CITATION: Bhattacherjee v. Marianayagam et al, 2013 ONSC 40
COURT FILE NO.: CV-10-3156-00
DATE: 20130103

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: PAMELA BHATTACHERJEE

Plaintiff

v.

ENID MARIANAYAGAM, MARCELINE MARIANAYAGAM, MICHAEL GROSSI AND NISAN CANADA INC.

Defendants

BEFORE: O'Connor J.

COUNSEL: J. Fireman, for the Plaintiff

H. L. Kawaguchi, for the Defendants, Enid Marianayagam and Marceline Marianayagam

D.A. Zuber and J. Tausendfreund, for the Defendant, Michael Grossi

E N D O R S E M E N T

[1] On June 10, 2010, the Plaintiff, Pamela Bhattacherjee (Bhattacherjee), was a passenger in a car driven by the Defendant-Responding Party, Enid Marianayagam (Marianayagam). As they were travelling west-bound on King St. W. in Hamilton, their vehicle entered the intersection at Macklin Street and

collided with a north-bound car driven by the Defendant-Moving Party Michael Grossi (Grossi). At that location, King St. W. is a four lane one-way west-bound street. Macklin St. is two lanes, one north-bound and the other south-bound.

[2] Grossi and Nisan Canada[1], the owner of his car, move for a summary judgment dismissing the action against them. Grossi claims the collision was caused entirely by the negligence of Marianayagam, whom he says entered the intersection against a red light. He was driving carefully and prudently, and he had the benefit of a green light at the material time. There is no evidence of any contributory negligence on his part whatsoever.

[3] Marianayagam says the roads were wet, that she was proceeding carefully, and that the light was amber when she entered the intersection. She was unable to come to a safe stop due to the wet road. She says the genuine issue for trial, as between these two Defendants, is whether Grossi was negligent to at least some degree for the collision that injured Bhattacherjee.

[4] The Plaintiff takes no position on this motion.

[1] In the Statement of Claim, the Plaintiff has named "Nisan Canada" as a Defendant in the main action. This appears to be a misspelling of 'Nissan'.

[5] For the reasons that follow, Grossi's and Nisan Canada's motion to dismiss the action against them is hereby granted.

The Facts

[6] The evidence that supports the disposition of the motion is contained in the affidavits of Grossi, Marianayagam, Bhattacherjee, Grossi's daughter Darria Young (Young), and Krishnagari Maheswaran (Maheswaran), another passenger in Marianayagam's car. All of the parties and witnesses who provided affidavits have been cross-examined on them by parties opposed in interest and by the Plaintiff. I will briefly summarize that evidence.

Michael Grossi

[7] The collision occurred at 1:00 am on June 10, 2010. Grossi said he was driving his daughter to her home on Macklin St., about a half block north of the intersection with King St W. in Hamilton. He had done so many times previously and was familiar with the area. He was driving under the speed limit and had not had any alcohol to drink that day. He saw the light ahead at King St. turn green approximately five seconds before he entered the intersection. His car was 'T-boned' by Marianayagam's car in the intersection.

Darria Young

[8] Grossi's daughter, Young, pointed out in her affidavit that if a north-bound car on Macklin made a right turn at King (as stated by Maheswaran, a passenger in Marianayagam's car), it would be going the wrong way on a one-way street. Young said that the light facing them "…had been green for at least several seconds as we approached the intersection, and remained green as we entered the intersection in a northbound direction." During her cross-examination on her affidavit, she said that the light was green from the first time she saw it at Carling Street, a block south of King St., until they entered the intersection. She said her father intended to go straight through the intersection to her home and not make a left turn onto King. Nor did he put on his left-turn signal. She said they were travelling at less than the speed limit.

[9] If Grossi and his daughter are believed, then Marianayagam entered the intersection against the red light.

Pamela Bhattacherjee

[10] Perhaps the most persuasive evidence of when Marianayagam entered the intersection comes from the Plaintiff , who was a passenger in the back seat of

Marianayagam's car. Her evidence was that Marianayagam was going fast as she approached the intersection. She, Bhattacherjee, saw that the light was red and remarked sarcastically, "I love how we're passing through the red light." She also said the light was red for "…five seconds before we entered."

Enid Marianayagam

[11] Shortly after the collision, she gave a statement to P.C. Booker, a Hamilton Police Officer investigating the incident, who recorded what she told him in his notebook. She said she saw the light was red, she slowed down, her tires slid, and she entered the intersection. She reviewed and signed the statement as being complete and accurate.

[12] She was subsequently charged with Careless Driving under the *Highway Traffic Act*, s. 130. She retained a criminal lawyer. She pleaded guilty to the lesser-included offence of Disobey Traffic Signal – Red under s. 144(18).

[13] At her examination-for-discovery and during her cross-examination on her affidavit for this motion, she said the lawyer "…never let me go to court" – essentially alleging ineffective assistance of trial counsel. She said she never wanted to plead guilty to anything. However, Marianayagam ultimately

acknowledged during cross-examination that she knew she could have continued to contest the charge at a trial if she had wanted to. Further, she did not appeal her conviction, nor did she take any steps to assert her claim of incompetent or ineffective assistance of counsel to otherwise have the matter reviewed.

[14] At the examination-for-discovery, Marianayagam gave several different versions of when she first saw the red light. They were not only inconsistent with each other, but also inconsistent with her statement to P.C. Booker and with the evidence of Grossi and Bhattacherjee. Marianayagam's credibility on when and how the collision occurred has been severely compromised by her inability to relate a consistent version of the incident.

Krishnagari Maheswaran

[15] He was the front seat passenger in Marianayagam's car. It was his birthday. The group in the car had been to McDonalds to celebrate and were returning home along King St. W. He had had two shots of rum about an hour before the collision. He said that in the car he was listening to his stereo and was engaged in "…two-way conversations with more than one person…" by texting them on his Blackberry.

[16] Like Marianayagam, Maheswaran was also inconsistent in what he told P.C. Booker at the scene and during cross-examination of his affidavit. He told the officer that the light was amber as they approached the intersection, and that the other vehicle was attempting to make a *right* turn onto King St. Conversely, in his cross-examination, he testified he was not looking at the traffic control signals just prior to the collision. The first time he saw the traffic light facing their vehicle was when Marianayagam's car was in the intersection, at which point the light was amber and the other car was attempting to make a *left* turn (not a right turn).

[17] Maheswaran's inconsistent recollections, possibly due to his occupation with texting and other activities that evening, were not helpful to the court in determining the state of the traffic signal when Marianayagam was approaching and entering the intersection.

The Law

[18] Significant changes affecting the application of Rule 20 of the *Rules of Civil Procedure* came into effect on January 1, 2010. Rule 20.04(2) now provides:

> 20.04(2) The court shall grant summary judgment if,
>
> (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or

(b) …

(2.1) In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.

2. Evaluating the credibility of a deponent.

3. Drawing any reasonable inference from the evidence.

[19] In *Combined Air Mechanical Services v. Flesch*, 2011 ONCA 764, 108 O.R. (3d) 1, at para. 37, the Court of Appeal determined that the amended rule now permits a motion judge to decide an action or an issue in an action where he or she is satisfied that no factual or legal issue raised by the parties requires a trial for the fair and just resolution of the action or issue. The court found that in some cases, the motion record and the examination-for-discovery/cross-examination evidence will be sufficient to determine the matter without the need for a trial. The court recognized three types of cases amenable to resolution by summary judgment - the second is actions or issues that are without merit, and the third is where there is no chance of success at trial.

[20] At paragraph 50 of *Combined Air*, the court introduced what it termed "the full appreciation test" to guide courts in applying the enhanced summary judgment powers:

> …In deciding if these powers (set out in rule 20.04(2.1) should be used to weed out a claim as having no chance of success or be used to resolve part or all of an action, the motion judge must ask the following question: can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?

[21] At paragraph 54, the court also instructed:

> The point we are making is that a motion judge is required to assess whether the attributes of the trial process are necessary to enable him or her to fully appreciate the evidence and the issues posed by the case. In making this determination, the motion judge is to consider, for example, whether he or she can accurately weigh and draw inferences from the evidence without the benefit of the trial narrative, without the ability to hear the witnesses speak in their own words, and without the assistance of counsel as the judge examines the record in chambers.

[22] And at paragraph 73, when summarizing its position respecting a claim that a defence has no chance of success at trial, the court said:

> …The availability of these enhanced powers to determine if a claim or defence has no chance of success will permit more actions to be weeded out through the mechanism of summary judgment. However, before the motion judge decides to weigh evidence, evaluate credibility, or draw inferences from the evidence, the motion judge must apply the full appreciation test.

[23] Of course, the requirement that the parties on a summary judgment motion must put their best case forward still applies under the increased powers regime introduced in *Combined Air*. That is, the moving party must satisfy the court that there are no issues of fact requiring a trial for resolution. And the responding party must show there are material factors to be tried to assess credibility, weigh evidence and draw factual inferences, and that there is a real chance of success at trial. The court is entitled to presume the evidence in the record is everything the parties would rely on if the matter proceeded to trial: *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 (C.A.), at p. 557; *Royal Bank v. Tie Domi Enterprises*, 2011 ONSC 7297, [2011] O.J. No. 5828, at paras. 4-6, *per* Allen J.

Discussion

[24] The primary issue to be decided on this motion is whether there is sufficient evidence to determine when Marianayagam proceeded into the intersection, i.e. whether the traffic signal was red, amber or green, from which to draw any reasonable inference from the evidence as to liability.

[25] If, using the full appreciation test, based on the evidence before this court, I am able to determine that the signal was red before she entered the intersection, the motion must be granted. Grossi cannot, in those circumstances, be held even 1 percent liable for the collision. If such a finding cannot be justified on the record before me, i.e. if there is a genuine issue as to whether the signal she faced was amber, or even green, the motion must fail, and the issue must be left to the trial judge (or jury) to determine.

[26] The evidence of Grossi and his daughter, Young, is consistent and, if believed, is dispositive of the issue. They said they faced a green light for several (Young) to five (Grossi) seconds before entering the intersection. Thus, as the cars met at approximately the middle of the intersection, it logically follows that Marianayagam must have faced a red light for at least an equal duration, i.e. several to five seconds.

[27] Marianayagam pleaded guilty to Disobey Traffic Signal – Red. A red light infraction is an absolute liability offence: *R. v. Kurtzman* (1991), 4 O.R. (3d) 417 (C.A.), at pp. 428-29. She did not appeal the finding of guilt, nor did she pursue the issue of ineffective representation of counsel in any other forum.

[28] In *Toronto (City) v. C.U.P.E, Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 51, the Supreme Court held that if the result, and essential findings underlying that result in a legal action, are different in a subsequent proceeding than from the first adjudication of the same issue, that inconsistency will undermine the credibility of the judicial process and thereby diminish its authority, credibility and the aim of finality.

[29] In my view, this is particularly true where, as in the case at bar, the appropriate reviewing mechanism of appeals or judicial review was never pursued by Marianayagam, and the evidence surrounding the conviction is now being disputed for the first time.

[30] The Court also recognized at para. 52 in *Toronto v. C.U.P.E.* some exceptions where relitgation will actually enhance, not impeach, the integrity of the judicial system. These include where the first proceeding was tainted by fraud or dishonesty, or where new evidence, previously unavailable, comes to light and conclusively impeaches the original result, or where fairness dictates the original result should not be binding in the next context.

[31] None of these considerations apply to this case. Marianayagam has produced no evidence to show her guilty plea was induced by fraud, or that she now has new evidence to conclusively refute the facts to which she admitted on her plea, or that fairness dictates a different result.

[32] Unless one or more of the above *C.U.P.E.* exceptions apply, and in this case I find they do not, the verdict in a criminal or quasi-criminal case, and the findings essential to that verdict, are generally conclusive in a related civil action: *Caci v. MacArthur*, 2008 ONCA 750, 93 O.R. (3d) 701, at paras. 15-16, leave to appeal to S.C.C. refused, [2009] S.C.C.A. No. 2.

[33] A plea of guilty is an admission to all legal ingredients to constitute the offence charged. Marianayagam waived her right to have the Crown prove its case and her right to any related procedural safeguards, including those constitutionally protected at a time when she was aware of the civil action and the jeopardy stakes facing her: *R. v. T.(R.)* (1993), 10 O.R. (3d) 514, at p. 519; *R. v. Eizenga*, 2011 ONCA 113, 270 C.C.C. (3d) 168, at paras. 43-44.

[34] As noted above, Marianayagam admitted on cross-examination that ultimately she voluntarily accepted the advice of her counsel to plead guilty. She

knew she could have exercised her right to contest the charge and the essential facts underlying it at trial but chose not to do so.

[35] In response, Marianayagam notes that in *Caci v. MacArthur*, the Court of Appeal permitted the appellant to show the other driver was partially responsible for the collision in the subsequent civil proceeding. This was not an abuse of process where the other driver's manner of driving had not been in issue in the earlier proceeding. Therefore, the appellant could call evidence that was relevant to the issue of the other driver's negligence. Marianayagam argues this principle should apply in the case at bar.

[36] However, in this case, Marianayagam's counsel was able to fully cross-examine Grossi, Young as well as the Plaintiff on their affidavits and the facts underlying the collision at the examinations-for-discovery. As a result, this court has a full appreciation of the key witnesses' evidence through the discovery process, the documentary evidence and the police investigation. Additionally, I have a full appreciation of the material facts and issues from which to weigh evidence, assess credibility and draw inferences necessary to determine the key disputed issue.

[37] I find a trial is not necessary to make dispositive findings about the key issue of whether Marianayagam was the sole cause of the collision at issue in this action. This is not a case where there is significant evidence that is reasonably capable of supporting more than one inference: *Iroquois Falls Community Credit Union Ltd. (Liquidator of) v. Co-operators General Insurance Co.*, 2009 ONCA 364, 97 O.R. (3d) 53, at para. 6.

[38] Furthermore, Marianayagam has not demonstrated that there is a real chance of success against Grossi at trial. The evidence she now relies on to dispute her guilty verdict is self-serving and contains only blanket denials of any wrongdoing. As noted, it is internally inconsistent and inconsistent with virtually all the other witnesses. I reject it and that of Maheswaran, and accept the overwhelming consistent documentary and *viva voce* evidence of Grossi, Young and Bhattacherjee: *Clarke (Litigation Guardian of) v. Arena*, 2012 ONSC 5557, [2012] O.J. No. 4616, at paras. 13-14, *per* Campbell J.

Result

[39] There is no genuine issue for trial respecting who was wholly and solely at fault for the collision. The motion for summary judgment to dismiss the action against Grossi and Nisan Canada is hereby granted.

[40] The parties may address the court in writing within 30 days of the release of these reasons on the issue of costs, unless otherwise settled. Their submissions shall be limited to eight pages, double-spaced, of no less than 14 font size.

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O'CONNOR J.

DATE: January 3, 2013

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ENDORSEMENT

O'CONNOR J.

DATE: January 3, 2013