

Marin v Amatore

2023 NY Slip Op 34324(U)

December 11, 2023

Supreme Court, Kings County

Docket Number: Index No. 520997/2019

Judge: Francois A. Rivera

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 52 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 11th day of December 2023

HONORABLE FRANCOIS A. RIVERA
-----X

BERNARDO MARIN,

Plaintiff,

-against-

DECISION & ORDER
Index No. 520997/2019

JOSEPH AMATORE and "JOHN DOE",

Defendants,
-----X

Recitation in accordance with CPLR 2219 of the papers considered on the notice of motion filed on August 1, 2023, under motion sequence three, by plaintiff Bernado Marin for an order: (1) pursuant to CPLR 3025 granting the plaintiff leave to amend the caption, summons and complaint to replace the name of "John Doe", with the now-known name of Dina Amatore; (2) deeming the amended summons and complaint served nunc pro tunc on all appearing defendants, or in the alternative, (3) amending the summons and complaint pursuant to CPLR 3025. This motion is opposed by defendant Joseph Amatore.

- Notice of Motion
- Affirmation in support
Exhibits A-B
- Affirmation in opposition by Joseph Amatore
Exhibit A-I
- Replying affirmation

BACKGROUND

On September 24, 2019, plaintiff Bernardo Marin (hereinafter Marin or plaintiff) commenced the instant action for damages for personal injury sustained in a motor vehicle accident by filing a summons and verified complaint with the Kings County Clerk's office. On November 13, 2019, defendant Joseph Amatore (hereinafter Joseph A.) interposed and filed a verified answer to the complaint.

The verified complaint alleges the following salient facts. On October 13, 2016, at approximately 8:30 a.m., the plaintiff was operating a motor vehicle on the Brooklyn Queens Expressway Northbound, at or near its intersection with 38th Street, a public street and thoroughfare. At the same date, place, and time, an individual designated as John Doe was operating a motor vehicle, owned by defendant Joseph A., and bearing registration number GEK.76572374 (hereinafter the adverse vehicle). Due to the negligent operation of the adverse vehicle by “John Doe” the adverse vehicle struck the plaintiff’s vehicle, and the collision caused the plaintiff to sustain serious physical injury.

LAW AND APPLICATION

The New York State Legislature has recognized that there are circumstances where a party is ignorant, in whole or in part, of the identity of a person who should be made a party to an action. CPLR 1024 allows for the commencement of an action against an unknown party by designating so much of his name and identity as is known (*see generally Orchard Park Cent. School Dist. v Orchard Park Teachers Assn.*, 50 AD2d 462, 467 [4th Dept 1976]). To be effective, a summons and complaint must describe the unknown party in such a manner that the “Jane Doe” would understand that she is the intended defendant by a reading of the papers (*see Olmsted v Pizza Hut of Am., Inc.*, 28 AD3d 855, 856 [3rd Dept 2006]).

The use of CPLR 1024 presents many pitfalls. One pitfall is that parties are not to resort to the John Doe procedure unless they exercise due diligence, prior to the running of the statute of limitations, to identify the defendant by name and, despite such efforts, are unable to do so (*see Hall v Rao*, 26 AD3d 694, 695 [3rd Dept 2006]; *Justin v Orshan*, 14 AD3d 492, 492–493 [2d Dept 2005]). Any failure to exercise due diligence to ascertain the “Jane Doe’s” name subjects the complaint to dismissal as to that party (*see Hall*, 26 AD3d at 695). A second requirement

unique to CPLR 1024 is that the Jane Doe party be described in such form as will fairly apprise the party that he or she is the intended defendant (*see City of Mount Vernon v Best Dev. Co.*, 268 NY 327, 331 [1935]). An insufficient description subjects the Jane Doe complaint to dismissal for being jurisdictionally defective (*see Lebowitz v Fieldston Travel Bur.*, 181 A2d 481, 482–483 [1st Dept 1992]).

In the case at bar, the verified complaint identifies the John Doe defendant as the driver of the adverse vehicle owned by Joseph A. and involved in the subject accident. The description sufficiently identifies the individual driver of the adverse vehicle.

The Court finds that the proposed amendment is not palpably insufficient or patently devoid of merit. Nor have the opposition papers of Joseph A. demonstrated any prejudice to him by the amendment. Joseph A.'s liability is premised on the negligence of John Doe and the application of Vehicle and Traffic Law § 388 as against him.

Joseph A. has argued that the use of John Doe pursuant to CPLR 1024 was improper because the plaintiff did not demonstrate the requisite due diligence to ascertain the individual's name before the statute of limitation expired. This argument, if valid, would subject the complaint to dismissal by notice of motion by Dina Amatore and not by Joseph A.

Joseph A. has also argued that, under these circumstances, the relation back doctrine is not applicable and, consequently, the action as against Dina Amatore is time-barred. Once again, the argument, if later determined to be valid, would give Dina Amatore a potential affirmative defense that the action as asserted against her is time-barred. Once again, this is a defense that belongs to Dina Amatore alone and is not available to Joseph A.

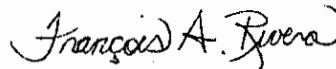
CONCLUSION

The branch of the motion by plaintiff Bernado Marin for an order granting the plaintiff leave to amend the caption, summons, and complaint to replace the name of "JOHN DOE", with the now-known name of Dina Amatore is granted.

The branch of the motion by plaintiff Bernado Marin for an order deeming the proposed amended summons and complaint served nunc pro tunc on all appearing defendants is denied. Plaintiff Bernado Marin is directed to serve the amendment complaint on all appearing defendants and upon Dina Amatore thirty days after entry of the instant decision and order.

The foregoing constitutes the decision and order of this Court.

ENTER:



J.S.C.

HON. FRANCOIS A. RIVERA
J.S.C.