

Falciano v Jovel

2018 NY Slip Op 34480(U)

October 15, 2018

Supreme Court, Bronx County

Docket Number: Index No. 31087/2017E

Judge: John R. Higgitt

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 14

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DOMENICO FALCIANO,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 31087/2017E

CARLOS JOVEL, PELHAM BAY CAR WASH &
AUTO LUBE, INC. and BENJAMIN AGBULOS,

Defendants.
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John R. Higgitt, J.

Upon plaintiff's February 15, 2018 notice of motion and the affirmation, affidavit and exhibits submitted in support thereof; the March 6, 2018 notice of cross-motion of defendant Benjamin Agbulos and the affirmation and exhibits submitted in support thereof; plaintiff's March 7, 2018 affirmation in reply; the March 9, 2018 affirmation in opposition of defendants Carlos Jovel and Pelham Bay Car Wash & Auto Lube, Inc.; and due deliberation; plaintiff's motion for a default judgment or partial summary judgment against defendant Benjamin Agbulos is granted in part and denied in part and the cross-motion of defendant Benjamin Agbulos for summary judgment on his cross claim against defendants Carlos Jovel and Pelham Bay Car Wash & Auto Lube, Inc. is granted.

Plaintiff moves for a default judgment against defendant Benjamin Agbulos on the ground that defendant Agbulos' answer was not verified. Plaintiff was entitled to treat defendant Agbulos' unverified answer as a nullity (*cf Giambra v Commissioner of Motor Veh.*, 46 NY2d 743 [1978]). The court notes, however, that defendant Agbulos has remedied the absence of verification by submitting a verification comporting with the requirements of CPLR 3020(a) and CPLR 3021 (*see Miller v Board of Assessors*, 91 NY2d 82 [1997]). The verification is dated January 3, 2018, the same day as defendant Agbulos' answer. Plaintiff has not demonstrated any

prejudice emanating from the absence of a verification (*see Duerr v 1435 Tenants Corp.*, 309 AD2d 607 [1st Dept 2003]).

Plaintiff alternatively moves for partial summary judgment on the issue of defendant Agbulos' vicarious liability under Vehicle and Traffic Law § 388. In support of the motion, plaintiff submits his affidavit in which he avers that while standing outside his vehicle and waiting for employees of Pelham Bay Car Wash & Auto Lube, Inc. (Pelham) to finish wiping down his vehicle, his vehicle was struck by defendant Agbulos' vehicle while it was being driven by defendant Carlos Jovel, another employee of Pelham. Plaintiff's unoccupied vehicle then struck him (*see e.g. Santos v Booth*, 126 AD3d 506 [1st Dept 2015]; *Jeffrey v DeJesus*, 116 AD3d 574 [1st Dept 2014]). Plaintiff also submits the verified police accident report containing a statement, ostensibly attributable to Jovel, that his foot was slippery and unable to grip the brake, causing the collision. Such statement is admissible as a party admission (*see Liburd v Lulgjuraj*, 156 AD3d 532 [1st Dept 2017]; *Penn v Kirsh*, 40 AD2d 814 [1st Dept 1972]; *Jackson v Trust*, 103 AD3d 851 [2d Dept 2013]; *see also Delgado v Martinez Family Auto*, 113 AD3d 426 [1st Dept 2014]).

Given the circumstances of the accident, defendant Jovel may be deemed a permissive user of defendant Agbulos' vehicle for the purposes of imputing defendant Jovel's negligence to defendant Agbulos under Vehicle and Traffic Law § 388 (*see Allcity Ins. Co. v Old Greenwich Delicatessen*, 75 Misc 2d 898 [Civ Ct, N.Y. County 1973]). Defendant Agbulos did not raise an issue of fact in opposition.

Defendant Agbulos cross-moves for summary judgment on his cross claim against defendants Jovel and Pelham alleging their negligence. Agbulos relies on plaintiff's proof. Although defendant cross-moved against non-moving parties, Jovel and Pelham do not claim to

have been prejudiced in their ability to respond substantively to the cross-motion on that basis. The court, therefore, overlooks defendant Agbulos' use of a cross-motion (instead of a separate motion) to seek affirmative relief against non-moving parties (*see* CPLR 2001). Jovel and Pelham argue that the cross-motion is premature and that it is "impossible" to conclude that defendant Agbulos was not actively negligent. They raise no issue of fact as to their own negligence. Their speculation is insufficient to defeat the cross-motion (*see State of N.Y. ex rel. Perkins v Cooke Ctr. for Learning & Dev., Inc.*, 2018 NY Slip Op 05903 [1st Dept 2018]).

Accordingly, it is


ORDERED, that the aspect of plaintiff's motion for a default judgment against defendant Benjamin Agbulos is denied; and it is further

ORDERED, that the aspect of plaintiff's motion for partial summary judgment on the issue of the vicarious liability of defendant Benjamin Agbulos is granted; and it is further

ORDERED, that the cross-motion of defendant Benjamin Agbulos for summary judgment on his cross claim against defendants Carlos Jovel and Pelham Bay Car Wash & Auto Lube, Inc. is granted.

This constitutes the decision and order of the court.

Dated: October 15, 2018



John R. Higgitt, A.J.S.C.