

Nolasco v Kessel Paving & Concrete, Inc.

2019 NY Slip Op 35166(U)

October 9, 2019

Supreme Court, Bronx County

Docket Number: Index No. 29370/2018E

Judge: John R. Higgitt

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This opinion is uncorrected and not selected for official publication.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 14

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NOLASCO, JESSICA

Index No. 29370/2018E

- against -

Hon. JOHN R. HIGGITT,
A.J.S.C.

KESSEL PAVING & CONCRETE, INC.

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The following papers numbered 15 to 18 and 25 to 29 in the NYSCEF System were read on this motion for SUMMARY JUDGMENT (LIABILITY), noticed on July 18, 2019 and duly submitted as No. 36 on the Motion Calendar of August 9, 2019

	NYSCEF Doc. Nos.
Notice of Motion – Exhibits and Affidavits Annexed	15-18
Notice of Cross-Motion – Exhibits and Affidavits Annexed	
Answering Affidavit and Exhibits	25-28
Replying Affidavit and Exhibits	29
Filed Papers	
Memoranda of Law	
Stipulations	

Upon the foregoing papers, plaintiff’s motion for summary judgment on the issue of defendant Kessel Paving & Concrete, Inc.’s liability for the subject accident is denied, in accordance with the annexed decision and order.

Dated: 10/09/2019

Hon. 
JOHN R. HIGGITT, A.J.S.C.

Check one:

- Case Disposed in Entirety
- Case Still Active

Motion is:

- Granted
- Denied
- GIP
- Other

Check if appropriate:

- Schedule Appearance
- Fiduciary Appointment
- Referee Appointment
- Settle Order
- Submit Order

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

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JESSICA NOLASCO,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 29370/2018E

KESSEL PAVING & CONCRETE, INC. and JOHN
DOE, fictitious name, true name unknown, party intended
being the operator of a 2008 Volvo Motor Vehicle,
bearing New Jersey State license plate number T81HHL,

Defendants.
-----X

John R. Higgitt, J.

Upon plaintiff’s June 12, 2019 notice of motion and the affirmation, affidavit, and exhibits submitted in support thereof; defendant Kessel Paving & Concrete, Inc.’s (Kessel Paving) August 1, 2019 affirmation in opposition and the exhibits submitted therewith; plaintiff’s August 5, 2019 affirmation in reply; and due deliberation; plaintiff’s motion for partial summary judgment on the issue of defendant Kessel Paving’s liability for causing the subject accident is denied with leave to renew.

This is a negligence action to recover damages for personal injuries plaintiff allegedly sustained in a motor vehicle accident that took place on July 23, 2018. In support of her motion, plaintiff submits the pleadings, the police accident report, and her affidavit. Plaintiff averred that at the time of the accident she was driving westbound on the Cross Bronx Expressway when her vehicle was suddenly struck in the rear by the vehicle owned by defendant Kessel Paving.

“A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle” (*Nsiah-Ababio v Hunter*, 78 AD3d 672, 672 [2nd Dept 2010]). Vehicle and Traffic Law § 1129(a) states that a “driver of a motor vehicle shall not follow another vehicle

more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway” (*see Darmento v Pacific Molasses Co.*, 81 NY2d 985, 988 [1993]). Based on the plain language of the statute, a violation is clear when a driver follows another too closely without adequate reason and that conduct results in a collision (*see id.*).

Plaintiff made prime facie showing of entitlement to judgment as a matter of law.

Defendant Kessel Paving argues that plaintiff’s motion should be denied, with leave to renew upon the completion of discovery, because its vehicle may have been operated by a non-permissive user at the time of the accident. Defendant Kessel Paving submitted the affidavit of its principal, who provided a peculiar but not legally incredible story regarding the abandonment of the vehicle by its driver around the time of the accident. The affidavit presents a narrative under which it may be possible that a non-permissive user of defendant Kessel Paving’s vehicle was operating it at the time of the accident.¹

Here, defendant Kessel Paving has persuaded the court that facts essential for its opposition may exist but could not be provided at this time, such that discovery is needed before the court determines plaintiff’s motion on the merits (*see* CPLR 3212[f]). Specifically, defendant Kessel Paving should have a reasonable opportunity to seek the deposition of Levon Johnson, the individual who was operating Kessel Paving’s vehicle before the accident and abandoned it, as

¹ 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 Nat’l R. Passenger Corp.*, 6 NY3d 172 [2006]). The statute creates a rebuttable presumption that the driver of a vehicle was using the vehicle with the owner’s permission (*see Chappellear v Dollar Rent-A-Car Sys.*, 5 AD3d 187 [1st Dept 2004]). The owner of the vehicle can rebut the presumption of permissive use by providing substantial evidence that the vehicle was stolen at the time of the accident (*see Villamil v Budget Rental*, 281 AD2d 207 [1st Dept 2001]).

well as other discovery related to who was operating the Kessel Paving vehicle at the time of the accident.

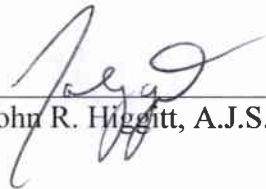
Accordingly, it is

ORDERED, that plaintiff's motion for partial summary judgment on the issue of defendants' liability is denied with leave to renew following the filing of the note of issue and certificate of readiness.

The parties are reminded of the February 14, 2020 compliance conference before the undersigned.

This constitutes the decision and order of the court.

Dated: October 9, 2019



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