

O'Connor v Richter
2023 NY Slip Op 31730(U)
May 23, 2023
Supreme Court, New York County
Docket Number: Index No. 161075/2021
Judge: James G. Clynnes
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
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

DONALD B. O'CONNOR,

Plaintiff,

- v -

SAUL M. RICHTER,

Defendant.

-----X

SAUL RICHTER

Plaintiff,

-against-

SAEED ALDHAHERI

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 42, 43, 44, 46

were read on this motion to/for

AMEND CAPTION/PLEADINGS

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 45, 47, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, the motion by Plaintiff Donald B. O'Connor to amend the caption to add an additional party Defendant, Saeed Mohammed Alham Aldhaheri (Motion Sequence Number 001) and the motion by Third-Party Defendant, Saeed Mohammed Alham Aldhaheri to dismiss the Third-Party Complaint against him (Motion Sequence Number 002) are consolidated for decision and are decided as follows:

Motion to Amend (Motion Seq No 1)

Leave to amend pleadings is freely granted in the absence of prejudice if the proposed amendment is not palpably insufficient as a matter of law (*Mashinsky v Drescher*, 188 AD3d 465 [1st Dept 2020]). A party opposing a motion to amend must demonstrate that it would be substantially prejudiced by the amendment, or the amendments are patently devoid of merit (*Greenburgh Eleven Union Free Sch. Dist. v Natl. Union Fire Ins. Co.*, 298 AD2d 180 [1st Dept 2002]). On a motion for leave to amend, the movant need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit (*Johnson v Montefiore Med. Ctr.*, 203 AD3d 462, 462 [1st Dept 2022]; see also (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010] [submission of affirmation by counsel along with a transcript of relevant deposition testimony established that the proffered amendment is not palpably insufficient or clearly devoid of merit]).

Plaintiff seeks leave to add the Third-Party Defendant Aldhaheri (Aldhaheri) as a direct defendant. Note of Issue has not yet been filed. In support of his motion, Plaintiff submits the original Summons and Complaint, Plaintiff's Bill of Particulars, Defendant Richter's Answer, the Third-Party Summons and Complaint, Aldhaheri's Third Party Defendant Answer, a Notice to Admit which included a photograph and a video purportedly exchanged via email but not submitted to the Court, and the proposed Supplemental Summons and Amended Complaint. Plaintiff contends that Aldhaheri is a necessary party to this action, and the facts upon which the amendment is based are the same as previously alleged, and as such, there is no surprise to Aldhaheri and no prejudice.

Aldhaheri opposes the motion and submits an affidavit in which he avers that at the time of the accident, he was seated inside his stationary vehicle, with the gears in park, with his left blinker illuminated, waiting for another vehicle to exit a parallel parking spot so that he could pull into the spot, he heard but did not witness the contact between a vehicle and a bicycle, there was no contact between his vehicle and the other vehicle and/or the bicycle, and he was not involved in the impact in any capacity. Aldhaheri contends that he was simply in the vicinity of the accident and his role is only one of an uninvolved witness.

Despite Aldhaheri's contentions, "owners of improperly parked cars may be held liable to plaintiffs injured by negligent drivers of other vehicles, depending on the determinations by the trier of fact of the issues of foreseeability and proximate cause" (*Gutierrez Bautista v Grand*

Ambulette Serv., Inc., 140 AD3d 639 [1st Dept 2016] quoting *O'Connor v Pecoraro*, 141 AD2d 443 [1st Dept 1988]). As such, the proposed amendments are not palpably insufficient nor devoid of merit. Further, all claims relate to the same accident and Aldhaeri may not claim prejudice or surprise as he is a third-party defendant in this matter (*see Duffy v Horton Mem. Hosp.*, 66 NY2d 473 [1985] [third-party was served with third-party complaint and all prior pleadings, the third-party defendant has actual notice of the plaintiff's potential claim at that time and must gather evidence and vigorously prepare a defense]). The motion is granted.

Motion to Dismiss (Motion Seq No 2)

To grant summary judgment, it must clearly appear to the trial court that no material triable issues of fact are presented. The burden is on the moving party to make a prima facie showing of entitlement to summary judgment as a matter of law and the burden shifts to the opposing party to raise an issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). It is not the role of the Court, in deciding this type of motion, to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist (*Rubin v Napoli Bern Ripka Shkolnik, LLP*, 179 AD3d 495 [1st Dept 2020]).

