Kelly v Beltran
2018 NY Slip Op 34155(U)
April 25, 2018
Supreme Court, Westchester County
Docket Number: Index No. 68739/2017
Judge: Terry Jane Ruderman

To commence the statutory time 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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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JUSTO KELLY, as Administrator of the Estate of SHARLENE STINSON,

Plaintiff,

-against-

BLASCO BELTRAN,

Defendant.

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CORRECTED
DECISION and ORDER
Sequence Nos. 1 and 2
Index No. 68739/2017

RUDERMAN, J.

The following papers were considered in connection with defendant's motion (sequence 2) for summary judgment dismissing the complaint, and plaintiff's cross-motion (sequence 2) for summary judgment in favor of plaintiff on the issue of liability:

Papers	Numbered
Notice of Motion, Affirmation, Exhibits A - D	1
Notice of Cross-Motion, Affirmation, Exhibits A - C	2
Reply Affirmation and Opposition to Cross-Motion, Exhibit A	3
Reply Affirmation	4

On November 23, 2015, plaintiff's decedent, Sharlene Stinson, was killed in an automobile collision when her car was struck by a stolen van driven by a teenager. The van, which belonged to defendant Blasco Beltran, had been stolen from Beltran's driveway on November 14, 2015. Plaintiff brings this wrongful death action against defendant as the owner of the vehicle.

In defendant's motion for summary judgment dismissing the complaint, he submits

evidence that he reported the theft to the police on November 14, 2015. The incident report from that date indicated that Beltran told the officer he had left his vehicle unlocked in his driveway; the report also stated that Beltran told the officer that he had lost one set of keys to the vehicle weeks before the theft, but that he had the remaining key. He relies on case law holding that while there is a presumption that a driver was using the vehicle with the owner's express or implied permission (*see* Vehicle and Traffic Law § 388[1]), "[e]vidence that a vehicle was stolen at the time of the accident will rebut the presumption of permissive use" (*Vyrtle Trucking Corp. v Browne*, 93 AD3d 716, 717 [2d Dept 2012], citing *Adamson v Evans*, 283 AD2d 527 [2d Dept 2001]). In *Vyrtle Trucking*, the defendant's affidavit and other documentary evidence demonstrated that his vehicle had been stolen and involved in a high-speed chase with the police prior to the accident with the plaintiff's vehicle, and that the unknown driver of the defendant's car fled the scene on foot, establishing the defendant's prima facie entitlement to judgment as a matter of law.

However, in the cross-motion, plaintiff submits evidence that defendant left the key to the van in the vehicle. He points to the supplemental police report dated November 24, 2015 which references the key found in the van's ignition after the accident, and includes a photograph of the key in the ignition. Also appended to plaintiff's cross-motion is the sworn statement defendant provided to the Yonkers police on December 5, 2015, after the accident, in which he stated that he leaves the door to his van unlocked because "neighbor kids" break into cars to take small things and change, and he wanted to avoid them damaging it, and that he kept a spare key under the floor mat. Plaintiff relies on case law holding that where a plaintiff proves that the car thief who got into the accident with plaintiff found the owner's car parked on a public street with its

keys dangling from the trunk lock, and used the keys to steal the car, the plaintiff was found to have made a a prima facie showing of entitlement to summary judgment against the car owner (*see Dougherty v Kinard*, 215 AD2d 521, 522 [2d Dept 1995]).

Analysis

While defendant's initial moving affidavit, as well as the police incident report from November 14, 2015, considered alone, made a prima facie showing that the permissive use presumption has been rebutted, pursuant to the rule illustrated by *Vyrtle Trucking Corp. v Browne* (93 AD3d at 717), the additional information contained in both parties' subsequent submissions with regard to the presence of a key in the van, establish that the *Vyrtle* rule does not dispose of this matter.

The rule regarding a vehicle owner's liability for the negligence of a thief who stole the vehicle is based on Vehicle and Traffic Law § 1210 (a), which provides that

> "No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, [and] removing the key from the vehicle, . . . provided, however, the provision for removing the key from the vehicle shall not require the removal of keys hidden from sight about the vehicle for convenience or emergency."

Consequently, the statute allows the car owner to keep an ignition key out of sight within the vehicle. The grant of summary judgment against the car owner in *Dougherty v Kinard*, *supra*, was based on the undisputed evidence that the key had been left in plain sight.

In contrast, where it was established on the plaintiff's case at trial that the owner had left the key hidden within the vehicle, the claim against the owner was held to have properly been dismissed at the close of the plaintiff's case (*see Banellis v Yackel*, 49 NY2d 882, 883 [1980]). An evidentiary hearing was required on the issues of whether the presumption of permissive use

was rebutted where, despite a showing that a vehicle was stolen at the time of the accident, the affidavit of the vehicle owner "admitted that she left the car keys in the vehicle at the time of the theft" (*Matter of State Farm Mut. Auto. Ins. Co. v Fernandez*, 23 AD3d 480, 481 [2d Dept 2005]); that decision does not indicate whether the affidavit specified the location of the keys in the vehicle.

Plaintiff observes that defendant has not been consistent in the information he has conveyed regarding the theft. In the original incident report dated November 14, 2015, defendant reportedly told the reporting officer that he was in possession of one key to the van, but had lost the other several weeks earlier, while on December 5, 2015, after the stolen van had been found with its key in the ignition, defendant swore that he kept a spare key under the floor mat, flatly contradicting his statement as initially reported. Further, plaintiff maintains, defendant's failure to make any reference to the spare key in his affidavit submitted with his initial moving papers was an omission that warrants scrutiny. Based on both the contradiction and the failure to address the issue in his moving papers, plaintiff submits that defendant's credibility is at issue. Plaintiff further points to defendant's acknowledgment that he left the van door unlocked as proof that he allowed the thief's use of his vehicle.

Defendant submits a further affidavit with his opposition to plaintiff's cross-motion, explaining the apparent contradiction. He states that on November 14, 2015, he told the police officer that there was a spare key underneath the floor mat, and denies telling the officer that he had lost his spare key. He suggests that because he is a native Spanish speaker, the police officer may have misunderstood him when he was trying to explain that he thought the thief had been able to drive away because of the spare key hidden under the mat. In conclusion, he points out

that he was not shown the prepared report or asked to sign it.

Although there is no evidence affirmatively contradicting defendant's assertion that the key used by the thief had been under the mat, the submissions on this motion, particularly his failure to make that assertion in first moving for summary judgment, as well as the absence of any such statement in the original incident report, create an issue with regard to defendant's credibility. Therefore, the question of whether the permissive use presumption has been successfully rebutted by defendant, so as to allow him to avoid liability for the collision, must be left to the finder of fact. Finally, with regard to plaintiff's argument that leaving the van door unlocked provides additional grounds for concluding in the present case that the thief's use of the van was permissive, it should be noted that in *Banellis v Yackel* (49 NY2d 882, 883, *supra*), the Court did not treat the fact that the defendant's vehicle had been left unlocked as an additional basis to find permissive use.

Accordingly, it is hereby

ORDERED that defendant's motion for summary judgment dismissing the complaint (sequence 1) and plaintiff's cross-motion for summary judgment in his favor (sequence 2) are both denied, and it is further

ORDERED that the parties are directed to appear on Monday, June 4, 2018 at 9:30 a.m. in the Preliminary Conference Part, Room 811, Westchester County Supreme Court, 111 Dr. Martin Luther King Jr. Blvd, White Plains, New York, for conference.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
April 25, 2018

HON. TERRY JANE RUDERMAN, J.S.C.