

Fuccio v New York City Tr. Auth.

2013 NY Slip Op 30604(U)

March 20, 2013

Supreme Court, New York County

Docket Number: 400353/09

Judge: Michael D. Stallman

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

**PRESENT: Hon. MICHAEL D. STALLMAN
*Justice***

PART 21

Index Number : 400353/2009
FUCCIO, LUCIA
vs.
NEW YORK CITY TRANSIT
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. 400353/09
MOTION DATE 3/19/13
MOTION SEQ. NO. 003

The following papers, numbered 1 to 7 were read on this motion for summary judgment


Notice of Motion—Affidavit of Service; Affirmation— Exhibits 1-10 _____ | No(s). 1-2; 3
Affirmation in Opposition—Affidavit of Service _____ | No(s). 4-5
Reply Affirmation —Affidavit of Service _____ | No(s). 6-7

Upon the foregoing papers, it is ordered that this motion for summary judgment is decided in accordance with the annexed memorandum decision and order.

FILED
MAR 27 2013
NEW YORK
COUNTY CLERK'S OFFICE

MICHAEL D. STALLMAN

Dated: 3/20/13
New York, New York


_____, J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
2. Check if appropriate:..... MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. Check if appropriate:..... SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21**

-----X
LUCIA FUCCIO,

Plaintiff,

Index No. 400353/09

- against -

THE NEW YORK CITY TRANSIT AUTHORITY, BRYAN
CHAN, ROYALE DRAPERIES, INC., CARMELA
ABRAHANTE, 349 CAR CORP., YSNOC BAUDUY,

Decision and Order

Defendants.

FILED

-----X
MAR 27 2013

HON. MICHAEL D. STALLMAN, J.:

**NEW YORK
COUNTY CLERK'S OFFICE**

This action arose out of an accident allegedly involving four motor vehicles on November 6, 2007, in southbound lanes of the FDR Drive, near an exit to South Street in Manhattan. The four vehicles concerned were: (1) a 2004 Mercedes Benz bearing license plate number CWF5243, allegedly owned and operated by defendant Bryan Chan; (2) a 2005 Jeep Grand Cherokee Laredo bearing license plate number DBH9144, allegedly operated by defendant Carmela Abrahante and allegedly owned by defendant Royale Draperies, Inc; (3) a 2007 Lincoln Town Car bearing license plate number T489011C allegedly operated by defendant Ysnoc Bauduy and allegedly owned by defendant 349 Car Corp; and (4) a bus bearing license plate number K42037, allegedly operated by Walder R. Schubert and allegedly owned by defendant New York City Transit Authority (NYCTA).

Plaintiff Lucia Fuccio was allegedly a passenger on NYCTA's bus.

Abrahante and Royale Draperies, Inc. now move for summary judgment dismissing the action as against them.

BACKGROUND

The multi-vehicle accident spawned this action and twelve others: bus passengers commenced ten actions; Bauduy and Abrahante commenced their own actions as well. All actions were coordinated for discovery and joined for trial as to liability. In addition, this Court also coordinated any contemplated motions for summary judgment as to liability in the actions. At a conference on June 23, 2011, the parties entered into a so-ordered stipulation dated June 23, 2011 which states, in pertinent part:

“Any motion or cross motion for summary judgment in any of the actions joined for trial based on liability shall be served on counsel in all the joined actions, and every party in each joined action has the right to submit papers to the motion or cross motion, and shall be bound by the court's decision in each respective action.”

(Sockett Affirm., Ex 5, at Exhibit D). Plaintiff Lucia Fuccio was a signatory to the stipulation. (*Id.*)

In *Ramirez v Chan* (Index No. 401704/2008), defendants Carmela Abrahante and Royale Draperies, Inc. moved for summary judgment dismissing the complaint and cross claims in *Ramirez v Chan* as against them. By decision and order dated

[*4]
July 16, 2012, the Court granted their motion for summary judgment. (Sockett Affirm., Ex 5.) The decision and order states, in pertinent part:

“Notwithstanding issues of fact as to the sequence of collisions, Abrahante and Royale Draperies, Inc. have demonstrated entitlement to summary judgment dismissing the action as against them as a matter of law. Abrahante, as the driver of the lead vehicle, testified at her deposition that she was driving in the right lane of the FDR Drive between 30 and 40 mph (i.e., within the speed limit), and that she did not change lanes. Under any possible version of the sequence of collisions, the unrebutted evidence establishes that defendant Abrahante’s operation of [the] Jeep Cherokee Laredo owned by defendant Royale Draperies, Inc. was not negligent as a matter of law.”

(*Id.* at 11-12.)

The Court noted, in its decision and order:

“As discussed previously, plaintiffs in all but three cases agreed in a so-ordered stipulation dated June 23, 2011 that they shall be bound by the Court’s decision on any motion or cross motion for summary judgment as to liability made in each respective action.

However, motions for summary judgment were not made in every action where Abrahante and Royale Draperies were named as defendants or co-defendants. Should the parties to the stipulation insist that Abrahante and Royale Draperies, Inc. proceed to joint trial notwithstanding the so-ordered stipulation, Abrahante and Royale Draperies, Inc. may seek leave from this Court to make late summary judgment motions in those actions, based on a showing of good cause. Should those parties to the other three actions who did not sign the stipulation not so stipulate, Abrahante and Royale Draperies, Inc. may similarly move for summary judgment.”

(*Id.* at 12 n 2.)

Meanwhile, in this action, plaintiff Lucia Fuccio moved for partial summary judgment in her favor on the issue of liability against NYCTA. By decision and order July 16, 2012, this Court denied plaintiff's motion for summary judgment and granted reverse summary judgment dismissing the action as against defendants Abrahante and Royale Draperies, Inc. The decision states, in pertinent part:

“Notwithstanding issues of fact as to the sequence of collisions, the Court grants reverse summary judgment dismissing the action as against defendant Abrahante and Royale Draperies, Inc., pursuant to CPLR 3212 (b). As discussed previously, Fuccio agreed in a so-ordered stipulation dated June 23, 2011 that she, like others who executed the stipulation, shall be bound by the Court's decision on any motion or cross motion for summary judgment as to liability made in each respective action. Abrahante and Royale Draperies, Inc. moved for summary judgment dismissing the action as against them in *Ramirez v Chan*, Index No. 401704/2008. Pursuant to the so-ordered stipulation, Fuccio had an opportunity to oppose Abrahante and Royale Draperies Inc.'s motion. The Court has determined that the un rebutted evidence established that defendant Abrahante's operation of Jeep Cherokee Laredo owned by defendant Royale Draperies, Inc. was not negligent as a matter of law.”

(Sockett Affirm., Ex 7.)

According to counsel for defendants Abrahante and Royale Draperies, Inc., Fuccio has appealed the court's decision, arguing that she was never served with the motion papers in the *Ramirez* action. (Sockett Affirm. ¶ 11.) Abrahante and Royale Draperies, Inc. now move for summary judgment dismissing the action as against them. Included as Exhibit 5 in this motion are the moving papers of their prior

[* 6]
motion for summary judgment in *Ramirez v Chan*.

DISCUSSION

Defendants Abrahante and Royale Draperies, Inc. have demonstrated good cause for this summary judgment motion. It was not until after the Court's decision granting reverse summary judgment that plaintiff Lucia Fuccio purportedly raised that she was not served with the motion papers in *Ramirez*.

The standards for summary judgment are well settled.

“On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action. The moving party's failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers.”

(*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012][internal quotation marks, brackets and citations omitted].) “On a motion for summary judgment, issue-finding, rather than issue-determination, is key. Issues of credibility in particular are to be resolved at trial, not by summary judgment.” (*Shapiro v Boulevard Hous. Corp.*, 70 AD3d 474, 475 [1st Dept 2010] [citations omitted].)

A police accident report (MV-104 AN) states, in pertinent part:

[* 7]

“AT T/P/O VEH # 1 [Chan’s vehicle] MADE ILLEGAL LANE CHANGE CROSSING OVER (ZEBRA STRIPE) PAVEMENT MARKINGS STRIKING REAR OF VEH # 2 [Abrahante’s vehicle] CAUSING VEH # 2 TO LOSE CONTROL KNOCKING DOWN LIGHT POLE APPROX. 450 FEET INTO BATTERY PARK UNDERPASS, VEH #1 [Chan’s vehicle] CRASHED INTO END OF MEDIAN IMMEDIATELY AFTER STRIKING VEH # 2. VEH # 3 [Bauduy’s vehicle] WAS SIMULTANEOUSLY REAR ENDED BY VEH # 4 [Schubert’s bus].”

(Sockett Affirm., Ex 5, at Exhibit C.)

Chan testified at his deposition that he tried to merge onto the southbound FDR Drive from the South Street exit. (Sockett Affirm., Ex 5, at Exhibit I [Chan EBT], at 20-21, 33.) He stated,

“So before I went into the FDR south it was three lanes and it was coming – it was on a downward slant off the FDR onto the street and then there’s an exit, so once you pass that exit it becomes two lanes.

Q. Is South Street the exit?

A. I think so.”

(*Id.* at 33.) When asked at his deposition if he had entered onto the FDR Drive at an exit only ramp, Chan answered, “Yes.” (*Id.* at 71.) Chan testified that he saw zebra lines, but that he “wasn’t sure at the time” the area was not made to merge onto the FDR Drive. (*Id.* at 27.) Chan stated that he received a ticket for “illegal turn into the FDR,” that he pleaded guilty, and that he paid for the ticket. (*Id.* at 53.)

Chan testified that his vehicle came in contact with another vehicle when Chan’s car was positioned in the middle lane of the FDR Drive, and that Chan’s car

“[b]asically went forward and to the right.” (*Id.* at 31-32.) Chan testified that he could not identify the other vehicle that came in contact with his vehicle, that he did not see this car actually make contact with his vehicle, and that he did not know what lane this car was traveling in “because I didn’t see the car.” (Chan EBT, at 35, 46.) According to Chan, his vehicle also impacted a barrier, which was “one car length, maybe two” away from his car after the impact with the other vehicle. (*Id.* at 43.)

Abrahante testified at her deposition that she was driving in the right lane of the FDR Drive, and that she got hit from behind and “felt a big impact.” (Socketk Affirm., Ex 5, at Exhibit H [Abrahante EBT], at 49.) According to Abrahante, “All I know is I got hit and the next thing I know, I woke up in the hospital.” (*Id.* at 54.)

Bauduy testified at his deposition that he entered the FDR Drive from 34th Street, and from 34th Street up until the accident “[t]here was no traffic . . . There were not many cars and all the cars were traveling pretty normally.” (Socketk Affirm., Ex 5, at Exhibit G [Bauduy EBT], at 14-15.) According to Bauduy, the rate of speed the traffic was moving was “around 40, 45” (*id.* at 15), and that he was “going along with the all the traffic. All the cars in the traffic around 40, 45, about.” (*Id.* at 36, 146.)

Bauduy stated at his deposition, “It’s the bus that hit me in the accident.” (*Id.* at 30.) When asked, “Before that bus hit you did you see another accident between the other cars in front of you?” Bauduy answered, “Yes.” (*Id.* at 30.) testified as

follows:

When asked about the accident in front of him, Bauduy testified as follows:

“A. It’s easy, around 150 feet to 200 feet before me I saw an accident and I was putting on my brakes to avoid getting involved in the accident.

Q. The accident that you saw 150 to 200 feet in front of you, was that between two vehicles?

A. Yes.

Q. Was one of those vehicles that was involved in the accident, was he changing lanes?

A. I didn’t have to see, the accident happened like a flashing light.

* * *

Q. Was one car coming onto the road and collided with another car or how would you describe the movement of the vehicles in front of you?

A. I saw a car going on the highway. The car that was in front of me hit it.

MR.GROSSBARD: Can you read that back, please?

Q. The car in front of you, was that in the same lane that you were traveling?

A. Yes.

* * *

Q. Can you describe how the hitting took place?

MR. GROSSBARD: Note my objection.

A. No idea.

Q. Was one car coming from the right or was one car coming from the left, how would you describe what the cars did?

A. I don’t remember anything about that. I was just focused on my driving.

Q. Do you know if one of the cars was changing lanes?

A. No idea.

Q. Do you know if one of the cars was coming into the FDR Drive?

A. I don’t recall these things.”

(*Id.* at 30-31, 34-35.) According to Bauduy, after he applied the brakes, “I didn’t have time to slow down, the bus hit me from behind and pushed me into the cars.” (*Id.* at

36.) When asked if his car ever came in contact with the cars in front of him, Bauduy answered, "I don't know anything about that. As soon as the car hit my mind just blew off." (*Id.* at 44.)

Ramirez testified at her deposition that she was a passenger in Bauduy's Lincoln town car, and that she was seated in the rear of the vehicle, on the left side. (Sockett Affirm., Ex 5, at Exhibit F [Ramirez EBT], at 22.) Ramirez also testified that she suffers from a congenital eye condition damaging the retina, and that she was determined to be legally blind at age 16. (*Id.* at 18.) Ramirez testified as follows:

"Q. What first alerted you that you were involved in an accident, did you feel something, hear something, or a combination?

A. It was a combination. It was like an explosion and I felt a very heavy, heavy hard, like, from the back, a hit.

Q. So the first – so your first inclination that you were involved in the accident is you felt an impact to the rear of the vehicle?

A. I just heard everything, noise and, like, a bomb went off.

* * *

Q. Let me ask. The vehicle that you were riding in that was involved in this accident, how many impacts were there to that vehicle; was it one, two, three, or something else?

A. I don't know. I don't know how many impacts there were.

Q. Was it more than one?

A. I don't remember. I remember a hard impact.

Q. Would it be fair to say that you only recall one impact to the vehicle that you were riding in?

A. Yes."

(Ramirez EBT, at 30-31.)

Schubert testified at his deposition that he entered the right lane of the FDR

Drive at 23rd Street and changed lanes to the middle lane. (Sockett Affirm., Ex 5, at Exhibit J [Schubert EBT], at 34.) Schubert stated that the traffic conditions at or about the scene of the accident were “Light, extremely light.” (*Id.* at 25.)

According to Schubert, a white car (which he thought was a BMW) entered the FDR Drive from South Street, crossing zebra lines and entering the middle lane of traffic. (*Id.* at 36, 42.) Schubert stated, “The BMW hit the Lincoln in the left lane. He was in the right lane, the Lincoln was in the left lane, but they (indicating). The Lincoln was in its lane.” (*Id.* at 41.) Schubert stated that the white car “seemed to brush against the side of a Lincoln town car” (*id.* at 36.), i.e., “It looked like they just touched sideways.” (*id.* at 99.) Schubert testified that the Lincoln town car then rear-ended an SUV (*id.* at 37), which was also in the left lane, the two vehicles came to a complete stop (*id.* at 57-59), and “the way they hit they took out both lanes.” (*Id.* at 59, 61). Schubert claimed that the front of his bus made a contact with the left rear corner of the Lincoln town car, which Schubert described as a “heavy” impact. (*Id.* at 53-54, 55.). According to Schubert, “I pushed him over the divider of the FDR Drive and partially on the opposite side, the northbound side.” (*Id.* at 55.)

A report from the Office of System Safety of MTA-New York City Transit states, “The B/O gave varying accounts of how the accident occurred, however, as based on the information downloaded from the ECM [electronic control module] of

the bus, an analysis of his statements and the physical evidence, a determination was made that he was operating too fast for the conditions (heavy, slow traffic in the right travel lane), while failing to maintain a safe following distance.” (Sockett Affirm., Ex 5, at Exhibit K.)

Defendant Bryan Chan argues that summary judgment is a drastic remedy.

Although there are issues of fact as to the sequence of collisions, Abrahante and Royale Draperies, Inc. have demonstrated entitlement to summary judgment dismissing the action as against them as a matter of law. Abrahante, as the driver of the lead vehicle, testified at her deposition that she was driving in the right lane of the FDR Drive between 30 and 40 mph (i.e., within the speed limit), and that she did not change lanes. Under any possible version of the sequence of collisions, the unrebutted evidence establishes that defendant Abrahante’s operation of the Jeep Cherokee Laredo owned by defendant Royale Draperies, Inc. was not negligent as a matter of law.

The Court does not consider the movants’ supplemental affirmation, which was served one day prior to the return date. Movants had served reply papers on February 26, 2013. In any event, the stipulation of discontinuance annexed to the supplemental affirmation was not signed by counsel to all parties who have appeared in this action. Although plaintiff’s counsel apparently signed the stipulation of

discontinuance, neither Chan nor the New York City Transit Authority signed the stipulation.


CONCLUSION

Accordingly, it is hereby ORDERED that the motion for summary judgment by defendants Carmela Abrahante and Royale Draperies, Inc. is granted, the complaint is severed and dismissed as against these defendants with costs and disbursements to these defendants as taxed by the Clerk upon the submission of an appropriate bill of costs, and all cross claims by these defendants in this action, and all cross claims against these defendants in this action, are severed and dismissed; and it is further

ORDERED that the remainder of the action shall continue.

Dated: March 20, 2013
New York, New York

ENTER:


J.S.C.
FILED
HONORABLE D. STALLMAN
MAR 27 2013
NEW YORK
COUNTY CLERKS OFFICE