

Palma v Verizon N.Y. Inc.
2021 NY Slip Op 32435(U)
November 22, 2021
Supreme Court, New York County
Docket Number: Index No. 155286/2017
Judge: Phillip Hom
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. PHILLIP HOM **PART 2**

Justice

-----X

SCOTT PALMA,

Plaintiff,

- v -

VERIZON NEW YORK INC., UNITED PARCEL SERVICE,
INC., and TRAVIS GORDON,

Defendants.

-----X

INDEX NO. 155286/2017

MOTION DATE 06/22/2021

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235

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

Upon the foregoing documents, it is

ORDERED that Plaintiff Scott Palma's ("Palma") amended motion (a) for summary judgment is denied, and (b) to dismiss Defendants' affirmative defense of culpable conduct is denied; and it is further

ORDERED that Defendant Verizon New York Inc.'s ("Verizon") cross-motion (a) for summary judgment, and (b) to dismiss Palma's Complaint and the Crossclaims are denied as academic; and it is further

ORDERED that Defendants United Parcel Service Inc. ("UPS") and Travis Gordon's ("Gordon") (collectively the "UPS Defendants") cross-motions (a) for summary judgment is partially denied and partially granted, and (b) to dismiss Palma's Claims and the Crossclaims is denied.

Background

Palma commenced this action on June 9, 2017 for serious personal injuries allegedly suffered on May 19, 2017 when he drove his motorcycle into a low hanging utility line on 59th Street between 11th and 12th Avenues in Brooklyn, New York. Palma alleges a vehicle operated by Gordon and owned by UPS drove into the utility line prior to the incident. Palma also alleges Verizon owned the utility line.

Palma moves for partial summary judgment on liability under CPLR §3212 and to dismiss Defendants' affirmative defense of culpable conduct. Verizon cross-moves for summary judgment under CPLR §3212 to dismiss Palma's Complaint and the Crossclaims. The UPS Defendants also cross-move for summary judgment dismissing Palma's Claims and the Crossclaims against them.

On August 3, 2021, Palma's attorney informed the Court by email, that the Claims against Verizon have been settled. Although, no Stipulation of Discontinuance has been filed as of the date of this Order, the Court denies Verizon's cross-motion as academic based upon Palma's Attorney's representation and will consider Palma's motion for summary judgment against the UPS Defendants and the UPS Defendants' cross motion only.

Summary Judgment on Liability

On a motion for summary judgment, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Fuller v KFG L & I, LLC*, 189 AD3d 666 [1st Dept 2020], citing *Zuckerman v New York*, 49 NY2d 557 [1980]). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof

in admissible form to establish that material issues of fact exist which require a trial of the action (*Fuller v KFG L & I, LLC.*, *supra*; citing, *Zuckerman v New York*, 49 NY2d 557 [1980]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Delgado v Martinez Family Auto*, 113 AD3d 426 [1st Dept 2014]).

The elements for negligence are: 1) a duty owed by defendant to plaintiff; 2) a breach of that duty; and 3) injury proximately resulting from the breach (*CB v Howard Sec.*, 158 AD3d 157, 164 [1st Dept 2018] citing *Solomon by Solomon v New York*, 66 NY2d 1026, 1027 [1985]). To establish a *prima facie* case of negligence, a plaintiff must demonstrate that a defendant (1) created the alleged defective condition which caused the accident or (2) had actual or constructive notice of the defective condition. In alleging constructive notice, plaintiff must prove that the dangerous condition was visible, apparent and existed for a sufficient period of time to permit defendant to remedy it (*Ferrigno v County of Suffolk*, 60 AD3d 726, 727, 875 N.Y.S.2d 202 [2d Dept 2009]).

To establish causation, plaintiff must show that a defendant's negligence was a substantial cause of events which produced the injury (*Washington v Autumn Props. II, LLC*, 134 AD3d 456, 457 [1st Dept 2015]). When a plaintiff fails to establish the cause of an accident and multiple causes can be attributed to the accident claimed, any determination as to the cause of the accident is nothing more than speculation (*Amadio v Pathmark Stores*, 253 AD2d 834, 678 N.Y.S.2d 500 [2d Dept 1998]). Although the issue of proximate cause is generally one for the jury, to impose liability, it is not sufficient that defendant's negligence furnished a condition or occasion for the occurrence, but was not one of its causes (*Peralta v Manzo*, 74 AD3d 1307, 1308, 905 N.Y.S.2d 245 [2d Dept 2010]).

