

Da Wu v Continental Truck Body Corp.

2019 NY Slip Op 30571(U)

March 7, 2019

Supreme Court, New York County

Docket Number: 160647/2015

Judge: Adam Silvera

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 22

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DA WU,

Plaintiff,

INDEX NO. 160647/2015

- v -

MOTION DATE 01/08/2019

CONTINENTAL TRUCK BODY CORP., MILEA TRUCK LEASING
OF QUEENS, INC, ROBERT CONNELLY

MOTION SEQ. NO. 004

Defendant.

DECISION AND ORDER

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HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75

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

Upon the foregoing documents, it is ORDERED that plaintiff’s motion for summary judgment, pursuant to CPLR 3212, on the issue of liability against defendants, to strike the affirmative defenses of comparative negligence and assumption of risk, and to set down this matter for trial on damages is granted. Plaintiff’s motion contends that on May 5, 2017, on the roadway in front of 61-66 Maurice Avenue in the County of Queens, City and State of New York, defendant driver Robert Connelly moved his stopped vehicle while plaintiff Da Ping Wu was standing in the rear of the truck. Defendant Connelly’s actions allegedly caused plaintiff to fall out of the back of the truck and sustain a serious injury. Defendants do not oppose the motion.

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the

burden shifts to the party opposing the motion to “demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure ... to do [so]” (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). Plaintiff has made out a prima facie case of negligence, and the burden shifts to defendants to raise a triable issue of fact.

Violation of the Vehicle and Traffic Law (“VTL”) constitutes negligence per se (*See Flores v City of New York*, 66 AD3d 599 [1st Dep’t 2009]). VTL 1162 places a duty upon motorists to not move a stopped or parked vehicle unless and until such movement can be made with reasonable safety. It is well settled that drivers have a common-law “duty to see that which, through the proper use of senses, should have been seen” (*Griffin v Pennoyer*, 49 AD3d 341, 342 [1st Dep’t 2008]).

Here, plaintiff avers that defendant Connelly entered the driver’s seat of the vehicle at issue, a box truck, and began to move the truck without checking the back of the truck to ensure that it was safe to move. At the time of the incident plaintiff was in the rear cargo area of the box truck attempting to close the broken back door of the truck. Plaintiff testified that when the ignition of the box truck was started, he screamed loudly, however the truck began to move and plaintiff fell from the truck onto the street where he lost consciousness (Mot, Exh E at 66, ¶15-19; 67, ¶ 4-18; 68, ¶6-11, 69, ¶2-5).

Plaintiff submits the certified police report which contains an admission by defendant Connelly in which the reporting officer recorded “driver of Veh #1 states he didn’t see anyone in cargo of Veh #1 or on rear of truck and proceed to back up truck into garage when someone advised Veh #1 Driver that a person had fallen off back of truck” (Mot, Exh A). Defendant’s statement is admissible as it is contained within a certified police report and is an admission

against interest (*Jackson v Donien Turst*, 103 AD3d 851, 851-52 [2013]). Defendant Connelly testified that the rear door was open, and he walked passed the back door without calling out to see if anyone was inside the back of the truck (Mot, Exh F at 21, ¶6-10).

Plaintiff has made a prima facie showing of defendant's negligence for failure to see that which, through the proper use of senses should have been seen and violation of the VTL (*Griffin*, 49 AD3d 341, 342 [1st Dep't 2008]). Defendant Connelly failed to shut the rear door of the truck he was operating and did not inspect the interior for occupants or loose equipment that could have fallen from the rear of the truck. Thus, the branch of plaintiff's motion for summary judgment, on the issue of liability, as against defendant is granted.

The branch of plaintiff's motion which seeks to strike the affirmative defenses of comparative negligence and assumption of risk is granted. Comparative negligence does not act as a defense shielding a defendant from liability. The Court of Appeals has held that a plaintiff is entitled to partial summary judgment on the issue of a defendant's liability even if a defendant raises an issue of fact regarding plaintiff's comparative negligence (*Rodriguez v City of New York*, 31 NY3d 312 [2018]). The issue of a plaintiff's comparative negligence is addressed and determined only when considering the damages that a defendant owes to a plaintiff. Further, the affirmative defense of assumption of risk is improper. Inasmuch as VTL 1162 imposes a nondelegable duty upon defendant to not move a stopped or parked vehicle unless and until such movement can be made with reasonable safety. Thus, plaintiff's motion is granted in its entirety.

Accordingly, it is

ORDERED that the motion is granted and the affirmative defenses of comparative negligence and assumption of risk of defendant is dismissed; and it is further

ORDERED that it appearing to the court that plaintiff is entitled to judgment on liability against defendants and that the only triable issues of fact arising on plaintiff's motion for summary judgment relate to the amount of damages to which plaintiff is entitled, it is

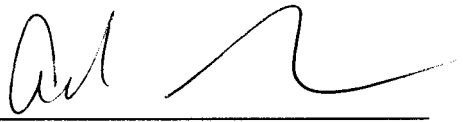
ORDERED that plaintiff's motion for summary judgment is granted on the issue of liability as against defendants; and it is further

ORDERED that an immediate trial of the aforesaid issues of fact shall be had before the court; and it is further

ORDERED that plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the Trial Support Office (Room 158) and shall serve and file with said Clerk a Note of Issue and statement of readiness and shall pay the fee therefor, and said Clerk shall cause the matter to be placed upon the calendar for such trial.

This constitutes the Decision/Order of the Court.

3/7/2019
DATE


ADAM SILVERA, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: