Weiss v 800 Brady Parking, Inc.

2024 NY Slip Op 33693(U)

August 28, 2024

Supreme Court, New York County

Docket Number: Index No. 152259/2018

Judge: James G. Clynes

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JAMES G. CLYNES** **PART 22M**

Justice

---X

ELIE WEISS,

Plaintiff,

- v -

800 BRADY PARKING, INC., RAMON E. SANTANA-FELIPE, FREDERICK BRINKMANN,

Defendants.

---X

INDEX NO. 152259/2018

MOTION DATE 12/07/2022

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

---X

FREDERICK BRINKMANN,

Plaintiff,

-against-

INTERBORO GARAGE, KATHCLARA GARAGE, MSK REALTY ENTERPRISES INC, JOEL RABINE, RAMON SANTANA-FELIPE, 800 BRADY PARKING, INTERPARKING GARAGE

Defendants.

---X

Third-Party
Index No. 595424/2021

The following e-filed documents, listed by NYSCEF document number (Motion 003) 43, 44, 45, 46, 47, 51, 52, 56, 57

were read on this motion to/for JUDGMENT – SUMMARY.

Upon the foregoing documents, the motion is decided as follows:

In this action, plaintiff Elie Weiss seeks recovery for injuries allegedly sustained when he was struck by a motor vehicle driven in a parking garage by one of the employee attendants of the garage. Defendant/third-party plaintiff Frederick Brinkmann ("Brinkmann"), the owner of vehicle, now moves for summary judgment (CPLR 3212) dismissing the complaint on the ground that he did not cause the accident or otherwise breach a duty to plaintiff. He also seeks dismissal of third-party defendant/counterclaim plaintiff MSK Realty Enterprises, Inc.'s ("MSK") counterclaim for indemnification or contribution on substantially the same ground. Finally, he also seeks summary judgment on his claims for contribution and indemnification against co-defendants 800 Brady Parking, Inc. ("800 Brady") and Ramon E. Santana-Felipe ("Santana-Felipe") (together, "the Co-

Defendants"), and third-party defendants Interboro Garage, Kathelara Garage, MSK Realty Enterprises Inc., Joel Rabine, and Interparking Garage (collectively, "the Third-Party Defendants").

FACTS

Plaintiff testified that at about 9:00 a.m. on February 20, 2018, he was injured in a parking garage when, while retrieving something from his vehicle's trunk, a parking attendant reversed someone else's car and pinned his right knee between the two vehicles (Weiss Deposition Transcript [NYSCEF Doc. 46] 14:6-10; 23:24-24; 26:7-9; 32:6-9). The Police Accident Report (NYSCEF Doc. 47) identified the driver as defendant Santana-Felipe, a parking attendant employed by the garage. Brinkmann was the owner of the vehicle that struck plaintiff but was not present at the time of the accident. Rather, he had left it overnight, in good working order, and was informed of the accident when he returned to retrieve it the next morning sometime after 11:00 a.m. (Brinkmann Deposition Transcript [NYSCEF Doc. 45] 7:23-14; 11:6-22).

As evidenced by a ten-year lease (the "Lease") commencing on January 1, 2016 [NYSCEF Doc. 55], the parking garage is operated by Interparking Garage as tenant with MSK as its landlord.[1] Pursuant to paragraph 8 of the Lease, the tenant is required to keep the premises in good condition, with the landlord responsible for maintaining the exterior, the common areas and the utilities. Paragraph 11 provides that the landlord shall not be liable for an injury to persons resulting from any causes whatsoever, unless due to the willful acts of landlord, its agents, or employees. In this connection, MSK's president has submitted an affidavit that the company had no employees at the garage at the time of the accident, and that Santana-Felipe was not an MSK employee or even a person known to her (Affidavit of Helene Kohn [NYSCEF Doc. 54], ¶¶ 4-5).

PROCEDURAL HISTORY

Plaintiff commenced this action against Brinkmann, 800 Brady, and Santana-Felipe by summons and complaint on March 18, 2018 (NYSCEF Doc. 1). On June 27, 2018, Brinkmann filed a verified answer with crossclaims for contribution and indemnification against the Co-Defendants (NYSCEF Doc. 5) and on May 10, 2021, he filed a third-party summons and complaint

[1] Brinkmann testified that at the time of the accident he had been paying for parking with checks made out to an entity named "800 Brady", but about a month later was instructed to change the name of the payee to "Interparty Parking". He produced a payment receipt for the later period bearing the name Interparty Parking and stated that he had receipts at home for the earlier period with the name "800 Brady" (Brinkmann Tr.,17:24-19:3; 19:14-20:18). The lease identifies the only tenant as Interparking Garage, with an address at 800 Brady Avenue.

seeking that same relief against the Third-Party Defendants (NYSCEF Doc. 31). Neither of the Co-Defendants responded to the complaint, and none of the Third-Party Defendants responded to the third-party complaint except MSK, which filed an answer with a crossclaim against Brinkmann for indemnification or contribution on December 31, 2021 (NYSCEF Doc. 34).