Aldhaeri moves to dismiss the Third-Party Complaint against him on the grounds that there are no triable issues of fact regarding his liability. He contends that he was not negligent and not a proximate cause of the accident as his vehicle was not moving and did not come into contact with either Plaintiff's bicycle or Richter's motor vehicle. Aldhaeri further contends that Plaintiff was negligent per se by violating VTL 1231, which provides, in pertinent part, that "[e]very person riding a bicycle or skating or gliding on in-line skates upon a roadway shall be granted all of the rights and shall be subject to all of the duties applicable to the driver of a vehicle by this title."

In opposition, Richter submits his affidavit, to which Aldhaeri objects as it is not in admissible form because it was notarized in New Jersey and was submitted without an accompanying certificate of conformity. However, the absence of a certificate of conformity is not a fatal defect and may be corrected nunc pro tunc (*Wager v Rao*, 178 AD3d 434 [1st Dept 2019]; *Matapos Tech. Ltd. v Cia. Andina de Comercio Ltda*, 68 AD3d 672 [1st Dept 2009]).

Richter contends that there are issues of material fact as to Aldhaeri's negligence and whether he was a proximate cause and contributing factor to the accident. Richter further contends that Aldhaeri violated VTL 1202 (a) (1) (a) ["no person shall stop, stand or park on the roadway

side of any vehicle stopped, standing or parked at the edge or curb of a street”] by having his vehicle illegally double parked at the location and time of the accident. Even without considering Richter’s affidavit, the Court agrees. An issue of fact exists as to whether Aldhaheeri’s vehicle was illegally double-parked, which would constitute some evidence of negligence. The violation of a parking statute is some evidence of negligence which should go to the jury, and owners of improperly parked cars may be held liable to plaintiffs injured by negligent drivers of other vehicles (*Murray-Davis v Rapid Armored Corp.*, 300 AD2d 96 [1st Dept 2002] [summary judgment denied finding an issue of fact existed as to whether defendants’ vehicle was illegally double-parked, and but for defendants’ allegedly illegally parked truck, plaintiff would not have had to make a lane change that purportedly precipitated the accident]; *see also Borbon v Pescoran*, 73 AD3d 502 [1st Dept 2010][where no contact between any vehicle and defendants’ truck, the Court found an issue of fact existed as to whether the defendants’ truck was illegally double-parked, which would constitute some evidence of negligence and but for the position of that truck, plaintiff’s vehicle would not have had to make the lane change that purportedly precipitated the accident]). Furthermore, even if Aldhaheeri was not the sole cause of the accident, he still could be found liable if he was a contributing cause (*Nakasato v 331 W. 51st Corp.*, 124 AD3d 522 [1st Dept 2015]). The motion is denied.

Accordingly, it is

ORDERED that the motion by Plaintiff Donald B. O’Connor to amend the caption to add an additional party Defendant, Saeed Mohammed Alham Aldhaheeri (Motion Sequence Number 001) is granted; 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 party in this action within 45 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:

SUPREME COURT STATE OF NEW YORK
COUNTY OF NEW YORK

DONALD B. O'CONNOR,
Plaintiff

Index No.: 161075/2021

-against

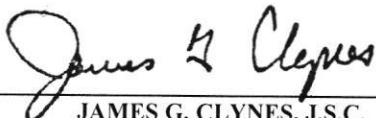
SAUL M. RICHTER, SAEED MOHAMMED ALHAM ALDHAHERI,
Defendants

And it is further

ORDERED that the motion by Third-Party Defendant, Saeed Mohammed Alham Aldhaheri to dismiss the Third-Party Complaint against him (Motion Sequence Number 002) is denied; and it is further

ORDERED that within 30 days of entry, Plaintiff shall serve a copy of this Decision and Order upon all Defendants with Notice of Entry.

This constitutes the Decision and Order of the Court.

<u>5/23/2023</u>			
DATE		JAMES G. CLYNES, J.S.C.	
CHECK ONE:	☐ CASE DISPOSED	☒ NON-FINAL DISPOSITION	
	☐ GRANTED ☐ DENIED	☒ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE