

Caraballo v First Steps Trans Inc.

2019 NY Slip Op 34986(U)

November 19, 2019

Supreme Court, Bronx County

Docket Number: Index No. 30070/2017E

Judge: John R. Higgitt

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This opinion is uncorrected and not selected for official publication.

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

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CLARILUZ CARABALLO,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 30070/2017E

FIRST STEPS TRANS INC., FRANKLIN BERNARDO
DIAZ, THOMAS BUSES, INC. and RELIANT
TRANSPORTATION INC.,

Defendants.
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John R. Higgitt, J.

Upon defendant Reliant Transportation Inc.'s (Reliant) July 19, 2019 notice of motion and the affirmation, affidavit and exhibits submitted in support thereof; plaintiff's September 11, 2019 affirmation in opposition and the exhibits submitted therewith; defendant Reliant's September 12, 2019 affirmation in reply; and due deliberation; defendant Reliant's motion for summary judgment dismissing the complaint as against it and all cross claims against it is denied.

This is a negligence action to recover damages for personal injuries that plaintiff allegedly sustained in a motor vehicle accident that took place on August 4, 2016. Defendant Reliant seeks summary judgment dismissing the complaint as against it and the cross claims against it on the ground that it is not liable for the accident. In support of its motion, defendant Reliant submits the pleadings, the police accident report, the transcripts of the parties' deposition testimony, and the affidavit of Jennifer Fleming, an employee of MV Transportation, which is the parent company of defendant Reliant.

Defendant Reliant asserts that it is not liable for plaintiff's accident because it neither owned the vehicle operated by defendant Diaz, nor employed or controlled defendant Diaz or the subject vehicle. Specifically, Ms. Fleming averred that neither MV Transportation nor defendant

Reliant owned, operated, managed, maintained, or controlled the vehicle operated by defendant Diaz. Ms. Fleming also averred that at the time of the accident defendant Diaz was not an employee of either MV Transportation or defendant Reliant. Defendant Reliant also relied on the police accident report, which indicates that the vehicle was owned by defendant First Step. Defendant Reliant asserts that it was made a party to this litigation because defendant Diaz mistakenly named Reliant as his employee during his deposition.

Under Vehicle and Traffic Law § 388, an owner of a motor vehicle is vicariously liable for a motor vehicle accident caused by a driver's negligence when the vehicle is operated with the owner's consent (*see Country-Wide Ins. Co. v National R.R. Passenger Corp.*, 6 NY3d 172 [2006]). Additionally, under the doctrine of respondeat superior, an employer is liable for the negligent actions of its employees conducted within the scope of employment (*see Ramos v Jake Realty Co.*, 21 AD3d 744 [1st Dept 2005]; *Goldberg v Sulzberger-Rolfe, Inc.*, 212 AD2d 408 [1st Dept 1995]).

In opposition to defendant Reliant's motion plaintiff asserts that triable issues of fact exist that preclude summary judgment in defendant Reliant's favor. Plaintiff asserts that there are questions of fact as to whether defendant Diaz was employed by defendant Reliant at the time of the accident, and that the conflicting averments of Ms. Fleming and testimony of defendant Diaz raise issues of fact. Plaintiff further asserts that the motion is premature because there are depositions still outstanding.

Defendant Reliant failed to make a prima facie showing of entitlement to judgment as a matter of law. Defendant Reliant failed to eliminate all triable issues of regarding its liability. Ms. Fleming's affidavit is hearsay: she relied on various unidentified business records in making most of the material statements in her affidavit, but those records were not submitted by

defendant Reliant. Ms. Fleming's averments as to the contents of the unidentified records are therefore hearsay (*see Bank of N.Y. Mellon v Gordon*, 171 AD3d 197, 205-206 [2d Dept 2019]). Additionally, Ms. Fleming's averments relate to matters exclusively within defendant Reliant's knowledge, matters on which plaintiffs have yet to obtain discovery (*see Quiroz v 176 N. Main, LLC*, 125 AD3d 628 [2d Dept 2015]). Defendant Diaz's deposition testimony that he was employed by defendant Reliant at the time of the accident, challenged only with hearsay, makes summary judgment in Reliant's favor manifestly inappropriate.

Accordingly, it is

ORDERED, that defendant Reliant's motion for summary judgment is denied; and it is further

ORDERED, that within 30 days after service of a copy of this order with notice of entry thereof, defendant Reliant's counsel shall pay to plaintiffs' counsel the sum of \$100.00 as costs on the motion (*see CPLR 8106, 8202*).

This constitutes the decision and order of the court.

Dated: November 19, 2019



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