

Ortiz v Barba

2021 NY Slip Op 33974(U)

December 13, 2021

Supreme Court, Queens County

Docket Number: Index No. 705114/2019

Judge: Maurice E. Muir

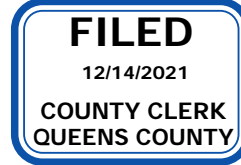
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This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR
Justice



KERRI ORTIZ,

IAS Part - 42

Plaintiff,

Index No.: 705114/2019

-against-

Motion Date: 7/15/21

ROBERTO CARLOS CARRERA BARBA,
FEDEX GROUND PACKAGE SYSTEM, INC.
and MANUEL B. PAUCARTENEZACA,

Motion Cal. Nos. 17

Motion Seq. No. 4

Defendants.

The following electronically filed (“EF”) documents read on this motion by Roberto Carlos Carrera Barba (“Mr. Barba”) and Fedex Ground Package System, Inc. (“Fedex”) (collectively, the “defendants”) for an order: a) pursuant to CPLR § 3212, granting defendants’ Motion for Partial Summary Judgment, dismissing plaintiff’s negligent hiring, supervision, training and retention claims with prejudice as a matter of law; and b) in the alternative, if the above motion is denied, granting leave to renew said motion at a later date; and c) granting such other and further relief as this Honorable Court may deem just, proper, and equitable. Moreover, the plaintiff cross moves for order pursuant to Uniform Court Rules Part 130 granting sanctions and costs against defense counsel Zachary G. Farnsworth, and more particularly, the firm Callahan & Fusco, LLC for the frivolous filing of a Motion for Partial Summary Judgment, dismissing plaintiff’s negligent hiring, supervision, training and retention claims with prejudice as a matter of law; and in the alternative granting leave to renew said motion at a later date, and for such other and further relief as to this Court deems just and proper.

	Papers
	<u>Numbered</u>
Notice of Motion-Affirmation-Exhibits-Service	EF114 - 125
Notice of Cross Motion-Affirmation-Exhibits-Service.....	EF179 - 204

Reply & Affirmation in Opposition to Cross Motion-Exhibits..... EF285 - 286

Upon the foregoing papers, it is ordered that the motion and cross-motion are combined herein for disposition, and determined as follows:

This is an action to recover damages for personal injuries, which Kerri Ortiz (“Ms. Ortiz” or “plaintiff”) allegedly sustained in a multi-vehicle collision on the Long Island Expressway (“LIE”) eastbound at or near Grand Central Parkway (“GCP”) westbound lanes, in the County of Queens, city and state of New York. The plaintiff alleges that on March 5, 2019, a vehicle operated by Mr. Barba and owned by FEDEX Ground Package System, Inc. (“Fedex”) rear-ended a vehicle owned and operated by Manuel B. Paucartenezaca (“Mr. Paucartenezaca”), who was propelled into the plaintiff’s vehicle. Moreover, the plaintiff alleges “[t]hat ‘. . . the defendant, FEDEX GROUND PACKAGE SYSTEM, INC. negligently entrusted defendant ROBERTO CARLOS CARRERA BARBA with a motor vehicle . . . with the knowledge, permission and consent of defendant FEDEX GROUND PACKAGE SYSTEM, INC.’” As a result, on March 22, 2019, the plaintiff commenced the instant action against the defendants; and on June 19, 2019, issue was joined wherein, Mr. Paucartenezaca interposed an answer. Thereafter, on October 16, 2020, the court granted the plaintiff’s motion for summary judgment on the issue of liability. However, Fedex filed the instant motion seeking partial summary judgment with respect to the plaintiff’s reference to its negligent hiring of Mr. Barba.

The defendants correctly argue that “New York law is clear that no liability may arise for negligent hiring, supervision, training and retention where negligence is undisputed and where vicarious liability exists for the negligent act/omission of an agent. In other words, “. . . where an employee is acting within the scope of his or her employment, the employer is liable under the theory of respondeat superior, and the plaintiff may not proceed with a claim to recover damages for negligent hiring, retention, supervision, or training.” (*Ambrose v. United Parcel Service of America*, 143 AD3d 929 [2d Dept 2016] *see also Fludd v. City of New York*, NY Slip Op 06344 [2d Dept 2021]). As such, summary judgment is proper on plaintiff’s negligent hiring, supervision, training and retention claims against Fedex, as no genuine issues of material fact exist as to those claims. Fedex has admitted, for purposes of this litigation, that Mr. Barba was its agent at the time of the subject accident and that it is vicariously liable for Mr. Barba’s negligence. In addition, the court has granted summary judgment on

negligence/liability in favor of plaintiff as to the vicarious liability claim. (*Tangalin v. MTA Long Is. Bus*, 92 AD3d 766 [2d Dept 2012]; *Ashley v. City of New York*, 7 AD3d 742, 743 [2d Dept 2004]; *Fludd v. City of New York*, 2021 NY Slip Op 06344; 2021 WL 5349480 [2d Dept 2021]). As such, the plaintiff's cross motion for sanctions is baseless.

It is well settled law that “[a] court, ‘in its discretion, may award to any party or attorney in any civil action or proceeding before the court . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct’” (*West Hempstead Water Dist. v. Buckeye Pipeline Co., L.P.*, 152 AD3d 558 [2d Dept 2017]; *Stone Mtn. Holdings, LLC v. Spitzer*, 119 AD3d 548, 550 [2d Dept 2014], quoting 22 NYCRR 130-1.1(a)). “Although the advancement of a meritless position may serve as the basis for a finding of frivolity, the standard for such a showing is high: the rule provides that a position will be deemed frivolous only where it is ‘completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law’” (*Stone Mtn. Holdings, LLC v. Spitzer*, 119 AD3d at 550, quoting 22 NYCRR 130-1.1(a); *see Mascia v. Maresco*, 39 AD3d 504 [2d Dept 2007]; *Kucker v. Kaminsky & Rich*, 7 AD3d 491 [2d Dept 2004]). “The party seeking sanctions has the burden to demonstrate that its opponent's conduct was frivolous within the meaning of 22 NYCRR 130-1.1(a); *Stone Mtn. Holdings, LLC v. Spitzer*, 119 AD3d at 550). Here, the plaintiff failed to meet her burden demonstrating that Fedex or its attorney engaged in conduct within the meaning of § 130-1.1(c) (*Stone Min. Holdings, LLC v. Spitzer*, 119 AD3d 548, 550 [2d Dept 2014]; *see also* CPLR § 8106).

Accordingly, it is hereby

ORDERED that defendants' motion for partial summary judgment, pursuant to CPLR § 3212, is granted; and it is further,

ORDERED that the court dismisses all claims, in the complaint and/or amended complaint, relating to Fedex's alleged negligent hiring, supervision, training and/or retention of Roberto Carlos Carrera Barba; and it is further,

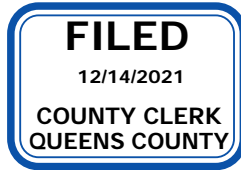
ORDERED, that the plaintiff's Notice of Cross Motion, pursuant to 22 NYCRR 130-1.1(a), is denied, in its entirety with prejudice; and it is further,

ORDERED that defendants shall serve a copy of this decision and order with notice of

entry upon the plaintiff on or before January 10, 2022.

The foregoing constitutes the Decision and Order of the court.

Date: December 13, 2021
Long Island City, New York



Maurice E. Muir
MAURICE E. MUIR, J.S.C.