

<b>Estate of Bowen v Tri State Haulers, Inc.</b>
2017 NY Slip Op 32017(U)
September 26, 2017
Supreme Court, New York County
Docket Number: 153988/12
Judge: David B. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 35

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ESTATE OF ROBERT EMMETT BOWEN, III, by  
and through the Estate Administrator, AMY LEMMON  
BOWEN, and AMY LEMMON BOWDEN, on her own  
Behalf and on behalf of her minor children,

Plaintiffs,

-against-

Index No. 153988/12

TRI STATE HAULERS, INC., FREDERICK STAIR,  
JR. and VERIZON NEW YORK, INC.,

Defendants.  
-----X

**DAVID COHEN, J**

Motion sequence numbers 002 and 003 are consolidated for disposition. In motion sequence number 002, defendant Verizon New York, Inc. (Verizon) moves, pursuant to CPLR 3212 (a), for summary judgment dismissing the complaint, as against it, and dismissing all cross claims asserted by its codefendants. In motion sequence number 003, defendants Tri State Haulers, Inc. (Tri State) and Frederick Stair, Jr. (Stair) similarly move for summary judgment dismissing the complaint, as against them.

This case arises out of an accident on August 26, 2010, in which the late Robert Emmett Bowen, III was fatally injured when, while cycling southward, he attempted to cycle around a Verizon truck parked in the west bus lane of Second Avenue, just north of 59<sup>th</sup> Street, and collided with a southbound vehicle traveling in the west traffic lane. An investigation by the New York City Police Department concluded that Mr. Bowen was hit by the right rear tires of a 60-foot-long southbound flatbed trailer truck, owned by Tri State, and driven by Stair. *See New*

York Police Department closing report, Podolsky affirmation, exhibit B at 1. The complaint alleges, as against all defendants, two causes of action sounding in negligence: the first, for pain and suffering; the second, for wrongful death.

Vehicle and Traffic Law (VTL) § 1103 (b) provides that, where a vehicle is “actually engaged in work on a highway,” a plaintiff claiming to have been injured thereby may recover only by showing “a reckless disregard for the safety of others”; that is, a plaintiff must show a “conscious disregard of ‘a known or obvious risk that was so great as to make it highly probable that harm would follow.’” *Bliss v State of New York*, 95 NY2d 911, 913 (2000), quoting *Saarinen v Kerr*, 84 NY2d 494, 501 (1994); see also *Yousef v Verizon, Inc.*, 33 AD3d 315, 315 (1st Dept 2006). The Verizon truck was parked pursuant to a utility manhole embargo permit, which was issued by the City of New York to allow Verizon employees to perform emergency work drying a wet splice that was accessible from a manhole located directly in back of the truck. See Bass affirmation, exhibit F. The truck contained a generator which provided heat, through a chute, to dry the splice. Accordingly, VTL § 1103 (b) is applicable to plaintiffs’ claims against Verizon.

Verizon has presented evidence that its truck was parked facing north, that is, facing the oncoming southbound traffic. At the time of the accident, the truck’s headlights, flashing front lights, five lights on the front of the truck, and a flashing strobe light on top of the truck were all on. Bass affirmation, exhibit E at 26, 35, 99-100; Jeffrey affidavit, ¶ 7. In addition, reflective orange traffic cones were in place next to the manhole, next to the truck on its east side, and behind the truck on the south side; and, a number of reflective traffic cones, with flags attached, were in place in the bus lane north of the truck. Jeffrey affidavit, ¶ 5. Accordingly, inasmuch as

anyone cycling or driving south, either in the bus lane, or in the adjacent right hand lane, would have had ample warning of the presence of the truck, Verizon has made a prima facie showing that it did not act negligently, let alone recklessly.

In opposition, plaintiffs speculate that the Verizon truck could have been parked closer to the curb, thus allowing passing cyclists to remain in the bus lane, and they complain that Verizon failed to create a safe passageway for cyclists to pass its truck. Neither this speculation, nor this imputation of a duty beyond the duty to warn, suffices to avert dismissal of the complaint.

Because Verizon breached no duty to plaintiffs and owed no separate duty to Tri State or to Stair, their claim for contribution fails. *Chunn v New York City Hous. Auth.*, 83 AD3d 416, 417 (1st Dept 2011). The claim for common-law indemnification also fails, because, if Tri State and Stair are found to be directly liable to plaintiffs, they, as wrongdoers, can have no recovery from Verizon. *Aiello v Burns Intl. Sec. Servs Corp.*, 110 AD3d 234, 247 (1st Dept 2013).

Tri State and Stair argue that, notwithstanding the police conclusion that the truck which struck Mr. Bowen was driven by Stair, there is no evidence that such was the case, and the conclusion of the police is based solely on Mr. Stair's identification of the truck on a videotape of traffic captured on 57<sup>th</sup> Street and Fifth Avenue shortly after the accident. Stair testified at his deposition that, in August 2010, he made numerous trips to New Jersey; that one of his two usual routes from Queens to the Lincoln Tunnel had him turning south from the 59<sup>th</sup> Street Bridge onto one of the right-hand lanes of Second Avenue, and then turning west on 57<sup>th</sup> Street; and, that he was usually there at about 8:00 p.m., the time of Mr. Bowen's accident. He recalled that on one of his trips, he saw a parked Verizon truck performing work on the west side of Second Avenue

between 59<sup>th</sup> Street and 60<sup>th</sup> Street. Accordingly, Mr. Stair's testimony, in conjunction with the video capture of his truck on 57<sup>th</sup> Street, shortly after the accident, shows that his truck was at the scene of the accident at approximately the time of the accident. The police eventually identified both Stair and the Tri State truck on the basis of a statement by one M.D. Islam, who was interviewed at the scene of the accident. Mr. Islam stated that he had been standing at the southwest corner of Second Avenue and 59<sup>th</sup> Street, and had observed that, when a cyclist attempted to cycle around the parked Verizon truck, and was alongside of it, he was hit by the side of a southbound black flat bed truck traveling in the west traffic lane to 57<sup>th</sup> Street, where it made a right turn. The cab of Mr. Stair's truck is white, but the flat bed behind it is black.

Tri State and Stair present the expert opinion of Robert Genna, who states that he reviewed the police files pertaining to the accident. Mr. Genna, however, completely ignores the police records of Mr. Islam's statement. Mr. Genna opines that, in view of the traffic light patterns in the area, a truck exiting the 59<sup>th</sup> Street Bridge and turning left onto the right lane of Second Avenue could not be traveling southbound at 40 miles per hour, because, assuming that the truck had a green light exiting the bridge, it would have had to stop at a red light on Second Avenue and 59<sup>th</sup> Street. Mr. Genna states that, in order to move down Second Avenue at the speed of traffic, a truck would have to drive from the bridge exit to the right lane of Second Avenue in three seconds, while, according to his calculations, a truck would take approximately 14 seconds, and reach a speed of 15-16 miles per hour, at which time the light at 59<sup>th</sup> Street would be red. That opinion is expressly based upon an average typical tractor trailer acceleration rate. It is not probative of either the acceleration rate of the Tri State truck, or the speed at which Mr. Stair drove past the Verizon truck. Moreover, Mr. Stair had no specific recollection of his

trip on the evening of the accident, other than that he noticed the Verizon truck. It is possible, assuming that he came over the 59<sup>th</sup> St. Bridge, that he went uptown for some reason, and then came down on Second Avenue. Mary Gustella stated at her deposition that, at the time of the accident, she was standing on the corner of Second Avenue and 59<sup>th</sup> Street, waiting for the light to change so that she could cross the street, and that, at that time, the light was green for southbound traffic, and heavy traffic was rapidly going past her on Second Avenue.

Tri State and Stair also argue that the finding, by a New York State Department of Motor Vehicles administrative law judge, that Stair did not violate VTL § 510 by failing to file a report of the accident, collaterally estops plaintiffs from arguing that Stair's truck was involved in Mr. Bowen's accident. That argument fails, because no police witness appeared at the hearing and the administrative law judge's opinion expressly states that "[t]here was no evidence *at this hearing* showing the factual basis on which police listed [Stair's] vehicle as being involved in the accident." Coleman affirmation, exhibit N at 3 (emphasis supplied)

In sum, there is circumstantial evidence that the Tri State truck was involved in the accident. Circumstantial evidence may show negligence and causation, and thus suffice to avert dismissal. *Weicht v City of New York*, 148 AD3d 551, 551 (1st Dept 2017); *Brito v Manhattan & Bronx Surface Tr. Operating Auth.*, 188 AD2d 253, 254 (1st Dept 1992). While plaintiffs may be unable to prove negligence, or even causation, at trial, at this stage of the action, dismissal would be premature.

Accordingly it is hereby

ORDERED that, in motion sequence No. 002, the motion of defendant Verizon New York, Inc. for summary judgment is granted and the complaint is dismissed, as to said defendant,


with costs and disbursements as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that, in motion sequence No. 003, the motion of defendants Tri State Haulers Inc. and Frederick Stair, Jr. for summary judgment is denied.

Dated: 9-26-2017

ENTER:



J.S.C.