

Cody v Bajaj
2017 NY Slip Op 33508(U)
March 29, 2017
Supreme Court, Nassau County
Docket Number: Index No. 604590/15
Judge: Anna R. Anzalone
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SUPREME COURT - STATE OF NEW YORK

PRESENT: *Honorable Anna R. Anzalone*
Justice of the Supreme Court

JOSEPH CODY,

Plaintiff,

- against -

DAVINDER BAJAJ, GURPARTAP BAJAJ, COUNTY OF
NASSAU, VEOLIA TRANSPORTATION SERVICES, INC.,
RAMNARINE ROOPNARINE, NASSAU INTER-COUNTY
EXPRESS and TRANSDEV TRANSPORTATION
SERVICES, INC.,

Defendants.

X
TRIAL/IAS, PART 24
NASSAU COUNTY

Index No. 604590/15
Motion Seq. No.: 001

The following papers read on this motion:

Notice of Motion	1
Affirmation in Opposition	2
Reply Affirmation	3

Motion by the defendants, County of Nassau, Veolia Transportation Services, Inc., Ramnarine Roopnarine, Nassau Inter-County Express and Transdev Transportation Services, Inc. (hereinafter collectively referred to as "the movants"), for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint and any and all cross-claims asserted against them is denied.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff while he was a passenger on a bus operated by the defendant,

Ramnarine Roopnarine (“Roopnarine”). Roopnarine was employed as a bus driver by the defendant, Veolia Transportation (“Veolia”).

In seeking summary judgment, the movants allege that: the defendant Gurpartap Baja (“Baja”) was the sole proximate cause of the accident; Roopnarine had the right of way when Bajaj made an unsafe lane change (*see* Vehicle & Traffic Law §1128[a]) and; Roopnarine was free from comparative negligence.

In support thereof, the movants rely upon the following exhibits:

- Exhibit A: Notice of claim and amended summons and complaint dated March 13, 2015 and June 23, 2015, respectively;
- Exhibit B: Verified answer of defendants with cross-claims dated August 14, 2015 and verified answer of co-defendants with cross-claims dated August 12, 2015;
- Exhibit C: Defendants’ demand for verified bill of particulars dated August 6, 2015, plaintiff’s verified bill of particulars dated October 9, 2015 and plaintiff’s supplemental verified bill of particulars dated March 10, 2016.
- Exhibit D: 50-H transcript of plaintiff Joseph Cody dated May 6, 2015;
- Exhibit E: Plaintiff Joseph Cody’s deposition transcript dated May 3, 2016;
- Exhibit F: Co-defendant Gurpartap Bajaj’s deposition transcript dated May 3, 2016;

- Exhibit G: Defendant Ramnarine Roopnarine's deposition transcript dated January 28, 2016;
- Exhibit H: Police accident report;
- Exhibit I: Various photographs marked A-J at 50-H examination;
- Exhibit J: Roopnarine's Operator Incident Report dated February 5, 2015; and
- Exhibit K: Note of Issue filed on or about October 6, 2016 and Certification Conference Order dated September 29, 2016.

In opposition to the motion, the attorneys for Davinder Bajaj and Gurpartap Baja argue that: the police accident report is uncertified and cannot properly be considered in support of a motion for summary judgment (*see Silva v Lakins*, 118 AD3d 556 [1st Dept 2014]); there are conflicting versions as to how the accident occurred, including which lane Bajaj was in at the time of the accident and which portions of the vehicles came into contact with one another; and there is an issue of fact as to whether Roopnarine violated his duty to operate the vehicle with reasonable care and, hence, could be held comparatively negligent for the plaintiff's injuries.

The plaintiff opposes the motion claiming, *inter alia*, that: there are conflicting versions of how this accident happened based on the deposition testimony of Bajaj and Roopnarine; and a question of fact exists as to whether Roopnarine was negligent

in operating the bus.

In reply, the movants maintain that they established their entitlement to judgment as a matter of law by submitting the Operator Incident Report and deposition testimony of Roopnarine; the admissible portions of the police accident report and various photographs which conclusively demonstrate that Bajaj was the sole proximate cause of the accident in that he made an unsafe lane change in violation of Vehicle & Traffic Law §1128(a) and crossed into the bus' path. The movants further submit that they were free from comparative fault as Roopnarine's response, which included lightly applying the brakes to stop the bus, was reasonable under the emergency doctrine (*see Leonard v Pomarico*, 137 AD3d 1085 [2d Dept 2016]; *see also Jiang-Hong Chen v Hearet Transit, Inc.*, 143 AD3d 946 [2d Dept 2016]).

At his examination before trial, Roopnarine was able to provide a detailed account of how the accident happened. The plaintiff was able to provide little information as to the happening of the accident as he was sitting in the back of the bus, and might have been dosing off or listening to his music (*see Exhibit E*, p. 41). He was, however, able to recall that he was "tossed" (*Id.* p. 30).

Roopnarine testified that: the bus was completely in the right lane at the time of and after the accident (*see Exhibit G*, pp. 13, 14, 15 & 18); he saw the vehicle just

at the moment of the accident (*Id.* pp. 16, 20, & 53); he immediately lightly applied the brakes and the bus came to a complete stop (*Ibid.* pp.18, 19, 21 & 22); Bajaj cut in front of her vehicle; and the points of impact between the vehicles were the front of the bus and the passenger side of Bajaj's vehicle.

Bajaj's testimony was inconsistent regarding the accident and damage to his car. Bajaj did, however, give the following testimony: the rear of his vehicle and the front of the bus were involved in the subject accident (*see* Exhibit F, p. 32); he was traveling in the right hand lane on Jericho Turnpike (*Id.* at p. 26); and there was no impact or contact on the right side (*Id.* at p. 63).

It is well settled that negligence cases by their very nature do not lend themselves to summary dismissal "since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination" (*Ugarriza v Schmieder*, 46 NY2d 471, 474 [1979]; *see also Andre v Pomeroy*, 35 NY2d 361, 364-365 [1974]).

In order to prevail in a motion for summary judgment in a personal injury action, a defendant "has the burden of establishing, *prima facie*, that he or she was not at fault in the happening of the subject accident. There can be more than one proximate cause" (*Suris v Citiwide Auto Leasing Inc.*, 145 AD3d 187 [2d Dept 2016] quoting *Lukyanovich v H.L. Gen. Contrs., Inc.*, 141 AD3d 693 [2d Dept 2016]).

Furthermore, the issue of comparative fault in a negligence action is generally a question for the jury to decide (*Blok v Mammadov*, 126 AD3d 836 [2d Dept 2015]).

The movants argue that the admissible portions of the police accident report (“point of impact” and “most damage”) and the post-accident photographs refute Bajaj’s testimony as they demonstrate damage to the passenger side of Bajaj’s vehicle, not the rear and damage to the bus on the left side front as well as the front of the vehicle.

The movants allege that Baja violated Vehicle and Traffic Law §1128(a), which states that “[a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.” “A violation of Vehicle and Traffic Law constitutes negligence as a matter of law” (*Gluck v New York City Tr. Auth.*, 118 AD3d 667 [2d Dept 2014] quoting *Vainer v DiSalvo*, 79 AD3d 1023, 1024 [2d Dept 2010]).

The police accident submitted by the movants constitutes inadmissible hearsay as it was not certified as a business record¹ (*see* CPLR 4518[a]; *Gezelter v Pecora*, 129 AD3d 1021 [2d Dept 2017]). However, the portion of the uncertified police report which refers to the vehicle damage codes may be “considered to the extent that

¹ The movants did not submit page 2 of the police accident report which sets forth the codes for the boxes.

it was based upon the personal observations of the police officer present at the scene and was under a business duty to make it” (*see* CPLR 4518[a]; *Westchester Med. Ctr. v Progressive Cas. Inc. Co.*, 51 AD3d 1014 [2d Dept 2008]; *Caldara v Utica Mut. Ins. Co.*, 130 AD3d 665 [2d Dept 2015]).

“A driver traveling with the right-of-way may be found to have contributed to the happening of the accident if he or she did not use reasonable care to avoid the accident or failed to see ‘what is there to be seen through the proper use of his or her senses’” (*Gezelter v Pecora, supra*, quoting *Lu Yuan Yang v Howsal Cab Corp.*, 106 AD3d 1055, 1056 [2d Dept 2013]). However, “[a] driver with the right-of-way who has only seconds to react to a vehicle that has failed to yield is not comparatively negligent for failing to avoid the collision” (*Desio v Cerebral Palsy Transport, Inc.*, 121 AD3d 1033 [2d Dept 2014] quoting *Vasquez v New York City Tr. Auth.*, 94 AD3d 870, 871 [2d Dept 2008]).

As noted above, both the plaintiff and the co-defendant, Baja, rely on co-defendant Baja’s testimony that he was purportedly traveling in the right lane at the time of the accident, and that the defendants’ bus touched the rear of his vehicle. This testimony differs from defendant Roopnarine’s testimony that the accident happened when co-defendant Bajaj attempted to change lanes, cutting off the bus, and causing the accident.

The conflicting deposition testimony of Roopnarine and Baja raise triable issues of fact as to how the accident occurred and whether Baja was the sole proximate cause of the accident (*see Milkins v New York City Tr. Auth.*, 140 AD3d 936 [2d Dept 2016]; *Castiglione v Kruse*, 27 NY3d 1018 [2016]; *Gonzalez v City of New Rochelle*, 132 AD3d 724 [2d Dept 2014]). Accordingly, the movants are not entitled to judgment on the issue of liability.

This constitutes the Decision and Order of this court.

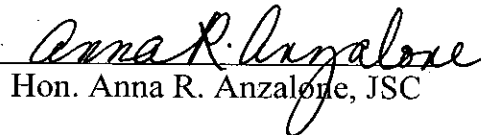
DATED: March 29, 2017
Mineola, New York

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NASSAU COUNTY
COUNTY CLERK'S OFFICE


Hon. Anna R. Anzalone, JSC