

Berlin v American United Transp. Inc.

2020 NY Slip Op 31345(U)

April 30, 2020

Supreme Court, Kings County

Docket Number: 501285/2019

Judge: Lorna J. McAllister

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: Part 10**

NACHMAN BERLIN,

Plaintiff(s),

-against-

AMERICAN UNITED TRANSPORTATION INC.,
CHEIKH NDOYE and SOLOMON FRIEDMAN,

Defendant(s).

Index No.: 501285/2019
Mot. Seq. # 3
(Action # 1)

DECISION / ORDER

Present:
Hon. Lorna J. McAllister
A.J.S.C.

ASYA LUKYANOVSKAYA,

Plaintiff(s),

-against-

SOLOMON FRIEDMAN, AMERICAN UNITED
TRANSPORTATION and CHEIKH NDOYE,

Defendant(s).

Index No.: 511351/2019
Mot. Seq. # 1
(Action # 2)

DECISION / ORDER

Present:
Hon. Lorna J. McAllister
A.J.S.C.

Recitation, as required by CPLR § 2219(a), of the papers considered on the review of these motions:

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1-2, 3-4</u>
Order to Show cause and Affidavits Annexed.....	<u> </u>
Answering Affidavits.....	<u>5, 6, 7</u>
Replying Affidavits.....	<u>8, 9, 10</u>
Exhibits.....	<u> </u>
Other:.....	<u> </u>

Upon the foregoing cited papers, and after oral argument, the Decision/Order on these motions are as follows:

The defendant Solomon Friedman (“Friedman”) has moved pursuant to CPLR § 3212 for an Order awarding summary judgment and a dismissal of both of the plaintiffs’ complaints as to the issue of liability. The plaintiff Nachman Berlin (“Berlin”) in Action #1 and Asya Lukyanovskaya (“Lukyanovskaya”), in Action #2, each oppose the relief sought by defendant Friedman upon the grounds that the motion is premature as no discovery pertaining to liability has been exchanged between the parties and depositions have not as yet been conducted. Co-defendants, American United Transportation, Inc., (“American United”), and Cheikh Ndoye (“Ndoye”) have also opposed Friedman’s motion upon the grounds that it is premature because depositions of all parties have not as yet been conducted.

Background

The action by Berlin was commenced by the filing of a summons and complaint on or about January 18, 2019. Issue was joined by the service of Friedman’s answer on or about April 8, 2019 and by the service of the answer and cross-claims of defendants American United and Ndoye, on or about February 25, 2019. Plaintiff Berlin was a passenger in the Friedman vehicle at the time of the incident.

The action by plaintiff Lukyanovskaya was commenced by the filing of a summons and complaint on or about May 21, 2019. Issue was joined by defendant Friedman by the filing and service of an answer on or about June 29, 2019 and by defendants American United and Ndoye by the filing and service of an answer with cross-claims on or about August 22, 2019. Plaintiff Lukyanovskaya was a passenger in the Ndoye vehicle at the time of the incident.

Facts and contentions

On October 31, 2018 at approximately 11:47 A.M., defendant Friedman was traveling westbound on Avenue N towards East 4th Street, Brooklyn, New York allegedly at a speed of less than twenty-five miles per hour. Avenue N is a two way street with one lane for travel in each direction and one lane for parking on both sides of the roadway. At the intersection of

Avenue N and East 4th Street, there is neither a traffic light nor a stop sign controlling traffic on Avenue N. East 4th Street is a one way street with one lane for travel in a southerly direction. There is a stop sign that controls traffic on East 4th Street where it intersects with Avenue N. Defendant Mr. Ndoye, who was operating a vehicle owned by American United, was traveling on East 4th Street at the time of the incident.

Defendant Friedman asserts that a stop sign controls traffic for vehicles traveling south on East 4th Street at this intersection with Avenue N, but not for vehicles traveling westbound on Avenue N. Mr. Friedman states that the accident occurred as he entered the intersection of East 4th Street and Avenue N with the right of way, and that co-defendant Mr. Ndoye was negligent when he went through the stop sign at East 4th Street, and/or failed to yield the right of way to the Friedman vehicle. In addition, Friedman asserts that Ndoye failed to submit a non-negligent explanation for causing this accident (see *Zuleta v. Quijada*, 94 AD3d 876, 943 NYS2d 111[2nd Dept. 2012]). Additionally, it is immaterial that Mr. Ndoye may have stopped at the stop sign before proceeding into the intersection because he did not have the right-a-way at the time his vehicle entered the intersection.

Defendant Friedman further maintains that the motion is not premature as the plaintiff is required to set forth some evidentiary basis to suggest that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant. The attorneys for the plaintiffs do not include an affidavit of either plaintiff or anyone else to contradict the arguments that are set forth in defendants' motion.

In opposition, the plaintiffs maintain that testimony elicited during depositions which have not yet been conducted could raise a question of fact regarding whether defendant Friedman was liable in whole or in part for this accident.

Defendants Ndoye and American United, in opposing the motion of co-defendant Solomon, offer the affidavit of Mr. Ndoye. Mr. Ndoye stated that he was traveling southbound on East 4th Street and after making a full stop at the intersection of Avenue N, proceeded cautiously after having stopped 4-5 seconds at the crosswalk. He then quickly observed the vehicle which was driven by Mr. Friedman to be speeding with emergency lights, traveling in the

westbound direction on Avenue N in the eastbound lane.¹ Mr. Ndoye then alleges that he stopped his vehicle in the westbound lane of the intersection at which time the Friedman vehicle veered into his lane and then struck the Ndoye vehicle. Defendant Ndoye further asserts that there is an attempt being made to secure the testimony of the independent witness who appears on the MV-104. As such, defendant Mr. Ndoye asserts that summary judgment is not warranted as a non-negligent explanation has been offered and there is evidence that Mr. Friedman's motor vehicle careened into the wrong lane and struck Ndoye's stopped vehicle, suddenly and without warning.

Discussion

In determining defendant Friedman's motion for summary judgment and a dismissal of the action as against Friedman, this Court has considered the arguments of the parties, their submissions, as well as the applicable law.

New York State Vehicle and Traffic Law places a duty on a driver approaching an intersection controlled by a stop sign to stop and to yield to traffic before entering the intersection. (See VTL § 1142(a)). The failure to yield constitutes negligence as a matter of law (see *McNamara v. Fishkowitz*, 18 AD3d 721, 722, 795 NYS2d 714 [2005]). A driver is entitled to anticipate that a motorist facing a stop sign will yield the right of way (see *Friedberg v. Citiwide Auto Leasing, Inc.*, 22 AD3d 522, 801 NYS2d 770 [2nd Dept. 2005]). Further, the fact that a motorist may have initially stopped at the stop sign does not negate his or her liability if he or she subsequently failed to yield the right of way (see *Maliza v. Puerto Rican Transportation Corp.*, 50 AD3d 650, 854 NYS2d 763 [2nd Dept. 2008]; *Friedberg v. Citiwide Auto Leasing, Inc.* 801 NYS2d at 770).

Here, defendant Friedman was traveling on Avenue N which had no traffic control devices at the intersection of East 4th Street. Defendant Ndoye was traveling on East 4th Street which street has a stop sign at the intersection of Avenue N. Pursuant to the VTL and the

¹ Defendants assert that the Friedman vehicle was not an official government emergency vehicle.

applicable case law, the Ndoye vehicle had a duty to yield to traffic prior to entering the intersection. In addition, there is no mention in the MV-104 report that the Ndoye vehicle stopped in the lane for traffic traveling in the opposite direction or that the Friedman vehicle crossed into the wrong lane of traffic prior to impact.

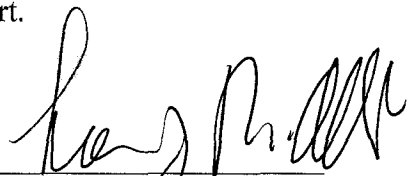
It is well settled that a motion for summary judgment shall be granted if, upon all the papers and proof submitted, a defense is established sufficiently to warrant the Court as a matter of law to direct judgment in favor of any party (see *Butler v. Giorno*, 28 AD3d 258, 813 NYS2d 394 [2002]). The Court concludes that neither the co-defendant's American United nor Ndoye as well as the plaintiff's have failed to raise a triable issue of fact as to defendant Friedman which would preclude an award of summary judgment on the issue of liability.

Conclusion

The motion's by defendant Solomon Friedman for summary judgment and a dismissal of the complaints of plaintiff Nachman Berlin in Action #1 and Asya Lukyanovskaya, in Action #2, as well as all cross-claims, pursuant to CPLR § 3212, are granted.

This constitutes the Decision and Order of the Court.

Dated: April 30, 2020


HON. Lorna J. McAllister
A.J.S.C.