Dalrymple v Morocho
2022 NY Slip Op 33793(U)
January 6, 2022
Supreme Court, Kings County
Docket Number: Index No. 522691/18
Judge: Wavny Toussaint
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At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 6th day of January, 2022.

PRESENT:

HON. WAVNY TOUSSAINT,
Justice.

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WOODY DALRYMPLE,
Plaintiff,

- against -

Index No. 522691/18

ROMAN MOROCHO AND AGGREGATE & CEMENT TRUCKING, LLC,

Motion Sequence 3

Defendants.

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The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	46 – 54
Opposing Affidavits (Affirmations)	58 – 66
Reply Affidavits (Affirmations)	70 – 72
Other (Letters from Counsel) Sur-replies	73, 74

Upon the foregoing e-filed papers, defendant Aggregate & Cement Trucking, LLC (hereinafter Aggregate) moves for an order pursuant to CPLR § 3211 (a) (5) dismissing plaintiff's complaint on the basis that it is time-barred under CPLR § 214 (5) (Seq 003). Plaintiff opposes this motion.

Background Facts and Procedural History

This is a lawsuit for personal injuries allegedly sustained by the plaintiff as a result of a motor vehicle accident that occurred on September 23, 2016 at approximately 10:00

a.m. on Irving Avenue, at or near its intersection with Willoughby Avenue, Brooklyn, New York. Plaintiff, Woody Dalrymple (plaintiff), alleges that immediately prior to his accident, he was proceeding by bicycle in the marked bicycle lane on Irving Avenue, approaching the intersection with Willoughby Avenue. According to the plaintiff, a large truck rolled past the stop sign on Willoughby Avenue, causing plaintiff to believe that it was not going to stop. In an attempt to avoid a collision with the truck, the plaintiff moved to the right, causing him to collide with the vehicle being operated by defendant Roman Morocho. The plaintiff was knocked off his bicycle and sustained injuries. It is undisputed that the driver of the dry-bulk tanker truck did not leave his personal identifying information with plaintiff or Morocho, however, the reason for not doing so is disputed by plaintiff and ACT as set forth below.

On November 9, 2018, plaintiff commenced the instant action by the filing of a summons and verified complaint against Morocho and defendants, "John Doe" and Cowan Systems, LLC (hereinafter Cowan). The complaint alleges that Cowan was the owner and "John Doe" was the operator of the truck in question.

On April 29, 2019, defendant Morocho moved for summary judgment, alleging defendant had no liability for the happening of the accident. By order dated October 9, 2019, this court granted defendant's motion, as the opposition submitted was insufficient as a matter of law. The action was severed and was continued against the remaining defendants. On September 18, 2020, plaintiff filed a motion, seeking to amend the

complaint "to name a previously unidentified- party, sued as John Doe. Plaintiff alleges that the identity of the owner of the truck involved was determined immediately prior to making the application to amend. Pursuant to order dated December 30, 2020, the plaintiff's motion was granted, and an amended complaint was filed. The amended complaint adds Aggregate as a defendant and removes Cowan Systems LLC and John Doe as defendants. On March 1, 2021, Aggregate filed its verified answer asserting the affirmative defense that the action is time-barred because it was not commenced within the applicable three-year statute of limitations pursuant to CPLR § 214 (5).

Motion to Dismiss:

Aggregate now moves to dismiss plaintiff's complaint, pursuant to CPLR § 3211 (a) (5), on the grounds that the action is untimely, as the subject accident occurred on September 23, 2016, the statute of limitations expired on September 23, 2019 and action against it was not commenced until December 30, 2020.

In opposition to the motion, plaintiff contends that Aggregate should be estopped from asserting the statute of limitations as a defense because the operator of the truck fled the scene of the crash making it difficult to identify Aggregate as the proper defendant. In support, plaintiff proffers surveillance video from a nearby school which, according to plaintiff, depicts the Aggregate truck driver frantically making multiple "cuts" as it tries to extricate itself from the crash scene and flee before police arrive. In addition, plaintiff proffers his own affidavit attesting to his recollection that, after the crash, the truck and car

drivers had an argument over who was responsible for the crash, but that neither driver spoke to him, nor did the truck driver identify himself (NYSCEF Doc. No. 59, ¶ 4). Instead, that the truck driver maneuvered the truck to complete his left turn onto Irving and left the scene (*id.* at ¶ 5).

Plaintiff's counsel also contends that he made diligent efforts to identify the truck including instituting a plenary action, pursuant to CPLR § 3102 (c), to obtain a copy of the school surveillance video - *Woody Dalrymple v The City of New York, et. al.*, Kings County Supreme Court Index No. 158458/2016. That the video, however, was grainy making it hard to identify the truck. Between the video and plaintiff's limited recollection, plaintiff's counsel states that it was believed that a logo matching that of Cowan was on the truck. Further, plaintiff' counsel states that extensive internet searches were conducted based on the video as well as personal visits to sand and concrete plants in Brooklyn and Queens following a suggestion by Cowan's general counsel regarding the type of truck seen in the video.

Then, on September 15, 2020, plaintiff's counsel represents that, by pure happenstance, he saw a dry-bulk tanker truck closely resembling the vehicle seen in the surveillance video and, consequently, believed the correct operator of the dry-bulk truck to be Aggregate. Accordingly, the September 15, 2020 sighting of the Aggregate truck was the first time Aggregate could be identified as the truck involved in the accident. Three days later, on September 18, 2020, plaintiff moved for leave to amend the complaint and

add Aggregate as a defendant in lieu of John Doe and Cowan. Said motion was subsequently granted by order of this court dated December 11, 2020.

In reply Aggregate proffers the affidavit of Pablo Sanchez (Sanchez), a commercial truck driver for Aggregate, who attests to operating a motor vehicle on Willoughby Avenue approaching its intersection with Irving Avenue when he witnessed an incident between a bicyclist and an SUV on Irving Avenue on September 23, 2016 (NYSCEF Doc. No. 71, ¶ 2). Sanchez states that he remained at the scene for an extended period of time and spoke with the responding police officers who told him to leave since they did not consider him to be involved (*id.* at ¶¶ 3, 4). Sanchez further states that he never prepared a company incident report regarding Dalrymple's accident because he was only a witness and did not cause the accident or flee the scene (*id.* at ¶¶ 5, 6). Aggregate also proffers the police accident report, contending that it corroborates Sanchez's affidavit. That the police report reflects that responding officers assigned number 14 to plaintiff, which corresponds in the key to pedestrian/bicyclist/other pedestrian error/confusion as an apparent contributing factor to the incident. And that the responding police officers did not assign any contributing factor to the incident to anyone else which is consistent with Sanchez's statement that the police did not consider him to be involved.

Finally, Aggregate also contends that a review of the surveillance video proffered by plaintiff confirms that Sanchez traveled slowly, came to a complete stop prior to the intersection, and remained at the accident scene for over 10 minutes. Defendant points

out that the surveillance video submitted by plaintiff has a break in footage from the 10:05 minute mark to the 10:45 minute mark. Thus, that said video cannot be relied upon in determining how long Sanchez remained at the scene, whether he spoke with the police and was told by the police to leave, or whether he fled the scene as argued by plaintiff.

In response, plaintiff submits a letter in sur-reply, contending that Aggregate's reply contradicts its answer by acknowledging for the first time that its vehicle and driver were involved in the subject incident. Plaintiff contends that he should be given the opportunity to depose Sanchez to determine whether Sanchez in fact complied with Vehicle and Traffic Law (VTL) § 600 (2) (a) or, as plaintiff contends and the video shows, Sanchez fled the scene without providing his and his employer's identification and insurance information to either plaintiff or the police. According to plaintiff, the video shows that Sanchez was only out of his truck for approximately one and a half minutes, hardly time to share his information with the two other parties involved in the crash or speak with police as claimed. Further, that the video does not show the presence of a police officer or police vehicle, and that, in any event, Sanchez still has a duty under VTL § 600 (2) (a) to specifically identify himself to Morocho and Dalrymple, which he did not do.

Objecting to plaintiff's submission of a sur-reply, Aggregate submits a letter arguing that plaintiff is not entitled to submit a sur-reply, as Sanchez's affidavit does not constitute new evidence because it was submitted in reply to plaintiff's affidavit and the surveillance video.

Discussion

As a preliminary matter, the court will consider plaintiff's sur-reply as it addresses new, responsive evidence proffered by Aggregate in its reply (*see Matter of Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380, 381-82 [1st Dept 2006] [finding that an opportunity for a sur-reply eliminates any prejudice where the court considers a claim or evidence offered for the first time in reply]).

"To dismiss a cause of action pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the applicable statute of limitations, a defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the action has expired" (*U.S. Bank N.A. v Gordon*, 158 AD3d 832, 834-835 [2d Dept 2018] [internal quotation marks omitted]). Here, Aggregate established, prima facie, that the three-year statute of limitations had expired prior to the filing of this action against it. Thus, the burden shifted "to the plaintiff to raise a question of fact as to whether the statute of limitations is tolled or is otherwise inapplicable" (*Collins Bros. Moving Corp. v Pierleoni*, 155 AD3d 601, 603 [2d Dept 2017]).

In New York, a defendant may be estopped from interposing a statute of limitations defense where the defendant's affirmative wrongdoing "produced the long delay between the accrual of the cause of action and the institution of the legal proceeding" (*General Stencils v Chiappa*, 18 NY2d 125, 128 [1966]). Applying equitable estoppel to prevent a defendant from asserting the statute of limitations is rooted in the principle that "no man

may take advantage of his own wrong" (*id.*, *citing Glus v Brooklyn Eastern Term.*, 359 US 231, 232-233 [1959]).

Generally, "equitable estoppel will apply where plaintiff was induced by fraud, misrepresentation or deception to refrain from filing a timely action" (*Zumpano v Quinn*, 6 NY3d 666, 674 [2006] [*quoting Simcuski v Saeli*, 44 NY2d 442, 449, 377 NE2d 713, 406 NYS2d 259 [1978]). The plaintiff must demonstrate reasonable reliance on the defendant's misrepresentations (*id.*). Moreover, a plaintiff must show subsequent and specific actions by defendants aimed to conceal the former tort which somehow prevented plaintiff from timely bringing suit (*id.*).

The instant action does not present a situation where plaintiff was lulled into inactivity or a false sense of security by Aggregate's fraud or misrepresentation. Rather, plaintiff timely commenced suit but failed to timely name the correct defendant, a failure that plaintiff attributes to Sanchez fleeing the scene of the accident. While there is no case proffered by plaintiff applying equitable estoppel to similar factual circumstances, the court finds that leaving the scene of a motor vehicle accident that he or she is involved in, which is a violation of VTL § 600 (2) (a),[1] amounts to an act of concealment that could preclude

[1] Vehicle and Traffic Law § 600 (2) (a) provides, in pertinent part, that "[a]ny person operating a motor vehicle who, knowing or having cause to know that personal injury has been caused to another person, due to an incident involving the motor vehicle operated by such person shall, before leaving the place where the said personal injury occurred, stop, exhibit his license and insurance identification card ... give his name, residence ... and [other enumerated] information ... to the injured party, if practical, and also to a police officer...."

a statute of limitations defense (*cf. Sherrill v Pettiford*, 172 AD2d 512, 513 [2d Dept 1991] [holding that a party who fails to comply with VTL § 505 (5), which requires that every motor vehicle licensee notify the Commissioner of Motor Vehicles of any change of residence within 10 days of the occurrence of the change, will be estopped from challenging the propriety of service made to the former address]).

The video proffered by plaintiff does not conclusively establish that Aggregate's truck was involved in the subject accident or whether Sanchez left the scene before police could arrive, as contended by plaintiff, or whether Sanchez waited for the police to arrive and was told to leave, as represented by Sanchez. Consequently, the issue of whether Aggregate should be estopped from asserting the statute of limitations as a defense involves a factual dispute requiring a trial (*see General Stencils v Chiappa*, 18 NY2d at 128; *see also Matter of Spewack*, 203 AD2d 133, 134 [1st Dept 1994] [citations omitted]).

Conclusion

Accordingly, it is

ORDERED that defendant Aggregate's motion to dismiss plaintiff's complaint as time-barred is denied.

This constitutes the decision and order of the court.

ENTER,

J. S. C.

HON. WAVNY TOUSSAINT

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