

Adames v New York City Tr. Auth.

2021 NY Slip Op 32370(U)

November 16, 2021

Supreme Court, Kings County

Docket Number: Index No. 503911/2019

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73

Index No.: 503911/2019
Motion Date: 10-25-21
Mot. Seq. No.: 1

-----X
KERWIN M. ADAMES,

Plaintiff,

-against-

DECISION/ORDER

NEW YORK CITY TRANSIT AUTHORITY,
METROPOLITAN TRANSPORTATION AUTHORITY,
MTA BUS COMPANY & JAMES FUTRELL,

Defendants.

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Upon the following e-filed documents, listed by NYSCEF as item numbers 18-22, the motion is decided as follows:

In this action to recover damages for personal injuries arising out of a motor vehicle accident, the plaintiff, KERWIN M. ADAMES, moves for an order pursuant to CPLR § 3212 granting him partial summary judgment on the issue of liability against defendants JAMES FUTRELL and NEW YORK CITY TRANSIT AUTHORITY. The plaintiff also seeks an order striking the affirmative defense of comparative negligence alleged by these defendants.

This lawsuit arises out of an accident that occurred on November 30, 2018, in the vicinity of the intersection of Avenue H and Nostrand Avenue, Brooklyn, New York. In support of the motion, the plaintiff submitted an affidavit stating that on November 30, 2018, at approximately 8:25-8:30 a.m., he was an occupant of a 2017 Ford SUV, a marked police vehicle, which was parked facing Eastbound on Avenue H, in Brooklyn, New York. He stated that he had been parked for several minutes when said vehicle was sideswiped by the 2005 Orion Bus bearing license plate number AT8916, which was operated by JAMES FUTRELL, which was making a right-hand turn from Northbound Nostrand Avenue to Eastbound Avenue H.

The plaintiff also submitted a copy of an uncertified police report reflecting that the bus that was involved in the accident was owned by the New York City Transit Authority and

operated by James Futrell. The description of the accident as set forth in the police report is as follows:

DRIVER OF VEHICLE ONE [the plaintiff] STATES HE WAS PARKED ON AVENUE H FACING EASTSOUND WHEN VEHICLE TWO STRUCK HIS VEHICLE'S FRONT, LEFT MIRROR AND QUARTER PANEL CAUSING DAMAGE. DRIVER OF VEHICLE TWO [Mr. Futrell] STATES HE WAS MAKING A RIGHT-HAND TURN FROM NORTHBOUND NOSTRAND AVENUE TO EASTBOUND AVENUE H WHEN HE STRUCK VEHICLE ONE CAUSING DAMAGE. DRIVER OF VEHICLE TWO STATES HE DID NOT REALIZE HOW CLOSE HE WAS TO VEHICLE ONE.

The plaintiff states in his affidavit that he was present when Mr. Futrell he gave his statement to the police and heard him state that he "was making a right-hand turn from Northbound Nostrand Avenue to Eastbound Avenue H when he struck" the parked vehicle and that he "did not realize how close he was to" the parked vehicle.

In the answer interposed by the defendants, the defendant MTA BUS COMPANY admitted that it owned, maintained, controlled and operated the bus. The defendant, NEW YORK CITY TRANSIT AUTHORITY denied that it was the owner of the bus and denied that it was Mr. Futrell's employer at the time of the accident

In opposition to the motion, the defendant submitted a photograph depicting the vehicles after they came to rest following the accident which shows that the police vehicle was parked in a bus stop at the time of the collision.

"A collision with a stationary vehicle amounts to prima facie evidence of negligence on the part of the operator of the moving vehicle. That operator, being in the best position to explain whether the collision was due to reasonable cause, is obligated to explain how the accident occurred" (*Guzman v. Schiavone Const. Co.*, 4 A.D.3d 150, 150, 772 N.Y.S.2d 25 (1st Dep't 2004) (citing *Johnson v. Phillips*, 261 A.D.2d 269, 271, 690 N.Y.S.2d 545 (1st Dep't 1999)). Here, the plaintiff established his prima facie entitlement to summary judgment on the issue of

liability against Mr. Futrell by submitting admissible proof that his vehicle was parked when it was struck by a bus operated by Mr. Futrell. The plaintiff did not establish his prima facie entitlement to summary judgment the New York City Transit Authority. Although the police report identifies the New York City Transit Authority as the registered owner of the bus, the police report was not certified and therefore does not constitute admissible proof (*see Yassin v. Blackman*, 188 A.D.3d 62, 63–64, 131 N.Y.S.3d 53, 55 (2020)).

The fact that the plaintiff himself heard Mr. Futrell give his account of the accident to the reporting police officer, Mr. Futrell's statement to the police constituted an admission and is therefore admissible even though the police report was not certified.

Although the admissible proof demonstrated that MTA BUS COMPANY was the owner of the bus and thus vicariously liable for Mr. Futrell's negligence, the plaintiff did not seek summary judgment against MTA bus company and its request for summary judgment against it made for the first time in a reply affirmation is inappropriate.

In opposition, the defendants failed to raise a triable issue of fact. While the defendants submitted admissible proof indicating that the plaintiff was illegally parked in a bus stop at the time of the accident, this goes to the issue of whether the plaintiff was partially at fault for causing the accident, not whether Mr. Futrell had a reasonable excuse for the happening of the accident.

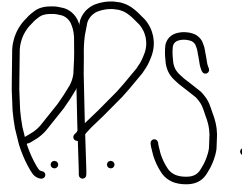
Accordingly, it is hereby

ORDERED that the plaintiff is awarded partial summary judgment on the issue of liability against defendant Futrell. The plaintiff did not establish his entitlement to summary judgment against the New York City Transit Authority; and it is further

ORDERED that the branch of the motion seeking dismissal of defendants' affirmative defense that the plaintiff was partially at fault in causing the accident is **DENIED** since there are triable issue fact as to whether he was negligent in parking in the bus stop.

This constitutes the decision and order of the Court.

Dated: November 16, 2021

A handwritten signature in black ink, consisting of the letters 'P.P.S.' in a stylized, cursive font. The signature is positioned above a horizontal line.

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020