Cuomo v Raspanti
2018 NY Slip Op 31175(U)
June 12, 2018
Supreme Court, Suffolk County
Docket Number: 1171-2015
Judge: William G. Ford
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER **INDEX NO.: 1171-2015**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

COPY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE of the SUPREME COURT

---x

JENNIFER CUOMO,

Plaintiff,

-against-

MIGUEL A. RASPANTI, CHRISTIAN RASPANTI & KENNETH R. MANGIONE,

Defendant.

---x

Motion Submit Date: 03/01/18
Motion Seq #: 002 - MG

PLAINTIFF'S COUNSEL:
Siben & Siben, LLP
By: Richard F. Simmons, Esq.
90 East Main Street
Bay Shore, New York 11749

DEFENDANTS' COUNSEL:
David J. Sobel, PC
By: David J. Sobel, Esq.
811 West Jericho Turnpike, Suite 105W
Smithtown, New York 11787

Russo & Tambasco
115 Broad Hollow Road, Suite 300
Melville, New York 11747

Upon the reading and filing of the following papers on defendant's motion seeking partial summary judgment as to liability pursuant to CPLR 3212: (1) Notice of Motion & Affirmation in Support dated February 7, 2017 and supporting papers; (2) Affirmation in Opposition dated April 11, 2017 and other opposing papers; (3) Reply Affirmation in Further Support dated April 28, 2017; & upon due deliberation and full consideration, now it is

ORDERED that defendant Kenneth Mangione's motion seeking partial summary judgment as to liability pursuant to CPLR 3212 dismissing plaintiff's complaint as against him is **granted** as follows; and it is further

ORDERED that plaintiff Jennifer Cuomo's complaint is **dismissed** as against defendant Kenneth Mangione; and it is further

ORDERED that movant's counsel is hereby directed to serve a copy of this decision and order with notice of entry on counsel for all parties by overnight mail, return receipt requested

Plaintiff Jennifer Cuomo brought this previously consolidated negligence personal injury action against defendants Miguel A. Raspanti and his son Christian Raspanti, and Kenneth R. Mangione arising out of a motor vehicle collision which occurred on November 19, 2014. The incident occurred at the intersection of Montauk Highway and South Strong Avenue in Lindenhurst, Suffolk County, New York. Plaintiff sues defendants seeking recovery of money damages for serious physical injuries she claims are proximately caused by defendants' negligence.

Plaintiff originally commenced an action filing a summons and complaint against the Raspanti defendants on January 23, 2015. They joined issue serving an answer on or about February 10, 2015. Subsequently, plaintiff commenced a separate, but putatively related action arising out of the same incident or occurrence against defendant Mangione, filing her summons and complaint on August 26, 2015. Mangione answered the complaint on or about September 17, 2015. Supreme Court (Baisley, J.) granted a motion pursuant to CPLR 602(a) to consolidate both actions under the present index number in the interests of judicial economy. The parties entered a Preliminary Conference Order on February 6, 2018 and discovery in the matter is well underway.

Defendant Mangione now seeks partial summary judgment on liability to dismiss plaintiff's claims against him. In support of his application, he submits copies of the pleadings, plaintiff's bill of particulars, and party deposition transcripts for the plaintiff, himself and co-defendant Christian Raspanti.

In support of his motion, Mangione argues that he is entitled to judgment as a matter of law and an award of summary judgment with no liability for plaintiff's accident, where the vehicle he owned, operated by his son, had no physical contact with the plaintiff's vehicle in her accident. Further, movant argues that plaintiff's theory of concerted action amongst the defendants holding them liable as joint tortfeasors has no bearing on him where he and other defendants have denied under oath any agreement for joint tortious action.

The relevant facts underlying the case are supplied by the parties sworn testimony given at examinations before trial. Plaintiff gave her deposition on November 4, 2016. At that proceeding, she testified that she was a 36-year-old phlebotomist/hematologist teaching an evening course at Hunter Business School and was on her commute home from work heading to her significant other's house in Lindenhurst on the evening of November 19, 2014 in dry clear weather at approximately 10:45 p.m. She stated that she was travelling southbound on South Strong Avenue in her mother's 2008 Mitsubishi Eclipse, when she stopped for traffic at a red light controlled intersection with Montauk Highway. After bringing her vehicle to full stop, Cuomo testified that she entered the intersection and looked to her left and recalls the last thing she saw before being rendered unconscious on impact were a set of vehicle headlights approximately 10 feet away from her. Subsequently, plaintiff came to learn that a collision occurred on her driver's side in a "T-bone" collision.

Defendant Kenneth Mangione also gave a deposition. He testified that he owned a blue Acura Integra sedan, operated by his son Vincent on November 19, 2014. Vincent had his permission to drive the vehicle to and from the gym, Retro Fitness on Montauk Highway in West Babylon. Mangione further testified he first learned of the motor vehicle accident from his son on his return home from the gym, where Vincent informed him that a friend of his "flew passed him and hit a car." Mangione stated that his son Vincent had driven westbound on Montauk Highway. Mangione additionally recounted that his son denied street racing that night.

Defendant Christian Raspanti also was deposed. He testified that he operated a silver Nissan Sentra, owned by his mother. On the date and time of the incident, he was travelling on Montauk Highway on his way back home from the Retro Fitness gym with a passenger Jeremy Zehner in his vehicle. Raspanti explained that he, Zehner and Vincent Mangione were all at the gym together and intended to return to Raspanti's home to hang out together afterwards. He acknowledged that he collided with plaintiff's vehicle, explaining that while traveling at no more

than 35 mph at the intersection of Montauk Highway and South Strong Street in the left lane with Mangione beside him in the right lane, that plaintiff's vehicle turned in front of him causing him to collide with her. Raspanti similarly denied engaging Mangione in a street race. However, he did testify that prior to the collision, his passenger Zehner was engaged in conversation from his rolled down window with Mangione in his vehicle as the two drove down Montauk Highway. Raspanti further explained that he was not a part of the conversation as he was focusing on his task of driving.

It is well settled that summary judgment is a drastic remedy which should not be granted when there is doubt as to the existence of a triable issue of fact. Where, however, one seeking summary judgment tenders evidentiary proof in admissible form establishing its defense sufficiently to warrant the court as a matter of law in directing judgment in its favor, the burden falls upon the opposing party to show, also by evidentiary proof in admissible form, that there is a material issue of fact requiring a trial of the matter (*see* ***Zuckerman v. City of New York,*** 49 NY2d 557, 562, 427 NYS2d 595 [1980]). The evidence presented on a motion for summary judgment must be scrutinized in the light most favorable to the party opposing the motion (*see* ***Goldstein v. Monroe County,*** 77 AD2d 232, 236, 432 NYS2d 966 [1980]).

The proponent on a motion of summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985];]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

If the moving party fails in meeting this burden, the motion must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see* ***Zuckerman***, *supra*). The function of the court in determining a motion for summary judgment is issue finding, not issue determination (***Pantote Big Alpha Foods, Inc. v Schefman,*** 121 AD2d 295, 503 NYS2d 58 [1st Dept. 1986]).

The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289AD2d 557, 735 NYS2d 197 [2d Dept. 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept. 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept. 1987]). The law is well-established that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see* ***Andre v Pomeroy,*** 35 NY2d 361, 362 NYS2d 131 [1974]; ***Benincasa v Garrubo,*** 141 AD2d 636, 529 NYS2d 797 [2d Dept. 1988]).

Movant Mangione now seeks summary judgment dismissing the complaint for negligence against him as the proximate cause of plaintiff's accident, arguing that the record deposition testimony reflects a consistent denial amongst the defendants that any of them were street racing or agreed to participate in a speed contest of any kind prior to or contributive to the incident here. Plaintiff opposes this application making two distinct arguments. First, plaintiff argues that this motion is premature since pretrial discovery has not completed and not every party has submitted to a deposition. Thus, relying on CPLR 3212(f), plaintiff seeks denial of summary judgment to defendant Mangione as procedurally premature. Next, plaintiff argues that triable questions of fact exist warranting denial of judgment as a matter of law.

In opposition to the motion for summary judgment, plaintiff submits a copy of the pleadings, and a certified copy of the Suffolk County Police Department accident investigation report dated November 19, 2014 along with its attached witness statements, along with the affidavit of Marvin Alexander Chaves dated December 10, 2016. Relying on witness statements provided to the police, in conjunction with Mr. Chaves' affidavit, plaintiff argues sufficient questions of fact exist concerning whether or defendants were engaged in concerted tortious action or behavior, i.e. excessive speeding or racing, as proximate cause of plaintiff's incident. As explained below, three witnesses were identified by police and gave statements regarding the occurrence involving the parties. However, this Court cannot consider the witness statements on the question of liability and causation of the accident as explained below.

At the outset and addressing plaintiff's first argument, this Court notes that to preclude entry of summary judgment as premature within the meaning of CPLR 3212(f) and inappropriate prior to the submission of parties to deposition during discovery, defendants must persuasively demonstrate that they have been unfairly and unreasonably deprived the opportunity to test the merits of plaintiff's claim by conducting reasonably pretrial disclosure (*see* ***Amico v Melville Volunteer Fire Co., Inc.***, 39 AD3d 784, 785, 832 NYS2d 813 [2d Dept 2007][resolving that a party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment]; *see also* ***Adrianis v Fox***, 30 AD3d 550, 550–51, 817 NYS2d 374, 375 [2d Dept 2006][Second Department holding that motion court properly denied, as premature, partial liability summary judgment motion as defendant's deposition was still outstanding and the parties had previously stipulated to hold that deposition only seven days after the motion was made]). Plaintiff clearly has not met this standard in her opposition papers.

On the merits, the police responded to the accident scene and investigated. Plaintiff has proffered the investigative report produced at the culmination of that investigation which indicates the involvement of a collision between plaintiff and defendant Mangione, to wit, that plaintiff was travelling southbound with a green traffic signal, while Mangione traveled westbound on Montauk Highway with a red traffic signal and struck plaintiff. The Court may consider this report as it is certified as an official public document (*see e.g.* ***Westchester Med. Ctr. v Progressive Cas. Ins. Co.***, 51 AD3d 1014, 1018, 858 NYS2d 754, 758 [2d Dept 2008][police accident report describing the circumstances of the accident was properly considered to the extent that it was based upon the personal observations of the police officer present at the scene and who was under a business duty to make it]; *see also* ***Memenza v. Cole***, 131 AD3d 1020, 1021, 16 NYS3d 287; [2d Dept 2015]; ***Wynn v Motor Veh. Acc. Indem. Corp.***, 137 AD3d 779, 780, 26 NYS3d 558, 560 [2d Dept 2016]; ***Shehab v Powers***, 150 AD3d 918, 919, 54 NYS3d 104, 106 [2d Dept 2017]["information in 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' "]).

However, it is plaintiff's additional reliance on the witness statements to police which poses a problem. The police identify Gabrielle Clement, Alex Chavez and Christopher Austin as eyewitnesses to the accident and took sworn statements from each of them. But those statements may not be considered since they constitute inadmissible hearsay. As the Second Department has previously explained, accident eyewitness accounts given to police as part of an accident investigation constitute hearsay, which may not be admitted as evidence or considered, unless it fits under a hearsay exception (***Pector v County of Suffolk***, 259 AD2d 605, 606, 686 NYS2d 789, 790 [2d Dept 1999][holding inadmissible as hearsay a written statement given by

an eyewitness to the police concerning the accident which did not fall under the excited utterance exception to the hearsay rule because eyewitness did not observe the claimed raced and further did not qualify as a business record exception to the hearsay rule, since the eyewitness was under no duty to impart information to the police]; *see also* ***Adobea v Junel***, 114 AD3d 818, 820–21, 980 NYS2d 564, 567 [2d Dept 2014]). While the eyewitness accounts may prove relevant and informative, none of those individuals were under a business duty to report their observations to the police concerning the happening of plaintiff's accident. Further, none of the parties have articulated precisely which, if any exceptions to the hearsay rule would apply here. Accordingly, the eyewitness statements annexed to the certified police report will not be considered for the purposes of determining the within motion.

Nevertheless, plaintiff has also offered the affidavit of Alexander Chaves independently of his statement given to police for much the same reason and effect. By his affidavit, Chaves testifies that on the date incident traffic was light. Shortly prior to plaintiff and defendant's collision, he was travelling westbound on Montauk Highway approaching its intersection with Wellwood Avenue when he observed a dark Acura vehicle "fly past [sic]" at a high rate of speed. Chaves further recounted observing a silver Nissan driving directly behind the Acura, appearing as if trying to "catch up" with the Acura. This observation left "no doubt in [his] mind" that the two vehicles were "racing" each other. He continued to relay that three minutes after observing the vehicles pass him, Chaves happened upon the collision at the intersection of Montauk Highway and South Strong Street, where he observed that the silver Nissan he previously saw was involved in an accident with plaintiff's Mitsubishi. Chaves further testified that he noticed the dark Acura pulled over in a nearby parking lot, whereupon he asked his passenger, brother-in-law Christopher Austin, to record the vehicle license plate.

Based upon this testimony, plaintiff requests that this Court deny Mangione summary judgment dismissing him from the action, arguing that sufficient material questions of fact ripe for jury determination remain concerning whether defendants were engaged as joint tortfeasors in concerted action, i.e. racing, immediately prior to plaintiff's accident. If the law required only a showing of excessive speeding to support an inference of a speed contest or street race and a conclusion of concerted tortious conduct, plaintiff would be successful. However, the law holds quite differently and for that reason, defendant's motion must succeed.

The theory of concerted action provides for joint and several liability on the part of all defendants having an understanding, express or tacit, to participate in a common plan or design to commit a tortious act (*see* ***Rastelli v Goodyear Tire & Rubber Co.***, 79 NY2d 289, 582 NYS2d 373 [1992]; ***Rodriguez v City of New York***, 35 AD3d 702, 827 NYS2d 220 [2d Dept 2006]; ***Shea v Kelly***, *121* AD2d 620, 503 NYS2d 649 [2d Dept 1986]). Mere parallel activity by co-defendants is insufficient to establish concerted action as the parties must engage in some overt act in furtherance of the alleged tort. While the existence of concerted action is generally a question of fact, speeding and racing are not concomitant acts and proof of speeding alone does not prove a race. Instead, there must be evidence of a challenge coupled with a response in speed and relative positioning that indicates acceptance of the challenge (***Vitale v. Guzman***, 2009 WL 645992 [Sup Ct, Suffolk Co. 2009])

Where, as here, proof is submitted that a vehicle in question was observed travelling at a high rate of speed while driving and/or passing, there is a failure of proof of one of the necessary elements to concerted tortious actions concerning racing, i.e. the agreement to race, express or implied (*see* ***Blakeslee v. Wadsworth***, 37 AD3d 1021, 1023, 831 NYS2d 556 [3d Dept

2007] [establishment of concerted action liability requires proof of an agreement to participate in a dangerous activity] ; ***Hathaway v Eastman***, 40 Misc3d 707, 712–13, 968 NYS2d 841, 845 [Sup Ct 2013], *affd,* 122 AD3d 964, 996 NYS2d 382 [3d Dept 2014]). Here, plaintiff's reliance on Chaves' mere observations that Mangione and Raspanti appeared to be speeding do not supply the requisite element of agreement to warrant the inference of racing. Without this, there is an insufficient basis for this Court to hold movant liable on a concerted action theory, particularly where Mangione by all undisputed accounts, had no contact with plaintiff's vehicle in the incident at question.

Further, while Chavez is described as an accident eyewitness, his own testimony makes clear that as much as three minutes elapsed between his observation of speeding of the defendants and his encountering the resulting accident scene. He did not witness the actual occurrence itself. Nor did Chavez testify to having witnessed any conversation taking place between defendants' vehicles as mentioned by Raspanti.

Therefore, having thoroughly reviewed the parties' motion submissions, this Court finds that movant has met his *prima facie* burden for entitlement to summary judgment on liability. Despite her opposition, plaintiff has failed to raise a triable issue of fact on liability, particularly regarding Mangione's involvement in concerted tortious action with defendant Raspanti. Having failed to raise a triable issue of fact warranting a trial on Mangione's liability as a joint tortfeasor engaged in concerted action, in accord with the foregoing, this Court is constrained to determine that defendant Mangione's motion for summary judgment as to liability is hereby **granted**.

The foregoing constitutes the decision and order of this Court.

Dated: June 12, 2018
Riverhead, New York

HON. WILLIAM G. FORD, J.S.C.

____ FINAL DISPOSITION **_X_ NON-FINAL DISPOSITION**