

Lopez v Achadary

2016 NY Slip Op 31998(U)

September 26, 2016

Supreme Court, Bronx County

Docket Number: 306421/14

Judge: Howard H. Sherman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX - Part 4

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Jose A, Marte Lopez ,

Decision and Order

Plaintiff

Index No. 306421/14

-against-

Howard H. Sherman
J.S.C.

Golan Achadary, "John Doe"
name fictitious and unknown), **Afriyie Adu,**
and **David O. Saprong,**

Defendants

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The following papers numbered 1-3 read on this motion by Defendant Golan Achdary for summary judgment dismissing the complaint and the cross-claim .

Notice of Motion, Affirmation , Exhibits A-G	1
Affirmation in Opposition , Exhibits A,B	2
Affirmation in Reply, Exhibit A	3

Upon the above-reflected submissions, the motion by Defendant Golan Achdary (Achdary) for summary judgment dismissing the complaint and the cross-claim is denied for the reasons set forth below.

In this action Jose A. Marte Lopez (Lopez) seeks damages for personal injuries alleged to have been sustained on July 19, 2014 when the motorcycle on which he was riding , which was being operated by an individual yet to be identified , came into contact with a motor vehicle owned by David O. Sarong (Sarong) then being driven by Afriyie Adu (Adu). After the accident, the driver of the motorcycle fled the scene. It is undisputed that at the time of the accident, the motorcycle was owned by Achdary.

This action was commenced on December 5, 2014 . Defendant Achdary and co-defendants Sarong and Adu have interposed answers asserting cross-claims. To date,

no Note of Issue has been filed.

Defendant Achdary now moves for summary judgment on his defense to the claim of vicarious liability for the conduct of the motorcyclist (see, Vehicle and Traffic Law § 388) , and contends that he demonstrates as a matter of law on this record that his motorcycle was stolen at the time of the accident, and that he had not given anyone either permission to use, or access to the vehicle's keys. The motion is supported by copies of the pleadings, and the movant's affidavit , as well as copies of a wireless phone statement for the month of July 2014 addressed to Achdary [Exhibit D], and New York City Police Department [NYPD] Incident Information Slip dated 07/23/14, and Complaint Report in connection with the theft of the motor bike ¹ [Exhibit E], and a notarized statement of theft provided by Achdary to his insurance carrier [Exhibit F].

In pertinent part, Achdary attests that at approximately 1:00 AM on July 19, 2014, he parked his motorcycle on Orchard Street in Lower Manhattan , a block from his residence. As he was parking on the street, he took his license plate with him . There were only two sets of keys, and he was in possession of both [¶ 3]. At 9:00 AM , he returned to Orchard Street, and discovered that the motorcycle was gone . After confirming with the City's 311 service, that it had not been towed, he called 911 and his insurance carrier .

¹ It is not disputed that the VIN # of the vehicle reported stolen corresponds to the motorcycle involved in the accident.

Achdary attests that officers responded to his 911 call at 9:24 AM on the 19th, and they drove him around in an attempt to locate the motorcycle, and failing to do so, instructed him to drive to the impound lot, which he did that day.

Four days later, he visited his local precinct to get the police report and "was told by the Captain that the report had not been done on Saturday and it would be done that day." Returning later that day, he was provided with a copies of the Incident Report and the Complaint respectively indicating 07/23/14 and 07/20/14 as the dates of the theft. Achdary states that he requested that the police "correct the date on the reports but they refused." [¶ 6]

Achdary attests that he does not know any of the parties involved in the accident, and has no personal knowledge of the facts and circumstances surrounding it, nor did he give anyone permission, express or implied, to operate [his] motorcycle on July 19, 2014 or any other dates."

Plaintiff opposes the motion and argues that there are material issues of unresolved fact precluding an award of summary judgment devolving from the inconsistency in the timing of the report of the theft as attested to by the defendant, and as reflected in the NYPD documents of that report. It is also noted that the Police Accident Report generated at 13:58 on the 19th, contains the license plate number of the motorcycle and does not indicate that the vehicle was reported stolen. Plaintiff submits copies of his emergency treatment records and an affidavit in which he attests that as a result of the accident he sustained severe head trauma and underwent brain

surgery, and he unable to recollect either the circumstances of the collision , or the identity of the person operating the motorcycle on which he was a passenger . He states that prior to the accident, he "would regularly ride as a passenger on motorcycles with various friends or other people [he] knew from the neighborhood []", and "it is impossible for [him] to speculate as to who specifically he was riding with that day."

In reply, defendant contends that he has provided substantial and irrefutable evidence to rebut the inference of permissive use.

Discussion and Conclusions

It is by now well settled that the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law , tendering sufficient evidence to demonstrate the absence of a material issues of fact (Zuckerman v. City of New York, 49 N.Y.2d 557, 404 N.E.2d 718 [1980]). To support the granting of such a motion , it must clearly appear that no material and triable issue of fact is presented , as the "drastic remedy should not be granted where there is any doubt as to the existence of such issues (Braun v. Carey, 280 App.Div. 1019) or where the issue is 'arguable' (Barrett v. Jacobs, 255 N.Y. 520, 522); 'issue-finding, rather than issue-determination, is the key to the procedure' (Esteve v. Avad, 271 App. Div. 725, 727)." Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, 404, 144 N.E.2d 387 [1957].

“Vehicle and Traffic Law § 388(1) creates a strong presumption that the driver of a vehicle is operating it with the owner’s permission and consent, express or implied, and that presumption continues until rebutted by substantial evidence to the contrary” (Greater New York Mut. Ins. Co. v. Clark, 205 A.D.2d 857, 858, 613 N.Y.S.2d 295, lv. denied 84 N.Y.2d 807, 645 N.E.2d 1216; see also, Villamil v. Budget Rental, 281 A.D.2d 207, 208, 721 N.Y.S.2d 638 [1st Dept. 2001]).

Upon consideration of the moving papers as afforded all favorable inferences in favor of the non-moving parties, the court finds that defendant has failed to meet his burden to demonstrate as a matter of law that the motorcycle was stolen on the afternoon of July 19th when the motor vehicle accident occurred.

While it is clear that in cases where the presumption is to be rebutted by proof of the theft of the subject vehicle, it has been held that “the failure to discover and report a theft until after the accident does not, of itself, preclude summary judgment” (citing Guerra v. Kings Plaza Leasing Corp., 172 A.D.2d 583, 568 N.Y.S.2d 413; Polsinelli v. Town of Rotterdam, 167 A.D.2d 579, 562 N.Y.S.2d 844; Bruno v. Privilegi, 148 A.D.2d 652, 539 N.Y.S.2d 403)“Villamil , supra at 639, citing authority of Pow v. Black, 182 A.D.2d 484, 485 , 582 N.Y.S.2d 186 [1st Dept. 1992] . That is not the case here.

It is plaintiff's unqualified assertion that his motorcycle was discovered to be and reported stolen nearly five hours before the collision . However, the NYPD documents do not confirm this , but raise an issue as to whether the initial report was made as a "walk in" on the 23rd. Also unresolved is the issue of how the license plate in defendant's possession as of 1:00 AM on the 19th , was identified in the police accident report.

In light of the unresolved issues of material fact, the court denies the motion with leave to renew upon the completion of discovery herein.

This shall constitute the decision and order of this court.

Dated: September 26, 2016


Howard H. Sherman