In support of the motion, Palma alleges that Gordon created the dangerous condition when he struck the subject wires and did not report the damage in violation of New York State Vehicle and Traffic Law (“VTL”) §600. Citing the testimony of an eyewitness, Mordechai Reich (“Reich”), Palma alleges that Gordon breached his duty when he struck Verizon’s low-hanging wires, continued to travel down 59th Street, struck a second set of Verizon’s low hanging wires, stopped and got out of the UPS truck to look at the area, and then drove away without calling the police or reporting it (NYSCEF Doc. No. 138 pages 18-22, 75-76).

Palma alleges that the breach of Gordon’s duty to report the hazardous condition under VTL §600 was the result of his injuries. Palma also alleges UPS is vicariously liable for Gordon’s actions because they occurred while he was working for UPS. The Court finds Palma has met his burden on summary judgment and the burden shifts to the UPS Defendants to present admissible evidence that triable issues of fact exist to warrant a jury trial.

In opposition and in their cross-motion, the UPS Defendants argue that Gordon could not have hit the wire because he was operating a UPS package car that was 10 feet 6 inches tall (NYSCEF Doc. No. 144, page 14), while the minimum height for wires to be installed over the roadway is 18 feet (NYSCEF Doc. No. 137, page 2). Gordon further testified that his package car never came into contact with wires while he was performing his deliveries along 59th Street between 12th and 11th Avenues on the date of the subject accident or any other time (*Id.* at pages 71, 73, 75, 77-78, 95-96).

UPS Defendants also argue that UPS has no record of a UPS tractor trailer on 59th Street on the date of the subject accident. Rochel Beneth (“Beneth”), a non-party witness, testified that the truck that hit the wire was not the truck she would normally see because it was much longer and bigger and it was a tractor trailer (NYSCEF Doc. No. 140, page 10-11). The affidavit of non-

party witness, 11-year-old Solomon Kahan, also states that the truck that came in contact with the wires was a tractor trailer (NYSCEF Doc. No. 146).

Additionally, Beneth testified that the wire which the unknown UPS tractor trailer hit was in front of her house, 1160 59th Street, but the wire that Palma allegedly came into contact with was eight houses away, closer to 12th Avenue and approximately 300 feet away (NYSCEF Doc. No. 140, pages 12, 23, and 28). Reich testified that the wire that was left behind by the unidentified UPS truck was attached to the wire that stretched from 1159 to 1160 59th Street (NYSCEF Doc. No. 138, page 11). Reich further testified that the truck did not hit the wires, but wires on top of the truck hit the Verizon wire (*Id.* at pages 16-17).

The UPS Defendants further argue that the wire Palma came into contact with was closer to 12th Avenue. Reich testified that he observed Palma drive 150 feet with wires around his neck before coming to a rest at 1155 59th Street (*Id.*). Palma testified that he came into contact with wire that was 30-40 feet onto 59th Street and he estimated that he traveled approximately 110 to 120 feet after the initial contact with the wire before coming to a stop (NYSCEF Doc. No. 147, page 9).

The UPS Defendants have provided sufficient evidence of triable issues of facts that exist regarding the accident, such as whether it was Gordon's UPS truck that hit the wire and whether Palma was injured by the wire that was allegedly damaged by the UPS tractor trailer. Even if it were Gordon's truck that hit the wire that injured Palma, it is well settled that whether a driver's determination that his truck could clear wires was erroneous, and whether the driver's failure to see and hear what was to be seen and heard caused the accident are issues of fact for a jury (*Agli v Turner Const. Co., Inc.*, 257 AD2d 469, 470, 683 N.Y.S.2d 531 [1st Dept 1999]). Accordingly, Palma's motion for summary judgment is denied.

Motion to Dismiss UPS' affirmative defense of culpable conduct

In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable intendment of the pleading, which is to be liberally construed (*Chestnut Realty Corp. v Kaminski*, 95 AD3d 1254, 1255 [2d Dept 2012]). Also, the Court does not consider arguments advanced for the first time in reply papers to a summary judgment motion (*Matter of Gonzalez v City of NY*, 127 AD3d 632, 633 [1st Dept 2015], citing *Lumbermens Mut. Cas. Co. v Morse Shoe Co.*, 218 AD2d 624, 626 [1st Dept 1995]).

