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| <b>Rector v Metropolitan Transp. Auth.</b>   |
| 2018 NY Slip Op 32299(U)   |
| September 18, 2018   |
| Supreme Court, New York County   |
| Docket Number: 155239/2015   |
| Judge: Kathryn E. Freed  |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2

Justice

INDEX NO. 155239/2015

DERRICK RECTOR,

Plaintiff,

MOTION SEQ. NO. 002

- v -

METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK
CITY TRANSIT AUTHORITY, EMPIRE PARATRANSIT CORP.,
and JAMEL POTTS,

DECISION AND ORDER

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 43,
44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62

were read on this motion to/for SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that the motion is denied.

In this personal injury action, plaintiff Derrick Rector moves, pursuant to CPLR 3212, for
summary judgment on liability as against defendants New York City Transit Authority (NYCTA),
Empire Paratransit Corp. (EPC), and Jamel Potts (Potts). After oral argument, and after a review
of the parties' motion papers and the relevant statutes and case law, the motion is denied.

FACTUAL AND PROCEDURAL BACKGROUND:

This case arises from a motor vehicle accident on March 24, 2014 in which plaintiff was
allegedly injured while riding as a passenger in an Access-A-Ride sedan owned by EPC under the
auspices of the NYCTA. Doc. 41. The captioned action was commenced by the filing of a

The claim against defendant Metropolitan Transportation Authority has been dismissed. Doc. 30.

summons and complaint on May 26, 2015. Doc. 19. Defendants joined issue by service of their answer filed November 10, 2015. Doc. 10.

Plaintiff testified at his deposition that, at the time of the incident, Potts, the driver of the sedan, was travelling northbound on Third Avenue at approximately 55 miles per hour when he drove over metal plates in the road, lost control of the vehicle, and the car spun around and struck a parking meter. Doc. 30; Doc. 44, at p. 15, 23-26, 31. Plaintiff recalled that it was cold, but not freezing, at the time of the accident. Doc. 44, at p. 28-29.

During discovery, defendants exchanged an accident report (MV-104 form) prepared by Potts. Doc. 46. In the report, Potts stated that he “was coming down Third Avenue and the car spun out of control and went into a pole.” Doc. 46.<sup>2</sup>

Plaintiff filed the note of issue and certificate of readiness on June 27, 2017. Doc. 38.

On August 25, 2017, plaintiff filed the instant motion, pursuant to CPLR 3212, seeking summary judgment on liability against defendants NYCTA, EPC, and Potts. Doc. 40. In support of the motion, plaintiff submitted, inter alia, the pleadings, plaintiff’s deposition transcript, and the accident report prepared by Potts. Plaintiff, citing *Pane v Cisilino*, 144 AD3d 567 (1<sup>st</sup> Dept 2016), argues that, “[a]s a passenger in a one-car accident, which happened when [Potts] lost control of the vehicle he was driving, the plaintiff passenger is entitled to summary judgment on the issue of liability.” Doc. 40, at par. 2.

NYCTA, EPC, and Potts oppose the motion, arguing that they have offered a non-negligent explanation for the occurrence, i.e., the presence of black ice. In opposition to the motion, defendants submit, inter alia, a Road Supervisor Report prepared by Christopher Boswell of EPC which annexes a diagram he drew of the area where the incident occurred. Doc. 54. The report

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<sup>2</sup>Although this Court ordered Potts to testify at a deposition by November 6, 2017, Potts failed to do so and is thus precluded from testifying at trial. Doc. 36.

written by Boswell reflects that he responded to the accident scene and was told by Potts that the vehicle spun out of control due to black ice. Doc. 54. The diagram drawn by Boswell, based on his own observation of the site, reflects that there was black ice in the roadway on Third Avenue between East 46<sup>th</sup> and East 47<sup>th</sup> Streets. Doc. 54. An ECP Driver's Statement written by Potts reflects that he was travelling northbound on Third Avenue when he spun out of control after he drove over a wet spot. Doc. 54.

In an affidavit in opposition to the motion, Boswell states that, on the day of the incident, he responded to the accident scene, where Potts told him that he (Potts) spun out of control after driving over black ice. Doc. 59.<sup>3</sup> Boswell personally inspected the area and saw a patch of black ice in the roadway of Third Avenue, which he noted in the Road Supervisor Accident Diagram he prepared that day. Doc. 59. Aaron Brooks, a Road Supervisor Manager employed by EPC, states in an affidavit in opposition to the motion that it was the duty of Potts and Boswell to prepare the incident reports submitted in connection with this motion, that the reports were maintained in the regular course of business of EPC, and that the reports were written on the day of the incident. Doc. 58.

In reply, plaintiff argues that the reference to black ice in Boswell's report should be disregarded by this Court because Potts' report states that he lost control when he drove over a wet spot and does not refer to black ice. Plaintiff further asserts that Potts' unsworn statement, as well as Boswell's statement reflecting that Potts said the accident was caused by black ice, constitute hearsay. Thus, asserts plaintiff, defendants have failed to raise an issue of fact warranting the denial of the motion.

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<sup>3</sup> Climatological data submitted by defendants reflects that the temperature was 22 degrees at the time of the incident. Doc. 56.

**LEGAL CONCLUSIONS:**

“An innocent passenger . . . who, in support of [his or] her motion for summary judgment, submits evidence that the accident resulted from the driver losing control of the vehicle, shifts the burden to the driver to come forward with an exculpatory explanation [for the accident].” *Johnson v Braun*, 120 AD3d 765, 766 (2d Dept 2014) (internal quotation marks omitted).” *Greco v Grande*, 160 AD3d 1345, 1345 (4th Dept 2018). Here, plaintiff’s deposition testimony, i.e., that he was the passenger of a sedan Potts was driving at 55 miles per hour on Third Avenue when the vehicle went over a road plate and Potts suddenly lost control of the car, is sufficient to establish plaintiff’s prima facie entitlement to summary judgment against defendants on liability. *Pane v Cisilino*, 144 AD3d 567 (1<sup>st</sup> Dept 2016).<sup>4</sup>

In *Pane*, a case with similar facts which, as noted above, is relied on by plaintiff herein, the Appellate Division, First Department reversed the denial of summary judgment to plaintiff on liability, holding that:

Plaintiff established his entitlement to judgment as a matter of law in this action for personal injuries sustained in a motor vehicle accident. Plaintiff submitted, inter alia, his affidavit averring that this was a one-car accident which occurred when defendant [ ] lost control of the vehicle he was driving, and in which plaintiff was a passenger.

144 AD3d at 567 (citations omitted).

However, *Cisilino* is clearly distinguishable from the captioned action, since the Appellate Division specifically stated therein that plaintiff therein failed to provide a “nonnegligent explanation for the accident.” 144 AD3d at 567 (citation omitted). In contrast, defendants in this

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<sup>4</sup> As of the date of the accident, the speed limit on Third Avenue was 30 miles per hour. See <http://www.nyc.gov/html/dot/downloads/pdf/current-pre-vision-zero-speed-limit-maps.pdf>.

action have provided a nonnegligent explanation for the accident which warrants the denial of plaintiff's motion. Specifically, defendants assert that the accident was caused by black ice on the roadway. In *Greco v Grande, supra*, the Appellate Division held that, although plaintiff, a passenger in defendant's car, had established a prima facie case of negligence against defendant because the latter had lost control of his vehicle, the burden then shifted to defendant to proffer a nonnegligent explanation for the incident. The Appellate Division held that defendant raised an issue of fact by asserting that he had encountered black ice on the roadway, which constituted an emergency. *Greco*, 160 AD3d at 1346.

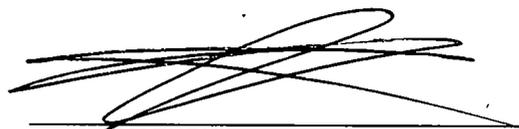
Since Brooks' affidavit establishes that Boswell and Potts had a duty to report the information contained in their reports, that the reports were made at or about the time of the occurrence, and the reports were maintained by EPC in the regular course of its business, the reports could be considered in connection with this motion under the business record exception to the hearsay rule. See CPLR 4518 (a); *Harrison v Bailey*, 79 AD3d 811, 813 (2d Dept 2010). However, even assuming, arguendo, that the reports constituted hearsay, they could be "used to defeat summary judgment as long as [they were] not the only evidence submitted in opposition." *Rugova v Davis*, 112 AD3d 404, 404-405 (1<sup>st</sup> Dept 2013). Since Boswell states in his affidavit that he personally observed black ice in the roadway at the scene of the accident, the reports are clearly not the only evidence submitted in opposition to the motion.

Therefore, in light of the following, it is hereby:

ORDERED that the motion by plaintiff Derrick Rector for summary judgment on liability as against defendants New York City Transit Authority, Empire Paratransit Corp., and Jamel Potts is denied; and it is further

ORDERED that this constitutes the decision and order of the court.

9/18/2018  
DATE

  
KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE