

Browne v Aviles

2021 NY Slip Op 31865(U)

June 3, 2021

Supreme Court, New York County

Docket Number: 153016/2019

Judge: Lisa S. Headley

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LISA S. HEADLEY PART IAS MOTION 22

Justice

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GABRIELA BROWNE,

Plaintiff,

- v -

CHRISTIAN AVILES, SER-SAL TRUCKING, INC.,GTI
HARBOR TRUCKING & RIGGING, INC.,GALASSO
TRUCKING & RIGGING, INC.

Defendant.

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INDEX NO. 153016/2019

MOTION DATE 03/02/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 50, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76

were read on this motion to/for JUDGMENT - SUMMARY.

I. Plaintiff Gabriela Browne's Motion for Summary Judgment on the issue of Liability

Plaintiff Gabriela Browne moves for partial summary judgment pursuant to CPLR §3126 on the issue of liability against defendants, Christian Aviles ("Aviles"), Ser-Sal Trucking, Inc. ("Ser-Sal") and Galasso Trucking Inc. ("Galasso"). Plaintiff also moves this court to find that she is free from any comparative negligence. Defendant Galasso cross-moves for summary judgment to dismiss the complaint alleging no liability based on the doctrine of vicarious liability. Both parties filed opposition and replies.

This personal injury case stems from a motor vehicle accident that occurred on January 29, 2019 at the intersection of 34th Street and 11th Avenue in New York County. Plaintiff alleges she was a pedestrian walking in the crosswalk with the light in her favor, when she was struck by a tractor truck driven by defendant Aviles, who was operating a vehicle owned by defendant Ser-Sal. Plaintiff alleges that at the time of the accident, defendant Ser-Sal was hauling trailers on behalf of co-defendant Galasso, who employed defendant driver Aviles. In addition, plaintiff alleges that as a result of the accident, she suffered severe injuries when she was knocked to the ground and defendant's truck ran over her abdomen.

In support of the motion, plaintiff submits, inter alia, her deposition testimony, the deposition testimony of defendant Aviles and a sworn statement of Susan Webber, an eyewitness to the accident. Plaintiff testified that on the date of the accident, as she approached the subject intersection, she saw that the pedestrian signal was not in her favor and waited at the curb until the signal changed. When the signal changed in her favor, plaintiff stated that she looked for

oncoming traffic before crossing 11th Avenue. Plaintiff states that when she did not see any vehicles, she proceeded to enter the crosswalk. Plaintiff testified that she was suddenly struck by a truck driven by defendant Aviles, as it made a right turn. Plaintiff further stated that she had crossed 8 to 10 steps before feeling the impact.

Defendant Aviles testified that he stopped at the red light before making a right turn. He stated that he knew he was required to yield to pedestrians crossing the street, and that they would have a walk signal at the same time he would have a green signal. He also acknowledged that in such a situation, pedestrians had the right of way. Defendant Aviles stated that upon seeing the green signal, he looked ahead of him, saw nothing and proceeded to turn right. He admitted not seeing plaintiff before striking her, and not stopping the truck until he ran over her.

Susan Webber's eyewitness statement indicates that she observed the events preceding the accident, as well as the occurrence of the accident. Ms. Webber stated that the plaintiff had the right of way while in the crosswalk, and that plaintiff did not run across the crosswalk. Ms. Webber further stated that, based on her observation, defendant Aviles was "100% responsible" for the accident. Here, based on the evidence presented, plaintiff asserts that she established that defendants are liable as a matter of law, and the defendants have no alternative explanation for the accident. Further, plaintiff contends that the evidence demonstrates that plaintiff was free from negligence.

Here, plaintiff's motion, which contends that she was a pedestrian walking in the crosswalk with the light in her favor, has made out a *prima facie* case of negligence, and the burden shifts to the defendant to raise a triable issue of fact. *See, Winegrad v. New York University Medical Center*, 64 NY2d 851, 853 (1985); *see also, Zuckerman v. City of New York*, 49 NY2d 557, 560 (1980).

