

Macaluso v Sardina
2021 NY Slip Op 33774(U)
April 15, 2021
Supreme Court, Orange County
Docket Number: Index No. EF003687-2020
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

HEATH B. MACALUSO,

Plaintiff,

- against -

MARIE SARDINA AND JENICA A. SARDINA,

Defendant.

-----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. EF003687-2020

DECISION and ORDER

Motion Date: March 3, 2021

The following papers numbered 1 to 14 were read and considered on (1) a motion by the Defendant Marie Sardina, pursuant to CPLR § 3212, for summary judgment dismissing the complaint as against her; and (2) a motion by the Defendant Jenica Sardina, pursuant to CPLR § 3212, for summary judgment dismissing the complaint as against her.

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Upon the foregoing papers, it is hereby,

ORDERED, that the motion of Defendant Marie Sardina is granted; and it is further

ORDERED, that the motion of Jenica A. Sardina is denied.

Introduction

The Plaintiff Heath Macaluso commenced this action to recover damages arising from a multiple vehicle chain-reaction accident.

The Defendants both move for summary judgment, each arguing that they were not at fault in the happening of the accident.

The Defendant Marie Sardina asserts that she was struck from the rear and pushed into the Plaintiff's vehicle.

The Defendant Jenica Sardina asserts that she was struck from the rear by a driver who fled the scene and pushed into the rear of Marie Sardina's vehicle.

In opposition, the Plaintiff avers that he saw no other driver flee the scene, and that Jenica Sardina made remarks at the scene which indicated that she was at fault in the happening of the accident.

The motion of Marie Sardina is granted, and the motion of Jenica Sardina is denied.

Factual/Procedural Background

According to a police report of the accident, the accident concerned four vehicles and occurred as follows: Vehicle one, being driven by a driver who fled the scene, struck the rear of the vehicle being driven by the Defendant Jenica Sardina, pushing it into the rear of a vehicle being driven by the Defendant Marie Sardina, pushing it into the rear of a vehicle being driven by the Plaintiff Heath Macaluso. The report indicates that Jenica Sardina told the responding officer that she was struck from the rear by a vehicle which left the scene.

Both Defendants move for summary judgment seeking dismissal of the complaint.

In support of Defendant Marie Sardina's motion, she submits her own affidavit.

Sardina avers that, on November 6, 2018, she was driving her vehicle on East Main Street in Port Jervis, New York, near what she knows as the Tri State Bridge. Traffic was heavy due to construction. As a result, she was stopped for at least five (5) minutes before the accident

occurred, waiting for traffic to clear. She was behind a vehicle being driven by the Plaintiff, who was stopped in front of her.

Marie Sardina avers that, as she remained at a full stop with her foot on the brake, she was struck from the rear by a vehicle being operated by the co-defendant, Jenica A. Sardina. As a result of the impact, she was pushed into the trailer hitch of the Plaintiff's vehicle.

Finally, she avers, prior to the accident, her vehicle did not have any operational problems and her brake lights and tail lights were in good working order.

In support of Defendant Jenica A. Sardina's motion, Jenica Sardina submits her own affidavit. Jenica Sardina avers that, on November 6, 2018, she was operating her vehicle on East Main Street in Port Jervis, Orange County, New York. She brought her vehicle to a stop for a red traffic light on East Main Street at the intersection of Jersey Avenue. After the light changed to green, she started to proceed through the intersection. However, she had to stop due to traffic caused by construction. She brought her vehicle to a complete stop approximately 5 to 10 feet behind a vehicle being driven by Marie Sardina. Jenica Sardina avers that, after she had been stopped for at least thirty (30) seconds, she was truck from the rear and pushed into Marie Sardina's vehicle. Jenica Sardina avers that the vehicle which struck her's fled the scene, which she told the police.

As a result of the accident, she avers, she suffered damage to the front and rear of her vehicle, as is shown by appended photographs.

Finally, Jenica Sardina avers, prior to the accident, there was no damage to her vehicle, it did not have any mechanical or operational problems, and her brake lights and tail lights were in good working order.

In opposition to the motions, the Plaintiff submits his own affidavit.

The Plaintiff avers that, at the time of the accident, he was driving a mini van. The weather was cloudy and the roads were wet.

Just before the accident, he avers, he was at a complete stop at the intersection of East Main Street and North Street. He was stopped for approximately 30 seconds before he felt a hard impact to the rear of his vehicle. He exited his vehicle and observed that it had been struck by a vehicle being driven by Marie Sardina, which had been struck by a vehicle being driven by Jenica Sardina. He spoke to both Defendants after the accident, and filmed the accident scene on his cellular telephone.

At the scene of the accident, he avers, Jenica Sardina did not tell him that she had been rear-ended by a driver who had fled the scene. Further, he did not hear any tires or brakes squeal, or see any other vehicle leaving the scene of the accident. Indeed, he avers, Jenica Sardina told him that her brakes had “locked up” and that she had slid into the rear of Marie Sardina’s vehicle.

Finally, the Plaintiff avers, he was not aware that Jenica Sardina claimed to have been rear-ended by a fourth driver who fled the scene until his attorneys informed him of the same on this motion practice. Nor was he aware that Jenica Sardina had made such a claim to the police officer who responded to the accident.

In further opposition to the motion, the Plaintiff submits an affirmation from counsel, Mark Cambareri.

Cambareri asserts that, on the video recording made by the Plaintiff at the accident scene,

Jenica Sardina can be heard saying, "I have rear wheel drive. My car just slid. It wouldn't stop."¹

Further, he argues, the photographs that Jenica Sardina submitted into evidence concerning damage to her vehicle do not show any apparent damage of any significance to the rear of her vehicle.

Thus, he asserts, Jenica Sardina's liability cannot be determined as a matter of law, and her motion must be denied.

In addition, Cambareri notes, from the repair records submitted by Jenica Sardina, it appears that the vehicle might be owned and insured by Marie Sardina. Thus, he argues, Marie Sardina should remain in the case as potentially vicariously liable for any negligence by Jenica Sardina.

In reply, Marie Sardina submits an affirmation from counsel, Linda Chetkof.

Initially, Chetkof argues, it is clear from the Plaintiff's opposition papers that he is not contesting that Marie Sardina was free from negligence in the happening of the accident. Rather, she asserts, it appears that he shifted focus and is now arguing that Marie Sardina may be held vicariously liable for the conduct of Jenica Sardina as owner of the vehicle she was driving at the time of the accident. However, Chetkof argues, this contentions should not be reached, as it is being raised for the first time on this motion practice. That is, the Plaintiff did raise the issue in the complaint or his bill of particulars.

In any event, Chetkof asserts, the evidence shows that the Dodge Charger being driven by Jenica Sardina was in fact owned solely by that Defendant. Indeed, she notes, in Jenica Sardina's

¹ The Court is unable to view the disc provided by the Plaintiff.

answer, she admits ownership of the vehicle. Further, the police report identifies her as the owner of the vehicle. In addition, she asserts, it is shown by the appended registration for the vehicle.

Finally, Chetkof notes, it is undisputed that both Defendants reside together and that both are covered under the same policy of insurance. The policy, issued by State Farm Insurance, provides underlying coverage of \$250,000/\$500,000 with 2 million dollars in umbrella insurance coverage.

In sum, she argues, the action should be dismissed as against Marie Sardina.

In reply, Jenica Sardina submits an affirmation from counsel, James Hayes.

Hayes asserts that, although the Plaintiff claims that Jenica Sardina fabricated the hit and run driver, the certified copy of the police report annexed to the motion papers indicates that an unknown vehicle (Vehicle #1) left the accident scene. Further, Hayes argues, the diagram of the accident scene shows Vehicle #1 passing the other three motor vehicles, and then "angled to the right as if to make a right turn down the side street, North Street, which according to the diagram, forms a T-intersection with East Main Street where the accident occurred."

Moreover, he asserts, the proffered video recording, in which Jenica Sardina appears to say, "The rear wheel drive my car just slid, I couldn't stop," is not inconsistent with her statement that she was struck from the rear.

In addition, Hayes asserts, during disclosure, the Plaintiff indicated that he was not in possession of any statements made by Jenica Sardina, and did not disclose the video until this motion practice.

Further, he argues, contrary to the contentions of the Plaintiff's counsel, the photographs

of the rear of Jenica Sardina's motor vehicle shows damage to the rear bumper cover, license plate, and the right side bracket, all of which had to be repainted. In addition, he notes, the damage repair estimate, under "rear lamps," indicates that there was damage to the license plate lamp. Further, under "rear bumper," the damage repair estimate notes: "additional damage found upon tear down, damages in file."

Finally, he argues, there is no evidence that Marie Sardina owns the Dodge Charger. Rather, he asserts, the appended registration and title for the vehicle show that it is owned by Jenica Sardina.

Discussion/Legal Analysis

A party seeking summary judgment bears the initial burden of establishing a *prima facie* entitlement to judgment as a matter of law by tendering competent evidence in admissible form sufficient to eliminate any triable, material issues of fact from the case. If the moving party fails to meet this burden, the papers submitted in opposition need not be considered. If the moving party makes such a *prima facie* showing, the burden shifts to the opposing party to demonstrate the existence of an issue of fact requiring a trial. *Phillip v. D & D Carting Co., Inc.*, 136 A.D.3d 18 [2nd Dept. 2015]; *Dempster v. Liotti*, 86 A.D.3d 169 [2nd Dept. 2011].

Relevant to the case at bar, a rear-end collision with a stopped or stopping vehicle establishes a *prima facie* case of negligence on the part of the operator of the rear vehicle, requiring that operator to come forward with evidence of a non-negligent explanation for the collision in order to rebut the inference of negligence. *Nikolic v. City-Wide Sewer & Drain Service Corp.*, 150 A.D.3d 754 [2nd Dept. 2017]; *Tumminello v. City of New York*, 148 A.D.3d 1084 [2nd Dept. 2017]. A non-negligent explanation may include a mechanical failure, a sudden,

unexplained stop of the vehicle ahead, an unavoidable skidding on wet pavement, or any other reasonable cause. *Tumminello v. City of New York*, 148 A.D.3d 1084 [2nd Dept. 2017].

However, while a non-negligent explanation for a rear-end collision may include evidence of a sudden stop of the lead vehicle, vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her car and the car ahead.

Tumminello v. City of New York, 148 A.D.3d 1084 [2nd Dept. 2017].

Evidence that a vehicle was struck in the rear and propelled into the vehicle in front of it may provide a sufficient non-negligent explanation for a rear-end collision. *Weiss v. Arunsi*, 184 A.D.3d 606 [2nd Dept.2020]. Thus, in a chain collision accident, the operator of a middle vehicle may establish prima facie entitlement to judgment as a matter of law by demonstrating that the middle vehicle was properly stopped behind the lead vehicle when it was struck from behind by the rear vehicle and propelled into the lead vehicle. *Bardizbanian v. Bhuiyan*, 181 A.D.3d 772 [2nd Dept. 2020].

To prevail on a motion for summary judgment on the issue of liability in a negligence case, the movant need no longer demonstrate that he or she was free from comparative fault.

Davis v. Commack Hotel, LLC, 174 A.D.3d 501 [2nd Dept. 2019].

Here, in support of Marie Sardina's motion, Maria Sardina demonstrated a prima facie entitlement to judgment as a matter of law with evidence that she was driving a properly stopped middle vehicle that was propelled into the lead vehicle when struck from the rear by another vehicle.

In opposition, the Plaintiff failed to raise a triable issue of fact as to the direct liability of

Marie Sardina in the happening of the accident.

Further, the Court notes, the issue of whether Marie Sardina may be held vicariously liable for the conduct of Jenica Sardina as owner of the vehicle she was driving is not properly before the Court, as such liability was not pleaded. Indeed, although not controlling, it does not appear to be the case.

However, should the Plaintiff be so advised, he may seek leave to file an amended complaint concerning the same.

Here, in support of Jenica Sardina's motion, Jenica Sardina demonstrated a prima facie entitlement to judgment as a matter of law with evidence that she was driving a properly stopped middle vehicle that was propelled into another vehicle when struck from the rear by another vehicle which fled the scene.

However, in opposition to the motion, the Plaintiff raised a triable issue of fact as to the liability of Jenica Sardina with his sworn allegations that he saw no fourth vehicle at the accident scene, and that Jenica Sardina not only failed to mention such a fourth vehicle at the scene, but also, made statements that might be interpreted as an admission that the accident occurred because she was unable to stop and skidded into the rear of Marie Sardina's vehicle.²

Indeed, the Court notes, although not controlling because, for example, damages might not be visibly apparent, the photographs submitted of the rear of Jenica Sardina's vehicle do not show any obvious damages, and certainly none that would be consistent with her vehicle having

²The Court also notes that Jenica Sardina's affidavit appears to suggest that she was rear ended at or near the traffic light located at the intersection of East Main Street and Jersey Avenue in the City of Port Jervis, which is located nearly a quarter of a mile from the traffic light located at the intersection of East Main Street and North Street, near the Tri-State Bridge.

been struck hard enough to have caused a four vehicle chain-reaction accident. By contrast, the Court notes, photographs of the front of the vehicle shows what appears to be the bumper being held on with rope.

Further, this issue is not resolved by the certified police report of the accident.

At the first level of hearsay, the police report itself must be admissible. *Yassin v. Blackman*, 188 A.D.3d 62 [2nd Dept. 2020]. A properly certified police accident report is admissible where the report is made based upon the officer's personal observations and while carrying out police duties. *Yassin v. Blackman*, 188 A.D.3d 62 [2nd Dept. 2020]. CPLR 4518© provides that the foundation for the admissibility of, *inter alia*, the records of a department or bureau of a municipal corporation or of the state may be laid through a proper certification. *Yassin v. Blackman*, 188 A.D.3d 62 [2nd Dept. 2020]. CPLR 4518© is governed by the same standards as the general business record exception. Thus, the certification must set forth that the record "was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter." *CPLR 4518[a]*; *see also Yassin v. Blackman*, 188 A.D.3d 62 [2nd Dept. 2020].

