

Almeida v Bordenave

2024 NY Slip Op 32088(U)

June 20, 2024

Supreme Court, New York County

Docket Number: Index No. 159368/2022

Judge: Judy H. Kim

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JUDY H. KIM **PART** **04**

Justice

-----X

DANIEL ALMEIDA,

Plaintiff,

- v -

AMARAL BORDENAVE, AW AUTO & TRUCK
WHOLESALEERS INC.,

Defendants.

-----X

INDEX NO. 159368/2022

MOTION DATE 06/23/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29

were read on this motion for

JUDGMENT - SUMMARY

Upon the foregoing documents, defendant AW Auto & Truck Wholesalers Inc.'s motion for summary judgment is denied for the reasons set forth below.

Plaintiff, a New York City Police Department police officer, alleges that on the morning of June 1, 2020, defendant Amaral Bordenave negligently operated a 2011 Mercedes-Benz motor vehicle owned by defendant AW Auto & Truck Wholesalers Inc. ("AW Auto") which led to plaintiff effecting a traffic stop of this motor vehicle. Plaintiff further alleges that, during this traffic stop, defendant resisted arrest, causing injury to the plaintiff (NYSCEF Doc. No. 1 [Compl. at ¶13). Plaintiff adds, in an affidavit, that

We attempted to stop the vehicle and speak to the driver. I proceeded to the vehicle front driver's side window of the Black Mercedes Benz sedan in an attempt to speak to the driver but couldn't see inside the vehicle due to heavily tinted windows ... The vehicle was running and I had asked the individual to roll down the window but he did not comply. I told him to unlock the door because I couldn't see in the vehicle because of the heavily tinted windows, but he did not comply. Because the defendant did not comply, I attempted to break the window with the collapsible or expandible baton and the window broke. We then attempted to unlock the door and

was [sic] successful. Once I gained entry, I heard the engine rev almost like his foot was to the floor and it was basically jumping off the rev limiter. I felt like as he was going to try to flee the location, we struggled with his hands and to remove [him] from the vehicle so he wouldn't be able to drive and take off with me in the car. During the struggle in the vehicle, I was injured. My legs were touching the floor of the street and my upper body was pretty much half in and half out of the vehicle I was then able to get the individual out of the car. My injury was sustained while the person that I was affecting the arrest on was operating the motor vehicle.

(NYSCEF Doc. No. 27 [Almeida Aff.]).

AW Auto now moves for summary judgment on the grounds that it did not own the subject Mercedes-Benz on the date of plaintiff's injury. In support of its motion, it submits the affidavit of one its managers, Vilma Cohen, who attests that:

I was employed by defendant AW Auto in May and June of 2020, and thus am familiar with and was involved in the circumstances of AW Auto's operations and sales in May and June of 2020.

On May 8, 2020, AW Auto sold a 2011 Black Mercedes E350 sedan with VIN # WDDHF8HB0BA491050 to Angelle Taylor Cuevas. The Bill of Sale for said purchase is annexed hereto as Exhibit "1".

On May 8, 2020, Ms. Cuevas, along with executing the Bill of Sale annexed hereto as Exhibit "1", left a \$795 deposit on the vehicle. This was paid via credit card, the receipt of which is annexed hereto as Exhibit "2".

On May 11, 2020, Ms. Cuevas paid the remainder of the purchase price (\$8,000), as reflected in the Bill of Sale annexed hereto as Exhibit "1" and came to pick up the subject vehicle[.] Ms. Cuevas did not receive temporary registration or license plates.

Thereafter, Title to the vehicle was signed over to Ms. Cuevas and sent to her via FedEx overnight delivery on May 14, 2020. The FedEx receipt with Title sent is annexed hereto as Exhibit "3".

...

AW Auto did not operate a 2011 Black Mercedes E350 sedan with VIN # WDDHF8HBOBA491050 on June 1, 2020. Specifically, AW Auto has no connection whatsoever and has never employed co-defendant, Amaral Bordenave

...

[P]laintiff is claiming that a New Jersey license plate bearing registration number DZT79 series 04 was affixed to the subject vehicle operated by codefendant, Amaral Bordenave. Although this plate was owned by defendant AW Auto, it had gone missing. Manager of AW Auto, Julio Lopez, went to the Hasbrouck Heights Police Department and reported the lost plate. Annexed hereto as Exhibit “4” is the police report

(NYSCEF Doc. No. 16 [Cohen Aff. at ¶¶1-2, 4-7, 9-10] [emphasis added]).

Plaintiff opposes the motion, arguing that an issue of fact exists as to whether a sale actually occurred, noting that plaintiff’s search of New Jersey Motor Vehicle Commission records did not uncover a certified registered title documenting a transfer of title to Cuevas.¹ Plaintiff also notes that Cohen’s affidavit is notarized out of state without the certificate of conformity required by CPLR §2309(c) and argues that this affidavit must therefore be disregarded.

DISCUSSION

“The 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 issues of fact from the case” (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). “Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action” (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]).

While the Court rejects plaintiff’s argument that the Vilma Cohen’s affidavit must be disregarded pursuant to CPLR §2309(c) (See Charnov v New York City Bd. of Educ., 171 AD3d 409, 409 [1st Dept 2019]), it nevertheless denies AW Auto’s motion. Even assuming that title to

¹ AW Auto did not timely file a reply to its motion. However, on September 26, 2023, nearly two months after the motion’s return date, it filed a request for leave to submit a late reply, to which plaintiff objected. This motion was then administratively resubmitted to this Court on January 23, 2024. At this juncture, the Court declines to grant AW Auto’s request and addresses the motion as submitted.

the motor vehicle was transferred to Cuevas once she executed the bill of sale and took physical possession of the motor vehicle (See e.g., Godfrey v G.E. Capital Auto Lease, Inc., 89 AD3d 471, 477 [1st Dept 2011] [“title to a motor vehicle is transferred when the parties intend such transfer to occur”]), this is not dispositive here. “A registered owner who transfers a vehicle without removing the license plates is estopped as against an injured third party from denying ownership” (Dairylea Coop. v Rossal, 64 NY2d 1, 10 [1984]; see also Pantojas v Niang, 122 AD3d 524, 524-25 [1st Dept 2014]) and there are issues of fact as to whether AW Auto was the registered owner of the motor vehicle during the events at issue and whether it left its plates on the motor vehicle such that it is estopped from denying ownership (See White v Mayfield, 161 AD3d 1552, 1553-54 [4th Dept 2018] [internal citations omitted]). While AW Auto asserts that the license plate in question was stolen prior to the events at issue here, this is an issue of fact requiring discovery.

Accordingly, it is

ORDERED that AW Auto and Truck Wholesaler Inc.’s motion is denied, without prejudice to renewal at the conclusion of discovery; and it is further

ORDERED that plaintiff shall, within twenty days of the date of this decision and order, serve a copy of this order, with notice of entry, upon all defendants as well as the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E filing” page on this court’s website at the address www.nycourts.gov/supctmanh); and it is further