In opposition to the motion, defendants argue that there are issues of fact regarding comparative fault that precludes the granting of summary judgment. Defendants contend that it is not conclusive that plaintiff was free of comparative negligence based on the evidence. Defendants refer to plaintiff's deposition testimony, where she claimed to have looked down before crossing the intersection, and thus, argue that plaintiff did not look adequately before crossing. Defendants also refer to Plaintiff's testimony where she claimed that she falsely told the police that she was walking in a westbound direction instead of an eastbound direction. Defendants asserts that there are discrepancies in defendant Aviles' testimony and the eyewitness' sworn statement wherein defendant Aviles' claimed that the impact occurred about 7 to 10 feet past the crosswalk, and the eyewitness statement indicates that plaintiff was struck by the **middle set of tires** on the passenger side of the truck, as opposed to being hit in **front of the truck**. (*Emphasis added*). Here, defendants argue that it is inconclusive as to whether plaintiff's conduct was non-negligent in light of the evidence.

"It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues." *Birnbaum v. Hyman*, 43 A.D.3d 374, 375 (1st Dep't 2007). "To prevail on a summary judgment motion, the moving party must provide evidentiary proof, in admissible form sufficient to warrant the direction of summary judgment in his or her favor." *Kershaw v. Hospital of Special Surgery*, 114 A.D.3d 75,

81 (1st Dep't 2013). "Once the burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial." *Id.* at 82.

Here, this court finds that defendants have failed to raise a material issue of fact. Plaintiff's deposition testimony provides that she had looked down and then looked over her shoulder before walking onto the crosswalk. Further, it is undisputed that plaintiff had the right of way before the accident occurred. The eyewitness statement averred that plaintiff was struck by the side of the truck. Defendants have failed to put forth a nonnegligent excuse for the accident. As such, plaintiff's motion for partial summary judgment is granted.

Furthermore, plaintiff's motion seeking to strike defendant's affirmative defenses which allege plaintiff's culpable conduct is also granted. As stated above, plaintiff has established that she was free from negligence in that she looked for cars before crossing the street, waited for the light in her favor, and crossed the street within the pedestrian crosswalk.

II. Co-Defendant Galasso's Cross-Motion to Dismiss

Co-defendant Galasso cross-moves for summary judgment seeking dismissal from this action on the ground that there is no principal-agent relationship between Galasso and defendants Aviles and Ser-Sal, and thus Galasso cannot be held liable based on vicarious liability.

Galasso also argues, *inter alia*, that the cross-motion was filed timely, and that if the court finds otherwise, the cross-motion falls within the exception to this rule, in that the subject matter in Galasso's cross-motion is similar to that in plaintiff's motion. In addition, Galasso claims that when Galasso and co-defendants filed the opposition papers, their counsel failed to consider Galasso's lack of vicarious liability defense, which is the basis of the instant cross-motion. Subsequently, Galasso discharged that counsel and hired another counsel, who is presently independent of the counsel for the other defendants.

In support of the cross-motion, defendant Galasso submits, *inter alia*, plaintiff's deposition testimony, co-defendant Aviles' deposition testimony, and the deposition testimony and affidavit of Galasso's vice president of operations, Stephen Doran. Mr. Doran testified that Galasso Trucking Inc. consisted of Galasso Trucking, LLC and Galasso Trucking and Rigging, Inc., which operated separately and on occasion each company relied on each other for supplies. In addition, when Galasso Trucking LLC was in need of trucks for its business, it would sometimes hire other companies to provide trucks, including co-defendant Ser-Sal.

Mr. Doran testified that on the day of the accident, a company known as Benjo Trucking hired Galasso to provide some trailers for work to be performed at the Javits Center in New York. Mr. Doran hired Ser-Sal to deliver trailers to the Javits Center. Galasso submits that an invoice indicates that services were performed by Ser-Sal on behalf of Galasso. Mr. Doran further stated that defendant Ser-Sal provided defendant Aviles, as the driver on that occasion, and that Mr. Doran had no prior knowledge of defendant Aviles. Mr. Doran contends that he did not retain any control over Ser-Sal's performance on the day of the accident; defendant Ser-Sal worked as an independent contractor; and that defendant Aviles was not an employee of Galasso. In sum, Galasso contends that Aviles was Ser-Sal's employee, and that Galasso had no control over

the operations of both, Ser-Sal and Aviles, on the day of the accident. Thus, Ser-Sal and Aviles' negligence, as independent contractors, cannot be attached to Galasso, and accordingly, Galasso should be dismissed from this action.

In opposition, plaintiff argues, *inter alia*, that the cross motion should be denied because it is untimely. Plaintiff contends that the cross-motion lacks good cause to avoid dismissal due to the replacement of counsel because Galasso's prior counsel could have served a timely cross-motion based on the ground Galasso now asserts. Further, plaintiff argues that if the court accepts the cross-motion, the deposition testimony of Aviles and Doran indicate that there is an agent-principal relationship among defendants, which confirms vicarious liability on behalf of Galasso. Plaintiff argues, in the alternative, there are issues of fact involving the defendants' relationship, which would preclude the granting Galasso's cross-motion for summary judgment.

Pursuant to *CPLR §2214*, a notice of motion is to be served at least 8 days before the time the motion noticed shall be heard. A cross-motion shall be served at least 7 days before such time if a notice is served at least 16 days before such time so demands. See, *CPLR §2214(b)*. The showing of good cause for such a delay means providing a satisfactory explanation for the untimeliness[.] See, *Brill v. City of New York*, 2 N.Y.3d 648, 652 (2004); see also, *CPLR § 3212(a)*. In addition, a cross-motion may be acceptable if its subject matter is nearly identical to that of the earlier motion. See, *Step-Murphy, LLC v. N&B Bros. Real Estate Corp.*, 60 A.D.3d 841 (2d Dep't 2009). Here, the cross-motion is untimely, despite Galasso's claim that plaintiff's motion was undecided. However, Galasso discussed its conflict with former counsel, which led to a change of counsel. Although there was a delay in the filing of the cross-motion, this court finds Galasso's explanation to be a satisfactory and reasonable excuse for the delay. Moreover, since plaintiff's motion had not been determined until this moment, and there has been no evidence of prejudice, Galasso's cross-motion shall not be dismissed, and will be considered by this court.

The primary issue set forth in Galasso's cross motion is whether Galasso is liable on vicarious liability grounds. A principal is not liable for the acts of an independent contractor because unlike the master-servant relationship, the principal cannot control the manner in which the independent contractor performs the work. See, *Melbourne v. New York Life Ins. Co.*, 271 A.D. 2d 296 (1st Dep't 2000). Moreover, control of the method and means by which work is to be performed is therefore, a critical factor in determining whether one is an independent contractor or an employee for the purposes of tort liability. *Id.* at 298.

Here, Mr. Doran, Galasso's Vice President of operations, testified that Galasso was carrying out an assignment on behalf of Benjo Trucking (a non-party), and Galasso needed additional vehicles for the Javits Center Project and thus, hired Ser-Sal to deliver Ser-Sal vehicles to that destination. Absent the aforesaid invoice, there was no written contract between Galasso and Ser-Sal regarding this particular transaction. Mr. Doran further testified that Galasso hired Ser-Sal to make a delivery to the Javits Center, and that Ser-Sal chose a driver unknown to Doran. Mr. Doran contends that Galasso did not choose the driver, Galasso did not pay or provide benefits to the driver Aviles, and that Galasso did not hold the driver to any fixed schedule.

Here, this court determines that Galasso had no control over the method of operations carried out by Ser-Sal and Aviles on the day of the accident, and thus, Galasso should not be bound by vicarious liability. As such, Galasso’s cross motion to dismiss Galasso as a defendant in this action is granted.

Accordingly, it is

ORDERED that plaintiff Gabriela Browne’s motion for partial summary judgment on the issue of liability is GRANTED as against defendants, Christian Aviles and Ser-Sal Trucking, Inc., only; and it is further

ORDERED that plaintiff’s relief sought to strike defendants’ affirmative defenses which allege plaintiff’s culpable conduct is GRANTED; and it is further

ORDERED that defendant Galasso Trucking, Inc.’s cross-motion for summary judgment is GRANTED, and the action is dismissed as to co-defendant Galasso Trucking, Inc. only; and it is further

ORDERED that the Clerk of the Court shall amend the caption to reflect the dismissal of defendant Galasso Trucking, Inc.; and it is further

ORDERED that this matter shall proceed to trial on the issue of damages against defendants, Christian Aviles and Ser-Sal Trucking, Inc., only; and it is further

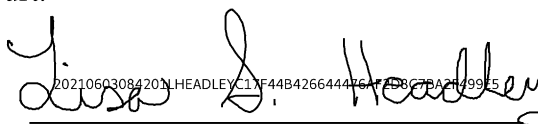
ORDERED that any relief sought not expressly addressed herein has nonetheless been considered; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this Decision/Order upon all defendants with notice of entry.

This constitutes the decision and order of the Court.

6/3/2021

DATE


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LISA S. HEADLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE