Senior v Bailon
2020 NY Slip Op 35286(U)
November 12, 2020
Supreme Court, Westchester County
Docket Number: Index No. 52535/2020
Judge: Lawrence H. Ecker
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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 WESTCHESTER

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JUVON SENIOR and
LAWRENCE HARDEN,

Plaintiffs,

-against-

IRENE BAILON and
FRANCISCO TORRES,

Defendants.

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INDEX NO. 52535/2020

DECISION/ORDER

Motion Seq. 1 & 2
Return Date: 8/19/2020

ECKER, J.

In accordance with CPLR 2219 (a), the decision herein is made upon considering all papers filed in NYSCEF relative to: (i) the motion of plaintiffs JUVON SENIOR (Senior) and LAWRENCE HARDEN (Harden) (jointly plaintiffs) (Mot. Seq. 1), made pursuant to CPLR 3212, for an order granting partial summary judgment as to liability against IRENE BAILON (Bailon) and FRANCISCO TORRES (Torres) (jointly defendants), striking defendants' fourth, fifth, tenth, and twelfth affirmative defenses, and dismissing defendants' counterclaim against Senior; and (ii) the motion of defendants (Mot. Seq. 2), made pursuant to 22 NYCRR 1200.0, Rule 1.7, for an order disqualifying plaintiffs' counsel from representing plaintiffs.

This is an action to recover damages for injuries plaintiffs allegedly sustained from a motor vehicle accident at the intersection of Commerce Street and Stevens Avenue in the Town of Mount Pleasant. The accident occurred on July 19, 2019.

Plaintiffs commenced this action in February 2020, asserting one cause of action sounding in negligence and alleging that a vehicle operated by Bailon and owned by Torres (defendants' vehicle) came into contact with a vehicle operated by Senior and occupied by Harden (plaintiffs' vehicle). A police accident report of the incident, attached to the complaint, suggests that the front of plaintiffs' vehicle impacted the driver-side of defendants' vehicle at a right angle resulting in a "T-bone" collision, which occurred near the center of the intersection.

In March 2020, defendants filed a verified answer with 13 affirmative defenses and a single counterclaim that the accident resulted in whole or in part from Senior's culpable

conduct, carelessness, or negligence.[1]

Prior to the close of discovery, plaintiff move (Mot. Seq. 1) for an order, pursuant to CPLR 3212, granting partial summary judgment as to defendants' liability for the accident, striking defendants' fourth, fifth, tenth, and twelfth affirmative defenses, and dismissing defendants' counterclaim. Defendants cross-move (Mot. Seq. 2) for an order, pursuant to 22 NYCRR 1200.0, Rule 1.7, disqualifying plaintiffs' counsel.

I. PLAINTIFFS' MOTION (MOT. SEQ. 1)

In support of their motion, plaintiffs submit, among other things, an affidavit of Senior, wherein he states that the traffic signal at the intersection of Commerce Street and Stevens Avenue was red in their direction as he and his passenger, Harden, approached the intersection in the eastbound lane of Stevens Avenue. Senior avers that he brought their vehicle to a complete stop at the light, and their vehicle initially stopped at the light first. About 5 to 10 seconds later, the traffic signal turned green and Senior lifted his foot off the brake pedal and depressed the accelerator pedal to move their vehicle through the intersection. As they moved forward, Senior states that Harden yelled, "watch out." According to Senior, Defendants' vehicle entered the intersection (from Senior's right side) and was "almost directly" in front of plaintiffs' vehicle when Senior immediately depressed the brake pedal and contacted defendants' vehicle.

Senior's affidavit includes photographs of both vehicles that depict significant damage to the front of plaintiffs' vehicle, and significant damage to the front and rear doors on the driver-side of defendants' vehicle, which, in the photograph, is flipped over and lying on its roof.

Senior further states that when Bailon exited her vehicle, she appeared intoxicated, unable to walk in a straight line, slurring her words, and that an "independent witness" called 911 and who later advised the responding police officer (Officer Hickey) that Bailon disregarded the red light in her direction.

Plaintiffs, through their counsel, assert that the facts regarding liability are undisputed. Plaintiffs further contend that Bailon was intoxicated at the time of the accident and that she was subsequently charged with violating Vehicle and Traffic Law §§ 1192 (3) (driving while intoxicated) and 1194 (1) (b) (refusal to take a breathalyzer test). In addition, plaintiffs rely on a certified copy of the police accident report of the scene, to further support their contention that Bailon disregarded the red light in her direction and that she was intoxicated.

Plaintiffs urge that entering an intersection against a red light in violation of Vehicle and Traffic Law § 1111 (d) is negligence as a matter of law and can be found to be the sole proximate cause if a collision occurs, and that a driver's intoxication constitutes negligence per se. Plaintiffs also argue that there are no bases in fact to support defendants' affirmative defenses as to defendants' liability and/or plaintiffs' alleged comparative fault.

[1] Plaintiffs have not answered defendants' counterclaim.

In opposition, defendants submit, among other things, an affidavit of Bailon, wherein she states that she approached the intersection from the northbound lane of Commerce Street at about 25-30 mph. Bailon avers that the traffic signal was green in her direction and remained so until she reached the intersection when the traffic signal changed to yellow, but having no opportunity to stop safely, she proceeded through the intersection while the traffic signal was yellow. At about the midpoint of the intersection, Bailon states that she felt a heavy impact to her rear door on the driver-side of her vehicle. Bailon further states that the impact was so forceful that it caused her vehicle to overturn two-and-a-half times, coming to rest upside-down in a parking lot near the intersection, that all her airbags deployed, and that she had hit her head.[2] After extricating herself from her vehicle, she felt dizzy and disoriented and was unable to speak clearly. Bailon confirms that she told Officer Hickey that plaintiffs were speeding and her light was green, but she clarifies that due to her condition, she was unable to clearly communicate that her light had changed to yellow immediately before the accident, and Officer Hickey refused to hear that part of her statement. Bailon explains that she was charged with driving while intoxicated because she refused a breathalyzer test and not because she was allegedly intoxicated, and that to date, she has never pled guilty or been convicted of driving while intoxicated as a result of the subject accident.

Defendants, through their counsel, contend that as a recipient of a green or yellow traffic signal, Bailon had the right-of-way, and that there is a question of fact as to whether she is the party who failed to yield. Defendants also argue that plaintiffs failed to establish with admissible, non-hearsay evidence that Bailon was intoxicated or that her actions caused the accident. Defendants assert that, assuming Senior had a green light, a recipient of a green light must still exercise reasonable care when entering an intersection and that Senior failed to exercise such care as evidenced by his affidavit wherein he states that it was his passenger, Harden — *and not him* — who noticed defendants' vehicle enter the intersection. Defendants claim that the force required to rollover defendants' vehicle and cause the significant damage depicted in plaintiffs' photographs does not support plaintiffs' assertion that they were completely stopped at a red light immediately prior to the accident, and that the photographs demonstrate that defendants' vehicle established control over the intersection at the time of impact. Lastly, defendants claim that the witness statements incorporated into the police accident report constitute inadmissible hearsay, and that any characterization of who had a green light in the report should be disregarded because Officer Hickey did not observe the traffic signal at the time of the accident.

In reply, plaintiffs note that Bailon does not refute that she was intoxicated, and plaintiffs proffer charging documents including a supporting deposition of Officer Hickey, which indicates that Bailon was arrested based on probable cause based on an odor of alcoholic beverage and glassy eyes. Plaintiffs also argue that Bailon's assertion of a yellow light is feigned and contradicts her statement to Officer Hickey that she had a green light.

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[2] Bailon further states that plaintiffs' vehicle is similar in size to her vehicle in order to cause her vehicle to roll over two-and-half times after impact. As such, she posits that plaintiffs "had to have been traveling at a high rate of speed prior to entering the intersection and [were] not stopped at a red light as [Senior] alleges" (Exhibit A to Mainhardt affirmation in opposition at ¶ 19 [NYSCEF Doc No. 17]).

It is well settled that the proponent of the summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *De Souza v Empire Transit Mix, Inc.*, 155 AD3d 605, 606 [2d Dept 2017]). Importantly, "[o]nce this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez*, 68 NY2d at 324; *Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 607 [1st Dept 2012]; see *De Souza*, 155 AD3d at 606; *Pinelawn Cemetery v Metropolitan Transp. Auth.*,155 AD3d 1069, 1072 [2d Dept 2017]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to raise a triable issue of fact (*Zuckerman*, 49 NY2d at 562; *Cabrera v Rodriguez*, 72 AD3d 553, 554 [2010]; *Hammond v Smith*, 151 AD3d 1896, 1898 [4th Dept 2017]).

"To prevail on a motion for summary judgment on the issue of liability, a plaintiff must establish, prima facie, not only that the opposing party was negligent, but also that the plaintiff was free from comparative fault" (*Bentick v Gatchalian*, 147 AD3d 890, 891 [2d Dept 2017]). Here, defendants raise triable issues of fact regarding Senior's comparative fault. First, there is a question of fact as to whether plaintiffs had a red light when plaintiffs' vehicle entered the intersection (*see Chuachingco v Christ*, 132 AD3d 798, 799 [2d Dept 2015]). Both parties submit conflicting affidavits as to which driver had the green light. In addition, plaintiffs rely on the police accident report, which contains statements Senior made to Office Hickey, as well as a statement attributed to a "911 caller," to support their contention that Senior had the green light. "Facts stated in a police report that are hearsay are not admissible unless they constitute an exception to the hearsay rule" (*Memenza v Cole*, 131 AD3d 1020, 1021 [2d Dept 2015] [internal quotation marks and citation omitted]; *see Yassin v Blackman*, 188 AD3d 62, ___, 2020 NY Slip Op 05090, *2-3 [2d Dept 2020]). Plaintiffs have not identified any exception to the hearsay rule, nor have they offered any response to defendants' arguments regarding this point of law. Moreover, the statements contained in the police accident report bear upon the ultimate issue of fact to be decided by the factfinder (*see Ardanuy v RB Juice, LLC*, 164 AD3d 1296, 1297 [2d Dept 2018]; *Hazzard v Burrowes*, 95 Ad3d 829, 831 [2d Dept 2012]; *Memenza*, 131 AD3d at 1022-1023).

Secondly, even if plaintiffs had a green light, there are issues of material fact as to whether Senior exercised reasonable care as his vehicle entered the intersection given that it was his passenger, Harden, who alerted him to defendants' vehicle, and as to whether Senior should have seen defendants' vehicle sooner in the immediate moments leading up to the accident (*see Vasquez v County of Nassau*, 91 AD3d 855, 856-857 [2d Dept 2012]; *Siegel v Sweeney*, 266 AD2d 200, 201 [2d Dept 1999]).

Third, there are also issues of fact as to whether plaintiffs were in fact stopped at the intersection prior to the accident and the level of speed that plaintiffs were traveling at the moment of impact given the extent of the damage the two vehicles sustained; and whether plaintiffs' vehicle, which is allegedly similar in size to defendants' vehicle, was able to cause

defendants' vehicle to rollover (*cf. King v Washburn*, 273 AD2d 725, 726 [3d Dept 2000] [affirming lower court's denial of plaintiff's motion to dismiss a counterclaim alleging comparative negligence because triable issues of fact existed regarding, inter alia, the speed at which plaintiff was traveling prior to the accident]). Accordingly, that branch of plaintiffs' motion for an order granting partial summary judgment as to liability against defendants is denied.[3]

Next, the court addresses plaintiffs' applications to strike certain affirmative defenses of defendants and to dismiss defendants' counterclaim against Senior. For the reasons set forth above, defendants have raised triable issues of fact as to Senior's comparative fault. Therefore, both of plaintiffs' applications to strike defendants' fourth affirmative defense regarding plaintiffs' culpable conduct and to dismiss defendants' counterclaim against Senior for his culpable conduct, are likewise denied.

The fifth affirmative defense pertains to plaintiffs' alleged failure to wear seatbelts. Senior states in his affidavit that he and Harden were wearing seatbelts at the time of the accident. Defendants fail to submit any arguments or evidence in rebuttal. However, the court takes judicial notice of the windshield damage depicted in the photograph of plaintiffs' vehicle, which appears to be a circular crushed area of glass near the center of the passenger side of the windshield. The record is devoid of what caused such damage, but the cause could bear on this affirmative defense. Nonetheless, an assertion of a seatbelt defense goes to the determination of damages and not to liability (*see Alexander v Stendardi*, 2019 NY Misc LEXIS 14231, *8 [Sup Ct, Bronx County 2019, index No. 21927/2018E]). As such and considering their premise of being awarded summary judgment motion on liability, plaintiffs' application to strike defendants' fifth affirmative defense is denied.

The tenth affirmative defense pertains to defendants being confronted with an emergency situation. Through her affidavit, Bailon states that she reached the midpoint of the intersection and observed that the traffic signal remained yellow and she did not see the vehicle that struck her. As such, Bailon fails to establish that her actions were dictated by an emergency when she was not aware of plaintiffs' vehicle until it impacted her vehicle (*cf. Starkman v City of Long Beach*, 106 AD3d 1076, 1078 [2d Dept 2013]). As such, plaintiffs' application to strike defendants' tenth affirmative defense is granted.

The twelfth affirmative defense pertains to actions of third parties. Plaintiffs assert that the accident was caused solely by Bailon's negligence. Defendants fail to identify any third party who contributed to the happening of the accident and fail to adduce proof to otherwise support this affirmative defense. Thus, plaintiffs' application to strike defendants' twelfth affirmative defense is granted.

[3] Because triable issues of fact exist relative to Senior's comparative fault, the court need not reach the parties contentions regarding Bailon's alleged intoxication in deciding plaintiffs' application for partial summary judgment as to liability.

II. DEFENDANTS' CROSS MOTION (MOT. SEQ. 2)

In support of their cross motion, defendants argue that their counterclaim against Senior alleges culpable conduct on Senior's part and such creates a conflict of interest between Senior, as the driver of plaintiffs' vehicle, and Harden, as his passenger. In response, plaintiffs reveal that Senior and Harden are coemployees for Cardinal McCloskey Community Services and were engaged in company business at the time of the accident.[4] Plaintiffs argue that, given these circumstances, Senior is insulated from any claims by Harden. In reply, defendants appear to concede this latter point, but nonetheless assert that Senior and Harden have conflicting pecuniary interests. Defendants further contend that plaintiffs must testify in the manner outlined in Senior's affidavit, which defendants allege are at odds with the evidence (e.g., comparing the heavy damage to each vehicle to Senior's testimony that they were stopped at the light immediately before impact); implicating Senior as the proximate cause of the accident (e.g., not seeing what he should have seen); and that upon hearing plaintiffs' combined testimony, a jury may ascribe no liability to Bailon for the accident (akin to finding Senior 100% liable) — which would deprive both Senior and Harden any relief based on Senior's incriminating affidavit testimony.

In a vehicle collision case, once a defendant asserts a counterclaim against a plaintiff driver, "the pecuniary interests of the driver [conflict] with those of the passenger" (*Shelby v Blakes*, 129 AD3d 823, 825 [2d Dept 2015]; *see Alcantara v Mendez*, 303 AD2d 337, 338 [2d Dept 2003] ["Ramirez has a conflicting personal interest antagonistic to her passengers who could assert claims against her for negligence just as the other driver, Carrasquillo, has done in the counterclaim"]). However, when coemployees are involved in a personal injury action, "Workers' Compensation qualifies as an exclusive remedy when both the plaintiff and the defendant are acting within the scope of their employment, as coemployees, at the time of injury" (*Power v Fraiser*, 131 AD3d 461, 462 [2d Dept 2015]). "Thus, the Workers' Compensation Law offers the only remedy for injuries caused by a coemployee's negligence in the course of employment" (*id*. [internal brackets, quotation marks and citation omitted]).

Here, defendants do not dispute that Senior and Harden are coemployees but assert that they nonetheless have conflicting pecuniary interests because Senior's purported incriminating affidavit testimony may deprive Harden relief from a jury. However, defendants' self-defeating arguments reinforce that Senior and Harden's interests *are aligned* in that both want a factfinder to find Bailon liable — *to any degree above zero percent* — for the accident.

Perhaps the case closest to the present facts regarding disqualification of an attorney representing a driver and passenger who are coemployees is *Ferrara v Jordache Enters. Inc.* (12 Misc 3d 769 [Sup Ct, Kings County 2006]). In *Ferrara*, a matter involving a collision between a school bus and a car, plaintiff bus driver and plaintiff bus matron were

[4] In support of their coemployee relationship, plaintiffs submit affidavits by Senior and Harden, both attaching documentation regarding Workers' Compensation claims filed with the State of New York Workers' Compensation Board (Exhibits C and D to Handler affirmation in opposition [NYSCEF Doc Nos. 33 - 34]).

represented by one law firm (*id*. at 770). The driver and matron were employed by different corporations, but in opposition to a motion to disqualify the law firm representing them, plaintiffs argued that the corporations were part of a joint venture, thusmaking the driver and matron coemployees insulated from claims against each other (*id*. at 771). The *Ferrara* court rejected plaintiffs' argument because plaintiffs failed to establish the predicate for such defense, that a joint venture existed — a fact laden issue (*id.* at 771).

Here, though, the court need not embark on a fact expedition to find that this case differs uniquely from cases involving dual representation of a driver and a passenger. The coemployee relationship between Senior and Harden forecloses the substantive avenues of conflict present in those cases. For example, "[a]n attorney could not zealously represent two clients whose interests are so directly adverse, a passenger, who is presumably free from negligence, and a driver, whose negligence is hotly contested by differing accounts of the accident. The negligence of either or both drivers affords redress to the plaintiff-passenger, while only the negligence of the opposing driver affords redress to the plaintiff-driver" (*Jong Keon Lim v Purisic*, 2013 NY Slip Op 30395[U] [Sup Ct, Queens County 2013]). As noted above, Harden, the passenger, has no redress against Senior by virtue of their coemployee relationship. For either Harden or Senior to prevail, there is only one objective — proving that Bailon was negligent as a matter of law. Harden and Senior's interests are aligned. Simply put, the conflicts that form the basis for a disinterested lawyer from believing that he or she can competently represent the interest of each client are not present in this case. Without such conflicts, the court will not disqualify plaintiffs' counsel at this time. Defendants fail to challenge plaintiffs' coemployee relationship or question whether the two were acting outside the scope of their employment at the time of the accident.[5] Accordingly, defendants' cross motion for an order disqualifying plaintiffs' counsel from representing plaintiffs, is denied.

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by the parties was not addressed, it is hereby denied. Accordingly, it is hereby:

ORDERED that the branch of the motion of plaintiffs JUVON SENIOR and LAWRENCE HARDEN (Mot. Seq. 1), made pursuant to CPLR 3212, for an order granting partial summary judgment as to liability against defendants IRENE BAILON and FRANCISCO TORRES, is denied; and it is further

ORDERED that the branch of the motion of plaintiffs JUVON SENIOR and LAWRENCE HARDEN (Mot. Seq. 1), for an order striking defendants' fourth, fifth, tenth, and twelfth affirmative defenses, is denied, except as to the tenth and twelfth affirmative defenses, which are hereby stricken; and it is further

[5] In her affirmation in support of defendants' cross motion, Bailon attests to an alleged statement made by Senior regarding "hot fast food" that he and Harden "wanted to get home to eat" (Exhibit A to Mainhardt affirmation in opposition at ¶ 16 [NYSCEF Doc No. 17]); however, Bailon's recollection of Senior's alleged statement is inadmissible hearsay and falls short of a credible challenge to plaintiffs' coemployee defense to defendants' cross motion.

ORDERED that the branch of the motion of plaintiffs JUVON SENIOR and LAWRENCE HARDEN (Mot. Seq. 1) for an order dismissing defendants' counterclaim against Senior, is denied; and it is further

ORDERED that plaintiff JUVON SENIOR shall serve his reply to defendants' counterclaim against him within twenty (20) days of entry of this decision and order; and it is further

ORDERED that the cross motion of defendants IRENE BAILON and FRANCISCO TORRES (Mot. Seq. 2), made pursuant to 22 NYCRR 1200.0, Rule 1.7, for an order disqualifying plaintiffs' counsel from representing plaintiffs, is denied; and it is further

ORDERED that plaintiffs JUVON SENIOR and LAWRENCE HARDEN shall serve a copy of this decision and order with notice of entry upon all parties within twenty (20) days of entry and shall file proof of service thereof via NYSCEF within ten (10) days thereafter; and it is further

ORDERED that the parties shall appear at the Compliance Conference Part of the Court on November 17, 2020, as is directed in the referee report, so ordered by the Hon. Joan B. Lefkowitz, J.S.C. on October 5, 2020 (*see* NYSCEF Doc No. 37).

The foregoing constitutes the Decision/Order of the court.

Dated: November 12, 2020
White Plains, New York

E N T E R:

/s/ Lawrence H. Ecker
HON. LAWRENCE H. ECKER, J.S.C.
November 12, 2020, 1:33 p.m.

Appearances:
All parties via NYSCEF.