SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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JOSEPH COOK,

Index No. 101907/2010

Plaintiff,

DECISION/ORDER

-against-

SUPREME SYSTEMS, INC.,

Defendant.

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JOSEPH COOK,

Index No. 156885/2012

Plaintiff,

-against-

SUPREME BUILDING MESSENGERS, INC., SUPREME BUSINESS MANAGEMENT SYSTEMS, INC., SUPREME COURIER SERVICE, INC.,

Defendants.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this personal injury action, defendants Supreme Systems, Inc. ("Supreme") and Supreme Building Messengers, Inc. ("Building Messengers") (collectively, "movants") move for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint of plaintiff Joseph Cook ("plaintiff") and any cross claims asserted against them.[1]

Background

Plaintiff was allegedly injured while crossing the street at the corner of 31st Street and 6th Avenue in New York, New York, on January 29, 2010, when an unidentified bicyclist struck

[1] Defendants Supreme Business Management Systems, Inc. and Supreme Courier Service, Inc. have not appeared in the action.

plaintiff's right foot and ankle as plaintiff began to cross 31st Street.

In support of summary dismissal of the complaint, defendants argue that they cannot be held vicariously liable for the alleged negligent operation of the bicycle by the unidentified cyclist since the bicyclist was not employed by movants, nor acting within the scope of any alleged employment with movants.

In opposition, plaintiff contends that Supreme failed to establish its entitlement to summary judgment. Further, there are sufficient facts from which a reasonable juror may infer that the unidentified bicyclist was an employee of Supreme, who was acting within the scope of his employment at the time of the incident. Plaintiff contends that the bag he saw the bicyclist wearing at the time of his accident was one issued by Supreme to its messengers prior to the subject accident: Plaintiff attests that the "photograph which was marked as Plaintiff's Exhibit '1' at the October 3, 2014 deposition of [Supreme] . . . is unequivocally a fair and accurate depiction of the bag [he] saw slung over the left shoulder of the bike messenger at the time of my January 29, 2010 accident" (¶9). Plaintiff further attests, "The photograph which was marked as Exhibit '1' at the at the October 3, 2014 deposition of [Supreme] is identical to the bag the messenger was wearing at the time of [his] accident" (¶10).

In reply, defendant argues that plaintiff's post-deposition affidavit should be stricken, since said affidavit is self-serving and contradicts his prior deposition testimony. The affidavit can only be considered to have been tailored to avoid the consequences of his earlier testimony.

Discussion

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR

3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012], *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986] *and Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR 3212 [b]; *Farias v Simon*, 122 AD3d 466 [1st Dept 2014]). The opponent must "assemble, lay bare, and reveal his proofs in order to show his defenses are real and capable of being established on trial ... and it is insufficient to merely set forth averments of factual or legal conclusions" (*Genger v Genger*, 123 AD3d 445, 447, 999 NYS2d 366, 368 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). In other words, the "issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 476 NYS2d 897 [1st Dept 1984]; *see also Armstrong v Sensormatic/ADT*, 100 AD3d 492, 954 NYS2d 53 [1st Dept 2012]).

The function of a court in reviewing a motion for summary judgment "is issue finding, not issue determination, and if any genuine issue of material fact is found to exist, summary judgment must be denied" (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474, 946 NYS2d 1 [1st

Dept 2012]). Where "credibility determinations are required, summary judgment must be denied" (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474, 946 NYS2d 1 [1st Dept 2012]). Thus, on a motion for summary judgment, the court is not to determine credibility, but whether there exists a factual issue, or if arguably there is a genuine issue of fact (*DeSario v SL Green Management LLC*, 105 AD3d 421, 963 NYS2d 24 [1st Dept 2013] [holding given the conflicting deposition testimony as to what was said and to whom, issues of credibility should be resolved at trial]).

Here, defendant Supreme established its *prima facie* entitlement to judgment as a matter of law. It is uncontested, as confirmed by plaintiff in his deposition testimony, that plaintiff never asked the bicyclist for his name or for the identity of his employer. At his first deposition, plaintiff described the bicyclist who struck him, as follows:

> "He was light-skinned Hispanic. He had black hair. He was approximately five nine, one hundred and sixty pounds. He reminded me of Cesar Milan, "The Dog Whisperer." That's how I remember what he looked like. He was wearing a sweatshirt, a Supreme Courier bag and driving a red bicycle."

(Aff. in Support, Exh. B, 12/3/2010 EBT of Plaintiff at 37, lines 10-16). Plaintiff estimated the bicyclist to be "[a]pproximately thirty to forty [years old]" (*id.* at 37, line 18), remembered the bicyclist to have hair that was "black and short" (*id.* at 37, line 24), with no facial hair (*id.* at 37, lines 19-20), and noticed no tattoos or scars on him (*id.* at 38, lines 4-6). At his second deposition, plaintiff further described the bicyclist as approximately 5'10", 170 lbs., and "[i]n his 30's" (Aff. in Support, Exh. E, 11/14/2013 EBT of Plaintiff at 29, lines 22-25; at 30, lines 2-24; at 31, lines 3-11).

According to George Modest, Vice President of Operations for Supreme, who testified at

his deposition in detail about the physical descriptions of the individual bike messengers employed by Supreme on the date of plaintiff's accident, none of Supreme's messengers matched the physical description provided by plaintiff. After Supreme received plaintiff's summons and complaint, Mr. Modest questioned each of Supreme's bike messengers who were on duty at about 2:00 p.m. on the date of plaintiff's accident, to ascertain whether any of them were involved in the accident, and each messenger said no. Mr. Modest further reviewed work sheets for January 29, 2010, which contain records of trips made by each bike messenger employed by Supreme that day, to determine the locations of the messengers on the date of the accident, and whether any messengers would have been present around the time and place of plaintiff's accident. Upon review of the work sheets, however, Mr. Modest could not identify any of Supreme's messengers who would have been in the subject area at the time of the accident. Although Supreme supplied bags to its messengers prior to January 2010 that said "Supreme Systems" on them and not, as plaintiff testified in his first deposition, "Supreme Courier," Mr. Modest testified that bike messengers were allowed to keep the bag and were not required to return the bag to Supreme if the messenger stopped working for the company. Moreover, messengers were permitted to use their own personal messenger bags for work. Furthermore, while plaintiff claims the unidentified bicyclist was riding a red bicycle at the time of the accident, Mr. Modest did not have any recollection of any messengers employed by Supreme who had a red bike in January of 2010.

Likewise, the only messenger from Supreme who was even remotely near the location and time of plaintiff's accident, Bah Drame, testified at his deposition that he was at 11 Penn Plaza, which is located on Seventh Avenue between 31st Street and 32nd Street, around 2:00 p.m.

on the day in question. Plaintiff, however, who was given the opportunity to observe Mr. Drame in person in an effort to identify whether he was the unidentified bicyclist, immediately confirmed upon seeing him that Mr. Drame was not said bicyclist. Furthermore, Mr. Drame testified that he never rode a red bike when making deliveries for Supreme, and that he did not know anyone among his fellow bike messengers who has a red bike. Thus, Supreme established *prima facie* that the unidentified bicyclist who allegedly struck plaintiff was not one of its bike messengers, entitling Supreme to judgment as a matter of law.

In opposition, however, plaintiff raised a triable issue of fact as to whether the bicyclist who struck him was an employee of Supreme. Plaintiff attests in his affidavit in opposition that the photograph marked as Exhibit 1 at the October 3, 2014 deposition of Supreme "is identical to the bag the [bicyclist] was wearing at the time of my accident" (¶ 10). The photograph marked as Exhibit 1 at the October 3, 2014 deposition of Supreme depicts a black messenger bag with silver reflective tape on it, displaying faded lettering printed in white or silver metallic shade that is light, which appears to read "Supreme Systems" across the top of the bag (*see* Aff. in Opp, Exh. D, Photograph). Mr. Modest testified at his October 3, 2014 deposition, upon being presented with said photograph, that he recognized the bag in the photograph to be like the bags issued by Supreme to its bike messengers, prior to January 2010. At plaintiff's November 14, 2013 deposition, he testified that the bicyclist who struck him was carrying a bike messenger bag that was rectangular in shape, black, with silver reflective tape on it, and lettering across the top of the bag, printed in a silver metallic or white color that was light. Accordingly, there is sufficient evidence from which a jury could infer that the bicyclist was Supreme's employee.

Contrary to Supreme's assertions, plaintiff's affidavit in opposition does not wholly

contradict plaintiff's prior deposition testimony (*see Ruffin v Chase Manhattan Bank, N.A.*, 66 AD3d 549 [1st Dept 2009] [finding plaintiff's deposition testimony, wherein she testified that she did not know what caused her to fall, but that she "believe[d] it was on the shiny part on the stairs" that "might" have caused her to slip, "enitrely consistent" with her affidavit in opposition, which states that she slipped because the steps were not completely covered by non-skid material]; *Bryant v Boulevard Story, LLC*, 87 AD3d 428 [1st Dept 2011] [finding plaintiff's deposition testimony, wherein she gestured degree of misleveling of elevator that caused her to fall and averred that she could not state degree of misleveling without venturing to guess, was not inconsistent with her affidavit in opposition, which estimated that the elevator misleveled by approximately 1 ½ to 2 ½ inches and, thus, sufficient to raise a triable issue of fact]; *Castro v New York City Tr. Auth.*, 52 AD3d 213, 214 [1st Dept 2008] ["Although the affidavit more specifically describes the types of pipes in the immediate vicinity of the area where plaintiff fell, it is not contradictory to the prior deposition testimony, but merely amplifies it."]). Plaintiff testified at his deposition on December 3, 2010 that the messenger bag carried by the unidentified bicyclist bore the words "Supreme Courier" on it. At his second deposition on November 14, 2013, plaintiff stated that the bag had "Supreme Messenger" written on it, and supplied a subsequent errata sheet to the deposition indicating that, upon "reflect[ing] further on [the] question after re-reading [it]," the first word on the bag, "Supreme," was very clear, but that "the second word looked like messenger on bag but could have been courier or system as it was more faded and I only clearly saw supreme on bag . . . ."

Plaintiff's deposition testimony that the bicyclist who struck him carried a messenger bag with the word "Supreme," followed by another word that could have been either "Courier,"

"System," or "Messenger," is, therefore, not inconsistent with his subsequent affidavit, wherein he identifies a photograph depicting a bag with the words, "Supreme Systems" on it. Moreover, "where[, as here,] there is arguably a genuine issue of fact, . . . a determination [on a motion for summary judgment] is improper, and a party's credibility remains a matter for a jury to consider" (*Fields v Lambert Houses Redevelopment Corp.*, 105 AD3d 668, 671-72 [1st Dept 2013]; *cf. Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [1st Dept 2000]).

Therefore, dismissal of the complaint against Supreme is denied.

Defendant Building Messengers also met its burden to show *prima facie* entitlement to summary judgment dismissing the complaint. According to the deposition testimony of Building Messengers' Vice President, Kevin Bennett, Building Messengers is in the business of providing package intercept centers located in loading docks, lobbies, and general areas of a building, which function to intercept delivery packages from other couriers and deliver them to the appropriate floor within the building that is serviced by Building Messengers. Mr. Bennett testified that Building Messengers, which is headquartered at 11 Penn Plaza, did not employ any bike messengers in January 2010. As such, Building Messengers cannot be held vicariously liable for the unidentified bicyclist's alleged negligence, and summary judgment is warranted in its favor. Plaintiff does not oppose the motion as to Building Messengers (Aff. in Opp at 1, fn 1).

Conclusion

Based on the foregoing, it is hereby

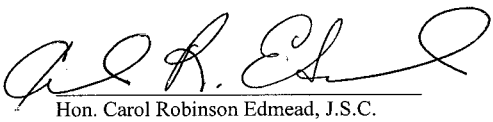
ORDERED that the motion for summary judgment by defendants Supreme Systems, Inc. and Supreme Building Messengers, Inc. is denied as against Supreme Systems, Inc. only; and it is further

ORDERED that the motion for summary judgment by defendants Supreme Systems, Inc. and Supreme Building Messengers, Inc. is granted as against Supreme Building Messengers, Inc. and the complaint is dismissed as to Supreme Building Messengers, Inc. only; and it is further

ORDERED that defendant Supreme Building Messengers, Inc. shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: January 7, 2016



Hon. Carol Robinson Edmead, J.S.C.