

Greene v Maliti
2013 NY Slip Op 34149(U)
October 7, 2013
Supreme Court, Bronx County
Docket Number: 300647/2012
Judge: Howard H. Sherman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

-----x
Jeffrey M. Greene, Sr.

Index No. 300647/2012

Plaintiff,

-against-

Charles M. Maliti, and Finbar A. Adefolayan,

Defendants

-----x
Charles M. Maliti, and Finbar A. Adefolayan,

Third-Party

Third-Party Plaintiffs

Index No. 83776-2013

-against-

DECISION/ORDER

**Metropolitan Transit Authority Bus Company, and
The City of New York¹**

Howard H. Sherman

Third-Party Defendants

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Facts and Procedural Background

Plaintiff seeks recovery for injuries allegedly sustained on May 14, 2010, in a collision that occurred at or near the intersection of Tillotson and Rombouts Avenues in Bronx County, New York.

At the time, plaintiff was employed by third-party defendant MTA Bus Company as a bus operator, and it is alleged that while his bus was parked near the intersection, it was struck by a motor vehicle owned by Finabar A. Adefolayan ("Adefolayan") then being

¹ By decision /order of this court dated 09/03/13, the motion of the City of New York to dismiss the third-party complaint as asserted against it, was granted.

operated by Charles M. Maliti ("Maliti").

Plaintiff commenced an action in January 2012, and issue was joined with the service of the answer of Adefolayan and Maliti in April.

In March 2013, defendants commenced a third-party action against plaintiff's employer and the City of New York interposing claims for contribution and /or indemnification, and alleging that MTA Bus Company was negligent in maintaining/operating the bus , and in failing to take evasive action to avoid the accident.

MTA Bus Company served its answer in May 2012, interposing nine affirmative defenses as well as a counterclaim.

Motion

1) Third-Party Defendant MTA Bus Company moves for an order pursuant to CPLR 3211, 3212, dismissing the third-party complaint on the grounds that any claim for indemnification/contribution is barred by operation of Workers' Compensation Law §11 and §29(6), and on the further grounds that on this record, the bus company was not negligent as a matter of law .

In opposition defendants/third-party plaintiffs contend that the third-party action is not barred by the Workers' Compensation Law because they were not employed by the third-party defendant.

With respect to MTA's arguments addressed to the lack of liability, it is argued that an argument could be made that the bus was parked in an improper place on the roadway,

and a jury could find that such illegal parking caused or contributed to the occurrence.

2) Defendants cross-move for an award of summary judgment on the issue of liability dismissing the complaint on the grounds that the collision was occasioned solely by the negligent actions of a non-party driver whose vehicle, described as a beige S.U.V. went through a stop sign causing plaintiff to swerve into the bus.

In opposition, plaintiff argues that questions of fact including, whether or not a "phantom vehicle" was present at the time and place of the accident, giving rise to issues of credibility, preclude dispositive relief. It is noted that the defendant driver, while testifying that he took down the plate number of that vehicle, has not yet produced either the number, or any other information with which to identify the offending vehicle.

Moreover, citing the authority of *inter alia*, Nevarez v. S.R.M. Management Corp., 58 A.D. 3d 295, 867 N.Y.S. 2d 431 [1st Dept. 2008], plaintiff argues that defendants fail to demonstrate their lack of negligence as a matter of law, because any fault attributable to the non-party for the failure to yield at the intersection, does not absolve the defendants from a finding of comparative fault in failing to use reasonable care to avoid a collision with that vehicle.

Discussion and Conclusions

Third-Party Defendant's Motion

Workers Compensation Preclusion

It is here undisputed that the first-party action arises out of a motor vehicle accident that transpired during the course of plaintiff's MTA employment, and upon a review of the soft-tissue injuries alleged in the verified bill of particulars, it is also clear that plaintiff does

not allege to have sustained a "grave injury."

Workers Compensation Law § 11 provides in pertinent part, the following:

"[a]n employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a "grave injury" ..

Upon review of the record here, and upon consideration of the applicable law, it is the finding of this court that the third-party claims for indemnification and contribution are barred by operation of Workers' Compensation Law §§ 11 and 29(6).

Liability

Upon review of the testimony of plaintiff as well as that of the defendant driver, it is the further finding of this court that defendant has demonstrated as a matter of law that the positioning of the bus parked on the right side of Tillotson Avenue, neither caused nor contributed to the collision .

Defendants' Motion

Upon review of the testimony as afforded all favorable inferences in favor of plaintiffs, it is the finding of this court that defendants have failed to demonstrate as a matter of law that the intersection collision was occasioned solely as a result of the conduct of the non-party driver.

Crucial unresolved questions include an explanation for the defendant driver's inability to avoid the drastic evasive movement he attests was necessitated, particularly in

light of the fact that at the time he was traveling at a speed of only five miles per hour in very light traffic , and he was able to keep the beige SUV , traveling " a little bit faster", under constant observation for approximately a minute while it approached the intersection [MALITI EBT: 52:14].

While it is established that the third vehicle's approach into the intersection was regulated by a stop sign , and defendant driver's approach was not, given the respective speeds of the vehicles, and the unobstructed ability to observe it for a significant period before the accident, the record presents a number of triable issues as to whether defendant exercised due care to avoid the collision with the bus by averting any near-collision with the as yet unidentified third vehicle .

Accordingly, for the reasons above-stated, it is

ORDERED that the motion of the third-party defendant be and hereby is granted and the third-party complaint dismissed , and it is further

ORDERED that the cross-motion of the defendants for an award of summary judgment dismissing the complaint be and hereby is denied.

This constitutes the decision and order of this court.

Dated : October 7, 2013



Howard H. Sherman