

Progressive Advanced Ins. Co. v Talmadge
2019 NY Slip Op 34676(U)
December 5, 2019
Supreme Court, Orange County
Docket Number: Index No. EF009611-2018
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

-----X
PROGRESSIVE ADVANCED INSURANCE
COMPANY,

Plaintiff,

- against -

RYAN TALMADGE, ROY F. HOLDEN and KATIELYN
SHIMER,

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. EF009611-2018

**DECISION, ORDER AND
JUDGMENT**

Motion Date: October 16, 2019

The following papers numbered 1 to 7 were read and considered on a motion by the Plaintiff,
pursuant to CPLR §3212, for summary judgment on the complaint.

Notice of Motion- Zarkower Affirmation- Exhibits A-T	1-3
Affirmation - DeBraccio	4
Affirmation in Opposition- Cole-Hatchard	5
Affirmation in Opposition- Kaplan	6
Affirmation in Reply- Zarkower- Exhibits A-H	7

Upon the foregoing papers, it is hereby,

ORDERED, ADJUDGED and DECREED, that the motion is granted to the extent set
forth herein, and otherwise denied.

Factual/Procedural Background

The proceeding at bar arises from, and is a bi-product of, an accident that is the subject
of another action pending before this Court entitled *Talmadge v Holden*, under Index No.
EF00718-2018 (hereinafter "*Talmadge Action*"). A decision in that action has been issued

simultaneously herewith. Roy F. Holden and Katielyn Shimer, Defendants herein, are also named as Defendants in that action. The decision in the *Talmadge* Action is significant because it resolves several issues raised in this action as discussed *infra*.

The facts and allegations concerning the accident are discussed at length in the decision in the *Talmadge* Action, and will not be reiterated herein. Many are in dispute. The following is a basic summary of the facts that are not in dispute.

On April 29, 2017, sometime before 8:56 p.m., the Defendant Ryan Talmadge, the Defendant Roy Holden, and non-party Cale Davis drove to the Venture Inn (a bar) in Port Jervis, New York, in a Ford truck owned and being driven by Holden.

The Plaintiff herein, Progressive Advanced Insurance Company (hereinafter “Progressive”), insured Holden’s truck at that time.

While inside the bar, Holden was involved in a physical altercation and was, along with others, ejected.

Once outside, Holden, Talmadge and Davis retrieved Holden’s truck from across the street and pulled in front of the Venture Inn, stopping in the street in the wrong lane of travel. The truck was left idling in the street.

Additional arguing/fighting ensued.

At one point, the Defendant Katielyn Shimer, who was also at the bar, entered the truck and drove off. As she did, the rear passenger side tire of the truck rolled over Talmadge.

Shimer was arrested for driving while intoxicated and later pleaded guilty to related charges.

In the *Talmadge* Action, Talmadge argued that Holden could be held vicarious liable for

the conduct of Shimer pursuant to Vehicle and Traffic Law §388 because she was a permissive user of the truck.

Further, he alleged, Holden could be held vicariously liable for the conduct of Shimer pursuant to Vehicle and Traffic Law §1210 because, *inter alia*, he left the truck “unattended.”

Finally, he alleged, Holden could be held liable for the accident based on various violations of the Vehicle and Traffic Law arising from the illegal manner in which he stopped and parked the truck.

In the decision in the *Talmadge* Action (issued herewith), the Court held that Holden may not be held vicariously liable for the conduct of Shimer pursuant to Vehicle and Traffic Law §388 because she had neither his express nor implied permission to operate the truck.

Further, the Court held, Holden may not be held vicariously liable for the conduct of Shimer pursuant to Vehicle and Traffic Law § 1210 because, *inter alia*, he did not leave his truck “unattended” within the meaning of the statute.

Finally, the Court held, Holden could not be held liable to Talmadge based on various Vehicle and Traffic Laws he violated in the illegal manner in which he stopped and parked the truck due to a lack of proximate cause between such violations and the happening of the accident.

Thus, the *Talmadge* Action was dismissed as against Holden.

In the action at bar, Progressive seeks to disclaim coverage for the accident.

Concerning the same, the parties raise arguments essentially identical to those raised in the *Talmadge* Action concerning the applicability and effect of the statutes *supra*.

However, consideration of those arguments anew in this case is barred by application of the doctrine of collateral estoppel, to wit: the arguments were raised and decided against

Talmadge and Shimer in the *Talmadge* Action, and both Shimer and Talmadge had a full and fair opportunity to litigate the arguments. *Buechel v. Bain*, 97 N.Y.2d 295 (2001); *Clifford v. County of Rockland*, 140 A.D.3d 110 [2nd Dept 2016]; *Paar v. Bay Crest Ass'n*, 140 A.D.3d 113 [2nd Dept 2016]; *Jeffreys v. Griffin*, 1 N.Y.3d 34 (2003); *Mavro Realty Corp. v. M. Slayton Real Estate, Inc.*, 77 A.D.3d 892 [2nd Dept. 2010].

Thus, those arguments will not be summarized or discussed in this action.

Further, applying the doctrine of collateral estoppel to such arguments, it is declared in this action that Progressive need not further defend or indemnify Holden as to the events at issue to the extent that any cause of action is based upon the alleged vicarious liability of Holden for the conduct of Shimer.

This leaves only one issue in this action to be decided— the liability of Progressive for SUM/UM coverage for Talmadge, as a passenger of Holden's vehicle at the time of the covered event.

The facts relevant to that issue are as follows.

The initial police report of the accident indicated that Talmadge was ejected from Holden's truck as it was being driven by Shimer.

Progressive, using this information, and asserting that Shimer was not an permissive user of Hoden's truck, initially concluded that Talmadge might be entitled to SUM/UM coverage under the policy issued to Holden, to wit: Shimer was the equivalent of an uninsured driver, and Talmadge was an "occupant" of Holden's vehicle.

Indeed, in the complaint in this action, filed in September 2018, Progressive, in effect, conceded that Talmadge might be entitled to such benefits.

However, by letter to Talmadge dated May 17, 2019, Progressive sought to disclaim SUM/UM coverage on the ground that investigation in the case had revealed that Talmadge was a “pedestrian” when run over by Holden’s truck, not an occupant.

Thus, in the motion practice at bar, Progressive seeks to amend its complaint to deny such coverage.

Progressive asserts that disclosure in this and the *Talmadge* Action, including a videotape recording of the incident, revealed that Talmadge had actually exited the truck prior to Shimer entering the truck.

In opposition to the request to amend, Talmadge, who has no memory of the relevant events himself, argues that the contradictory and inconsistent testimony in the two cases demonstrates that there is at least a question of fact whether he was still in the truck when Shimer entered the same and drove off.

Further, he asserts, the Court should not consider the videotape because it has not been authenticated, and because it is a mere cellular telephone copy of the original, and is grainy and of extremely poor quality.

In reply, Progressive argues that the videotape should be considered because copies were provided to all parties, and all parties and counsel viewed the video at office of Bryan Kaplan (counsel for Shimer) on March 28, 2019.

Further, Progressive notes, the videotape was shown at the deposition of nonparty Cale Davis.

In any event, Progressive argues, summary judgment is warranted regardless, as other evidence demonstrates that Talmadge was out of the truck before he was run over.

Discussion/Legal Analysis

In relevant part, Progressive's SUM/UM coverage includes: "(2) Any other person while occupying: (I) A motor vehicle owned by the named insured * * *." The term "occupying" is defined as meaning "in, upon, entering into, or exiting from a motor vehicle."

Initially, the Court notes, the factual recitation in the police report concerning the happening of the accident is not based on the reporting officer's personal knowledge of the same. Thus, it is hearsay and not competent evidence of the matter asserted (*i.e.*, that Talmadge was ejected from the truck while it was moving). *Memenza v. Cole*, 131 A.D.3d 1020 [2nd Dept. 2015].

Further, as noted by the parties, the other testimony in the record is not clear as to that issue.

However, the videotape is sufficiently clear to be make certain conclusions. The Court finds review and consideration of the videotape to be warranted, despite its limitations.