Palma moves to dismiss the UPS Defendants' affirmative defense of culpable conduct. However, Palma's affirmation in support of his motion for partial summary judgment and the memorandum of law are silent as to the dismissal of this affirmative defense. Palma raised this argument for the first time in his reply papers, thus no consideration is accorded to it (*Matter of Gonzalez v City of NY, supra* at 633). Accordingly, Palma's motion to dismiss affirmative defense of culpable conduct is denied.

UPS and Gordon's Cross Motion for Summary Judgment

The UPS Defendants cross move for summary judgment. The UPS Defendants argue that Beneth testified that ten to fifteen minutes passed from the time the UPS tractor trailer drove down the street and the motorcyclist came into contact with the wire in the roadway. Between the time that the alleged UPS tractor trailer drove down the street and the motorcycle came into contact with the low hanging wire loop, a mixture of busses and cars freely passed in the roadway (NYSCEF Doc. No. 206 at page 17, 31 and 32). The UPS Defendants further argue that

Reich testified that he did not see the truck hit the wires (NYSCEF Doc. No. 205 at page 65), and neither of the witnesses have testified that Gordon's 10 foot 6-inch-high brown UPS package delivery vehicle was responsible for coming into contact with or in any way causing any utility wire to fall on 59th Street between 12th and 11th Avenues on the day of the subject accident. The Court finds the UPS Defendants have met their burden on summary judgment and the burden shifts to Palma to present admissible evidence that triable issues of fact exist to warrant a jury trial.

In opposition to the cross motion, Palma argues that Gordon was the only UPS driver assigned to deliver packages on the subject roadway on the day of the accident. Palma argues Gordon struck the wires that caused his injuries and then fled the scene without reporting the incident to law enforcement in violation of VTL §600. Palma argues that Reich testified that it was a 'box truck' (NYSCEF Doc. No. 138, page 21 and 54). However, Reich further testified that he saw the front of the truck, and was unable to identify whether it was a tractor trailer or a delivery truck (NYSCEF Doc. No. 138, page 54-55). Further, Reich described the UPS truck driver as "dark-skin, African American," which generally describes Gordon's appearance (*Id.* at page 43). Palma submitted Gordon's photograph in support of his argument (NYSCEF Doc. No. 226).

Palma further argues while Beneth believed that Palma and the wires he struck were approximately 300 feet further away from her house (NYSCEF Doc. No. 140 page 27), that should not raise a material inconsistency because she was further down towards the middle of the block. Other witnesses testified that Palma traveled approximately 150 feet after he struck the wires.

The testimony is consistent that it was a UPS truck that struck some overhead wires. The Court finds that there are triable issues of fact warranting a jury trial as to whether an alleged UPS truck came in contact with the wire that caused Palma's injuries. Accordingly, UPS' cross motion for summary judgment is denied.

There is conflicting testimony about the UPS driver. Beneth describing him as a "white guy" (NYSCEF Doc. No. 206, page 15), and Reich describing him as "dark-skin, African American" (NYSCEF Doc. No. 205, page 43). While Reich's testimony generally describes Gordon's appearance, it is too broad to have probative value. None of the witnesses have testified that Gordon's UPS package delivery vehicle came into contact with the wire which caused Palma's injuries and Gordon testified he did not hit the wire that injured Palma. The Court finds there is no evidence that it was Gordon driving the UPS truck that allegedly struck the wire injuring Palma and grants Gordon's cross motion for summary judgment, dismissing the claims against him.

Accordingly, UPS's cross motion for summary judgment is denied and Gordon's cross motion for summary judgment is granted.

UPS Defendants' Motion to dismiss crossclaims

The UPS Defendants move to dismiss Verizon's Crossclaims against the UPS Defendants for apportionment of liability, judgment against the UPS Defendants and indemnification (NYSCEF Doc. No. 3 page 3).

The UPS Defendants' cross motion is silent as to the dismissal of the crossclaims and no arguments are made in support of the same. Accordingly, Court denies the UPS Defendants' cross motion to dismiss Crossclaims against them.

