

<b>Palma v Verizon N.Y. Inc.</b>
2019 NY Slip Op 30682(U)
March 18, 2019
Supreme Court, New York County
Docket Number: 155286/2017
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM**

*Justice*

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SCOTT PALMA,

Plaintiff,

- v -

VERIZON NEW YORK INC., UNITED PARCEL SERVICE, INC.  
and "JOHN DOE" (a fictitious designation for a presently unknown  
person),

Defendants.

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INDEX NO. 155286/2017  
MOTION DATE 03/04/2019  
MOTION SEQ. NO. 001

**DECISION AND ORDER**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27

were read on this motion to/for AMEND CAPTION/PLEADINGS.

Upon the foregoing documents, it is ordered that the motion is granted.

In this personal injury action, plaintiff Scott Palma moves, pursuant to CPLR 3025(b) and, in effect, pursuant to CPLR 1001(a), to amend the summons and complaint to substitute Travis Gordon as a defendant in place and stead of fictitiously named defendant "John Doe". After a review of the motion papers, as well as the relevant statutes and case law, the motion, which is unopposed, is granted.

Plaintiff was allegedly injured on May 19, 2017 when he drove his motorcycle into a "very low hanging telephone wire" on 59<sup>th</sup> Street between 11<sup>th</sup> and 12<sup>th</sup> Avenues in Brooklyn. Doc. 18. On June 9, 2017, plaintiff commenced the captioned action against defendant Verizon New York Inc. ("Verizon") which allegedly owned and maintained the utility line, as well as defendant United Parcel Service, Inc. ("UPS") which, it claimed, owned a truck which was

driven into the wire. Doc. 20. Plaintiff also named as a defendant “John Doe”, an unidentified employee of UPS, who drove the truck into the wire. Doc. 20.

At a nonparty deposition on December 4, 2017, Rochel Beneth, who lived on 59<sup>th</sup> Street, testified that, at approximately 12:30-1:00 p.m. on May 19, 2017, she saw a tall tractor trailer with a UPS logo strike telephone wires on her block. Doc. 22, at 7-11, 25, 31, 43. The truck knocked several wires to the ground in front of her house. Doc. 22 at 13, 27. After the truck struck the wires, the driver of the truck, a white male, exited his vehicle “to check the wires at least twice.” Doc. 22 at 15-17, 24-25. Beneth did not realize at that point that the truck had torn down the wires on her block. Doc. 22 at 25-26. About 10-15 minutes later, Beneth heard a motorcycle coming, heard a scream, and then looked down her street, where she saw a motorcyclist on the ground tangled in wires. Doc. 22 at 17-20.

Mordechai Reich also lived on the block in question and appeared for a nonparty deposition. Reich was certain that, at approximately 2:30 p.m. that day, he saw a UPS truck strike the utility wires and then the driver stopped, got out of the truck, and looked at the hanging wires. Doc. 23 at 10-12, 55. He also saw a motorcyclist drive down the street into a hanging wire. Doc. 23 at 11-12.

UPS subsequently provided documentation produced by its “DIAD” (Deliver Information Acquisition System Device) System relating to deliveries and pickups on the block in question on the date of the incident. Doc. 17 at par. 6. After receiving the records (Doc. 24), plaintiff deposed the individual who drove the truck, Travis Gordon. Doc. 17 at par. 6. Although Gordon did not recall seeing any low hanging wires and did not admit to driving into any wires,

he conceded that he had a stop at 1031 59<sup>th</sup> Street that day and that he drove down 59<sup>th</sup> Street between 11<sup>th</sup> and 12<sup>th</sup> Avenues to get there. Doc. 25 at 69, 71.<sup>1</sup>

Plaintiff now moves, pursuant to CPLR 3025(b) and, in effect, pursuant to CPLR 1001(a), to amend the summons and complaint to substitute Gordon as a defendant in place of fictitiously named defendant "John Doe". The motion is unopposed.

It is well settled that "[m]otions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit." *Y.A. v Conair Corp.*, 154 AD3d 611, 612 (1st Dept 2017); see CPLR 3025 (b); *Pichler v Jackson*, 157 AD3d 450 (1st Dept 2018).

Further, CPLR 1001(a) provides that "persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants..." Given the evidence set forth above, there is a colorable claim against Gordon, and he should be a party to this action. The absence of any prejudice to Gordon as a result of the substitution is underscored by his failure to respond to the instant application, which was served on counsel for UPS and on him personally. Doc. 27. Thus, this Court directs that Travis Gordon be substituted for "John Doe" as a defendant in order to afford the parties to the captioned action complete relief.

Therefore, in light of the foregoing, it is hereby:

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<sup>1</sup> Although the DIAD records reflect that the delivery to 1031 59<sup>th</sup> Street was made at "14.5892", which, in military time, appears to correlate to approximately 2:35 p.m., about the same time Reich estimated that the truck struck the wires, Gordon, despite being a UPS driver, maintained that he was not sure what that notation meant. Doc. 25 at 60.

ORDERED that plaintiff's motion to amend the summons and complaint to substitute Travis Gordon as a party defendant in place and stead of defendant "John Doe" is granted; and it is further

ORDERED that Travis Gordon is substituted as a party defendant in place and stead of defendant "John Doe"; and it is further

ORDERED that the caption, the summons and the complaint are amended to reflect the substitution of Travis Gordon as a party defendant in place and stead of defendant John Doe; and it is further

ORDERED the caption as amended shall read as follows:

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SCOTT PALMA,

Plaintiff,

Index Number 155286/17

-against-

VERIZON NEW YORK INC., UNITED PARCEL

SERVICE, INC. and TRAVIS GORDON,

Defendants.  
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and it is further

ORDERED that within 20 days from the date of entry of this order, plaintiff shall serve a copy of this order, with notice of entry, upon the defendants, the County Clerk (Room 141 B) and the General Clerk's Office Trial Support Clerk (Room 119) pursuant to e-filing protocol at genclerk-ords-non-mot@nycourts.gov., and it is further

ORDERED that the County Clerk and General Clerk's Office Trial Support Clerk are directed to amend the caption to reflect the substitution noted above; and it is further

ORDERED that plaintiffs are to serve a copy of this order, with notice of entry, together with a copy of the amended summons and amended verified complaint, in the form annexed to the motion papers (Doc. 26), in accordance with the CPLR, upon Travis Gordon, the substituted party in this action, within 30 days from the date of entry of this order, and it is further

ORDERED that defendants Verizon New York Inc. and United Parcel Service, Inc. shall be deemed served with the supplemental summons and amended verified complaint at the time plaintiff serves defendants with this order, with notice of entry; and it is further

ORDERED that all defendants shall serve an answer to the amended verified complaint within 30 days of service; and it is further

ORDERED that the parties are to appear for a compliance conference on June 25, 2019 at 80 Centre Street, Room 280, New York, New York, at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

3/18/2019

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

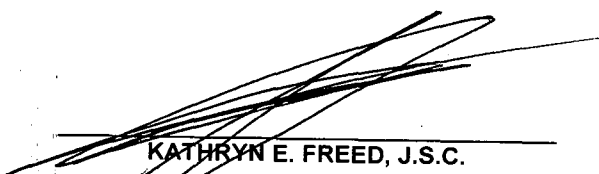
SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE

  
KATHRYN E. FREED, J.S.C.