

**Villa v Ramp Motors, Inc.**

2013 NY Slip Op 31164(U)

May 23, 2013

Supreme Court, Suffolk County

Docket Number: 08-38126

Judge: Jerry Garguilo

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 47 - SUFFOLK COUNTY

**PRESENT:**

Hon. JERRY GARGUILO  
Justice of the Supreme Court

MOTION DATE 3-8-13  
ADJ. DATE 4-10-13  
Mot. Seq. # 005- MotD

-----X  
FABIAN VILLA, as Administrator of the Goods,  
Chattels and Credits of NELLY MERCEDES  
VILLA DE MARCA, deceased

Plaintiffs,

- against -

RAMP MOTORS, INC., and TASHIA AUSTIN

Defendants.

KUJAWSKI & KUJAWSKI, ESQ.  
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ROBERT P. TUSA, ESQ.  
Attorney for Third-Party Defendant Marca  
898 Veterans Memorial Highway, Suite 320  
Hauppauge, New York 11788

-----X  
RAMP MOTORS, INC. AND TASHIA AUSTIN,  
Third-Party Plaintiffs,

-against-

EDGAR A. MARCA,

Third-Party Defendant.  
-----X

Upon the following papers numbered 1 to 24, read on this motion to renew and reargue; Notice of Motion/ Order to Show Cause and supporting papers (005) 1-20; Notice of Cross Motion and supporting papers   ; Answering Affidavits and supporting papers 21-22; 23-24; Replying Affidavits and supporting papers   ; Other   ; (~~and after hearing counsel in support and opposed to the motion~~); it is

**ORDERED** that motion (005) by defendants/third-party plaintiffs Tashia Austin and Ramp Motors, Inc. pursuant to CPLR 2221 (e) for an order granting renewal of motion (004) which motion sought dismissal of the

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plaintiff's complaint as asserted against defendant/third-party plaintiff Ramp Motors, Inc., and for further order granting summary judgment dismissing the plaintiff's complaint as asserted against defendant Ramp Motors, Inc. and Tashia Austin, on the issue of liability, is granted as to renewal, and upon renewal, dismissal of the complaint asserted against Ramp Motors, Inc. is granted, and dismissal of the complaint against Tashia Austin is denied.

In motion (004), by order dated January 17, 2013 (Garguilo, J.), this court denied the motion and granted the moving parties leave to renew upon submission of proper papers, including a copy of the plaintiff's bill of particulars, which had not been provided with the prior application. The parties were advised that the application served after the note of issue was filed was being treated as a motion for summary judgment as the parties moved pursuant to CPLR 3211 and 3212.

In this action, Fabian Villa, as administrator of the estate of decedent, Nelly Mercedes Villa DeMarca, and derivatively, seeks damages premised upon the alleged negligence of the defendants/third-party plaintiffs, Ramp Motors, Inc. and Tashia Austin, arising out of an automobile accident which occurred on February 4, 2007 at approximately 10:10 a.m., on Victory Avenue at or near the entrance ramp of Route 27, in the Town of Brookhaven, New York, when the vehicle owned by defendant/third party plaintiff Ramp Motors, Inc., and operated by defendant/third-party plaintiff Tashia Austin, came into contact with the vehicle operated by the third-party defendant, Edgar A. Marca. The plaintiff's decedent, Nelly Mercedes Villa DeMarca, was a passenger in the vehicle operated by third-party defendant, Marca, and sustained severe and serious injuries resulting in her death. By letters of administration purportedly issued April 4, 2008, Fabian Villa was appointed administrator of the estate of Nelly Mercedes Villa DeMarca.

In a related action pending under Index No. 07-31747, the plaintiff, Karen Cole, seeks damages personally and derivatively for injuries alleged to have been sustained by her infant daughters, Karan Cole and Jalena Cole, as a result of this motor vehicle accident. The infant plaintiffs were passengers in the vehicle operated by Tashia Austin and owned by Ramp Motors, Inc., when it collided with the vehicle operated by co-defendant Edgar A. Marca.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

By this motion, defendant/third-party plaintiff Ramp Motors seeks summary judgment dismissing the complaint asserted against it on the basis that the action is barred by the Graves Amendment 49 USC § 30106. Tashia Austin seeks summary judgment dismissing the complaint asserted against her on the basis that she is not liable for the occurrence of the accident.

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In support of this motion, movants have submitted an attorney's affirmation, a copy of the prior motion consisting of, inter alia, an attorney's affirmation, a copy of the summons and complaint, defendants' answers, a copy of the third-party summons and complaint and defendant Marca's answer; copy of the Ramp Motors Lease Agreement dated January 25, 2007; an uncertified copy of an MV 104 Police Accident report which is deemed hearsay and is not in admissible form (*see, Lacagnino v Gonzalez*, 306 AD2d 250, 760 NYS2d 533 [2d Dept 2003]; *Hegy v Coller*, 262 AD2d 606, 692 NYS2d 463 [2d Dept 1999]); affidavit of Wayne Rampone, Jr. which is improperly dated; copies of the transcripts of the examinations before trial of Karan Cole and Galena Cole dated November 11, 2009 (partial but signed), Tashia Austin dated July 29, 2010 which is unsigned but is deemed admissible as adopted as accurate by Austin (*Ashif v Won Ok Lee*, 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]); the partial and unsigned and uncertified copy of the transcript of Edgar Marca dated May 25, 2010 which is not in admissible form; and statements by Donna Ayala and Christine Knoell, dated February 4, 2007. Additionally submitted, are the plaintiff's bill of particulars and verified bill of particulars.

In opposition to the prior application, the plaintiffs submitted an attorney's affirmation and the affidavit of Andrew Davis Webb dated August 14, 2012. In reply, the defendants/third-party plaintiff submitted an attorney's affirmation. In opposition to the motion to renew, the plaintiff and third-party defendant Marca have both submitted attorney's affirmations.

Defendant Ramp Motors seeks dismissal of the complaint by virtue of the Transportation Equity Act of 2005 (49 USCS § 30106, Graves Amendment). New York State Vehicle and Traffic Law Section 388 (1) imposes vicarious liability upon the owner of any vehicle involved in an accident (*De La Cruz Sigaran v ELRAC, Inc.*, 2008 NY Slip Op 52569U, 22 Misc3d 1101A, 875 NYS2d 824 [Sup Ct, Bronx County 2008]). The Graves Amendment, however, preempted Vehicle and Traffic Law § 388 by barring vicarious liability actions against professional lessors and renters of vehicles (*Graham v Dunkley*, 50 AD3d 55, 852 NYS2d 169 [2d Dept 2008]). "The Graves Amendment," by its express language, preempts all state statutory and common law to the extent those laws hold owners in the business of renting or leasing motor vehicles vicariously liable for the negligence of drivers, except when there is negligence or criminal wrongdoing on the part of the vehicle's owner" (*De La Cruz Sigaran v ELRAC, Inc. et al, supra; see Novovic v Greyhound Lines, Inc.* 2008 US Dist. Lexis 94176 [ED NY 2008]; *American Association for Justice, AAJ Annual Convention Reference Materials*, 2 Ann 2007 AAJ-CLE 1873 [2007])." Here, the plaintiff asserts that defendant Ramp Motors, as owner of the subject vehicle, bears liability in this action premised upon the theory of vicarious liability for the negligence of its lessee, defendant Austin in operating the Ramp vehicle at the time of the accident.

Wayne Rampone, Jr. set forth in his affidavit that he is the Vice President of Ramp Motors, Inc. He averred that Ramp Motors, Inc. was the lawful owner of the vehicle allegedly involved in the subject accident. Rampone continued that Ramp Motors, Inc. was in the business of renting and leasing automobiles on the date of the alleged accident. He concluded that co-defendant Austin was not, and has never been, an employee of Ramp Motors, Inc.

The lease agreement dated January 25, 2007, establishes that Tashia Austin leased the vehicle from Ramp Motors, Inc. through February 5, 2007. Except for speculative and conclusory assertions unsupported by evidentiary proof, no party has demonstrated a basis upon which this Court can conclude as a matter of law that Ramp Motors was negligent or that there was criminal wrongdoing on the part of Ramp Motors, the vehicle's owner.

Based upon the foregoing, it is determined as a matter of law that 49 USCS § 30106, The Graves Amendment, preempts this action asserted against Ramp Motors, Inc. on the basis of vicarious liability for the

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acts of Tashia Austin.

Third-party defendant Marca's counsel has proffered the argument that there is a conflict of interest in defense counsel representing both Ramp Motors and Tashia Austin. In that the action asserted against Ramp Motors is dismissed herein as a matter of law, such conflict has been rendered academic.

Turning to the branch of motion (005) wherein defendant/third-party plaintiff Austin seeks summary judgment on the basis that she bears no liability for the occurrence of the accident, it is determined that there are factual issues which preclude summary judgment on the issue of liability.

Tashia Austin testified that on the date of the accident, Saturday, February 4, 2007, she was operating a Ford Expedition which she rented from Ramp Motors. In 1999, she was convicted of felony possession of cocaine, but she stated that she did not use drugs. At the time of the accident, she had five passengers in the car, including the infant plaintiffs, Karan Cole and Jalena Cole, whom she was dropping off at their home. She had never been to their home, so Jalena was giving her directions. She traveled past the Yaphank Jail but could not remember the name of the road. She made a left turn at the stop sign and entered onto Victory Avenue, a road on which she had traveled frequently. She stated that she traveled about four or five minutes on Victory Avenue, on which she described as a dry, level roadway, until she reached the point where the accident occurred. The day was clear and sunny. She then testified that she traveled east on Victory Avenue a couple of seconds (five or ten-not a mile-a half mile even), prior to the accident, then stated that she could not remember. She thought she might have been traveling about five or ten miles per hour, less than fifteen miles per hour, as she had just pulled onto Victory Avenue and put her foot on the gas after she made the left turn. She testified that she did not see the car traveling in the other lane as she "wasn't looking in the other lane," that she was looking to just where she was driving. She stated she could see about a mile or two miles ahead. She continued that the cars traveling west on Victory could turn (left) to gain access to the Sunrise Highway entrance ramp to travel westbound on Sunrise Highway. She initially testified that vehicles traveling east could not turn right to turn onto the entrance ramp, but then corrected her testimony. She later testified that she had "seen a car driving...heading westbound in its lane" when she entered onto Victory Avenue. Their vehicles were separated by about a car length or two at the time. She added that she was about four or five car lengths from the stop sign when she saw the other car. She had no visual impairments or obstructions to her direct or peripheral vision. When she first saw the Marca vehicle, she said it was traveling straight with no turn signals, and it had not yet reached the turn lane, but she did not know how far from that turn lane it was. She continued that when she first saw the Marca vehicle, her vehicle and his were about equal distance to the entrance ramp. She then stated that she could not remember. Up until the accident occurred, she did not change her speed or compass direction of her vehicle or apply her brakes. She only saw the other vehicle change direction when it hit her. She stated that she did not see the other vehicle begin to make its left turn prior to the accident and never saw it travel south prior to impact. The last time she saw the other vehicle, it was still traveling straight in a westbound direction. The drivers' front side of her vehicle was impacted. She did not know what portion of the Marca vehicle impacted with her vehicle.

Karan Cole testified that she and her then sixteen year old sister, Jalena, were passengers in the vehicle driven by Tashia Austin when it was involved in an accident in the morning as Austin was taking her and her sister home to Shirley, New York. Karan testified that she was asleep in the vehicle from the time they left Austin's home until the accident occurred. Jalena Cole testified that she and her then thirteen year old sister Karan were involved in the accident at about 10 a.m. while they were riding in the vehicle, described as a truck, being driven by Austin. Jalena stated she had been dozing for about five minutes when she heard Austin yell, so she jumped up and opened her eyes. She saw the other vehicle involved in the accident. It was stopped, but the

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Austin vehicle was moving. She did not see the impact.

Donna Ayala set forth in her statement dated February 4, 2007 that she was a passenger in the Austin vehicle. Austin had a sleep-over birthday party at Austin's home in Medford, and Karan and Jalena Cole slept over. They were taking the girls home when the accident occurred. Ayala stated that she was seated in the front passenger seat. They were traveling on the Sunrise Service Road when a car traveling in the opposite direction seemed to hesitate, then started to make a left turn and collided with the front of the Austin vehicle.

Christine Knoell, set forth in her statement that she was traveling westbound on the North Service Road for Sunrise Highway behind a purple Beretta traveling about thirty five miles per hour. The Beretta entered the turn lane, and she followed behind it. She could see a SUV approaching in the eastbound lane. The Beretta made a left turn for the entrance ramp to Sunrise Highway and turned in front of the SUV just as the SUV entered into the intersection, and the vehicles collided.

Andrew Davis Webb set forth in his affidavit that he has a Bachelor of Science degree in Mechanical Engineering and has seventeen years of corporate engineering experience for various corporations, including Chrysler Motors, General Motors, Caterpillar, Raychem and Carron & Company, and over nine years of forensic engineering experience with Accident Research Specialists, PLLC (ARS). ARS performed an accident reconstruction using PC-Crash, a program used to simulate motor vehicle accidents. He continued that the PC-Crash program is a recognized accident reconstruction tool which has been admitted into State and Federal Courts, and is used in the engineering and accident reconstruction community. Webb set forth the materials provided to him and performed an analysis of the accident. It was Webb's opinion that the pre-impact speed of the Ford Expedition was approximately 61.5 miles per hour and the pre-impact speed of the Beretta was approximately 24 miles per hour.

While the defendants object to Webb's affidavit, there are other factual issues which preclude summary judgment. Austin did not know the speed of her vehicle at the time of impact, and no evidentiary proof has been submitted to establish the same.

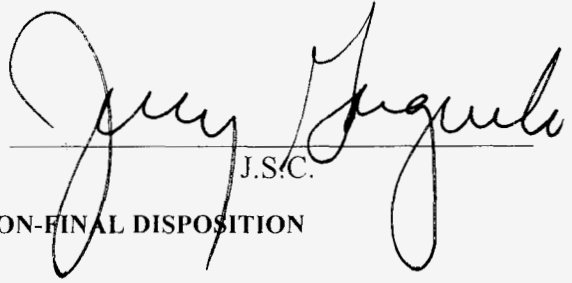
Vehicle & Traffic Law §1141 provides that the driver of a vehicle intending to turn left within an intersection shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard (*Kiernan v Edwards, et al*, 97 AD2d 750, 468 NYS2d 381 [2d Dept 1083]; *Mass et al v Leinker et al*, 46 AD2d 383, 362 NYS2d 552 [2d Dept 1975]; *Bogorad v Fitzpatrick*, 38 AD2d 923, 329 NYS2d 874 [1st Dept 1972]). Failure to yield the right of way in such circumstances is negligence (*Hamby v Bonventre et al*, 36 AD2d 648, 318 NYS2d 178 [3d Dept 1971]). Here, in view of Austin's contradictory and inconsistent testimony, she did not meet the burden of establishing prima facie entitlement to summary judgment dismissing the complaint. Moreover, if, as Austin testified, she observed defendant Marca's vehicle on Victory Avenue prior to executing her left turn onto Victory Avenue, an issues of fact exist as to whether she was maintaining a proper lookout, whether she could have avoided the accident by changing her speed or applying her brakes, and the speed of her vehicle as it traveled on Victory Avenue.

While counsel for third-party defendant Marca asserts that Austin directed the children in her car to lie to the police concerning the use of seatbelts, no evidentiary proof has been submitted in support of that assertion. The entire deposition transcripts of the Cole children has not been provided to this court. Additionally, issues of credibility are for jury determination which precludes summary judgment as a matter of law (*S.J. Capelin Associates, Inc. v. Globe Manufacturing Corporation*, 357 N.Y.S.2d 478, 34 N.Y.2d 338 [1974]).

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Accordingly, that branch of motion (005) by Tashia Austin which seeks dismissal of the complaint and judgment in her favor on the issue of liability is denied.

Dated: 5/23/13

  
\_\_\_\_\_  
J.S.C.

\_\_\_\_ FINAL DISPOSITION     NON-FINAL DISPOSITION