

<b>Wallace v Tri-State Assembly, LLC</b>
2020 NY Slip Op 31822(U)
June 11, 2020
Supreme Court, New York County
Docket Number: 155741/2017
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

*Justice*

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TYRONE WALLACE,

Plaintiff,

- v -

INDEX NO. 155741/2017

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 006

TRI-STATE ASSEMBLY, LLC, AMAZON.COM  
LLC, AMAZON.COM.DEDC, LLC, ABC  
CORPORATION, ABC PARTNERSHIP,

Defendants.

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**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 006) 134-158 were read on this motion to/for summary judgment.

Defendants Amazon.com LLC and Amazon.com.DEDC, LLC (movants), move pursuant to CPLR 3212 for an order dismissing the complaint as against them. Plaintiff opposes.

I. BACKGROUND

A. The complaint (NYSCEF 137)

In his complaint, plaintiff alleges that on April 10, 2017 at approximately one am, he was riding the electric bicycle that his father had purchased for him through Amazon.com when, at the intersection of East 26th Street and Second Avenue in Manhattan, the bicycle “fell apart and broke, causing [him] to sustain injuries.” Based on his assertions that defendants “maintained and operated a business that invited members of the public to be their customers and patrons, that they manufactured, sold and/or assembled an Eshion Electric mountain bicycle to and for him,” and that they sold, delivered and/or assembled the bicycle in the State of New York sometime before April 10, 2017, plaintiff advances causes of action against all defendants for negligence,

breach of express and implied warranty, and *res ipsa loquitur*.

B. Plaintiff's deposition (NYSCEF 144)

At his deposition, plaintiff testified that the bicycle was delivered in a box to him in late March and that his father had arranged through Amazon for defendant Zev Biton of defendant Tri-State Assembly to assemble the bicycle for him, which he did in the foyer of plaintiff's apartment. According to plaintiff, the assembly is included with the purchase of the bicycle and that on its platform, Amazon recommends Tri-State.

The first time plaintiff rode the bicycle was the night of the accident. As he was in the process of turning right onto 26th Street, the handlebar of the bicycle loosened which caused him to lose control. The bicycle veered from one side to the other. As he tried to brace himself for falling, his shoulder dislocated and his arm broke. As he fell, his kneecap was hit by a bicycle pedal.

C. Deposition and affidavit of Director of Amazon Home Services (NYSCEF 145, 148)

The Director of Amazon Home Services testified at a deposition that part of his job is to "connect third party service providers with customers who choose to buy their services." A vetting process is employed by which the director screens potential service providers. Background checks are performed by an outside company which indicates to the director whether the potential service provider passed or failed. The director retains discretion to reject a provider passed by the other company. The director also checks the businesses and performances of the service providers and compares them with third-party review sites. Nonetheless, Amazon neither recommends providers nor denotes them as preferred. Only businesses are accepted as service providers, and a license is not required. Rather, the business must be searchable online and must be insured. The agreement signed by the provider states therein that the provider is

insured. (NYSCEF 145).

The director described the procedure for obtaining assembly services on Amazon's platform. When a customer purchases assembly services, an agreement is entered into between the provider and the customer, although Amazon processes the payment for the services. To schedule the service appointment, the customer provides a date to Amazon, which Amazon relays to the service provider which confirms or declines it. (*Id.*).

As Tri-State was on Amazon's platform, the director characterized it as an Amazon-approved service provider, and a customer is free to review the offers of providers that appear on the platform and then choose the provider it wants. To facilitate a customer's choice, Amazon provides customer reviews and a review form for the customer to record his or her own review. The posted customer reviews are assessed by Amazon with a view to determining whether a "quality bar" has been reached. Amazon is also able to see whether a provider has been reliable in its services, such as by responding promptly to appointments and in rendering the services. (*Id.*).

Calls are also received by Amazon's customer service, and if a customer complains about a service provider, its customer service division does what it can to satisfy the customer. If a customer complains about assembly of a purchase, Amazon would seek another assembler for the customer and connect the customer with the new assembler. (*Id.*).

By affidavit, the director specified that Amazon does not control the methods, means, or manner of work performed by service providers, nor does it provide them with tools to perform their work or offer "service-specific training" or require providers to complete or comply with any specific training beyond any legal requirements. Providers are not instructed by Amazon as to how to complete their work; it does not obtain insurance for them, pay them a salary or other

payroll compensation, prevent them from hiring their own subcontractors, employees, or technicians, or stop them from seeking other means of work. Moreover, providers like Tri-State are, and always were, free to determine what services they offer, where they offer them, the price for their services, and how they perform them. Providers have full control over who performs a particular service, and the employment or contractor relationship with those individuals. (NYSCEF 148).

## II. CONTENTIONS

### A. Movants (NYSCEF 134-151)

Movants argue that Amazon's sole connection to the bicycle was its internet platform that plaintiff's father used to buy the bicycle and through which he was referred to the assembly services of an independent seller and assembler. They thus disclaim any relationship to the bicycle, having taken no action with respect to it, and having never owned or possessed it. They deny having manufactured, sold, operated, managed, or used it, nor did they install or assemble it, maintain or inspect or repair it. They observe that Eshion owned the bicycle, set the price and offered it for sale on Amazon.com, through which plaintiff's father purchased it. Eshion then transferred to him its title to the bicycle and shipped it directly to plaintiff. Tri-State then assembled the bicycle. Plaintiff owned, managed, operated, and used the bicycle.

Absent any meaningful connection between movants and the bicycle, movants maintain that plaintiff cannot establish the duty or breach elements of his negligence claim. Moreover, they assert, *res ipsa loquitur* is inapplicable as the accident in issue is not the kind of accident that "ordinarily does not occur in the absence of someone's negligence—or at least the absence of negligence by somebody other than the rider or the operator of another vehicle," and the bicycle was not within movants' control, much less exclusive control. To the contrary, plaintiff

was the sole person in control of the bicycle when he crashed, and there is no reason to believe that an accident at one am cannot have been due to voluntary action of or contribution by the rider.

Movants also argue that plaintiff's causes of action for breach of warranty fail absent an express warranty contained in Amazon's Conditions of Use and because they disclaim therein all warranties. They observe that the Uniform Commercial Code implies warranties only against the seller of a product, which in this case is Eshion.

#### B. Plaintiff (NYSCEF 155)

Based on his testimony, plaintiff asserts that as the bicycle was purchased from the Amazon website, as Amazon "sent a company out to assemble it," and as the company had neither insurance nor the "proper expertise," he was seriously injured. He argues that defendants owed him a duty and warrantied the bicycle, both of which he claims they breached. He relies on Uniform Commercial Code (UCC) § 2-316, which provides for an implied warranty of merchantability in a sales contract if the seller is a merchant "with respect to goods of that kind," unless excluded or modified, and on § 2-315, which provides for an implied warranty of fitness where a seller at the time of contracting "has reason to know any particular purpose for which the goods are required "and that the buyer is relying on the "seller's skills or judgment to select or furnish suitable goods unless excluded or modified under the next section . . . "

Thus, at minimum, plaintiff maintains that issues of fact exist as to Amazon's conduct in "vetting" Tri-State for its competency and insurance. Having failed to request proof of insurance, he maintains, movants breached their duty to him as he relied on Amazon's requirement that the provider have insurance. And, as Amazon sold and delivered the bicycle to him, supplied an uninsured assembler, set up the assembly time, and received payment for the assembly of the

bicycle, Amazon must be held liable for causing plaintiff's injuries.

C. Movants' reply (NYSCEF 157)

Movants argue that plaintiff's causes of action for negligence and breach of implied warranty fail absent evidence establishing a material issue of fact. They maintain that as they offered unrefuted evidence that Amazon did not sell him the bicycle, plaintiff is precluded from relying on theories of negligence and implied warranty.

In asserting that plaintiff's unsupported allegations cannot support his causes of action for negligence and implied warranty, movants observe that he cites no authority for the proposition that Amazon owed him a duty with respect to the bicycle, nor does he offer evidence refuting their evidence that the seller Eshion, not Amazon, sold and shipped the bicycle to him and that Tri-State assembled it. Thus, plaintiff does not sustain his burden of producing admissible evidence sufficient to demonstrate the existence of material issues of fact which require a trial. Rather, movants observed, plaintiff offers only his conclusions that Amazon sold him the bike, owed him a duty and implied warranties, and breached that duty and those warranties, and relies on his own testimony that his father had told him that he had purchased the bicycle for him through Amazon's website, which is not only inadmissible hearsay, but does not prove that Amazon was the seller of the bicycle.

Movants rely on an alleged "uniform recognition" by New York courts that Amazon is not a seller of products sold by third-party sellers. Moreover, they argue, plaintiff's reliance on the UCC is misplaced as warranties are implied only against the seller of a product, which pursuant to the UCC, Amazon is not. As it is undisputed that Eshion, not Amazon, held and transferred title to the bicycle, movants assert that Eshion was the seller.

Additionally, movants allege that plaintiff improperly advances a new theory of liability

which is prohibited when opposing a motion for summary judgment but that even if the new theory is considered, movants argue that he cites no authority for the proposition that Amazon may be held liable for vetting Tri-State or for failing to vet it “properly in terms of competency and insurance.” Nor does plaintiff set forth a standard for proper vetting and offers no evidence that Tri-State lacked competence apart from his conclusion that its assembly of his bicycle caused his accident.

To the extent that plaintiff argues that Tri-State did not carry the insurance that Amazon required, movants observe that his injury was not the result of the presence or absence of insurance. Nor does plaintiff cite authority for the proposition that Amazon had a legal duty to verify that independent contractors carry insurance, and while he claims to have relied on the contract between Amazon and Tri-State, he was not a party to it.

As plaintiff does not address their arguments concerning his causes of action for *res ipsa loquitur* and the breach of express warranty, movants assert that he abandons them.

### III. ANALYSIS

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 [2019]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; “conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient.” (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the “light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable

inference.” (*O’Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

Here, whether movants may be held liable depends on Amazon’s role in the transaction by which plaintiff obtained the bicycle. Pursuant to UCC § 2-106, a “‘sale’ consists in the passing of title from the seller to the buyer for a price.” As one cannot pass title without possessing title, “some kind of ownership rights” in the goods is required. (*Corona Treasures LLC v Star Home Designs, LLC*, 42 Misc 2d 1224[A] [Sup Ct, Kings County 2013]).

Having offered admissible documentary evidence that Eshion owned the bicycle and shipped it to plaintiff, and transferred its title to the bicycle to plaintiff, and that Amazon provided only an online platform for doing so without ever having possessed the bicycle, movants demonstrate, *prima facie*, that Amazon was not the seller of the bicycle.

As plaintiff offers no support for his contention that Amazon sold him the bicycle notwithstanding the evidence that Eshion owned, sold, and transferred its title to the bicycle to him, he raises no issue as to Amazon’s role in the transaction. His conclusory assertion that Amazon sold the bicycle to his father has no evidentiary value. As Amazon was not the seller of the bicycle, plaintiff’s reliance on the other sections of the UCC is misplaced as they pertain to the seller of goods.

It is also undisputed that Tri-State, a third-party service provider which participates in Amazon’s online platform, assembled the bicycle, which suffices to satisfy movants’ *prima facie* burden of proving that Amazon did not. As Amazon did not assemble the bicycle, to hold it liable for Tri-State’s negligence, Amazon must owe a duty to plaintiff. (*Pulka v Edelman*, 40 NY2d 781, 782 [1976] [“It is well established that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff.”])).

In *Philadelphia Indem. Ins. Co. v Amazon.com, Inc.*, the plaintiff argued that Amazon

may be held liable for negligence when it contracted with a provider “without conducting a credit check or securing evidence of insurance . . .” (425 F Supp 3d 158, 163-165 [EDNY 2019]). The court rejected that argument and granted Amazon summary dismissal of the plaintiff’s cause of action for negligence, reasoning that as Amazon did not manufacture, sell, or otherwise distribute the allegedly defective product to the plaintiff, it owed him no duty with respect to the product. (*Id.*; *Eberhart v Amazon.com, Inc.*, 325 F Supp. 3d 393, 297-401 [SDNY 2018] [same]).

As movants again demonstrate, *prima facie*, that Amazon did not sell, manufacture, distribute or assemble the bicycle, it also shows that it owed no duty to plaintiff sufficient to render it liable for Tri-State’s allegedly negligent assembly of it or for a breach of an express warranty. That Amazon provided plaintiff with the names of providers that it vetted for past criminal conduct and service issues and that Tri-State did not comply with Amazon’s insurance affords no basis for finding it liable for Tri-State’s alleged negligent assembly of the bicycle. (*See Philadelphia Indem., supra*, 425 F Supp 3d at 163-165). And again, plaintiff offers no authority for his conclusory assertions to the contrary nor can he claim to have relied on the agreement between Amazon and Tri-State. He thus fails to raise an issue of fact or law.

In any event, plaintiff improperly asserts for the first time his contention that having vetted Tri-State and having failed to ascertain whether it was insured, Amazon may be held liable. (*Palka v Vill. of Ossining*, 120 AD3d 641 [2d Dept 2014] [plaintiff cannot, for first time in opposition to motion for summary judgment, raise new theory of recovery which is materially different from those pleaded in complaint and bill of particulars]).

Moreover, having failed to offer opposition to movants’ arguments relating to his causes of action for breach of an express warranty and *res ipsa loquitur*, plaintiff abandons them. (*See*

*Josephson LLC v Column Fin., Inc.*, 94 AD3d 479 [1st Dept 2012] [remaining claims deemed abandoned by plaintiff's failure to oppose those parts of defendants' motion that sought summary judgment dismissing them]; *Genovese v Gambino*, 309 AD2d 832 [2d Dept 2003] [as plaintiff did not oppose branch of the motion, he abandoned his claim]).

#### IV. CONCLUSION

For all of the foregoing reasons, it is hereby

ORDERED, that movants' motion for summary judgment is granted and the action is severed and dismissed as against defendants Amazon.com LLC and Amazon.com.DEDC, LLC; it is further

ORDERED, that absent evidence that the remaining defendants ever appeared or answered in this action, and as more than one year has passed since they were allegedly served with the pleadings, the action is dismissed as against them pursuant to CPLR 3215(c) based on plaintiff's failure to seek a default judgment against them timely; and it is further

ORDERED, that the action is therefore dismissed in its entirety, and the clerk of the court is directed to enter judgment accordingly.

6/11/2020

DATE

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BARBARA JAFFE, J.S.C.

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