

Strickani v Hertz Vehs. LLC

2023 NY Slip Op 32746(U)

August 4, 2023

Supreme Court, Kings County

Docket Number: Index No. 513955/2021

Judge: Ingrid Joseph

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At an I.A.S Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of August 2023.

PRESENT: HON. INGRID JOSEPH, J.S.C
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

-----X
SKENDER STRICKANI,

Plaintiff,

Index No.: 513955/2021

DECISION & ORDER

-against-

HERTZ VEHICLES LLC and "JOHN DOE," a
fictitious name/person as unknown
operator of the subject vehicle,

Defendants.

-----X

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of

Plaintiff and Defendants' motion.

<u>Papers</u>	<u>NYSCEF Nos.</u>
Notice of Motion and Affidavits/Affirmations Annexed.....	39-47; 48-55
Affirmation in Opposition Papers.....	48-55; 56-59
Reply to Opposition Papers.....	62; 61

Upon the foregoing papers, Plaintiff, Skender Strickani ("Plaintiff"), moves (MS#3) for an order, pursuant to CPLR § 3212 granting summary judgment on the issue of liability, dismissing Defendant, Hertz Vehicles LLC's ("Defendant") affirmative defenses of comparative fault and Graves Amendment. Defendant opposes Plaintiff's motion and cross-moves (MS#4) for an order pursuant to CPLR § 3211(a)(7) dismissing Plaintiff's complaint on the grounds that the pleadings fail to state a cause of action upon which relief may be granted.

This is an action to recover damages for personal injuries allegedly sustained by Plaintiff arising from a motor vehicle collision that occurred on August 15, 2020 near the intersection of 20th Avenue and 57th Street, in Brooklyn, New York. It is undisputed that at the time the incident occurred, Plaintiff was riding his bike on 20th Avenue when he was involved in a collision with a vehicle¹ owned by Defendant. Police officers responded to the scene, and a police accident report was prepared after the officers spoke with Plaintiff.

In support of the branches of Plaintiff's motion for summary judgment and to dismiss Defendant's affirmative defense of comparative fault, Plaintiff submitted a certified copy of the police accident report ("accident report") and his own affidavit wherein, Plaintiff avers that when he was half way through the intersection of 20th Avenue and 57th Street, Defendant's vehicle, "came speeding, failed to stop at the stop sign and struck" the side of his bicycle. Plaintiff argued that since 57th Street is governed by a stop sign at its intersection with 20th Avenue, he had the right-of-way while proceeding through the intersection; and that Defendant's vehicle failed to yield the right-of-way to his bicycle. Thus Defendant violated Vehicle and Traffic Laws ("VTL") §§ 1172(a)² and 1142(a)³, which constitute negligence as a matter of law. Additionally, Plaintiff argued that he was not comparatively at fault for the subject incident since he was halfway through the intersection with the right of way when the incident occurred. In support of the branch of Plaintiff's motion seeking to dismiss Defendant's affirmative defense of the Graves Amendment, Plaintiff submitted a copy of Hertz's 7-day rental agreement ("rental agreement")⁴. Plaintiff argued that since the subject incident occurred sixty-six (66) days after the rental agreement period had expired, the affirmative defense of the Graves Amendment should be dismissed.

¹ Pursuant to the certified copy of the police accident report, the vehicle owned by Defendant left the scene of the accident.

² VTL §1172 provides in pertinent part, "[e]very driver of a vehicle approaching a stop sign shall stop ... at the point nearest the intersecting roadway where the driver has a view of the approaching traffic on the intersecting roadway before entering the intersection and the right to proceed shall be subject to the provisions of section eleven hundred forty-two."

³ VTL § 1142(a) provides, in pertinent part, that "[e]xcept when directed to proceed by a police officer, every driver of a vehicle approaching a stop sign shall stop . . . and after having stopped shall yield the right of way to any vehicle which has entered the intersection from another highway or which is approaching so closely on said highway as to constitute an immediate hazard during the time when such driver is moving across or within the intersection."

⁴ Based on the terms of the rental agreement, the duration of the rental was from June 3, 2020 to June 10, 2020.