Based on the videotape, the following relevant information may be concluded.

Holden's truck pulled up to the front of the bar, and stopped in the wrong lane of travel. The driver exited and walked over to a crowd. There appeared to be scuffling/arguing.

About seven seconds after the driver exited, another person exited from the passenger side of the truck and walked around to the driver's side.¹

About eight seconds after that, a second person exited from the passenger side of the truck.² Almost immediately, an unknown fourth person came from the right of the screen and

¹ Davis testified that he was this person.

² Davis testified that this person was Talmadge.

appeared to begin fighting with the second passenger to exit the truck. During this altercation, a person entered the driver's seat of the truck and shifted the truck into gear. At one point, it appeared that the fourth person pushed the second passenger against the side of the truck. At this point, the truck was being driven briskly to the right. It appeared that the second passenger was knocked to the ground by the rear passenger "suicide" door, which was open, and that he was run over.

Progressive argues that, based on such a scenario, Talmadge was not an occupant/passenger of the truck that was ejected and run over. However, this is not correct, regardless of whether or not Talmadge remained in the truck or not just prior to being run over.

The Court of Appeals has held that, where a departure from a vehicle is occasioned by or is incident to some temporary interruption in the journey, and the occupant remains in the immediate vicinity of the vehicle and, upon completion of the objective occasioned by the brief interruption, intends to resume his or her place in the vehicle, such a person does not cease to be a occupant/passenger. *Rice v. Allstate Ins. Co.*, 32 N.Y.2d 6 (1973). *See also, Rowell v. Utica Mutual Insurance Company*, 77 N.Y.2d 636 (1991); *J. Lawrence Construction Corp. v. Republic Franklin Insurance Company*, 145 A.D.3d 761 [2nd Dept. 2016]; *Rosado v. Hartford Fire Insurance Company*, 71 A.D.3d 860 [2nd Dept. 2010].

Here, there is no genuine dispute that the parties were in the process of leaving the bar at the time that Holden stopped the truck outside the bar. Indeed, Talmadge had arrived at the bar with Holden, and was leaving with Holden.

Further, there is no evidence or allegation that Talmadge intended the front of the bar to be the end of his occupancy of the vehicle, or that he requested or consented to the vehicle being

stopped. Rather, the stop, at the behest and under the control of Holden, was a temporary interruption in the journey.

In addition, regardless of which version of the facts is credited, Talmadge either remained in the truck, or in close proximity to the truck, at all relevant times.

Thus, Talmadge remained an occupant/passenger of the truck for purposes of SUM/UM coverage under the Progressive policy. *Government Employees Ins. Co. v. Nakhla*, 140 A.D.3d 762 [2nd Dept. 2016]; *Rosado v. Hartford Fire Ins. Co.*, 71 A.D.3d 860 [2nd Dept. 2010].

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

ORDERED, ADJUDGED and DECREED, that the branch of the motion which seeks to disclaim further coverage for the event at issue to the extent that it arises from the alleged vicarious liability of Roy F. Holden for the conduct of Katielyn Shimer is granted; and it is further,

ORDERED, that the branch of the motion which seeks to amend the complaint is denied; and it is further,

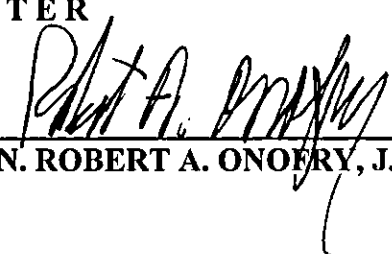
ORDERED, ADJUDGED and DECREED, that the branch of the motion which seeks to disclaim SUM/UM coverage for the event at issue to Ryan Talmadge is denied; and it is further,

ORDERED, that a Status Conference on this and the *Talmadge* Action is scheduled for Tuesday, January 21, 2020, at 1:30 p.m., at the Orange County Supreme Court, Court room #3, 285 Main Street, Goshen, New York, at which the parties, through respective counsel, are directed to, and shall, attend.

The foregoing constitutes the decision and order of the court.

Dated: December 5, 2019
Goshen, New York

ENTER


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