Bailey v Gabrielli Truck Leasing LLC
2021 NY Slip Op 32535(U)
December 1, 2021
Supreme Court, New York County
Docket Number: Index No. 154850/2019
Judge: Lisa Headley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LISA HEADLEY **PART** 22

Justice

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SHARON BAILEY,

Plaintiff,

- v -

GABRIELLI TRUCK LEASING LLC,GABRIELLI HOLDING CO. INC.,ATLAS TRANSPORT & LOGISTICS GROUP LLC,DENROY KEITH DUNCAN

Defendant.

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INDEX NO. 154850/2019

MOTION DATE 03/01/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 27, 28, 29, 30, 31, 33, 34, 35, 36, 37, 38, 39, 40

were read on this motion to/for JUDGMENT - SUMMARY.

In this motor vehicle collision case, plaintiff moves for an order: (1) granting summary judgment in plaintiff's favor on the issue of liability pursuant to *CPLR §3212*; (2) dismissing defendants' affirmative defenses for comparative negligence and for the failure to use a seatbelt; (3) determining that plaintiff was free of comparative fault; and (4) directing a trial on the issue of damages pursuant to *CPLR §3212*. Defendants, Gabrielli Truck Leasing, LLC (Leasing) and Gabrielli Holding Co. Inc. (Holding), cross-move for dismissal of the complaint as against them pursuant to *CPLR §§ 3211(a)(1), (2) and (7)*.

The proponent of a motion for summary judgment carries the burden of tendering admissible evidence to demonstrate the absence of a material issue of fact as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 325 (1986). If the movant meets her burden then "the party opposing a motion for summary judgment bears the burden of 'producing evidentiary proof in admissible form sufficient to require a trial of material questions of fact'." *People v. Grasso*, 50 A.D.3d 535, 545 (1st Dep't 2008) [citation omitted]).

On August 2, 2019, defendants filed a Verified Answer in which they admit that Leasing owns at least the tractor portion (the tractor) of the tractor-trailer involved in the collision (the Tractor-Trailer). The Tractor-Trailer was leased to defendant Atlas Transport & Logistics Group LLC (Atlas). Plaintiff testified that on October 18, 2018 there was a collision between a car she was driving and the Tractor-Trailer. There is no dispute that co-defendant, Denroy Keith Duncan (Duncan), was the operator of the Tractor-Trailer.

Here, plaintiff has established a *prima facie* case for liability. Specifically, plaintiff's motion is supported by her deposition testimony that she was stopped on 125th Street in Manhattan, eastbound in the left lane, at the First Avenue intersection, and prior to the collision, she saw the Tractor-Trailer, in the right lane, which attempted to make a left turn when the collision occurred. Based on the police report, defendant Duncan admitted that he "was in the process of making a left turn from the right lane and struck" plaintiff's vehicle. (*See, NYCEF Doc. No. 29)*.

Plaintiff contends that her deposition testimony and Duncan's admission in the police report support the argument that defendant was in violation of *Vehicle and Traffic Law (VTL) § 1160 (c)*, which provides that where a driver is making a turn from a two-way roadway onto a one-way roadway, the driver intending to make the left must "approach the intersection in the extreme left-hand lane of the roadway lawfully available to traffic moving in the direction of travel of such vehicle." "A violation of the [VTL] constitutes negligence as a matter of law." *Simon v. Rent-A-Center E., Inc.*, 180 AD3d 1100, 1101 (2d Dep't 2020) [citation omitted] ["plaintiff's affidavit established, *prima facie*, that the driver of the defendants' vehicle was negligent when attempting to make a left turn from the right lane of traffic."]).

