wet road conditions; plaintiff himself, in neither

of his two submitted affidavits, addresses defendant's rate of speed at the time of and preceding the crash.

At this time, the Court finds defendants' reliance upon the emergency doctrine is sufficient to interdict judgment in plaintiff's favor. Initially however, the Court notes that the emergency doctrine is an affirmative defense, see Stockman v. City of Long Beach, 106 A.D.3d 1076 (2nd Dept. 2013), which defendants here failed to plead in their answer. Therefore, to the extent that defendants argue at bar that plaintiff failed to prima facie establish his entitlement to liability judgment because he had failed to address in his supporting affidavit the prevailing weather and road conditions, said argument is without merit. In the absence of defendants having pleaded the defense of emergency doctrine, plaintiff did not have the burden in the first instance to refute said defense, and he had not been required to address what had been the then extant weather and road conditions.

However, on the unrefuted record at bar and the circumstances presenting, this Court cannot find as a matter of law that the emergency doctrine defense does not apply; plaintiff's motion for partial summary judgment on the issue of liability therefore is denied.

The emergency doctrine holds that a defendant faced with a sudden and unexpected circumstance, not of his own making, that leaves him with little or no time for reflection, may not be found to have been negligent if his actions had been reasonable and prudent in the context of the emergency. See Franco v. G. Michael Cab Corp., 71 A.D.3d 1082, 1083 (2nd Dept. 2010); Bello v. Transit Auth. of N.Y. City, 12 A.D.3d 58, 60 (2nd Dept. 2004). Although plaintiff has established in his replying papers that at the time of the crash it had been snowing with more than one inch of ground accumulation, and temperatures necessarily at or below freezing, facts which defendant has failed to address in his

opposing affidavit, nevertheless, defendant's unrefuted claim is that he had been driving at a speed of no more than 15 miles per hour at the time, with his foot on the brake. Upon these circumstances, triable issues of fact are presented as to whether the presence of the black ice on the roadway causing defendants' vehicle to slide had been sudden and unexpected, and whether defendant's driving speed under the circumstances had been reasonable and prudent. See Kandel v. FN, 137 A.D.3d 980 (2nd Dept. 2016); MacFarland v. Reed, 257 A.D.2d 802 (3rd Dept. 1999); cf. Caristo v. Sanzone, 96 N.Y.2d 172 (2001); Matos v. Sanchez, 147 A.D.3d 585 (1st Dept. 2017); Williams v. Kadri, 112 A.D.3d 442 (1st Dept. 2013); Mughal v. Rajput, 106 A.D.3d 886, 888 (2nd Dept. 2013).

The parties shall appear in the Preliminary Conference Part, at 9:30 a.m., on June 5, 2017.

Dated: May 1, 2017
White Plains, New York

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Preliminary Conference Part