At the second level of hearsay, assuming a properly certified police accident report, the statement recorded within the police accident report by the police officer must satisfy a hearsay exception. *Yassin v. Blackman*, 188 A.D.3d 62 [2nd Dept. 2020]. This Court has held that, even where a police report is properly certified, the hearsay statements of non-parties or unknown sources contained therein may not be admitted for their truth. *Yassin v. Blackman*, 188 A.D.3d 62 [2nd Dept. 2020].

Where the police report has not been certified, and a foundation for its admissibility has

not been laid by some other method, the report and its contents constitute inadmissible hearsay.

Yassin v. Blackman, 188 A.D.3d 62 [2nd Dept. 2020].

Further, although a party's admission is a general exception to the hearsay rule, such an admission may not be received into evidence where the business record containing the purported admission is not itself in admissible form. *Yassin v. Blackman*, 188 A.D.3d 62 [2nd Dept. 2020]. Stated differently, a party's admission contained within a police accident report may not be bootstrapped into evidence if a proper foundation for the admissibility of the report itself has not been laid. *Yassin v. Blackman*, 188 A.D.3d 62 [2nd Dept. 2020].

In general, 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 A.D.3d 1020 [2nd Dept. 2015]. Pursuant to CPLR 4518(a), a police accident report is admissible as a business record so long as the report is made based upon the officer's personal observations and while carrying out police duties. *Memenza v. Cole*, 131 A.D.3d 1020 [2nd Dept. 2015]. If information contained in a police accident report was not based upon the police officer's personal observations, it may nevertheless be admissible as a business record if the person giving the police officer the information contained in the report was under a business duty to relate the facts to him or her. *Memenza v. Cole*, 131 A.D.3d 1020 [2nd Dept. 2015]. If the person giving the police officer the information was not under a business duty to give the statement to the police officer, such information may be proved by a business record only if the statement qualifies under some other hearsay exception, such as an admission. *Memenza v. Cole*, 131 A.D.3d 1020 [2nd Dept. 2015]. In other words, each participant in the chain producing the record, from the initial declarant to the final entrant, must be acting within the course of regular business conduct or the declaration must

meet the test of some other hearsay exception. The proponent of hearsay evidence must establish the applicability of a hearsay-rule exception. *Memenza v. Cole*, 131 A.D.3d 1020 [2nd Dept. 2015].

Here, there is no indication that the responding officer concluded that there was a fourth vehicle at the scene either based on his own investigation of the accident scene, or based on his observation of the accident itself. Rather, it is clear from the report that the officer was merely reporting what was told him by Jenica Sardina. Thus, any such statement in the report was mere hearsay.

For the same reasons, the Court notes, any diagram of the fourth vehicle in the police report is also mere hearsay.

Moreover, the Court notes, contrary to the arguments of counsel for Jenica Sardina, nothing about the diagram in the police report suggests that the Plaintiff might not have seen the alleged fourth vehicle because it turned down a side street (North Street). Rather, the diagram, which is necessarily hearsay as to the same, shows Vehicle #1 passing all three vehicles and continuing on East Main Street passed North Street.

Finally, although not controlling, at a minimum, reasonable minds might differ as to whether Jenica Sardina's alleged statements at the accident scene are consistent with having been struck from the rear.

Indeed, given all of the above, the Court trusts that Jenica Sardina and her attorney have carefully considered whether to proceed with the contention that a fourth vehicle was involved in the accident.

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

ORDERED, that the motion of Marie Sardina is granted, and the complaint and all cross claims are dismissed as against her; and it is further,

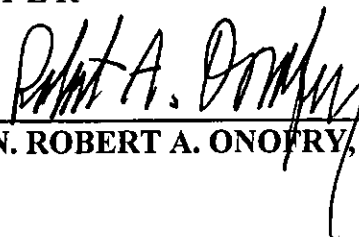
ORDERED, that the motion of Jenica Sardina is denied; and it is further,

ORDERED, that the parties are directed to appear for a status conference on Tuesday, July 20, 2021, at 1:30 p.m., at the Orange County Supreme Court, Court room #3, 285 Main Street, Goshen, New York, if the Courts are in session and open to the public. If the Courts are not open to the public at that time, the conference will be held virtually, by video conferencing, at a time to be designated by the Court.

The foregoing constitutes the decision and order of the court.

Dated: April 15, 2021
Goshen, New York

ENTER



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