

Nam Hyeon Jeon v Benco Dental Supply, Co.

2022 NY Slip Op 32110(U)

June 27, 2022

Supreme Court, New York County

Docket Number: Index No. 155787/2020

Judge: James G. Clynnes

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JAMES G. CLYNES PART 22M

Justice

-----X

NAM HYEON JEON,

Plaintiff,

- v -

BENCO DENTAL SUPPLY, CO., EMKAY TRUST, INC.,
JOHN DOE

Defendant.

INDEX NO. 155787/2020

MOTION DATE 02/14/2022,
02/28/2022

MOTION SEQ. NO. 004 005

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 79, 80, 81, 82, 83, 84, 85

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 005) 71, 72, 73, 74, 75, 76, 77, 78, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, plaintiff’s motion for an order (a) amending the complaint and the caption to reflect that the “John Doe” defendant is Yevgeny Kelman, (b) granting summary judgment as to liability as against Benco and Kelman, and dismissing Benco’s third affirmative defense alleging culpable conduct of plaintiff, (c) upon granting summary judgment, setting this action down for a trial on the assessment of damages, and (d) compelling defendants to provide all of the independent medical examination (IME) reports relating to plaintiff (Motion Sequence Number 004) and the motion by defendant Benco Dental Supply, Co. for an order granting summary judgment dismissing the complaint, or alternatively, partial summary judgment as to liability, and plaintiff’s cross motion for sanctions are decided as set forth herein.¹

Plaintiff Nam Hyeon Jeon seeks recovery for injuries sustained on February 20, 2020, when he was allegedly struck by a van leased by defendant Benco Dental Supply Co. (Benco) while he was standing in a parking lane on West 56th street.

¹ The claims against defendant Emkay Trust Inc. were dismissed by a prior order (NYSCEF Doc. No. 40).

Plaintiff's Deposition Testimony

Plaintiff testified with the aid of a Korean interpreter (deposition transcript, NYSCEF Doc. No. 67). He stated that on the day of the accident, he was working his usual 6:00 a.m. to 3:00 or 3:30 p.m. shift as a cook at a restaurant located on West 56th Street, a one-way street between 6th to 5th Avenues. At about noon, he took a 40-minute break. He had half of a muffin and a cup of coffee, and then went outside. He thought that he had gone out intending to smoke a cigarette, but never took the pack out of his pocket (*id.* at 14:12-15:2, 7; 19:8-20:2; 23:2-24:19).

Plaintiff stood in the parking lane in front of the restaurant between two vehicles. There was a commercial van behind him and a minivan on the other side, and they were between seven to ten feet apart. He was facing the street and "just looking at the sky, not doing anything". He did not notice whether there was anyone in the vehicles or whether they had their lights on. They were not idling and he did not hear either one starting the engine. He believed that the minivan was white. (*id.* at 35:20-28:3; 29:2-15).

After plaintiff had been standing there between five and ten minutes, the minivan suddenly backed up and hit him on the left shoulder. He did not see or hear it coming. He fell and sat down for two or three minutes. When he saw that the vehicle was about to drive away, he got up and wrote down its license plate number. He did not have to go far because the vehicle had not moved much due to a red light. He did not speak to the driver (*id.* at 25:15-19; 27:23-28:3; 29:24-30:4; 34:2-7; 49:12-17).

Yevgeny Kelman's Deposition Testimony

Non-party Yevgeny Kelman was deposed (deposition transcript, NYSCEF Doc. No. 66) after being identified as the driver of a vehicle present on 56th Street at the time of the accident. He testified that at noon on the date of the accident, he was sitting in the van immediately next to the curb in front of 25 West 56th street with the engine running. He had completed a service call at a nearby dental office and was doing the billing through his cellphone. He left after about seven or eight minutes. (*id.* at 12:8-12; 21:16-20; 23:11-16; 25:23-26:6; 42:6-43:14).

Kelman denied being in an accident on that day, and denied that any part of his vehicle came in contact with a man. He testified that while he was still idling, he heard a light thump that sounded like someone had dropped a cup of something on his van. Looking through the rear view mirror, he saw what looked like water dripping down the back two doors. He stuck his head

through the window but saw nobody around (*id.* at 10:13-16; 26:19-22; 32:6-15; 33:6-12; 34:16-20; 38:20-24).

Kelman did not recall whether he first backed up before driving forward down the street. After he pulled out of the spot, an Asian man wearing a cook's shirt and white hat came up to his window. The man was yelling in broken English that Kelman had hit him. Kelman testified that he "looked at him like he came from outer space" and responded "I don't know where you came from . . . I didn't hit you". The exchange lasted between ten and fifteen seconds, and then the man turned and walked away. Kelman did not notice any damage to the back of his vehicle. He did not file a police report or any other report with respect to the incident, and was never charged for it (24:17-24; 26:23-28:25; 30:4-6; 34:21-35:5; 35:7-23; 38:11-14; 48:4-7).

Plaintiff's motion for summary judgment as to liability is denied. "It is not the court's function on a motion for summary judgment to assess credibility" (*Melendez v All. Hous. Assocs., L.P.*, 201 AD3d 437, 438 [1st Dept 2022] [internal quotation marks and citation omitted]), and the parties' conflicting testimony raises a question of fact as to whether there was an accident at all, and if there was, whether defendant's vehicle was involved in it (*see Savall v New York City Transit Auth.*, 173 AD3d 566, 567 [1st Dept 2019]) ["Triable issues of fact exist as to how the accident occurred since plaintiff and defendant . . . provided conflicting versions of the accident"]. Kelman's denial that he hit plaintiff is a sufficient basis to deny the motion, notwithstanding his admitted presence at the time and place of the incident, and plaintiff's alleged identification of defendant's vehicle (*see Richard v Motor Vehicle Acc. Indemnification Corp.*, 23 AD2d 922 [3d Dept 1965] "[t]he mere fact that [defendant] was in the area at the time, that he was driving his automobile in an inebriated condition, and that his car had suffered unexplained damages" not sufficient to establish his involvement in the motor vehicle accident"); *see also Romero v Koziol*, 2019 WL 13152400,*2 [Sup Ct, New York Co 2019] [summary judgment denied where "one party says there was an accident . . . and the other party denies same"]; *Giacolone v Ford*, 2016 WL 9176389,*2 [Sup Ct, New York Co 2016] [summary judgment denied where defendant driver denied striking the plaintiff while entering a garage, even although he admitted his car might have come in contact with one of the picketers who surrounded the vehicle without him feeling it, and although two witnesses submitted affidavits that they saw a car matching the make and color of defendant's vehicle strike the plaintiff).

Plaintiff nevertheless insists that it must have been defendant's vehicle that hit him, because plaintiff was drinking a cup of coffee and coffee was spilled on the van after Kelman heard the thump. This theory, however, mischaracterizes the parties' deposition testimony. As noted, Kelman testified that the liquid that spilled on the van looked like water, not coffee, and that the van was stationary when he heard the thump. Moreover, it is unclear whether plaintiff was drinking or even holding a cup of coffee after he left the restaurant. Although plaintiff testified "I had a cup of coffee and was just standing out there", he also said "I did have a half a muffin and some coffee, and *then* I went out". And when asked "did you throw coffee at the driver of the vehicle who came in contact with you?" he simply answered "no" -- without elaboration that would have confirmed whether he was holding a cup of coffee, or whether coffee was spilled on the van as opposed to having been thrown at the driver. The parties' testimony also conflicts in other respects. Kelman recalled seeing and speaking with a man, whereas plaintiff denies any discussion whatsoever with the driver after he was hit.

Plaintiff's motion to dismiss the affirmative defense alleging his own culpable conduct is denied, as is defendant's motion for summary judgment holding that plaintiff was wholly or partially responsible for the accident. Assuming that plaintiff was struck, and that it was defendant's van that hit him, the court cannot hold, as a matter of law, that a pedestrian standing in an active city parking lane is completely free from fault. Even where a pedestrian has the right of way, he or she has a duty of care that includes the obligation to see what there is to be seen (*Quintavalle v Perez*, 139 AD3d 182, 184 [1st Dept 2016]). Kelman testified that his engine was idling, and if plaintiff was able to hear it, he might have been able to prepare himself for any sudden movement on its part. Although a plaintiff need not prove his own freedom from fault to obtain summary judgment on the issue of the defendant's liability (*see Rodriguez v City of New York*, 161 AD3d 575, 576 [1st Dept 2018]), that is not the question presented by the motion to dismiss the affirmative defense.

Plaintiff's motion to amend the complaint is granted. Absent a showing of prejudice or undue delay, leave to amend to add a new defendant should be freely granted (*Glob. Liberty Ins. Co. v Tyrell*, 172 AD3d 499, 500 [1st Dept 2019]). As Kelman was deposed as a witness on behalf of defendant Benco, there can be no prejudice or surprise. Nor does there appear to be any issue with respect to the statute of limitations (*compare, Diaz v City of New York*, 160 AD3d 457

[1st Dept 2018]). Plaintiff is directed to serve Kelman and Benco with a copy of the amended pleading within twenty (20) days of service of notice of entry of this order.

Plaintiff's motion to compel defendant to provide copies of all IME reports of plaintiff is granted. Pursuant to the scheduling order dated February 4, 2021, defendant was required to serve copies of such reports within 30 days of the examination. Plaintiff asserts that he was examined by Drs. Neil Roth and Paul Lerner on November 15, 2021, and Dr. Yong Kim on November 22, 2021, but that only Dr. Kim's report was provided. Defendant does not meaningfully deny this claim, asserting only, in a footnote, that "[u]pon information and belief, all IME Reports have been turned over, and to the extent that further IME Reports are created, Benco will turn those over as well." Defendant therefore is directed to provide copies of the reports of Drs. Roth and Lerner within twenty (20) days of service of notice of entry of this order.

Finally, plaintiff's cross-motion for sanctions is denied.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment as to liability as against defendant Benco and Kelman and dismissing Benco's third affirmative defense alleging culpable conduct of plaintiff is denied, and it is further

ORDERED that the amended complaint, in the form annexed to the motion papers, shall be deemed served upon service of a copy of this order with notice of entry upon all parties who have appeared in the action; and it is further

ORDERED that a supplemental summons and amended complaint, in the form annexed to the motion papers, shall be served, in accordance with the Civil Practice Law and Rules, upon the additional parties in this action within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the action shall bear the following caption:

NAM HYEON JEON,

Plaintiff,

- v -

BENCO DENTAL SUPPLY, CO., EMKAY TRUST, INC.,
YEVGENY KELMEN,

Defendants.

And it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being added pursuant hereto; and it is further

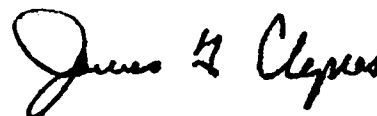
ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address (www.nycourts.gov/supctmanh).

ORDERED that plaintiff's motion to compel production of the independent medical reports is granted, and defendant is directed to provide plaintiff with copies of the IME's of Drs. Neil Roth and Paul Lerner within twenty (20) days of service of notice of entry of this order, and it is further

ORDERED that defendant's motion for summary judgment dismissing the complaint in whole or part is denied, and it is further

ORDERED that plaintiff's cross-motion for sanctions is denied.

This constitutes the Decision and order of the Court.



JAMES G. CLYNES, J.S.C.

6/27/2022

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

APPLICATION:

SETTLE ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE