

**Martin v City of New York**

2021 NY Slip Op 30714(U)

January 21, 2021

Supreme Court, Queens County

Docket Number: 704184/16

Judge: Kevin J. Kerrigan

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

NEW YORK SUPREME COURT - QUEENS COUNTY

FILED

Present: HONORABLE KEVIN J. KERRIGAN Justice

Part 10

1/22/2021 12:43 PM

Simone I. Martin,

Plaintiff,

- against -

The City of New York, MTA Bus Company, New York City Transit Authority, Metropolitan Transportation Authority, Sean Holohan, Tyrece Evans, Shirley Chin, Yeung Hin Yu, Yul Hum Mai-Lee and Simon Cheung Chan,

Defendants.

Index Number: 704184/16

Motion Date: 1/11/21

Motion Seq. No.: 11

COUNTY CLERK QUEENS COUNTY

The following papers numbered E175-E185, E191-E198 & E200 read on this motion by plaintiff for partial summary judgment and for leave to amend the caption; and cross-motion by defendants, MTA Bus Company, New York City Transit Authority (TA), Metropolitan Transportation Authority (MTA) and Tyrece Evans, to dismiss.

Papers Numbered

Notice of Motion-Affirmation-Memorandum of Law- Exhibits... E175-183
Notice of Cross-Motion-Affirmation-Exhibits... E191-197
Affirmation in Opposition... E184
Affirmation in Opposition... E185
Reply... E198
Reply... E200

Upon the foregoing papers it is ordered that the motion and cross-motion are decided as follows:

That branch of the motion by plaintiff for leave to amend the caption to reflect the appointment of the Public Administrator of Westchester County as administrator of the estate of defendant Yul Hum Mai-Lee, a/k/a Mai-Lee Yum Hum, a/k/a Mai-Lee, deceased, is granted, there appearing no opposition to this branch of the motion. Those branches of the motion by plaintiff for summary judgment on the issue of liability against defendants City, Holohan, Yu and Chin and for summary judgment on the issue of comparative negligence are also granted. Cross-motion by MTA Bus, the TA, MTA and Evans to dismiss the complaint and all cross-claims against them for failure to state a cause of action is granted, there appearing no opposition to the cross-motion.

Plaintiff allegedly sustained injuries in a multi-vehicle

accident at the intersection of Main Street and 37<sup>th</sup> Avenue in Queens County on May 11, 2015. It is alleged that NYPD Officer Holohan was operating an NYPD vehicle and traveling northbound on Main Street and drove through a steady red light at the subject intersection without his emergency lights or siren activated and was struck on the passenger side in the middle of the intersection by the vehicle owned by Hin Yeung Yu and operated by Shirley Chiu which was traveling on 37<sup>th</sup> Avenue westbound and which entered the intersection with a green light controlling her direction of travel. The collision then caused Chin to collide with an MTA bus operated by Evans and which was traveling southbound on Main Street at 37<sup>th</sup> Avenue and on which plaintiff was a passenger and then to strike two more vehicles. It is plaintiff's contention that due to Chin's excessive speed (which she alleges was over 45mph in a 25 mph speed limit, she was unable to take evasive action to avoid striking Holohan's NYPD vehicle, which had run the red light without its lights or siren activated, in violation of the VTL and traffic regulations. Plaintiff contends that she is entitled to partial summary judgment on the issue of liability against the City, Holohan, Yu and Chin as well as summary judgment on the issue of comparative negligence, since as an innocent passenger on the bus that was struck, no case of comparative negligence lies against her.

"The right of the plaintiffs, as innocent passengers, to summary judgment is not 'restricted by potential issues of comparative negligence' which may exist between the defendant driver and the driver of the host vehicle" (Balladares v City of New York, 177 AD 3d 942, 944 [2<sup>nd</sup> Dept 2019][citing Medina v Rodriguez, 92 AD 3d 850, 850 [2<sup>nd</sup> Dept 2012]]). Thus, the issue of comparative negligence between the drivers is irrelevant to an innocent passenger's entitlement to summary judgment on the issue of whether he or she was at fault (Medina) and so plaintiff, who as an innocent passenger was not negligent in the happening of the accident as a matter of law, is entitled to summary judgment dismissing defendants' affirmative defenses against her alleging comparative negligence. Indeed, although the answers of defendants on this motion all contain boilerplate affirmative defenses alleging comparative negligence on the part of plaintiff, respective counsel for defendants do not contend, in opposition to this motion, that plaintiff, who was merely a passenger on the bus, in any way contributed to the happening of the accident. Indeed, defendants do not oppose the granting of this branch of the motion for summary judgment on the issue of comparative negligence.

As to that branch of the motion for summary judgment on the issue of liability, a plaintiff is entitled to summary judgment on the issue of liability against a defendant if the plaintiff establishes that the defendant was negligent - that the defendant breached a duty of care to the plaintiff and that such negligence was a proximate cause of the plaintiff's alleged injuries (see Balladares, supra). Thus, the innocent passengers in Balladares established an entitlement to summary judgment, without regard to

the issue of the comparative negligence between the two drivers, because they submitted un rebutted evidence showing, prima facie, that the defendant driver was negligent in entering an intersection without yielding the right of way, which resulted in a collision with plaintiff's host vehicle whose driver was a non-party. Plaintiff has established a prima facie entitlement to summary judgment on the issue of liability against the City, Holohan, Yu and Chin by proffering un rebutted evidence in the form of plaintiff's affidavit that Holohan ran a steady red light and failed to yield the right of way at the intersection, that he did not have his emergency lights and siren activated, that such action resulted in the accident that led to plaintiff's injuries, and that Chin, entered the intersection, albeit with the right of way, at such a high rate of speed as to be observably unable to take timely evasive action, which resulted in her striking Holohan's vehicle and then careen into the bus on which plaintiff was a passenger. Plaintiff, moreover, avers that she has personal knowledge of the facts and circumstances set forth in her affidavit, which this Court deems to be an averment that she personally witnessed and observed the events she set forth. No affidavits of Holohan or Chin have been proffered in opposition that dispute plaintiff's averments. Counsel for the City and Holohan does not dispute plaintiff's account that Holohan passed through a steady red light at the intersection, which proximately resulted in the accident, but merely speculates that Holohan may have been qualifiedly privileged in his action under the so-called "emergency" doctrine in which a police vehicle when actually engaged in an emergency operation may disobey the traffic rules as long as the officer did not act recklessly. No evidence is offered that Holohan was responding to an emergency. Moreover, no affidavit of Chin is submitted in opposition disputing plaintiff's averments that she was traveling in excess of 45mph in a 25mph zone and that due to such excessive speed, there was no time to take evasive action to avoid Holohan's police vehicle and thus struck his vehicle and, due to her speed, bounced off his vehicle and continued on to strike the bus and two other vehicles. Thus, the undisputed averments of plaintiff establish that both Holohan and Chin were negligent in the operation of their respective vehicles, and that such negligence was a substantial factor in causing plaintiff's alleged injuries. The percentage or degree of comparative fault as between Holohan and Chin is irrelevant to plaintiff's entitlement to summary judgment as to liability only.

Plaintiff also submits an uncertified photocopy of a standard MV-104AN police accident report that was prepared by the police officer who responded to the accident, but this report is inadmissible and may not be considered.

An uncertified police accident report is inadmissible where a foundation for its admission as a business record has not in some other proper fashion been laid (see Yassin v. Blackman, 188 A.D.3d 62 [2<sup>nd</sup> Dept 2020]). Moreover, since a police report that has not been certified as a business record and a foundation for its

admission as such has not been laid by some alternative method, is inadmissible as evidence, any statement contained therein also constitutes inadmissible hearsay and may not be considered (see id.). Consequently, although a party's admission is admissible as evidence against that party as an exception to the hearsay rule, "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" (id. at 67).

Plaintiff's counsel agrees with the foregoing and in fact cites Yassin in his reply, but argues that the police accident report is properly certified and establishes that Holohan ran the red light without his lights or siren activated and that Chin was traveling at a high rate of speed and collided with Holohan at the subject intersection, causing the Chin vehicle to collide with the bus on which plaintiff was a passenger, "based upon the Defendant drivers' statements".

This Court is at a loss to understand counsel's assertions in this regard, for the photocopy of the accident report he annexes in support of the instant motion as E-182 contains no certification and no party admission or statement whatsoever. The only statement contained therein is in the "Accident Description/Officer's Notes" section, in which the responding police officer who prepared the report writes, "V/O #1 traveling N/B on Main St @ I/O 37 Ave Dept veh was struck by V/O #2 traveling W/B on 37 Ave. Veh then traveled @ high rate of speed N/B on Main St hitting V/O #3 traveling S/B. V/O #2 also struck V/O #4 and V/O #5. Department veh oper proceeded through a steady red light." The officer does not recite that any of this description was related to him by a party. The report does set forth that there was a witness by the name of "Glen", with a telephone number written next to that name, but there is no indication that this witness related the information contained in the officer's description and, in any event, this "Glen" is clearly is not a party.

The officer does not state that any party related to him the facts set forth in his description and he does not otherwise state that he was an eyewitness to the events. Moreover, even if it is argued that the events of the accident must have been related to the officer by the participants of the accident, since the officer was not a witness, the report does not establish which party related what facts set forth in the report. Indeed, counsel himself only states vaguely that it was based upon the defendant drivers' statements with no further specification. Thus, even if, *arguendo*, the report were properly certified, it has not been shown that any party made any admission against himself or herself that may be considered. The officer's narrative description that Holohan ran a red light is not specified anywhere in the accident report as having been related to the officer by Holohan, and the officer's description that Chin was traveling at a high rate of speed is not specified to have been provided to the officer by Chin. Therefore, the statements of the officer contained in the accident report

concerning these reported acts of Holohan and Chin that form the basis of plaintiff's claim of negligence against them have not been shown to be admissible for their truth as admissions. Consequently, the police accident report, and the narrative description of the accident set forth therein, may not be considered. However, as noted, the affidavit of plaintiff constitutes sufficient, admissible and probative evidence of defendants' liability that is unrebutted so as to support the granting of summary judgment to plaintiff on the issue of liability.

Cross-motion by MTA Bus, the TA, MTA and Evans for summary judgment dismissing the complaint an all cross-claims against them is also granted. The undisputed evidence is that the bus on which plaintiff was a passenger was owned by MTA Bus and operated by Evans and that it was struck by Chin's out-of-control vehicle while stopped at a red light. Therefore, MTA Bus and Evans have established a prima facie entitlement to summary judgment by proffering undisputed evidence that Evans was not negligent in the operation of his bus. It is also undisputed that neither the TA nor the MTA owned or operated the subject bus and, therefore, that they did not owe plaintiff any duty of care with respect to the subject bus on which she was a passenger. Indeed, neither plaintiff nor co-defendants have opposed the cross-motion.

Accordingly, the stay imposed as a result of the death of defendant Mai-Lee is vacated, the action is restored to active status and the caption of the action is amended to read as follows:

-----X  
Simone I. Martin, Index  
Number: 704184/16  
Plaintiff,  
- against -

The City of New York,  
Sean Holohan, Shirley Chin,  
Yeung Hin Yu and Public Administrator of  
Westchester County, as Administrator of  
the Estate of Yul Hum Mai-Lee, a/k/a  
Mai-Lee Yum Hum, a/k/a Mai-Lee, and  
Simon Cheung Chan,  
Defendants.

**FILED**  
**1/22/2021**  
**12:43 PM**  
**COUNTY CLERK**  
**QUEENS COUNTY**

Dated: January 21, 2021

-----X  
  
\_\_\_\_\_  
KEVIN J. KERRIGAN, J.S.C.

**FILED**  
**1/22/2021**  
**12:43 PM**  
**COUNTY CLERK**  
**QUEENS COUNTY**