

Gibbs v Van Arsdale

2021 NY Slip Op 33937(U)

December 23, 2021

Supreme Court, Queens County

Docket Number: Index No. 717177/2018

Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

MARK ALAN GIBBS,

Index No.: 717177/2018

Plaintiff,

Motion Date: 12/23/21

- against -

Motion No.: 7

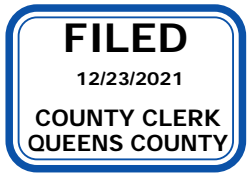
LANCE HARRY VAN ARSDALE,

Motion Seq.: 3

Defendant.

- - - - - x

LANCE HARRY VAN ARSDALE,



Third-Party Plaintiff,

- against -

ROBERT AND ANN ELSASSER, INC. and JOHN
DOE,

- - - - - x

The following electronically filed documents read on this motion by third-party defendant ROBERT AND ANN ELSASSER, INC. for an Order pursuant to CPLR 3212, granting third-party defendant ROBERT AND ANN ELSASSER, INC. summary judgment and dismissing the third-party complaint and any and all cross-claims:

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	EF 45 - 53
Affirmation in Opposition-Exhibits.....	EF 63 - 69
Reply Affirmation.....	EF 70 - 71

This is an action to recover damages for personal injuries allegedly sustained by plaintiff as a result of a pedestrian knockdown that occurred on March 15, 2018 in front of 70-20 Parsons Boulevard, in Queens County, New York.

This action was commenced by the filing of a summons and complaint on November 8, 2018. Defendant joined issue by service of an answer on December 19, 2018. A third-party action was

commenced on August 9, 2019. Third-party defendant, Robert and Ann Elsasser, Inc. (Elsasser), joined issue by service of an answer on August 22, 2019. Elsasser now moves for summary judgment.

Non-party witness, Joel Britto, testified that at the time of the accident, he was working within the course of his employment for Elsasser. He was the driver of the truck, and had a helper, Eduardo. While making a commercial delivery to Bagel Plus at the Electchester Shopping Center, he double-parked the truck on Parsons Boulevard between Jewel Avenue and 71st Street. The shopping center was to the right of the truck. The accident occurred on Parsons Boulevard. He was not permitted to park the truck in the parking lot of the shopping center. He was not permitted to park in the rear of the shopping center because Bagel Plus did not allow him to make deliveries through the rear entrance. On the date of the accident, there were no parking spots where he could completely put the truck in. When he is looking for a place to park, he looks for the biggest spot so that he can open the doors to the truck to make his delivery and also allow enough room for vehicles to pass between his vehicle and the parked vehicles to the left. On the date of the accident, there was enough room for cars to pass by his truck. He saw cars and even a bus pass by his truck without incident. A delivery to Bagel Plus would typically take seven to a maximum of fifteen minutes. After he parked the truck, both he and Eduardo exited the truck, opened the passenger side door, and were putting juices on the hand truck when the accident occurred. While loading the hand truck, Eduardo told him that there were people running from the parking lot of the Shopping Center. He turned his head and saw one man running very fast, being chased by two other men also running very fast, approximately eight feet behind the first man. The man in the front continuously turned his head over his shoulder to see where the other two men were. The man in the front then ran into the street in front of the second parked car ahead of the truck. He then heard an impact.

In support of the motion, Elsasser also submits a copy of the certified Police Accident Report. In the accident description portion, the responding officer notes:

AT T/P/O DRIVER OF VEHICLE ONE STATES HE WAS TRAVELING NORTHBOUND ON PARSONS BLVD WHEN PEDESTRIAN CROSSED EAST TO WEST OVER PARSONS BLVD, IN FRONT OF TROPICANA TRUCK WITHOUT LOOKING AT ONCOMING TRAFFIC. PEDESTRIAN STATES HE WAS CROSSING STREET WHEN HE WAS STRUCK BY VEHICLE ONE. WITNESS STATES VEHICLE WAS TRAVELING AT LOW RATE OF SPEED AND PEDESTRIAN WAS CROSSING PARSONS BLVD WHILE LOOKING

BACK, NOT PAYING ATTENTION TO ONCOMING TRAFFIC.

Based on the evidence submitted, Elsasser contends that the truck was legally double-parked at the time of the accident, and thus, cannot be deemed negligent.

In opposition, Van Arsdale contends that the issues of fact preclude summary judgment. Specifically, Van Arsdale alleges that the double-parked truck was obstructing and blocking the bicycle lane at the time of the accident, and thus, Brito violated Section 4-08(e)(9) by parking within the bike lane.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form, eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his or her position (see Zuckerman v City of New York, 49 NY2d 557 [1980]).

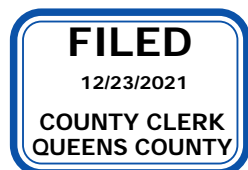
New York City Department of Transportation Traffic Rule Section 4-08(a), provides that where parking is prohibited by rules, no person shall stop a vehicle "except temporarily for the purpose of and while expeditiously receiving or discharging passengers or loading or unloading property to or from the curb". Section 4-08(f)(1) provides that double parking is prohibited "except a person may stand a commercial vehicle alongside a vehicle parked at the curb at such locations and during such hours that stopping, standing or parking is not prohibited, while expeditiously making pickups, deliveries, or service calls, provided that there is no unoccupied parking space or designated loading zone on either side of the street within 100 feet that can be used for such standing".

Here, Elsasser established that the exception applies. The truck was lawfully stopped while Brito was actually engaged in delivering merchandise when the accident occurred (see Reid v Lichinchi, 215 AD2d 639 [2d Dept. 1995]). Moreover, even if the truck was improperly parked at the time of the accident, there was no evidence to establish that movant's vehicle was obstructing traffic (cf. Theodorou v Perry, 129 AD3d 1056 [2d Dept. 2015][finding that issues of fact precluded summary judgment where movant failed to establish that movant was free from fault in the happening of the accident when movant obstructed traffic by double parking]; Adams v Lemberg Enterprises, Inc., 44 AD3d 694 [2d Dept. 2007][same]). As such, the opposition failed to raise an issue of fact sufficient to defeat summary judgment.

Accordingly, and based on the above reasons, it is hereby

ORDERED, that the motion by third-party defendant ROBERT AND ANN ELSASSER, INC. is granted, the third-party complaint and any and all cross-claims are hereby dismissed.

Dated: December 23, 2021
Long Island City, N.Y



Robert J. McDonald

ROBERT J. MCDONALD
J.S.C.