Olaru v Hernik
2021 NY Slip Op 30850(U)
January 5, 2021
Supreme Court, Queens County
Docket Number: 718969/20
Judge: Allan B. Weiss
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Short Form Order

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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable **ALLAN B. WEISS** IAS PART 2
Justice

DAVID OLARU,

Plaintiff,

-against-

PAWEL HERNIK,

Defendant.

Index No. 718969/20

Motion Date: 12/16/20

Motion Seq. No. 3

The papers numbered EF Document Numbers 4-19, found on NYSCEF, were read on the defendant's motion to reargue and renew.

The defendant moves to reargue and renew this Court's prior decision, on Motion Sequence Number 2, that granted the plaintiff's motion for partial summary judgment on the issue of liability. The basis of the motion to reargue is that the Court misapprehended the factual situation. The basis of the motion to renew is an intervening change in the decisional law by the Appellate Division, Second Department.

Turning first to the motion to reargue, the Court did not misapprehend the relevant facts. The light was constantly green for the plaintiff as he entered the intersection, going straight. See plaintiff's affidavit on the original motion. Defense counsel contends that "the light was not red when [defendant] entered the intersection." The defendant actually stated in his affidavit that the sun was glaring in his eyes and that the light was yellow when he entered the intersection. The plaintiff, with the right of way, thus was entitled to anticipate that another motorist would obey the traffic laws and traffic signals. *See, Balladares v City of New York*, 177 A.D.3d 942 (2nd Dept. 2019).

In support of the motion to reargue, defendant further contends that the plaintiff's motion for partial summary judgment was made prior to depositions. Defendant's argument is incorrect as a matter of law since the two principal parties to this litigation have personal knowledge of the facts and what has taken place. This Court thus was entitled to grant the motion for partial summary judgment even without depositions. *See, Rosenblatt v. Venizolos*, 49 A.D.3d 519, 520 (2nd Dept. 2008). The branch of the defendant's motion seeking reargument is thus denied.

The motion to renew is based on the change in the decisional law of the Appellate Division, Second Department, in *Yassin v. Blackman*, 188 A.D.3d 62 (September 23, 2020), holding that, absent a proper foundation, a party's admission contained in an uncertified police accident report is inadmissible. The decision by this Court, granting partial summary judgment on liability in favor of the plaintiff, on Motion Sequence Number 2, dated February 20, 2020, and entered on Feb. 24, 2020 - - prior to the holding in *Yassin*, was based on the defendant's admission to police that he went through a red light, contained in an uncertified police accident report. The defendant contends in light of the *Yassin* decision, the motion to renew should be granted and, upon renewal, urges this Court to deny the prior motion for partial summary judgment on the issue of liability.

The key to deciding a motion to renew based on a change of law is the burden cast on defendant here of "demonstrat[ing] that there has been a change in the law that would change the prior determination." CPLR 2221(e)(2); *Opalinski v. City of New York*, 164 A.D.3d 1354 (2nd Dept. 2018), *lv. to appeal dismissed*, 33 N.Y.3d 1008 (2019). Here, the prior determination would not be changed since, on the present motion, the plaintiff has offered a certified copy of the police accident report containing the defendant's admission. At the time of the original motion for partial summary judgment, under Motion Sequence Number 2, plaintiff was not required to submit a certified copy. Now, he has done so.

Defendant's motion to renew is unfounded for other reasons. First, the defendant relied on the uncertified police accident report, as his principal exhibit, in successfully arguing to this Court, on Motion Sequence Number 1, to strike the plaintiff's demand for punitive damages based on allegedly reckless conduct. This Court referred, in fact, to the accident report in its decision striking the plaintiff's demand for punitive damages.

Second, defendant, in his affidavit, claims that the police officer's inclusion in the police accident report, that the defendant went through a red light, was substantively wrong, and that he later noticed it. The defendant does not deny that he made an admission to the police that he went through the red light. He states simply: "When I later read the police accident report, I realized it was wrong in that I did not go through a red light. The light was not red when I entered the intersection." The defendant's affidavit sworn to on December 12, 2019. The accident occurred on May 26, 2018. The defendant thus waited over 18 months to make the "correction," and only after the present action was commenced. Under the circumstances, this Court can consider that the statement contained by the defendant in his affidavit is a feigned issue. *See, Curl v. Schiffman*, 183 A.D.3d 415, 415–416 (1st Dept. 2020).

In this regard, the complete, unredacted police accident report, provided by the defendant on his motion to strike the claim for punitive damages, was a five-page, detailed document, containing a complete diagram of the accident, including how the defendant struck a third, parked vehicle. The report was thus not hastily drafted by the police officer.

Third, defense counsel, on the present motion to renew, explains that defendant did not directly deny making the admission to the police in his December 2019 affidavit in opposing the motion for partial summary judgment, and simply contended that he did not go through a red light, because she contends that English is not the defendant's main or principal language. First, defense counsel's vague contention of her client's alleged imprecision of and unfamiliarity with the English language is non-probative and without personal knowledge. She does not append an affidavit by the defendant as to his place of birth and his alleged unfamiliarity with the English language. In fact, the contrary appears to be the case. The defendant's affidavit, provided to the Court in opposition to the prior motion by plaintiff for partial summary judgment on liability, was a two-page, ten-paragraph affidavit in English, and not one done, as would have been required legally, in a foreign language with a translation in English, accompanied by an affidavit from the translator. *See*, CPLR 2102(b); *501 Fifth Avenue Co., LLC, v. Alvona, LLC*, 110 A.D.3d 494 (1st Dept. 2013). Defense counsel's factually unsupported contention thus also lacks merit, as a matter of law. The branch of the motion seeking renewal is thus denied since, even though *Yassin v. Blackman* [188 A.D.3d 62] did change the decisional law, it was not a change of

law "that would change the prior determination." CPLR 2221(e)(2); *Opalinski v. City of New York*, 164 A.D.3d 1354, *supra*.

The defendant's motion is thus denied.

Dated: January 5, 2021
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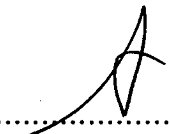

J.S.C.

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