In opposition to Plaintiff's motion, Defendant submitted an affidavit by its Assistant Secretary, Dennis McGinley ("Mr. McGinley")⁵ who states in his affidavit, titled "Second McGinley Affidavit" ("2nd Affidavit")⁶, that when the renter fails to return the rental vehicle at the appropriate time, the rental agreement remains in effect and the renter is still required to comply with the terms and conditions of the rental agreement. In addition, Mr. McGinley avers that once a rental vehicle is overdue, Hertz will make attempts to contact the renter to obtain possession of the rental vehicle. Defendant also submitted a copy of an invoice⁷ dated approximately six (6) months after the rental agreement's end date of June 10, 2023, in which Hertz charged non-party Ryan Whitten ("renter") for the entire rental period from June 3, 2020 to November 17, 2020. Defendant argued that the Graves Amendment does apply since the status of the rental vehicle did not change simply because the renter did not return the vehicle on time.

In support of Defendant's cross motion dismissing Plaintiff's complaint pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, Defendant submitted Mr. McGinley's 1st Affidavit wherein he stated that the subject vehicle received routine service and maintenance and that there had not been any known safety issues or manufacturer recalls. In further support of its contention that Defendant did not negligently maintain the subject vehicle, Defendant submitted copies of the vehicle's service maintenance records⁸. Additionally, Mr. McGinley avers in his 1st Affidavit that since the renter has never been associated with or was Defendant's employee Plaintiff has no factual basis to attribute any negligence to Defendant.

In opposition to Defendant's cross motion, Plaintiff argued that the court should deny Defendant's motion since Defendant has failed to satisfy its burden on a motion to dismiss a complaint. In support of his position, Plaintiff submitted a copy of Defendant's Response to Discovery Order, dated February 2, 2023 ("Defendant's Discovery Response"). Plaintiff argued that while Mr. McGinley attested to the procedure Defendant engages in once a rental vehicle is overdue, it proffered no evidence to show that its own procedures were followed. While Mr.

⁵ Mr. McGinley was an Assistant Secretary for Hertz Vehicles LLC and has been employed with The Hertz Corporation for 33 years.

⁶ Defendant submitted two affidavits. The affidavit titled "First McGinley Affidavit" ("1st Affidavit") is submitted in support of its cross motion (NYSCEF Doc. No. 54 - Exhibit D) and the 2nd Affidavit is submitted in opposition to Plaintiff's motion (NYSCEF Doc. No. 55 - Exhibit E).

⁷ The invoice is dated December 14, 2020 (NYSCEF Doc. #55 - Exhibit E-1)

⁸ The Court notes that the vehicle service maintenance records (NYSCEF Doc. #54 - Exhibit D-3) included the following: an invoice for an oil change dated February 27, 2020; a work order detail for oil and filter change dated August 23, 2019; and a Hertz service checklist dated February 27, 2020.

McGinley stated in his 2nd Affidavit that Defendant will make attempts to contact the renter to obtain possession of the rental vehicle when the rental vehicle is overdue, Defendant's Discovery Response indicated that the invoice was the only proof of any effort made to contact the renter. Additionally, while Mr. McGinley stated that once a rental vehicle is overdue, Hertz will charge the renter's credit card for applicable rental charges until the credit card stops authorizing payment, Defendant's Discovery Response indicated that Defendant is not in possession of any receipts showing that the renter's credit card was charged or that attempts to charge were made and not honored by the credit card company when the subject vehicle was overdue. Based upon these contradictions, Plaintiff contends that Defendant should not be entitled to use the Graves Amendment and therefore should be held vicariously liable for the negligence of the renter operating Defendant's vehicle at the time of the incident.

In considering a motion to dismiss pursuant to CPLR § 3211(a)(7), the court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Pirozzi v Garvin*, 185 AD3d 848, 850 [2d Dept. 2020]; *Shah v Exxis, Inc.*, 138 AD3d 970, 971 [2d Dept. 2016]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). A court may consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR § 3211(a)(7) (*see* CPLR § 3211[c]; *Mawere v Landau*, 130 AD3d 986, 988 [2d Dept. 2015]; *Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept. 2010]). When evidentiary material is considered on a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), and the motion has not been converted to one for summary judgment, the sole criterion on such a motion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion to dismiss will fail (*Leader v Steinway, Inc.*, 180 AD3d 886, 888 [2d Dept. 2020]; *Leon v Martinez*, 84 NY2d 83 at 88; *see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

Under VTL § 388, proof of ownership of a motor vehicle creates a presumption that the driver was using the vehicle with the owner's permission, express or implied, and that presumption continues until there is substantial evidence to the contrary (*Utica Mut. Ins. Co. v Lahey*, 95 AD2d 150, 152 [2d Dept. 1983]). "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” (see VTL § 388(1)). However, the Graves Amendment shields the owner of a leased or rented motor vehicle from liability for personal injuries resulting from the use of such vehicle “during the period of the rental or lease, if (1) the owner . . . is engaged in the trade or business of renting or leasing motor vehicles; and (2) there is no negligence or criminal wrongdoing on the part of the owner” (see 49 USC § 30106[a]; *Keys v PV Holdings*, 205 AD3d 787, 788 [2d Dept. 2022]; *Edwards v J&D Express Serv. Corp.*, 180 AD3d 871, 873 [2d Dept. 2020]; *Cioffi v S.M. Foods, Inc.*, 178 AD3d 1006, 1012 [2d Dept. 2019]).

In addressing Defendant’s motion pursuant to CPLR § 3211(a)(7), to dismiss the complaint insofar as asserted against it on the ground that it is entitled to the protection of the Graves Amendment, the Court finds that the affidavits and documents annexed thereto submitted by Defendant failed to establish as a matter of law that Plaintiff has no cause of action. Where, as here, evidentiary material is submitted and considered on a motion pursuant to CPLR § 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether Plaintiff has a cause of action, not whether Plaintiff stated one, and unless it has been shown that a material fact claimed by the plaintiff to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate.

While Defendant asserts the Graves Amendment as a defense, Defendant’s own submission of Mr. McGinley’s 2nd Affidavit and an invoice dated approximately six (6) months after the rental agreement’s end date of June 10, 2023 failed to establish that at the time the incident occurred, a rental agreement was still in effect. According to Defendant’s own policy as stated in Mr. McGinley’s 2nd Affidavit, when a rental vehicle is overdue, Defendant will take affirmative action to continue the terms of the rental agreement, such as making attempts to contact the renter to obtain possession of the vehicle or alternatively charging the renter’s credit card for applicable rental charges until the credit card stops authorizing payment. However, since Defendant’s submissions appear to fly in the face of their own policy, it has not established a defense under the Graves Amendment. Thus contrary to Defendant’s contention, the Court concludes that the averments of the complaint and its supporting affidavit are sufficient, if believed, to support an inference that Defendant is vicariously liable for the negligence of the driver under VTL § 388(1).

A party moving for summary judgment 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 (*Orellana v Mendez*, 208 AD3d 888, 889 [2d Dept. 2022]; *Deutsche Bank Natl. Trust Co. v Brewton*, 142 AD3d 683 [2d Dept. 2016]); *Alvarez v Prospect Hosp.* 68 NY2d 320, 324 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Jean-Joseph v Port. Auth. of N.Y. & N.J.*, 211 AD3d 717, 718 [2d Dept. 2022]; *Jones v Pinto*, 133 AD3d 634, 635 [2d Dept. 2015]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). A violation of the Vehicle and Traffic Law (“VTL”) constitutes negligence as a matter of law (*Orellana v Mendez*, 208 AD3d at 888). VTL § 1142(a) provides, in pertinent part, that “[e]xcept when directed to proceed by a police officer, every driver of a vehicle approaching a stop sign shall stop . . . and after having stopped shall yield the right of way to any vehicle which has entered the intersection from another highway or which is approaching so closely on said highway as to constitute an immediate hazard during the time when such driver is moving across or within the intersection” (VTL § 1142[a]).

If one party has established that the other party has committed negligence per se, the burden then falls to the opposing party to submit a nonnegligent explanation for the action (*see Arbizu v REM Transp., Inc.*, 20 AD3d 375 [2d Dept. 2005]). The burden is shifted to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which requires a trial of the action (*see Marietta v Scelzo*, 29 AD3d 539, 539 [2d Dept. 2006]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 360 [1980]). Mere conclusions or unsubstantiated allegations are insufficient to raise triable issues of fact (*Marietta v Scelzo*, 29 AD3d 539, 540 [2d Dept. 2006]). While the operator of a vehicle with the right-of-way is entitled to assume that others will obey the traffic laws requiring them to yield, a driver with the right-of-way still has a duty to exercise reasonable care to avoid a collision and see what there is to be seen through the proper use of his or her senses (*Ballentine v Perrone*, 179 AD3d 993, 994 [2d Dept. 2020]). A bicyclist is required to use reasonable care for his or her own safety, to keep reasonably vigilant lookout for vehicles, and to avoid placing himself or herself in a dangerous position (*Sturm v Chaudhary*, 210 AD3d 927, 927 [2d Dept. 2022]; *Flores v Rubenstein*, 175 AD3d at 1491; *Palma v Sherman*, 55 AD3d 891, 891 [2d Dept. 2008]).

A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries (*see Rodriguez v City of New York*, 31 NY3d 312, 319 [2018]). To be entitled to partial summary judgment a plaintiff does not bear the burden of establishing the absence of his or her own comparative fault (*Id.* at 324-325). Even though a plaintiff need not demonstrate the absence of his or her own comparative negligence to be entitled to partial summary judgment as to a defendant's liability (*Id.* at 324-325), the issue of plaintiff's comparative negligence may be decided in the context of a summary judgment motion where, the plaintiff moved for summary judgment dismissing a defendant's affirmative defense of comparative negligence (*Poon v Nisanov*, 162 AD3d at 808).

Here, with respect to that branch of Plaintiff's motion pursuant to CPLR § 3212 for summary judgment on the issue of liability, Plaintiff's submissions demonstrated, prima facie, that the driver of Defendant's vehicle violated VTL § 1142(a) by failing to stop at the stop sign and colliding with Plaintiff in the intersection after facing a stop sign, while the Plaintiff faced no traffic control device at the same intersection. Thus, the Plaintiff established that Defendant was negligent as a matter of law. In opposition to Plaintiff's prima facie showing, Defendant failed to raise a triable issue of fact. Defendant failed to offer a nonnegligent excuse for the driver of Defendant's vehicle's violation of VTL § 1142(a). However, with respect to the issue of comparative negligence, Plaintiff failed to demonstrate, prima facie, that he did not contribute to the happening of the accident.

As to that branch of Plaintiff's motion pursuant to CPLR § 3212 dismissing Defendant's affirmative defense of Graves Amendment, the record indicates that Plaintiff submitted only the 7-day rental agreement covering a duration from June 3, 2020 to June 10, 2020. The submission of the 7-day rental agreement alone is insufficient to establish Plaintiff's entitlement to summary judgment dismissing Defendant's affirmative defense of Graves Amendment since it failed to eliminate all triable issues of fact as to whether there was any lease agreement in effect between Defendant and the renter on the date of the incident. Failure to make such a showing requires denial of that branch of the motion, regardless of the sufficiency of any opposition thereto (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853).

Accordingly, it is hereby

ORDERED, that Plaintiff's motion (MS #3) for an Order granting him summary judgment on the issue of liability is granted to the extent that the issue of comparative fault is left for the trier of fact.

ORDERED, that Plaintiff's motion (MS #3) for an Order dismissing Defendant's affirmative defense of Graves Amendment, is denied; and it is further

ORDERED, that Defendant's cross motion (MS#4) for an Order pursuant to CPLR § 3211(a)(7) dismissing Plaintiff's complaint, is denied.

Issues not addressed are either moot or without merit.

This constitutes the Decision and Order of the Court.

ENTER



HON. INGRID JOSEPH, J.S.C.

**Hon. Ingrid Joseph
Supreme Court Justice**