Hong v Bhatti
2022 NY Slip Op 32686(U)
August 9, 2022
Supreme Court, Kings County
Docket Number: Index No. 511404/2019
Judge: Debra Silber

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9

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PETER K. HONG,

Plaintiff,

-against-

BALAL S. BHATTI,

Defendant.

---x

DECISION / ORDER

Index No. 511404/2019
Motion Seq. No. 3
Date Submitted: 6/9/22

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant's motion to reargue the court's denial of summary judgment.

Papers	**NYSCEF Doc.**
Notice of Motion, Affirmation and Exhibits Annexed.....	66-72
Affirmation in Opposition and Exhibits Annexed.....	73-75
Reply Affirmation.....	76

Upon the foregoing cited papers, the Decision/Order on these motions is as follows:

This is a personal injury action which arises from a motor vehicle accident. In Motion Seq. #2, the court denied defendant's motion for summary judgment dismissing the action on the grounds that the defendant's vehicle had been stolen. The court found that the defendant had not rebutted the presumption of permissive use. The accident took place at 4:00 p.m. on September 19, 2017, and defendant's vehicle fled the scene. However, the license plate fell off and was recovered by the officer who responded.

Defendant testified at his EBT that he had parked his vehicle on the street, near his home and near the accident location, and that when he noticed that it was not there, he filed a report with the police. The report was made at 3:00 a.m. on September 20, 2017, which was after the accident [Doc 70]. When asked how he learned of the accident, he said "I'm not too sure if it was the insurance company that called me or if it

was the police that called me." Q: Do you know when that was? A: No. Q: How much time passed after the accident before you were notified? A: I don't remember [Doc 67 Page 20]. He then testified that nobody was charged with the alleged theft, and the vehicle was returned to him a few months later by the police.

Now, defendant moves to reargue the court's decision, claiming the court misapprehended the facts and the law. Counsel cites *Guerra v Kings Plaza Leasing Corp.*, 172 AD2d 583 [2d Dept 1991] and argues that the facts are comparable. The court disagrees. In that case, the vehicle owner reported her car stolen to the police before she learned that it had been in an accident. Here, defendant did not report the car stolen until after he learned that it had been in an accident. Defendant's counsel then cites *Pow v Black*, 182 AD2d 484 [1st Dept 1992], claiming that it stands for the proposition that "failure to discover and report a theft until after the accident does not, of itself, preclude summary judgment." However, in that case, the defendant reported the car stolen within 15 minutes of discovering it was no longer where he parked it and before he learned about the accident, which had taken place a few hours earlier. Finally, counsel argues that "any suggestion that the vehicle might have been operated with defendant's permission amounts to mere speculation." Not true - it amounts to a statutory presumption, which he has not rebutted.

Vehicle & Traffic Law § 388 was enacted to "ensure access by injured persons to 'a financially responsible [party] against whom to recover for injuries'" and "to change the common-law rule and to impose liability upon the owner of a vehicle 'for the negligence of a person legally operating the car with the permission, express or implied, of the owner'…" (*Morris v Snappy Car Rental,* 84 NY2d 21, 27, 637 N.E.2d 253, 614 N.Y.S.2d

362, [1994]).

This statute also creates a presumption that the vehicle is being operated with the owner's consent, but the presumption may be rebutted by substantial evidence showing that the operation was without permission (*see Murdza v Zimmerman,* 99 NY2d 375, 380, 786 N.E.2d 440, 756 N.Y.S.2d 505 [2003]; *Leotta v Plessinger,* 8 NY2d 449, 171 N.E.2d 454, 209 N.Y.S.2d 304 [1960]; *Bernard v Mumuni,* 22 AD3d 186, 187, 802 N.Y.S.2d 1 [2005], *affd* 6 N.Y.3d 881, 850 N.E.2d 25, 817 N.Y.S.2d 210 [2006]; *Cherry v Tucker,* 5 AD3d 422, 424, 773 N.Y.S.2d 405 [2004]; *Naidu v Harwin,* 281 AD2d 525, 721 N.Y.S.2d 826 [2001]; *Leonard v Karlewicz,* 215 AD2d 973, 974, 627 N.Y.S.2d 169 [1995]; *Guerra v Kings Plaza Leasing Corp.,* 172 AD2d 583, 568 N.Y.S.2d 413 [1991]; *Bruno v Privilegi,* 148 AD2d 652, 539 N.Y.S.2d 403 [1989]; *Albouyeh v County of Suffolk,* 96 AD2d 543, 465 N.Y.S.2d 50 [1983], *affd* 62 NY2d 681, 465 N.E.2d 29, 476 N.Y.S.2d 522 [1984]).

In the court's prior decision, the court details the testimony of defendant at his EBT, deemed incorporated herein. He was unable to answer many of the questions posed to him. He testified that the car had been stolen "a day or two prior to the accident" [Doc 67 Page 18] but that he had used the car "the day before" the accident. [Id.] The court then determined that, viewing the evidence in the light most favorable to the non-moving party, the motion could not be granted. There is nothing in the instant motion which changes the court's conclusion.

"A motion for summary judgment 'should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility'" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010], quoting *Scott v Long*

Is. Power Auth., 294 AD2d 348 [2d Dept 2002]; see also *Benetatos v Comerford*, 78 AD3d 750, 751-752 [2d Dept 2010]; *Lopez v Beltre*, 59 AD3d 683, 685 [2009]; *Baker v D.J. Stapleton, Inc*., 43 AD3d 839 [2d Dept 2007]).

Accordingly, it is **ORDERED** that court grants defendant leave to reargue, but upon reargument, adheres to the prior decision.

This constitutes the decision and order of the court.

Dated: August 9, 2022

ENTER:

Hon. Debra Silber, J.S.C.