

Baxter v Bennett
2019 NY Slip Op 35019(U)
August 27, 2019
Supreme Court, Bronx County
Docket Number: Index No. 30739/2018
Judge: Mary Ann Brigantti
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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DENNIS BAXTER,

Plaintiff,

Index No.: 30739/2018

-against-

ORVILLE J. BENNETT and JESSICA FENOFF,
Defendants.

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HON. MARY ANN BRIGANTTI:

This is an action to recover for alleged personal injuries sustained in a motor vehicle accident, which occurred on June 28, 2018, in Bronx, NY. Plaintiff alleges that she was a pedestrian who was struck by the vehicle operated by Defendant ORVILLE J. BENNETT and owned by JESSICA FENOFF (*see* Verified Complaint, dated Sept. 18, 2019, ¶ 5 and 6). The vehicle involved was a 2002 Honda, bearing Vermont License plate number HCK583.

This action was commenced by the filing of a Summons and Complaint on or about September 19, 2018. Defendant ORVILLE J. BENNETT filed his Answer on or about January 4, 2019. Defendant, JESSICA FENOFF has not Answered yet.

Defendant, JESSICA FENOFF, makes this pre-Answer Motion to dismiss the Complaint as against her, pursuant to CPLR 3211(a)(7), which provides that a “party may move for judgment dismissing one or more causes of action asserted against [her] on the ground that: ... the pleading fails to state a cause of action”.

Movant JESSICA FENOFF argues that the cause of action as against her should be dismissed, upon the ground that she did not own the motor vehicle involved in the accident. In support of her motion, she submits her Affidavit saying that she did not own the subject vehicle at the relevant time. However, therein, she also admits that she owned the subject Vermont State license plate number HCK583 – which was on the vehicle at the time of the accident (*see* Jessica

Fenoff Affidavit, dated January 18, 2019; *see* Police Accident Report).

In addition, Movant presents the Affidavit of Defendant, ORVILLE J. BENNETT, who states, in relevant part, that he “was involved in the subject accident on June 28, 2018”, and that he was the “operator and titled owner of a motor vehicle bearing Vermont State license plate number HCK583.” He also reiterates that the said license plate number HCK583 belonged to JESSICA FENOFF. Movant does not submit any other documentation to support the allegations.

In opposition to the Motion, Plaintiff submits a certified “Vermont Registration Tax and Title Application” form, which does indicate that the subject vehicle was, in fact, owned by JESSICA FENOFF. Therein, in particular, it seems that JESSICA FENOFF sets forth that she owns the vehicle, a 2002 Honda Accord; that she *acquired* it from ORVILLE J. BENNETT on September 3, 2017; and that it bears license plate number HCK583, which expires September 2018 (*see* Vermont Registration Tax & Title Application, dated September 11, 2017. This is certified to be a true copy of the records of the Vermont Department of Motor Vehicles, signed and dated July 19, 2018).

The Vehicle and Traffic Law provides that:

“Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner”

(Vehicle and Traffic Law § 388[1] “Negligence in use or operation of vehicle attributable to owner”).

Further, an “Owner” is defined as: “A person, other than a lien holder, having the property in or title to a vehicle or vessel. The term includes a person entitled to the use and possession of a vehicle or vessel subject to a security interest in another person and also includes any lessee or bailee of a motor vehicle or vessel having the exclusive use thereof, under a lease or

otherwise, for a period greater than thirty days” (Vehicle and Traffic Law § 128).

A Court stated that a defendant failed to establish “that he was not the owner of the vehicle that struck plaintiff’s car, [where] the DMV abstract of registration shows that he had been issued license plates with the number that plaintiff alleged was on the plates on the vehicle that struck him” (*Pantojas v Niang*, 122 AD3d 524, 524-525 [1st Dept 2014]).

“Our courts, ... have as a matter of public policy estopped a former owner from denying ownership of the vehicle bearing his registration plates at the time of an accident in violation of the statutes regulating the use of such plates, ... when he is sued in tort by an injured party as the owner of such vehicle” (*Phoenix Ins. Co. v Guthiel*, 2 NY2d 584, 587-588 [1957]).

A defendant who “fail[ed] to comply with the statutory requirements regarding vehicle registration procedures . . . is estopped from denying ownership of the vehicle and is fully liable to the plaintiff as if it were the 'owner' of the vehicle” (*Bunn v City of NY*, 166 AD3d 491, 491-492 [1st Dept 2018]; *see Switzer v Aldrich*, 307 NY 56, 61 [1954]).

“A CPLR 3211 (a) (7) motion may be used by a defendant to test the facial sufficiency of a pleading in two different ways. On the one hand, the motion may be used to dispose of an action in which the plaintiff has not stated a claim cognizable at law. On the other hand, the motion may be used to dispose of an action in which the plaintiff identified a cognizable cause of action but failed to assert a material allegation necessary to support the cause of action. As to the latter, the Court of Appeals has made clear that a defendant can submit evidence in support of the motion attacking a well-pleaded cognizable claim (see *Rovello*, 40 NY2d 633, 357 NE2d 970, 389 NYS2d 314; *Guggenheimer*, 43 NY2d 268, 372 NE2d 17, 401 NYS2d 182; *see also Board of Managers of Fairways at N. Hills Condominium v Fairways at N. Hills*, 150 AD2d 32, 545 NYS2d 343 [2d Dept 1989]).

When documentary evidence is submitted by a defendant “the standard morphs from whether the plaintiff stated a cause of action to whether it has one” (John R. Higgitt, CPLR 3211 [A] [7] and [A] [7] Dismissal Motions—Pitfalls and Pointers, 83 NY St BJ 32, 33 [2011] [emphasis omitted]; John R. Higgitt, CPLR 3211 [A] [7]: Demurrer or Merits-Testing Device?, 73 Albany L Rev 99, 110 [2009]). As alleged here, if the defendant’s evidence establishes that the plaintiff has no cause of action (i.e., that a well-pleaded cognizable claim is flatly rejected by the documentary evidence), dismissal would be appropriate”

(*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134-135 [1st

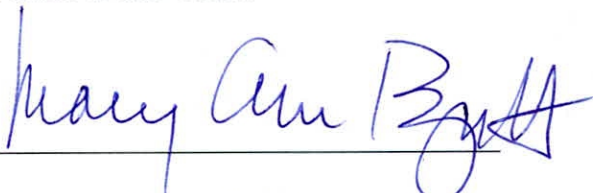
Dept 2014]).

Applying these principals, Defendant JESSICA FENOFF's Motion to dismiss, pursuant to CPLR 3211 (a)(7), is denied, because Plaintiff has stated a claim cognizable at law, and asserted material allegations necessary to support the cause of action as against this Defendant. The Court of Appeals has consistently held that "affidavits submitted by the defendant will seldom if ever warrant the relief he seeks unless too the affidavits establish conclusively that plaintiff has no cause of action" (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]).

Moreover, it is anticipated that discovery will flesh out whether JESSICA FENOFF owned the motor vehicle involved in the accident; and whether, even if she was not the titled owner, she may, by her actions, be deemed liable as if she were the owner. Relevant documentation, such as Title, and Registration, were not submitted, nor was there an explanation proffered for failing to obtain, and present, the pertinent documents at the time of the making of any motion on the issue presented. There was also no explanation proffered as to how her license plate number HCK583 came to be affixed to the subject motor vehicle.

Accordingly, Defendant JESSICA FENOFF's premature motion to dismiss this action as against her, is denied, without prejudice to renewal, if warranted, after the completion of discovery. This constitutes the decision and order of this Court.

Dated: 8/27, 2019


HON. MARY ANN BRIGANTTI, J.S.C.