

<b>Bagarozzi-Bly v Adirondack Ins. Exch.</b>
2018 NY Slip Op 34396(U)
March 7, 2018
Supreme Court, Monroe County
Docket Number: Index No. 2015-1058
Judge: Debra A. Martin
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STATE OF NEW YORK : SUPREME COURT

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CARLA BAGAROZZI-BLY,

Plaintiff,

BENCH DECISION

Index No. 2015-1058

-against-

ADIRONDACK INSURANCE EXCHANGE,

Defendant.

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Defendant moved for summary Judgment, arguing that plaintiff failed to prove there was actual contact between her vehicle and the "hit and run" vehicle that allegedly caused her to swerve and hit a barrier. Such contact is required to obtain coverage under the SUM portion of her motor vehicle insurance policy with the defendant.

Defendant pointed to the original complaint, the police report, the transcript of plaintiff's report of the accident to defendant, and the depositions of the investigating officer and an eye witness, none of which mention an unidentifiable vehicle contacting plaintiff's vehicle before she swerved out of control. In fact, the officer was quite emphatic at his deposition that he would have asked her if there was another car involved and would have put that in his report, although he has no specific recollection of this particular accident investigation.

Plaintiff submitted an affidavit dated August 29, 2015 in opposition to the defendant's earlier motion to dismiss and with her opposition to the subject motion, in which she described a beige car that came from the left lane, hit her car on the driver's front quarter panel and caused her to take evasive action and go out of control. This

beige car fled the scene. On the basis of this affidavit, defendant's motion to dismiss was denied on October 20, 2015.


At her deposition on October 13, 2016, plaintiff gave the same description of the "tan" car that hit hers and fled. She recalled talking to the police officer afterwards but didn't see a copy of the report. She didn't recall giving a statement to the police, but did remember having trouble breathing and was taken away in an ambulance. She sustained a fractured rib, among other injuries.

Defendant urged the Court to disregard the plaintiff's "new" version of the accident and grant its motion based on "no contact". In making this argument, defendant relied upon many cases that granted a defendant's motion and dismissed similar claims based on a "feigned" issue of fact, one allegedly concocted after the accident to avoid the harsh application of the physical contact requirement. However, defendant overlooked a key component of this line of cases:

"As this Court has held many times, "[a] party's affidavit that contradicts [his or] her prior sworn testimony creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment" (*Harty v Lenci*, 294 AD2d 296, 298 [2002], citing *Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [2000], and *Kistoo v City of New York*, 195 AD2d 403, 404 [1993]; see also *Amaya v Denihan Ownership Co., LLC*, 30 AD3d 327, 327-328 [2006])."

*Burkoski v Structure Tone, Inc.* (40 AD3d 378, 383 [1st Dept 2007])(emphasis added); (see also *Hughes-Berg v Mueller*, 50 AD3d 856, 858 [2d Dept 2008]; *Martin v Savage*, 299 AD2d 903 [4th Dept 2002].) Here, plaintiff's prior statements were to the police officer at the scene and to an insurance adjuster on the phone, but not in the form of a sworn statement or at a deposition. Therefore, this is a question of credibility, which is cannot be decided by the Court on a motion for summary judgment. (*S. J. Capelin Assoc., Inc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]).

Dated: March 7, 2018  
Rochester, New York



Hon. Debra A. Martin, Acting J.S.C.