The burden now shifts to defendants to submit admissible evidence sufficient to "raise a question of fact as to whether there was a nonnegligent reason for the collision." *Maynard v. Vandyke*, 69 A.D.3d 515, 515 (1st Dep't 2010). Defendants fail to proffer an "adequate nonnegligent explanation for the accident." Defendants proffer only an attorney's affirmation and fail to raise any genuine issues of fact regarding plaintiff's *prima facie* case of negligence with regards to this rear end collision. "[A] bare affirmation of . . . [an] attorney who demonstrated no personal knowledge... is without evidentiary value and thus unavailing." *Zuckerman v. City of New York*, 49 NY2d 557, 563 (1980). Thus, defendant's attorney's conclusory and speculative affirmation, is insufficient to raise any factual issues to warrant a denial of the within motion. *See GTF Marketing Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 968 (1985).

Here, defendants' counsel interposed a cross-motion in opposition on behalf of co-defendant Leasing and Holding to plaintiff's summary judgment motion. Defendants' counsel's affirmation argues, *inter alia*, that the motion is premature, and the discovery is not complete. Further, defendants' counsel claims that he has been unable to locate defendant Duncan, who is a long-distance trucker, but that an investigation to find Duncan is being conducted. In addition, defendants' counsel argues that the police report conflicts with plaintiff's testimony as to where the accident occurred and whether plaintiff was going straight or making a left. Defendants' counsel also argues that because the police report contains plaintiff's statement "that she was going to make the left turn and Driver 1 [Duncan] struck her vehicle while attempting to make the left turn from the outside lane," an issue of fact is raised as to plaintiff's testimony about how the collision occurred. Further, defendants' counsel argues, *inter alia*, that plaintiff has not adequately addressed, with evidence, the ownership of the Tractor-Trailer, or relationships between driver Duncan and any defendant.

Further, defendants contend that the complaint should be dismissed against Leasing because it is protected by the Graves Amendment. "*49 USC § 30106*, the Graves Amendment, bars State law vicarious liability actions commenced . . . against owners of motor vehicles engaged in the trade or business of renting or leasing motor vehicles." *See*, *Hernandez v. Sanchez*, 40 A.D.3d 446, 447 (1st Dep't 2007). "Under the Graves Amendment, in order for recovery to be barred, the owner, or an affiliate of the owner [of the vehicle], must be engaged in the trade or business of renting or leasing motor vehicles, and the owner, or its affiliate, must not be negligent." *Antoine v. Kalandrishvili*, 150 A.D.3d 941, 942 (2d Dep't 2017).

In determining whether a complaint states a cause of action pursuant to *CPLR § 3211 (a) (7)*, a court must afford "the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference." *Chanko v. American Broadcasting Cos. Inc.*, 27 N.Y.3d 46, 52 (2016). "Where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to *CPLR §3211 (a) (7)* . . . the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been

shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate." *Rabos v. R & R Bagels & Bakery, Inc.*, 100 A.D.3d 849, 851-52 (2d Dep't 2012); *see, Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 274-275 (1977). "On a motion to dismiss pursuant to *CPLR §3211(a)(1)*, the defendant has the burden of showing that the relied-upon documentary evidence 'resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim'." *Fortis Fin. Servs. v. Fimat Futures USA*, 290 A.D.2d 383, 383 (1st Dep't 2002) [citation omitted]).

The cross-motion is denied because, while defendants' moving papers included evidence addressed to Leasing's maintenance of the *tractor* and rental of it to Atlas, the evidence submitted reviewed in a light favorable to plaintiff, does not address the *trailer. See, NYSCEF Doc. No. 34, ¶ 5; NYSCEF Doc. No. 35* [indicating that rental was of "TDM DAYCAB TRACTOR"]). Demonstrating that they are not claiming that they have addressed the trailer, defendants argue that *VTL § 388 (2)* defines a trailer as a vehicle and, as such, plaintiff should have performed due diligence to determine the trailer's owner and to sue that owner. This argument presumes that the complaint does not allege that Leasing and Holding owned or maintained the trailer. On this motion, with the pleading construed liberally and plaintiff granted the benefit of favorable inferences, the complaint cannot be said to address only the tractor. *Chanko, supra* at 52; *JF Capital Advisors, LLC v. Lightstone Group, LLC*, 25 N.Y.3d 759, 764 (2015). Here, the complaint supplies what may be the license plate number for the tractor alone, but this may not be viewed as limiting the pleading to only the tractor where plaintiff also alleges that the "vehicle operated" by Duncan collided with her car. (*See,* NYSCEF Doc. No. 1, ¶ 62). Duncan operated the entire Tractor-Trailer. To the extent that the complaint is ambiguous, any ambiguity must be resolved in plaintiff's favor. *JF Capital Advisors, LLC*, *supra* at 764; *see also, CPLR § 3026*. Plaintiff also testified that the collision was with the trailer portion of the Tractor-Trailer (*NYSCEF Doc. No. 30 at 36*). The defendants did not address the trailer and its ownership, or application of the Graves Amendment to the trailer. As to Holding, the submitted affidavit of Ralph Rotella does not provide a basis for his knowledge as to Holding and is insufficient to dismiss the complaint against it on the ground that it does not own the trailer. No affidavits from Holding's officers or owners have been submitted.

Further, where a movant has not met his or her burden, the motion must be denied, regardless of the sufficiency of the opposition. See, *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). In addition, as addressed below, fact issues remain as to whether the Graves Amendment precludes liability against Leasing, and as to Holding's relationship, or lack thereof, to the Tractor-Trailer. For these reasons, plaintiff's motion for partial summary judgment on liability may only be granted as against co-defendant, Duncan, and is denied as to the remaining defendants.

Plaintiff's motion for a determination that plaintiff is free from comparative negligence and for dismissal of defendants' defense of plaintiff's fault and comparative negligence is granted, as defendants do not raise a fact issue to negate plaintiff's showing. To the extent that defendants have raised an issue concerning plaintiff's use of safety devices in the vehicle "it is well settled that [such a failure would be implicated in] mitigation of damages only, not to comparative liability." *Godfrey v. G.E. Capital Auto Lease, Inc.*, 89 A.D.3d 471, 479 (1st Dep't 2011])[concerning seatbelt defense]).

With her unchallenged testimony that she was wearing a seatbelt when the accident occurred, plaintiff has sufficiently demonstrated that the defense of lack of a seatbelt should be

dismissed. Consequently, to the extent that defendants' tenth affirmative defense alleges that plaintiff's injuries were caused by her failure to use a seatbelt, it is dismissed.

Lastly, plaintiff's argument that defendants' answer should be stricken for their willful failure to appear for depositions is unpersuasive as defendants' depositions were the subject of another motion, addressed above, and decided on June 15, 2021. (See, *NYSCEF Doc. No. 41*). In this court's discovery decision, defendants were given until August 30, 2021, after the filing of this motion, to conduct depositions.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment on liability against defendants is granted **only** as to defendant Denroy Keith Duncan, and denied as to the remaining defendants; and it is further

ORDERED that plaintiff's motion for a determination that she is free of comparative fault in this action is granted; and it is further

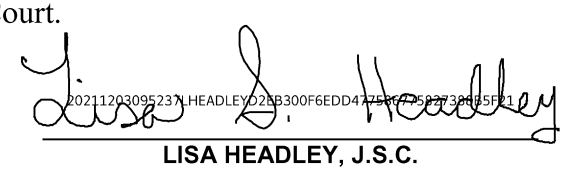
ORDERED that the branch of plaintiff's motion for dismissal of the first and ninth affirmative defenses of defendants' verified answer is granted, and thus, the first and ninth affirmative defenses of the verified answer are hereby dismissed; and the branch of plaintiff's motion for partial dismissal of the tenth affirmative defense of defendants' verified answer is granted, but only to the extent that the portion of the tenth affirmative defense of the verified answer which alleges that plaintiff failed to use a seatbelt is dismissed; and plaintiff's motion is otherwise denied; and it is further;

ORDERED that defendants' cross motion to dismiss the complaint as against Gabrielli Truck Leasing LLC and Gabrielli Holding Co. Inc. is denied; and it is further

ORDERED that any relief sought not expressly addressed herein has nonetheless been considered; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon defendants with notice of entry.

This constitutes the decision and order of the Court.



12/1/2021
DATE

LISA HEADLEY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE