

Maheer v Vargas-Bonilla

2022 NY Slip Op 34540(U)

March 14, 2022

Supreme Court, Kings County

Docket Number: Index No. 513169/18

Judge: Carolyn E. Wade

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At an IAS Term, Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 14 day of March, 2022.

MS = 2/19

PRESENT:

HON. CAROLYN E. WADE,
Justice.

-----X

KHALED MAHER,
Plaintiff,

-against-

Index No. 513169/18

ROBERTO VARGAS-BONILLA, GOALS SERVICE
STATION, INC and GEORGE RAMOS,

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	_____	162-163, 176-177
Opposing Affidavits (Affirmations)	_____	177, 181, 187, 193
Affidavits/ Affirmations in Reply	_____	197, 199
Other Papers: Affidavit of Cristos Tzavelis	_____	175

Upon the foregoing papers, and after oral argument, plaintiff Khaled Maher moves for an order, pursuant to CPLR 3212, granting him summary judgment against defendants Roberto Vargas-Bonilla (Vargas-Bonilla), Goals Service Station, Inc. (Goals) and George Ramos (Ramos) on the issue of liability. Ramos cross-moves for an order, pursuant to CPLR 3212, dismissing the complaint and all cross-claims as against him.

Plaintiff commenced this action to recover damages for personal injuries sustained by him at Goals' auto repair shop when a vehicle owned by Ramos and operated by

Vargas-Bonilla, a Goals employee who was driving the vehicle onto a lift to be serviced, moved forward off the front of the lift, crashing into a wall. At that time, plaintiff was on the other side of the wall washing a mug in a sink attached to the wall. The collision of Ramos' vehicle with the wall propelled the wall and sink into plaintiff, causing him to fall and sustain injury. According to the police report completed following the occurrence, Vargas-Bonilla stated that as he was driving Ramos' vehicle onto the lift, the "vehicle accelerated" and "hit [the] wall inside [the] building causing damage to the wall."

Following the commencement of this action, Ramos filed an answer setting forth various affirmative defenses and a cross-claim against Vargas-Bonilla and Goals for contribution and indemnification. Vargas-Bonilla and Goals filed an answer which included cross-claims against Ramos for contribution, indemnification and breach of contract.¹ On May 7, 2019, plaintiff appeared for an examination before trial (EBT) where he testified as to the events leading to his injuries. Plaintiff testified that he visited Goals' service station to use the bathroom (Plaintiff EBT Transcript, NYSCEF Doc No 18, at 26), but since the bathroom was occupied at the time, he decided to wash his coffee mug in a sink while he waited for the bathroom to become unoccupied. (*id.* at 28). Plaintiff stated that he felt vibrations immediately before the accident happened (*id.* at 36-37) and that a second later, the wall and sink collapsed on top of him, knocking him unconscious (*id.* at 28-30).

Based upon plaintiff's EBT testimony and the police report, plaintiff moved for summary judgment on the issue of liability, among other relief. By order dated

¹ The cause of action for breach of contract is predicated on the failure of Ramos, who was a co-owner of Goals, to procure liability insurance covering Vargas-Bonilla and Goals as required by Goals' lease for the subject premises.

November 6, 2019, this court denied that branch of plaintiff's motion for summary judgment as premature. The November 6, 2019 order was affirmed by the Appellate Division, Second Department, which found that plaintiff failed to establish a *prima facie* case of Vargas-Bonilla's negligence (*Maheer v Vargas-Bonilla*, 191 AD3d 867 [2d Dept 2021]). In its order, the Appellate Division stated that plaintiff's EBT testimony demonstrated that he did not know how the accident occurred and that, contrary to plaintiff's contention, "the police report, which contained Vargas-Bonilla's statement, did not unequivocally state that the vehicle accelerated due to Vargas-Bonilla's negligence." (*Maheer*, 191 AD3d at 868).

In response to a motion by plaintiff for summary judgment on the issue of serious injury under the No-Fault Law (Insurance Law § 5102), Ramos cross-moved for summary judgment dismissing the complaint and all cross-claims as against him on the grounds that Ramos was neither negligent nor breached any duty to plaintiff and/or, alternatively, is entitled to indemnification. By order dated August 7, 2020, this court granted plaintiff's unopposed motion and denied Ramos' cross-motion, "as issues of fact existed."

Ramos appeared remotely for an EBT on November 9, 2020. Ramos testified that he was present at the shop on the date of the incident and had given the employees of Goals the keys to his vehicle in order to perform a routine wheel alignment (Ramos EBT Transcript, NYSCEF Doc No 172, at 39-41). Ramos testified that there were no mechanical issues or problems with his vehicle on the date of the incident (*id.* at 42). Ramos was sitting in the front booth of the store outside of the garage when he heard a

loud bang (*id.* at 29- 30). Ramos testified that he observed his vehicle off the ramp of the lift and ran to the other side of the wall where he observed plaintiff sitting in a chair (*id.* at 30). Ramos observed an open hole in the wall of the garage and his vehicle on the lift with the front bumper against the wall (*id.* at 31-32). Ramos observed that the metal cross bar which is normally situated between the wall and any vehicle on the lift, had been pushed through the wall where he observed the hole (*id.* at 51-52, 54). Ramos testified that he did not know what caused the vehicle to collide with the wall (*id.* at 35), and that when he questioned Vargas-Bonilla as to what happened, Vargas-Bonilla responded that he did not know (*id.* at 36).

Despite several orders directing Vargas-Bonilla to appear for an EBT, Vargas-Bonilla failed to comply, resulting in preclusion pursuant to a self-executing order dated January 4, 2021 (Lawrence Kripel, J.).

In support of the instant motion for summary judgment on the issue of liability, plaintiff submits the affidavit of an expert witness, Christos Tzavelis. In his affidavit, Tzavelis states that he has been an automotive mechanic for over 30 years with extensive experience servicing and maintaining automobiles, including replacing and repairing hydraulic and pneumatic braking systems, and has driven vehicles hundreds of times onto hydraulic lifts, such as the one used by Goals, for general servicing and wheel alignments. Tzavelis avers that based on his review of the EBT testimony taken in this action, the verified bill of particulars and police report, as well as his professional experience, it was his opinion that the accident was caused by the negligence of Vargas-Bonilla in carelessly accelerating the vehicle at a rate of speed far in excess of the speed required to drive onto

the lift, causing the vehicle to strike the crossbar in the front of the lift, before traveling into and then through the wall of the garage. Tzavelis bases his opinion on the fact that no one reported any mechanical difficulties with the vehicle at any time before this incident or at any time after the incident; and on Ramos' confirmation that the vehicle was in proper working order on the date of the accident. Tzavelis states that the fact the vehicle traveled over the wheel block/chocks of the lift, past the crossbar and through the wall of the service station indicates that Vargas-Bonilla pressed the gas pedal excessively in his attempt to put the vehicle onto the lift. Tzavelis asserts that driving over the wheel blocks/chocks would have required Vargas-Bonilla to accelerate the vehicle at an excessive and unsafe speed.

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence" to *eliminate any material issue of fact from the case* (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008] [internal quotation marks and citation omitted]). The "[f]ailure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The proof submitted to the court should be scrutinized carefully in the light most favorable to the party opposing the motion (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). "It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012]).

"Negligence cases by their very nature do not usually lend themselves to summary judgment, since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination" (*Ugarriza v Schmieder*, 46 NY2d 471, 474 [1979]). "[E]ven when 'the facts are conceded there is often a question as to whether the defendant or the plaintiff acted reasonably under the circumstances. This can rarely be decided as a matter of law'" (*Smith v Key Bank of W. N.Y.*, 206 AD2d 848, 849 [4th Dept 1994], quoting *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]).

Here, there is no direct evidence that Vargas-Bonilla was negligent in the operation of the vehicle. As the Appellate Division concluded, neither plaintiff's EBT testimony nor the police report was sufficient to establish a prima facie case for plaintiff on the issue of liability. Vargas-Bonilla failed to appear for an EBT and thus there is no first-hand account as to what actions he may have taken while operating the vehicle prior to the accident. The affidavit of Tzavelis is based only upon his review of the record adduced in this matter and his assumption that there was careless and excessive input to the gas pedal by Vargas-Bonilla, a fact that has not been established. The court finds this affidavit, along with the other proof in the record, is insufficient to establish negligence as a matter of law; and it is ultimately the role of the jury to assess the evidence, make findings as to the cause of the accident and to determine whether Vargas-Bonilla breached any duty of reasonable care.

Accordingly, plaintiff's motion for summary judgment on the issue of liability is denied.

Turning to Ramos' cross-motion for summary judgment dismissing the complaint and all cross claim against him, Vehicle and Traffic Law [VTL]§ 388 (1) provides:

“Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner.”

There is no dispute that the vehicle involved with plaintiff's injuries was owned by Ramos and that Vargas-Bonilla was operating the vehicle with Ramos' permission. Thus, Ramos may be held vicariously liable under VTL 388 (1) for any personal injuries to plaintiff caused by the negligence of Vargas-Bonilla. Ramos is correct in noting that a passive owner of a vehicle vicariously liable pursuant to Vehicle and Traffic Law § 388 is entitled to common-law indemnification from the employer of an active tortfeasor acting within the scope of his employment (*see Traub v Dinzler*, 309 NY 395, 398-400 [1955]; *Dunn v Hurtt*, 4 AD3d 884 [4th Dept 2004]; *Denton Leasing Corp. v Breezy Point Surf Club*, 133 AD2d 95 [2d Dept 1987]; *Hertz Corp. v Dahill Moving & Stor. Co.*, 79 AD2d 589 [1st Dept 1980], *aff'd* 54 NY2d 619 [1981]). Ramos ostensibly argues that because he is entitled to common law indemnification from Vargas-Bonilla and/or Goals, he is relieved of liability to plaintiff. However, such an interpretation would vitiate the objective of VTL 388, which is to allow persons injured as the result of negligently operated motor vehicles to recover damages from the owner of the vehicle under the principle of vicarious liability where the driver was operating the owner's vehicle with the owner's permission. While Ramos may ultimately be able to recover indemnification

from his co-defendants, he remains vicariously liable to plaintiff for any negligence on the part of Vargas-Bonilla.

Accordingly, that part of Ramos' cross-motion to dismiss the complaint is denied.

Nonetheless, Ramos is entitled to dismissal of the cross-claims of Vargas-Bonilla and Goals for contribution/indemnity. VTL 388 does not permit a negligent driver or anyone other than an injured third party to recover damages against the owner for injuries resulting from the driver's own negligence (see *Shepard v Power*, 190 AD3d 63, 65 [2d Dept 2020]; *Heins v Vanbourgondien*, 180 AD3d 1019, 1024 [2d Dept 2020]), and there is no other proof adduced in this matter showing that Ramos was in any way involved with or contributed to the accident, or was otherwise negligent.

As a result, that part of Ramos' cross-motion for dismissal of the cross-claims for contribution and indemnification is granted. Because Ramos did not address or submit proof regarding the remaining cross-claim for breach of contract, Ramos's cross-motion for dismissal is denied with respect to it.

The foregoing constitutes the decision and order of the court.

ENTER,



HON. CAROLYN E. WADE

HON. CAROLYN E. WADE
JUSTICE OF THE SUPREME COURT



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KINGS COUNTY CLERK
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