Cuesto v Castano
2020 NY Slip Op 35510(U)
August 27, 2020
Supreme Court, Bronx County
Docket Number: Index No. 21589/2019E
Judge: Veronica G. Hummel
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - IAS PART 31

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MARINO CUESTO, ANEWDY PEREZBLANCO, and JOSE LIRIANO CRUZ,
Plaintiffs,

Index No. 21589/2019E
DECISION and ORDER
Mot. Seq. 1

-against-

ROWELL CHARIN LUGO CASTANO and RIGO LIMO-AUTO CORP.,
Defendants.

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VERONICA G. HUMMEL, A.J.S.C.:

In accordance with CPLR 2219(a), the decision herein is made upon consideration of all papers filed in NYSCEF as submitted by the parties regarding the motion of plaintiff MARINO CUESTO (plaintiff)[Mot. Seq. 1], made pursuant to CPLR 3212, for an order granting plaintiff partial summary judgment as to liability against defendants ROWELL CHARIN LUGO CASTANO and RIGO LIMO AUTO GROUP (defendants).

In this action, plaintiff seeks monetary damages for alleged serious personal injuries arising out of a two-car accident that occurred on March 16, 2018 (the Accident) on Tarrytown Road at or near the intersection with School Street, White Plains, N.Y. At the time of the Accident, plaintiff and non-movant plaintiffs Anewdy Perezblanco and Jose Liriano Cruz (co-plaintiffs) were passengers in a motor vehicle allegedly owned by defendant Rigo Limo-Auto Corp. (Rigo Limo) and operated by defendant Rowell Charin Lugo Castano (the defendant driver). The driver and owner of the other vehicle involved in the collision (the other vehicle) are not parties to this action and have not been deposed.

The depositions of plaintiff and co-plaintiffs have been completed, and the deposition of the defendant driver remains outstanding. Plaintiff testified that he did not see the damage to the respective vehicles.

Co-plaintiff Blanco testified that he saw the other vehicle when the Accident happened. He testified that the front, left-side of the defendants' vehicle came into contact with the rear right tire of the other vehicle. After the collision, co-plaintiff Blanco observed damage to the left front of defendants' vehicle and damage to the rear, right-side of the other vehicle.

Co-plaintiff Cruz testified that he did not observe the Accident. He testified that he felt a "very strong impact" between the front, left-hand side of defendants' motor vehicle and the rear of the other vehicle. Upon exiting defendants' vehicle, co-plaintiff Cruz saw that the front part of the bumper on defendants' vehicle was destroyed and the rear of the other vehicle was damaged.

Plaintiff also submits a copy of a police report in which the officer recorded, based on the registration, that Rigo Limo was the owner of defendants' vehicle. The report also provides that the defendants' car struck the other vehicle "from behind", and includes a diagram showing defendants' car crossing over the relevant lane marking and striking the other vehicle.

Defendants served a Notice to Admit containing photographs that are allegedly of the two cars involved in the Accident. The photographs show damage to the front left bumper and side of defendants' vehicle and the other vehicle's rear right quarter panel.

The proponent of a 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 . . ." (*Winegrad v New York Univ. Med Ctr.*, 64 NY2d 851 [1985]). The moving party is entitled to summary judgment only if it tenders evidence sufficient to eliminate all material issues of fact from the case (*Winegrad v New York University Medical Center*, *supra; Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]) If a party makes a *prima facie* showing of its entitlement to summary judgment, the opposing party bears the burden of establishing the existence of a triable issue of fact (*Zuckerman v City of New York, supra*). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Casper v Cushman & Wakefield*, 74 AD3d 669 [1st Dept 2010]; *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227 [1st Dept (2006)]). A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, *prima*

facie, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries (*see Rodriguez v. City of New York,* 31 NY3d 312 [2018]).

Based on the record, plaintiff sets forth a *prima facie* showing warranting partial summary judgment as to liability. In terms of defendants' liability for the Accident, plaintiff sets forth a *prima facie* case based on the co-plaintiffs' testimony that defendants' vehicle struck the back right, rear or side of the other vehicle, causing the Accident (*Bachman by Charles v Hong*, 169 AD3d 436 [1st Dept 2019]). Of note, drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident (*Martinez v WE Transport, Inc.,* 161 AD3d 458 [1st Dept 2018]; *Johnson v. Phillips*, 261 AD2d 269[1st Dept. 1999]; *see Fernandez v Ortiz,* 183 AD3d 443 [1st Dept 2020]). The operator of a motor vehicle approaching another motor vehicle from the rear is obligated to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (*see* Vehicle and Traffic Law 1129 [a]; *Darmento v Pacific Molasses Co., Inc.,* 81 NY2d 985 [1993]). Moreover, under the Vehicle and Traffic Law, whenever a roadway has been divided into two or more clearly marked lanes for traffic, a vehicle shall be driven as nearly practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety (*see* Vehicle and Traffic Law 1128(a); *Castro v Hatim*, 174 AD3d 464 [1st Dept 2019]). An operator who had the right of way, is entitled to anticipate that other vehicles will obey traffic laws (*Steigelman v Transervice Lease Corp.*, 145 AD3d 439 [1st Dept 2016]; *Paulino v Guzman,* 85 AD3d 631 [1st Dept 2011]).

In opposition, defendants fail to submit any affidavit or other evidence concerning how the accident occurred that would generate an issue of fact as to whether the defendant driver was negligent in the operation of the vehicle (*see Castro v Hatim, supra*). The affirmation in opposition submitted by defendants' attorney is not based on personal knowledge, and therefore fails to generate an issue of fact as to the cause of the accident as the affirmation has no probative value (*Thompson v Pizzaro*, 155 AD3d 423 [1st Dept 2017]; *Vasquez v Chimborazo*, *supra*; *Bendik v Dybowski*, 227 AD2d 228 [1st Dept 1996]; *see Brown v Nocella*, 149 AD3d 470 [1st Dept 2017]). Of note, defendants do not explain the failure to submit an affidavit from an individual with

personal knowledge of the Accident nor the failure to implead or depose the driver of the other vehicle. Nor do defendants argue that motion is premature (*see Flores v City of New York,* 66 AD3d 599 [1st Dept 2009]).[1]

In addition, the submitted photographs of the cars' damage, without more, are insufficient to create a question of fact as to defendants' liability for the collision or to show a nonnegligent explanation for the defendant driver's striking of the other vehicle. Standing alone, the photographs do not show that the defendant driver acted without negligence. In light of defendants' decision to not submit an affidavit from the defendant driver or depose the driver of the other vehicle, any speculation that the other vehicle's driver could also have been at fault based on the photographs is insufficient to deny plaintiff's motion for summary judgment given the uncontested showing of negligence (*Estate of Bachman v Hung,* 169 AD3d 436 [1st Dept 2019]; *see Martinez v Cofer*, 128 AD3d 421, 422 [1st Dept 2015]).

While totally ignoring the apparent conflict of interest issue, Rigo Limo next argues that summary judgment must be denied because no admissible proof is proffered by the movant proving that Rigo Limo allowed for permissive use of the relevant vehicle or that Rigo Limo is vicarious liability for the defendant driver's negligence [NYSCEF No. 21 p4]). The police report[2], however, lists Rigo Limo as the registered owner of the vehicle. As to the issue of ownership, although the police report submitted by plaintiff is not certified, the vehicle registration information therein is admissible, because drivers are obligated by law to present insurance and registration information to a responding officer (*see Lopez v Ford Motor Credit Co.*, 238 AD2d

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[1] Defendants do not argue that the motion is premature nor do they set forth an evidentiary basis for denying the motion as premature as the information as to why the defendants' vehicle struck other vehicle is within defendants' own knowledge (*Estate of Bach v Hong*, 169 AD3d 436 [1st Dept 2019]; *Rodriguez v Garcia*, 154 AD3d 581 [1st Dept 2017]; *see Castaneda v DO & CO New York Catering, Inc.*, 144 AD3d 407 [1st Dept 2016]). Depositions are unnecessary where defendants have personal knowledge of the facts, yet fail to meet their obligation of laying bare their proof and presenting evidence sufficient to raise a triable issue of fact (*Thompson v Pizzaro,* 155 AD3d 423 [1st Dept 2017]; *Avant v Cepin Livery Corp.,* 74 AD3d 533, 534 [1st Dept 2010]).

[2] In terms of plaintiff's burden to set forth a *prima facie* case showing that defendants caused the Accident, the court did not consider the statement by the other vehicle's driver, or the conforming diagram, recorded by the officer in the uncertified police report. The statement by the driver of the other vehicle that defendants hit his car in the rear constitutes inadmissible hearsay concerning an ultimate factual issue in the case, as there is no evidence that the responding officer witnessed the accident (*see, Figueroa v Luna,* 281 AD2d 204 [1st Dept 2001]; *Roman v Cabrera,* 113 AD3d 541 [1st Dept 2014] *see, Rodriguez v Sit,* 169 AD3d 406, [1st Dept 2019]).

211 [1st Dept 1997] [admitting registration portion of accident report]; *American Sec. Ins. Co. v Ferrier,* 110 AD2d 503 [1st Dept 1985] [admitting insurance portion of accident report]).

Furthermore, Vehicle and Traffic Law 388(1) imputes to the owner of a car the negligence of any person who uses or operates it with the owner's permission. This section gives rise to a presumption that the vehicle is being operated with the owner's consent. This presumption must be rebutted by substantial evidence to the contrary (*see Murdza v Zimmerman*, 99 NY2d 375 [2002]; *see Country-Wide Ins. Co. v National R.R. Passenger Corp.*, 6 N.Y.3d 172 [2006]). Here, defendants fail to submit any evidence, competent or otherwise, suggesting implausibility, collusion, or implied permission to require the issue of consent to be submitted to a jury (*American Country Insurance Company v Umude*, 176 AD3d 542 [1st Dept 2019]). Of note, Rigo Limo does not claim that it informed the police of an unauthorized use (see *id.; Motor Veh. Acc. Indem. Corp. v Levinson,* 218 AD2d 606, 607 [1st Dept 1995]). As such, Rigo Limo fails to generate an issue of fact as to its ownership of the relevant vehicle and vicarious liability for the defendant driver's negligence.

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

ORDERED that the motion of MARINO CUESTO (plaintiff)[Mot. Seq. 1], made pursuant to CPLR 3212, for an order granting plaintiff partial summary judgment as to liability against defendants ROWELL CHARIN LUGO CASTANO and RIGO LIMO AUTO GROUP is granted.

The parties are reminded that this matter is scheduled for a compliance conference at 9:30 a.m. on December 1, 2020.

This constitutes the decision and order of the court.

Dated: August 27, 2020

ENTER:

Hon. Veronica G. Hummel

VERONICA G. HUMMEL, A.S.C.J.

Cuesto v. Castano
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