

**Rosario v Sunbelt Rentals, Inc.**

2022 NY Slip Op 34984(U)

August 17, 2022

Supreme Court, Kings County

Docket Number: Index No. 516285/2019

Judge: Carolyn E. Wade

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS: HON. CAROLYN E. WADE

-----X  
DARIO ROSARIO,

Plaintiff,

Index No. 516285/2019

-against-

SUNBELT RENTALS, INC., PEREZ JAVIER,  
BROOKLYN GC LLC, and QUALITY FACILITY  
SOLUTIONS CORP.,

**DECISION AND ORDER**

Motion Seq. 3 & 5

Defendant.

-----X  
SUNBELT RENTALS, INC.,

Third-Party Plaintiff,

-against-

BROOKLYN GC LLC,

Third-Party Defendant.

-----X  
BROOKLYN GC LLC,

Second Third-Party Plaintiff,

-against-

QUALITY FACILITY SOLUTIONS CORP.,

Second Third-Party Defendant.

-----X

**Recitation, as required by CPLR §2219(a), of the papers considered in the review of Plaintiff's and Defendant/Third-Party Plaintiff's Motion:**

<u>Papers</u>	<u>NYSCEF #'s</u>
Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed.....	65,66, 67, 79, 103, 104
Cross-Motion and Affidavits/Affirmations.....	
Answering Affidavits/Affirmations.....	92, 96, 101, 132, 134
Reply Affidavits/Affirmations.....	128, 141

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Upon the foregoing cited papers, and after virtual oral argument; 1) Plaintiff DARIO ROSARIO (“Plaintiff” or “Rosario”), moves pursuant to § 3212, for partial summary judgment on the issue of liability and to strike defendants, SUNBELT RENTALS, INC. (“Sunbelt” or “Defendant Third-Party Plaintiff”), PEREZ JAVIER (“Mr. Javier”), BROOKLYN GC LLC (“Brooklyn GC”), and QUALITY FACILITY SOLUTIONS CORP.’s (“QFS”) (collectively “Defendants”) affirmative defenses of negligence, culpable conduct, comparative negligence, contributory negligence and/or assumption of risk (Mot. Seq. 3); 2) Sunbelt, moves pursuant to CPLR § 3211 (a)(7) and CPLR § 3212, to dismiss the second amended complaint and all cross-claims asserted by the co-defendants for failure to state a cause of action, and on the ground that it is immune from vicarious liability pursuant to 49 U.S.C. § 30106 (a)(1) of the Federal Transportation Act, the Graves Amendment (Mot. Seq. 5).

The motions are decided as follow:

The underlying action arises from a collision that occurred on June 21, 2019, where a Toyota Model: 8FGU25 forklift (“subject forklift”); operated by Mr. Javier, an employee of QFS, struck the rear passenger side taillight of Plaintiff’s vehicle in the rear passenger side taillight. The subject forklift was owned by Sunbelt and rented to Brooklyn GC. The accident occurred on Evergreen Avenue, at or near its intersection with Melrose Street, Brooklyn, New York. Plaintiff alleges that he was stopped on the left side of Evergreen Avenue, for approximately 7-10 minutes while he waited for his stepdaughter.

Plaintiff’s Partial Summary Judgment Motion on Liability (Mot. Seq. 3)

Plaintiff contends that he is entitled to summary judgment on the issue of liability because the subject forklift, operated by Mr. Javier, struck him in the rear passenger side taillight of his vehicle while he was stopped. In support of the instant motion, Plaintiff submits an affidavit, certified police report, Google Maps image of the accident’s location, and a photograph of the subject forklift. As for the branch of the motion to dismiss the Defendants’ affirmative defenses, Plaintiff asserts that the evidence demonstrates that he did not cause or contribute to the accident.

Defendants, Mr. Javier, QFS, and Sunbelt (“opposing parties”), respectively oppose the instant motion on the grounds that the Plaintiff’s affidavit in support, which is translated from Spanish to English, is inadmissible. The translator of Plaintiff’s affidavit, Maria Avilan, does not submit an affidavit which authenticates her qualifications or the accuracy of the translation. Rather, Edna Eiber, a principal of Eiber Translations, Inc., authenticated her translation. They also contend that the police report, photograph of the subject forklift, and Google Maps image are inadmissible, as they are not authenticated.

CPLR § 2101 (b) provides that “[w]here an affidavit or exhibit annexed to a paper served or filed is in a foreign language, it shall be accompanied by an English translation and an affidavit by the translator stating his qualifications and that the translation is accurate” (*Saavedra v 64 Annfield Ct. Corp.*, 137 AD3d 771, 772 [2d Dept 2016]). Here, Maria Avilan, who translated Plaintiff’s affidavit from Spanish to English, does not submit an affidavit stating her qualifications, and verifying the accuracy of the translation. Plaintiff’s failure to include an affidavit from Maria Avilan renders Plaintiff’s affidavit inadmissible; thus it will not be considered by the Court in deciding the motion (*Cupeles v Carballosa*, 75 Misc 3d 1202[A], 2022 NY Slip Op 50342[U], \*3-4 [Sup Ct, Bronx County 2022]).

Accordingly, Plaintiff’s motion is DENIED in its entirety.

Sunbelt’s Motion to Dismiss and for Summary Judgment (Mot. Seq. 5)

In support of its motion to dismiss and for summary judgment, Sunbelt contends that it is immune from vicarious liability pursuant to the Graves Amendment. Sunbelt also asserts that New York Vehicle and Traffic Law (“VTL”) § 388 does not apply because a forklift does not qualify as a motor vehicle pursuant to VTL § 125. Moreover, Sunbelt argues that even if the subject forklift is deemed a motor vehicle, the Graves Amendment, which preempts the VTL, would still protect them from vicarious liability as the lessors of the subject forklift. Lastly, Sunbelt contends that pursuant to the rental agreement, Brooklyn GC, the lessee of the forklift, expressly assumed responsibility for the operation of the subject forklift.

Sunbelt submits the affidavits of Joseph Pennachio, Sunbelt's store manager (Pennachio Affidavit"); Sean Derencin, Sunbelt's driver ("Derencin Affidavit"); and John Barbato, Sunbelt's service manager (Barbato Affidavit") (Exhibit "C"), as well as business records. (Sunbelt's Exhibits "A", "B", "C"). The Pennachio Affidavit includes a copy of the alleged rental agreement for the subject forklift between Sunbelt and GC. The Barbato affidavit includes copies of inspection reports, maintenance records, and pickup tickets for the subject forklift. The Derencin Affidavit includes copies of delivery tickets.

In opposition to the motion to dismiss, Plaintiff argues that he has sufficiently alleged a cause of action against Sunbelt. As to his opposition to the summary judgment motion, Plaintiff asserts that significant issues of material facts exist as to whether the subject forklift qualifies as a motor vehicle. Defendants, Mr. Javier and QFS raise similar opposition the instant motion.

Moreover, Plaintiff, Mr. Javier, and QFS, argue that Sunbelt's summary judgment motion is premature. They argue that further discovery is necessary to determine whether the forklift may be classified as a motor vehicle under the VTL §§ 125 and 134, which defines what a motor vehicle is and what a public highway is, respectively. Lastly, Mr. Javier and QFS, in opposition argue, that the Court should not consider Sunbelt's three affidavits in support. Defendants claim that the affidavits failed to lay the proper foundation for the annexed business records thereto and are therefore inadmissible.

In rebuttal, Sunbelt argues that further discovery is not necessary because the information the opposition seeks is within their own knowledge. Additionally, Sunbelt submits new affidavits that address any potential irregularities in the supporting affidavits.

On a motion to dismiss pursuant to CPLR § 3211(a)(7), courts are to "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994]; see *Biro v Roth*, 121 AD3d 733, 994 N.Y.S.2d 168 [2d Dept 2014]). The standard is not whether the complaint states a cause of action, but whether the plaintiff

has a cause of action (*see Morales v Copy Right, Inc.*, 28 AD3d 440, 813 N.Y.S.2d 731, 732 [2d Dept 2006]).

Here, Plaintiff alleges that defendant Sunbelt, negligently owned, operated, maintained and/or controlled their motor vehicle, which caused serious injury and economic loss to Mr. Rosario. Affording the Plaintiff every favorable inference, the Court finds that he has sufficiently alleged a cause of action of action for negligence against Sunbelt. Moreover, QFS' cross-claims for indemnification survive since Plaintiff alleges a viable negligence claim against Sunbelt.

"[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 demonstrate the absence of any material issues of fact" (*Manicone v City of New York*, 75 AD3d 535, 537, 905 N.Y.S.2d 640 [2d Dept 2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]).

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 [.]" A vehicle is defined as "every vehicle operated or driven upon a public highway which is propelled by any power other than muscular power . . ." (VTL § 125). A "public highway" is defined as "any highway, road, street, avenue, alley, public place, public driveway or any other public way" (VTL § 134).

"Under the Graves Amendment, in order for recovery to be barred, the owner, or an affiliate of the owner, must be engaged in the trade or business of renting or leasing motor vehicles, and the owner, or its affiliate, must not be negligent" (*Khan v MMCA Lease, Ltd.*, 100 AD3d 833, 834 [2d Dept 2012]).

Here, Sunbelt failed to establish its *prima facie* entitlement to judgment as a matter of law pursuant to the Graves Amendment. As Plaintiff and QFS correctly argue, its applicability turns on whether the subject forklift is classified as a motor vehicle pursuant to VTL § 125. This determination cannot be reached without first determining whether the location of the accident fell within the "job zone" or a "public

highway,” as defined by VTL § 134. Contrary to the opposing parties’ contentions, if the subject forklift is classified as a motor vehicle, the Graves Amendment would bar a claim against Sunbelt, absent any negligence in its maintenance of the forklift.

Moreover, Sunbelt’s supporting affidavits are defective and not properly before this Court. “When a party relies upon the business records exception to the hearsay rule in attempting to establish its prima facie case, ‘[a] proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker’s business practices and procedures’ (see CPLR 3408 [a]; *Fed. Natl. Mtge. Assn. v Marlin*, 168 AD3d 679, 681 [2d Dept 2019] [internal citation omitted]). “[A] party moving for summary judgment cannot meet its prima facie burden by submitting evidence for the first time in reply [... and it] should be disregarded by the court” (*Deutsche Bank Natl. Trust Co. v Adlerstein*, 171 AD3d 868, 870 [2d Dept 2019] [citations omitted]). This rule applies even when the moving party submits affidavits on reply to correct deficiencies raised in opposition. *Id.*

Here, the business records annexed to the affidavits of Pennachio, Barbato, and Derencin in support of the instant motion are not properly before this Court. The affidavits failed to lay the proper foundation for the supporting documents. Specifically, the affidavits do not included a statement regarding the annexed documents being made in the regular course of business.

Sunbelt cannot now rely on the affidavits submitted in reply to satisfy its prima facie burden in the instant motion. Thus, the documents annexed to affidavits submitted in the moving papers are inadmissible, and will be disregarded.

Accordingly, Sunbelt’s motion for summary judgment and to dismiss is DENIED in its entirety.

This constitutes the Decision and Order of the court.

DATED: 8/17, 2022

  
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HON. CAROLYN E. WADE J.S.C.

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