

Cronk v Volk

2019 NY Slip Op 34290(U)

September 17, 2019

Supreme Court, Orange County

Docket Number: Index No. EF004937/18

Judge: Robert A. Onofry

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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, J.S.C.

SUPREME COURT : ORANGE COUNTY

JOSEPH D. CRONK,

Plaintiff,

- against -

RICHARD L. VOLK and CARMEN CAY,

Defendants.

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

Index No. EF004937/18

DECISION and ORDER

-----X Motion Date: June 19, 2019

The following papers numbered 1 through 5 were read and considered on a motion by the Plaintiff, pursuant to CPLR § 3212, for summary judgment as against the Defendant Richard Volk on the issue of liability.

Notice of Motion- Ingber Affirmation- Exhibits A-C	1-3
Affirmation in Opposition- Kaplan	4
Affirmation in Reply- Ingber	5

Upon the foregoing papers, it is hereby,

ORDERED, that the motion is granted.

Introduction

The Plaintiff Joseph Cronk commenced this action to recover damages allegedly arising from a “chain reaction” style motor vehicle accident involving four vehicles.

According to a police report of the accident, a vehicle being driven by the Defendant Richard L. Volk struck a vehicle being driven by the Defendant Carmen L. Cay and pushed it into a vehicle being driven by non-party Nicolas Reyes, which pushed the Reyes vehicle into a

vehicle being driven by non-party Christine Ryan. According to the report, at the time of the accident, all vehicles other than Volk's were stopped for a red light. Further, according to the report: "Operator 1 [Volk] states he misjudged the distance to vehicle 2, striking it in the rear, pushing vehicle 2 into vehicle 3 and vehicle 3 into vehicle 4."

The Plaintiff was a passenger in the Reyes vehicle.

The Plaintiff moves for summary judgment as against Volk on the issue of liability.

In support of his motion, the Plaintiff submits an affirmation from counsel, Norman Ingber.

Ingber notes that a rear-end collision into a stopped or stopping vehicle creates a *prima facie* case of liability as against the operator of the vehicle, shifting the burden to that driver to offer a non-negligent explanation for the collision.

Thus, here, he asserts, the Plaintiff is entitled summary judgment on the issue of liability as against Volk.

In opposition to the motion, Volk submits an affirmation from counsel, Bryan Kaplan.

Initially, Kaplan asserts, the motion is premature, as all of the information and knowledge needed to oppose the motion is not exclusively within the knowledge of Volk. Rather, he notes, there was a vehicle (the Cay vehicle) between Volk's vehicle and the vehicle in which the Plaintiff was a passenger (the Reyes vehicle).

Further, Kaplan argues, significantly, there is not an affidavit from the Plaintiff that eliminates all issues of fact in the action. Rather, he notes, the Plaintiff merely submits an affirmation from his attorney, who lacks competent knowledge of the facts.

For example, he asserts, there is no competent evidence as to whether the Cay vehicle

was stopped or moving, or whether she came to a stop or what her role she played in the accident.

Indeed, he argues, given that two parties are named as Defendants, it is unclear why the Plaintiff is seeking summary judgment as against Volk only. "This is especially troubling," he asserts, because the bill of particulars alleges negligence by both defendants, each of whom was in a different car. At a minimum, Kaplan argues, the issue of comparative negligence cannot be sorted out on the motion.

Also, he asserts, Cay's knowledge of the actions of the car in front of her (in which the Plaintiff was a passenger) is withing Cay's exclusive knowledge and, until depositions are held, Volk has no way of knowing whether Cay or anyone else came to a short stop, etc.

In addition, he argues, if the Plaintiff is granted relief, he would not be entitled to an inquest on damages. Rather, he asserts, Volk would be entitled to a disclosure and a full trial on the issue of damages, and the Plaintiff will need to prove a "serious injury" within the meaning of the no-fault law.

In reply, Ingber argues that the affirmation from Kaplan suffers from the same infirmity he complains of in Ingber's affirmation, to wit: it is not based on personal knowledge of the facts. Otherwise, he notes, Kaplan did not submit an affidavit from Volk or anyone with personal knowledge of the facts.

Discussion/Legal Analysis

A rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of negligence with respect to the operator of the moving vehicle, and imposes a duty on that operator to rebut the inference of negligence by providing a non-negligent explanation for the

collision. *Tumminello v. City of New York*, 148 A.D.3d 1084 [2nd Dept. 2017]; *Phillip v. D & D Carting Co., Inc.*, 136 A.D.3d 18 [2nd Dept. 2015]. A non-negligent explanation may include a mechanical failure, a sudden, unexplained stop of the vehicle ahead, an unavoidable skidding on wet pavement, or any other reasonable cause. *Tumminello v. City of New York*, 148 A.D.3d 1084 [2nd Dept. 2017]. However, while a non-negligent explanation for a rear-end collision may include evidence of a sudden stop of the lead vehicle, vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her car and the car ahead. *Tumminello v. City of New York*, 148 A.D.3d 1084 [2nd Dept. 2017].

In a multi-vehicle, chain reaction accident, when the operator of a vehicle that was propelled into another vehicle by a following vehicle presents evidence that he or she was able to safely bring his or her vehicle to a stop behind the lead vehicle before being struck in the rear by a following vehicle, that operator has established his or her *prima facie* entitlement to judgment as a matter of law. *Niosi v. Jones*, 133 A.D.3d 578 [2nd Dept. 2015]. Thus, in chain collision accidents, the operator of the middle vehicle may establish *prima facie* entitlement to judgment as a matter of law by demonstrating that the middle vehicle was struck from behind by the rear vehicle and propelled into the lead vehicle. *Niosi v. Jones*, 133 A.D.3d 578 [2nd Dept. 2015].

To prevail on a motion for summary judgment on the issue of liability, a plaintiff must establish, *prima facie*, that the opposing party was negligent. A plaintiff is no longer required to show freedom from comparative fault in establishing his or her *prima facie* case. *Rodriguez v. City of New York*, 31 N.Y.3d 312 (2018); *Tsyganash v. Auto Mall Fleet Management, Inc.*, 163 A.D.3d 1033 [2nd Dept. 2018].

A motion for summary judgment may be denied as premature when it appears that facts essential to justify opposition may exist but cannot then be stated. *CPLR 3212(f); Aurora Loan Services, LLC v. LaMattina & Associates, Inc.*, 59 A.D.3d 578 [2nd Dept. 2009]. This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion. *Aurora Loan Services, LLC v. LaMattina & Associates, Inc.*, 59 A.D.3d 578 [2nd Dept. 2009]. However, the proponent must offer an evidentiary basis that disclosure might reveal or lead to relevant evidence, or that facts essential to oppose the motion were exclusively within the knowledge and control of the plaintiff. *Yiming Zhou v. 828 Hamilton, Inc.*, 173 A.D.3d 943 [2nd Dept. 2019]. The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the disclosure process is insufficient to deny the motion. *Cortes v. Whelan*, 83 A.D.3d 763, 922 N.Y.S.2d 419 [2nd Dept. 2011].

Here, although the Plaintiff has done a poor job of supporting his motion, the record is nonetheless sufficient to support the grant of summary judgment.

As noted by Volk, the Plaintiff did not submit an affidavit or affirmation from anyone with personal knowledge of the facts. Rather, in his affidavit, the Plaintiff merely avers that he read the affirmation from his attorney (Ingber), and “it is true and correct and that I was seriously injured in a Motor Vehicle accident on January 3, 2018.”

However, the police report is sufficient to establish the relevant facts.

In general, information in a police accident report is admissible as a business record to the extent that it is based upon the officer's personal observations while carrying out police duties. *Shehab v. Powers*, 150 A.D.3d 918 [2nd Dept. 2017]. Conversely, information is inadmissible to

the extent that it came from witnesses not engaged in the police business in the course of which the report was made, and the information does not qualify under any other hearsay exception.

Shehab v. Powers, 150 A.D.3d 918 [2nd Dept. 2017].

Here, there is no evidence that the responding officer observed the accident at bar.

However, in the report, the officer recounts that Volk stated at the scene that the cause of the accident was that he misjudged the distance between his and the Cay vehicle, which caused the chain reaction accident. This information is attributed to and could have only come from Volk. Further, it is admissible as against Volk under the hearsay exception for a party admission. *Iannielli v. Consolidated Edison Co.*, 75 A.D.2d 223 [2nd Dept. 1980]; *see generally, Hochhauser v. Electric Ins. Co.*, 46 A.D.3d 174 [2nd Dept. 2007].

The admission is sufficient to demonstrate, *prima facie*, that Volk was negligent in the happening in the accident.

In opposition, Volk did demonstrate that the Plaintiff's motion should be denied as premature. Indeed, contrary to Volk's contentions, clearly he himself is the party most likely to have personal knowledge of the relevant facts.

Further, that the Plaintiff did not seek summary judgment as against all Defendants is not controlling.

In addition, the Court does not read the Plaintiff's motion papers as seeking an immediate inquest as to damages. Nor would such relief be appropriate. Volk has not defaulted in the action.

In any event, Volk cross claimed as against Cay for contribution and indemnity. Thus, there must first be a determination as to comparative fault, if any.

Accordingly, and for the reasons discussed herein, it is hereby,

ORDERED, that the motion is granted, and it is further,

ORDERED, that the parties, through respective counsel, are directed to, and shall, appear for a Status Conference on Wednesday, November 6, 2019, at 9:15 a.m., at the Orange County Surrogate's Court House, Courtroom #3, 285 Main Street, Goshen, New York.

The foregoing constitutes the decision and order of the court.

Dated: September 17, 2019
Goshen, New York

E N T E R


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