

Capocciamo v Govia
2020 NY Slip Op 34639(U)
August 3, 2020
Supreme Court, Orange County
Docket Number: Index No. EF011578/2018
Judge: Sandra B. Sciortino
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To commence the statutory time 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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

-----X
**PAUL CAPOCCIAMO and
PATRICIA CAPOCCIAMO,**

Plaintiffs,

DECISION AND ORDER

Index No.:EF011578/2018

Motion Date: 6/30/2020

Sequence No. 2 & 3

-against-

**HENRY B. GOVIA, HENRY THOMPSON, DAVE
DOMINICK REID, LISA HUGHES, ALTAVIA Y.
FUSSELL and EAN HOLDINGS, INC.,**

Defendants.

-----X
SCIORTINO, J.

The following papers numbered 1 to 13 were read on the motions for summary judgment dismissing the Complaint as against Defendant, ALTAVIA Y. FUSSELL (Mot. Seq. #2) and Defendants, DAVE DOMINICK REID and LISA HUGHES (Mot. Seq. #3):

<u>PAPERS</u>	<u>NUMBERED</u>
<u>Mot. Seq.#2</u>	
Notice of Motion/Affirmation (Robbins) Exhibits A- M	1 - 3
Affirmation in Opposition (Cambareri)/ Exhibit 1	4 - 5
Affirmation in Opposition (McDonagh)	6
Reply Affirmation (Robbins)/ Exhibit A	7 - 8
<u>Mot. Seq.#3</u>	
Notice of Motion/Affirmation (McDonagh)/ Exhibits A - I	9 - 11
Memorandum of Law	12
Affirmation in Opposition (Robbins)	13

This is a personal injury action stemming from a motor vehicle accident which occurred on December 31, 2017 on Interstate 95 North at its intersection with the Pelham Parkway in Bronx,

New York. Plaintiffs commenced this action by the electronic filing of a Summons and Verified Complaint on November 26, 2018.

Plaintiff, Paul Capocciamo was operating his 2004 Audi in the middle lane with his wife, plaintiff Patricia Capocciamo, in the front passenger's seat. Defendants Govia, Reid and Fussell were operating a 2008 BMW, 2017 Toyota and 2017 Cadillac respectively.

Defendant Fussell moves to dismiss the Complaint claiming she was not involved in the accident involving the plaintiffs. (Seq. #2) In her affidavit, Fussell avers that, while traveling on the Bruckner Expressway, the vehicle directly in front of her stopped abruptly. As a result, her vehicle hit the rear of that vehicle which she describes as "an older model Toyota box car." (Seq. #2, Exhibit I, ¶5) After impact, she exited her car and spoke with the driver of the Toyota. After confirming there were no injuries, the Toyota driver reentered his vehicle and left the scene of impact. It was then that she observed there was a three-vehicle accident some distance ahead of where she was stopped on the Bruckner Expressway. According to Fussell, she did not come into physical contact with any vehicle that was involved in the accident which is the basis for this action nor did she have any conversation with anyone involved in that accident. She claims, however, that she was told to pull to the side of the road by a "first responder .. to allow for traffic to pass." (Seq. #2, Exhibit I, ¶11) She then recounted her story to a "law enforcement officer" who mistakenly put in the police report the she "struck one of the vehicles involved in the unrelated three vehicle accident in its rear." (Seq. #2, Exhibit I, ¶12)

In support of her motion, Fussell submits an uncertified copy of the police report and the deposition transcripts of both plaintiffs and defendant Reid. "Party admissions contained in an uncertified police report are admissible (*citations omitted*)." (*Harrinarain v Sisters of St. Joseph*, 173

AD3d 983, 983 [2d Dept 2019]) In the police report. Fussell is said to have stated that she rear ended defendant Reid's Toyota and defendant Reid is said to have stated that he rearended the plaintiffs' vehicle.

At his deposition, Mr. Capocciamo testified that he was struck by the Govia BMW two times and then three more times by a different vehicle or vehicles. (Seq #3, Exhibit G, page 30) At first he was unable to accurately remember which vehicle or vehicles struck his but he later stated that the occupants of the Cadillac, i.e. defendant Fussell, actually spoke to him and told him that she hit his vehicle. (Seq #3, Exhibit G, pages 90-91) Neither plaintiff specifically testified that their vehicle were struck by defendant Reid's Toyota. However, Mr. Capociamo testified that, after bouncing off the barrier, "another vehicle hit me, bounced off again, another 6 vehicle hit me, and another vehicle hit another vehicle, and hit me again." (Seq #3, Exhibit G, page 30)

Defendant Reid testified at his deposition (Seq. #2, Exhibit G; Seq #3, Exhibit F) that he believes he was hit by defendant Govia's BMW, not defendant Fussell's Cadillac, and that he did not strike any other vehicle. He remembers only one impact to his vehicle and does not remember seeing any of the vehicles prior to impact yet states that there were four cars involved in the accident (See G, p.17). He does not remember hearing or seeing any other accident on the road with any other vehicles and does not know what happened first. (Exhibit G, p.34, 37-38) Reid testified that, after he came to a stop on the shoulder, he exited his vehicle and looked back to see what occurred. The first thing he saw was the BMW and the driver, Govia, who Reid described as "very excited expressing that he was cut off by another car and that he was going so fast that he hydroplaned and that's when he lost control." (Exhibit G, p. 45) Reid was able to see the damage to the BMW on the front driver's side and the damage to his Toyota on the fender and bumper on the driver's side

rear (Exhibit G, p.48-49). All of the other vehicles involved in the accident were behind him on the road. Reid states that he walked over and spoke to the occupant's of the Cadillac and Fussell and her passenger said "they witnessed the whole accident and that the BMW hit [Reid] and then hit another vehicle." (Exhibit G, p.60)

The police report is clearly inconsistent with the testimony of all parties involved. The report states that Fussell rear ended Reid who then hit plaintiffs' vehicle. Reid states that he did not see or hear anything prior to impact with his car. He believes it was the BMW because it was behind him when he got out of his car and Govia was stating how he lost control. Fussell states that she was involved in an accident in which she rear ended a Toyota, but not the Toyota that was involved in the subject accident. Plaintiff states that he was hit by the BMW and another vehicle or vehicles one of which, he later remembers, as being the Cadillac driven by Fussell. There is no testimony of defendant Govia as he has not appeared in this action.

Defendants Reid and Hughes (vehicle owner) also move for summary judgment dismissing the complaint as against them. Defendants argue that, while the statements noted in the police accident report differ from the testimony of the parties, liability cannot be imputed to Reid for the happening of the subject accident. It is undisputed that Reid, at a minimum, was struck in the rear. There is no testimony or allegation that Reid was driving erratically or at a high rate of speed. There is testimony that he, or a Toyota in front of the Cadillac, stopped suddenly. Reid testified that there was only one impact to his vehicle which was in the rear and plaintiff remembers being struck by defendant Govia and being told by Fussell that she struck him.

Given that the litigating parties have proffered such different versions of events resulting in differing sets of facts upon which the issue of liability rests, their credibility and the weight to assign

their testimony and evidence is a proper matter for a jury to decide. The conflicting statements in the record as to the happening of the accident create a triable issue of fact as to whether Fussell's conduct caused or contributed to the accident (*Omrami v Socrates* 227 AD2d 459 [2d Dept 1996]). As the defendants have failed to demonstrate entitlement to judgment as a matter of law. The Court, therefore, need not examine the sufficiency of the opposition papers. (*see Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]).

In light of the above, it is

ORDERED that the motion for summary judgment dismissing the Complaint as against defendant Altavia Y. Fussell, is denied; and it is further;

ORDERED that the motion for summary judgment dismissing the Complaint as against defendants Dave Dominick Reid and Lisa Hughes is denied; and it is further

ORDERED that the parties shall appear for a virtual conference on August 25, 2020 at 1:30 p.m. A link will be emailed to counsel prior to the conference date.

Dated: August 3, 2020
Goshen, New York

ENTER:



HON. SANDRA B. SCIORTINO, J.S.C.

TO: *Counsel of Record via NYSCEF*