

Rosario v Delgado

2020 NY Slip Op 33671(U)

November 4, 2020

Supreme Court, Kings County

Docket Number: 516563/2019

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9**

_____ X

ARELIZ ROSARIO,

Plaintiff,

-against-

**FRANCHESCA DELGADO and
HOYT TRANSPORTATION,**

Defendants.

_____ X

DECISION / ORDER

Index No. 516563/2019

Motion Seq. No. 3

Date Submitted: 11/4/20

Recitation, as required by CPLR 2219(a), of the papers considered in the review of plaintiff's motion to reargue

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>46-58</u>
Affirmation in Opposition.....	<u>66</u>
Reply Affirmation.....	<u>68</u>

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

This is a personal injury action arising from a motor vehicle accident which took place on March 26, 2019 on 25th Avenue near the intersection of Astoria Boulevard in Queens, NY. Plaintiff Areliz Rosario was driving a car owned by her husband, Rafael Rosario, which came into contact with a yellow school bus driven by defendant Delgado and owned by defendant Hoyt Transportation. The court granted defendants' motion (MS #1) for summary judgment and dismissed the complaint by order dated August 10, 2020, and plaintiff now moves to reargue. For the reasons which follow, the court grants plaintiff leave to reargue, and upon reargument, recalls the decision and order dated August 10, 2020 and reinstates the complaint. The parties shall appear for a compliance conference on January 21, 2021.

Defendants moved for summary judgment on the issue of liability and an order dismissing the complaint. Defendant Delgado provided an affidavit which stated that the school bus she was driving had slowed down and came to a gradual stop to wait for traffic to clear when it was rear-ended by plaintiff. She states that she did not put the bus into reverse and back up. She also provided an affidavit from the bus matron, who stated that she was seated at the back of the bus, and stated that the bus had been stopped for five seconds when it was rear-ended by plaintiff, and it did not stop short or back up. Defendants also provided a copy of defendant driver's MV104, which is consistent with her affidavit. Finally, defendants provided a certified police report in which plaintiff Areliz Rosario is reported as having told the responding officer that the bus "suddenly stopped causing [her] to collide into [the bus]." The officer wrote on the report that the cause of the accident was plaintiff's following too closely [box 21]. On defendants' motion papers, the court found that defendants made a prima facie case for summary judgment. The burden then shifted to plaintiff to offer evidentiary proof demonstrating the existence of a material issue of fact requiring a trial.

Plaintiff opposed the motion with a cross motion (MS #2) for summary judgment on the issue of liability. Plaintiff supported her motion with an affidavit from Rafael Rosario, her husband, who was a passenger in the car, and an unsigned EUO transcript of the plaintiff, which was certified by the legal stenographer, who called herself a "court reporter" in one place and a "shorthand reporter and notary public" in another [E-File Doc. 35]. Mr. Rosario stated in his affidavit that the bus was stopped, waiting for traffic to clear, then, when it started moving, it hit a construction sign, and it then backed up to reposition itself, but plaintiff had moved forward when the bus moved forward, and so the bus hit the car when it backed up. He states that he saw the back-up lights on the bus and heard the backup

beeping sounds from the bus. Plaintiff testified to the same set of facts at her EUO, held on August 19, 2019.

Defendants argued that the plaintiff's EUO should not be considered by the court, as defendant was not there to cross-examine her and since it was unsigned, so it was inadmissible. The court erroneously agreed with defendants' counsel and concluded that the EUO provided was not in admissible form, and said "even if it were, it does not provide a non-negligent explanation. Instead, she states that the bus backed up and struck her car [Pages 19 and 20], which contradicts the statement she gave to the police at the scene." As the plaintiff's husband's affidavit was inconsistent with the police report, the court's decision concluded that it "raises feigned issues of fact and is insufficient to overcome the defendants' prima facie case for summary judgment."

There is not much appellate case law on this point, but the EUO was admissible, and the court was incorrect in determining that it was not. In *American States Inc. Co. v Huff*, 119 AD3d 478 (1st Dept 2014), the First Department concluded that an EUO of a party, if certified by the stenographer/reporter, is admissible, which is cited positively by the Appellate Term, Second Department in *Compas Medical v Elrac*, 47 Misc 3d 143(A) (2015).

In the Second Department, a party's statement on a certified police report is admissible if it is an exception to the hearsay rule, such as an admission. Here, plaintiff admitted that she rear-ended the bus, stating that it "stopped suddenly." Then, in her EUO several months later and after she had filed this action, she said the bus backed up and hit her. She also states at her EUO that that the police report was not correct when it states that there were no injuries, as she complained to the officer of pain to her neck but said she did not want an ambulance, and her husband drove her to an emergency room after the

police left. She was not asked if the police report was correct with regard to the description she gave of the accident.

Faced with plaintiff's contradictory statements, the court must determine whether to consider the EUO to raise a feigned issue of fact, as defendants' counsel argues, or whether to defer this issue of credibility to the trier of fact. The court concludes that the police report cannot defeat the testimony of the plaintiff and her husband here. They were witnesses to the accident, albeit interested parties. The officer was not a witness. Nor can the court determine issues of credibility. The certified police report sets forth a hearsay statement of the plaintiff driver, which, while admissible as an admission, and therefore an exception to the hearsay rule, it is still rebuttable as an inaccurate transcription of her statement to the officer. Had plaintiff filed an MV-104, as she should have done, which also stated that defendant had "stopped short," the outcome would be different, as that would have the plaintiff's signature on it. Here, plaintiff is entitled to the benefit of the doubt that the officer did not write her statement down correctly.

While there are decisions, such as *Yassin v Blackman*, ___AD3d___, 2020 NY Slip Op 05090 [2020]; *Batashvili v Veliz-Palacios*, 170 AD3d 791, 792 [2d Dept 2019]; *Abramov v Miral Corp.*, 24 AD3d 397 [2d Dept 2005] which support a trial court's conclusion that a subsequent and inconsistent affidavit "was a belated effort by the defendant to avoid the consequences of his earlier admission by raising what appeared to be a feigned issue of fact, which was insufficient to defeat the motion," the court finds that here, where the plaintiff was the driver in the rear, to find that she raised a feigned issue of fact would result in the complete dismissal of her action, while in the cases that approve of this analysis, and find that the party is not credible as a matter of law, the party raising the "feigned issue" is the defendant, and finding the defendant "not credible as a matter of law" does not result in the

dismissal of the plaintiff's action. It is also noted that the police officer drew a diagram of the accident that appears to be consistent with the plaintiff's claim that the bus had to back up in order to proceed, a conclusion which would be aided by the photos, depending on the information provided by the photos, which plaintiff testified were taken by Mr. Rosario, but they were not included in the prior motions. The court cannot conclude, on these facts, that the plaintiff's complaint must be dismissed. The officer, it is also noted, had to write down the names and ages of all of the children on the school bus, at 7:00 in the morning at a busy location. Plaintiff is entitled to the benefit of the doubt.

In conclusion, the plaintiff's motion is granted, and the complaint is re-instated to active status. The parties shall appear in CCP for a compliance conference, probably virtually, on January 21, 2021.

This constitutes the decision and order of the court.

Dated: November 4, 2020

ENTER :



Hon. Debra Silber, J.S.C.