By order dated August 6, 2018 (NYSCEF Doc. 17), this Court granted plaintiff's motion for default judgments against the Co-Defendants. By order dated September 20, 2022 (NYSCEF Doc. 42), the Court granted Brinkmann's motion for default judgments for indemnification as against the Third-Party Defendants to the extent of directing a judgment against 800 Brady only.[2]

DISCUSSION

For the following reasons, Brinkmann's motion to dismiss the complaint is denied and the part of his motion for judgment for indemnification against the Third-Party Defendants is denied as premature. The part of the motion seeking summary judgment dismissing MSK's counterclaim for indemnification is granted.

The Motion to Dismiss the Complaint

The motion to dismiss the complaint is denied. Brinkmann's argument that he was a passive owner or bailor is not a defense to liability under Vehicle and Traffic Law ("VTL") § 388. That statute provides as follows:

> "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 a person using or operating the same with the permission, express or implied, of such owner."

The statute creates a rebuttable presumption that the vehicle was being used with the permission of the owner which may only be overcome by substantial proof that it was being operated without such consent (*Murdza v Zimmerman*, 99 NY2d 375, 380 [2003]). In most, but not all cases, that presumption may only be overcome by "uncontradicted statements of both the owner and the driver that the driver was operating the vehicle without the owner's permission."

[2] Brinkmann's notice of motion ((NYSCEF Doc. 36) sought a default judgment against "the third-party defendant". The accompanying affirmation in support, however, elaborated that judgment was sought against third-party defendants Interboro Garage, 800 Brady, and Interparking Garage (Affirmation of Lynn Golder, Esq. [NYSCEF Doc. 36] ¶ 1]). However, an affidavit of service was filed for only Interboro Garage and 800 Brady (*id.*, ¶¶ 3-4; NYSCEF Doc. 38) and the plea for relief in the supporting affirmation sought defaults only as against those two entities (*id.*, ¶ 6).

(*Country-Wide Ins. Co. v Nat'l R.R. Passenger Corp.*, 6 NY3d 172, 177 [2006]; *see Murphy v Carnesi*, 30 AD3d 570, 571 [2d Dept 2006]). However, a vehicle owner who merely entrusts the keys to a parking lot attendant will be found to have given permission (*see Carter v Travelers Ins. Co.*, 113 AD2d 178, 180-182 [1st Dept 1985] [finding liability under VTL § 388 even where owner claimed that he would have refused to allow the attendant to park his vehicle had he known the attendant was unlicensed]).

Here, Brinkmann does not dispute that he gave the keys and his express permission to the parking lot employees to operate his vehicle. That is all that matters. Liability under VTL § 388 is vicarious and based solely upon the defendant's ownership of the vehicle and the grant of its use to another, not upon the owner's own negligence in driving it. Brinkmann's argument that he was a passive owner or bailor is thus irrelevant to the question of liability because that is precisely who the statute targets – owners who are not driving but who lend their vehicles to others. It is the bailment of the vehicle that creates the liability.

Brinkmann's argument that he cannot be found to be the proximate cause of the accident is equally unavailing, as he would be vicariously liable for the conduct of the attendant who *did* cause it. Also beside the point is his further observation that a person who merely "furnishes the condition" for an accident cannot be said to have caused it. That principle applies only where, for example, the condition is furnished by a vehicle which is not being operated negligently but which happens to become involved in the accident by being in the path of the offending vehicle (*see Caro v Chesnick*, 155 AD3d 447, 447 [1st Dept 2017] [tractor-trailer which was unlawfully in the left lane merely furnished the condition for the death of a weaving and speeding motorcyclist who was propelled under and run over by its wheels]). Here, Brinkmann's vehicle did more than furnish the condition for the accident but was actively involved in it.

This conclusion obviates the necessity for an extended discussion of the parties' contentions regarding the admissibility and relevance of the police report. As a threshold matter, the Court concurs with plaintiff that the uncertified report is inadmissible insofar as Brinkmann has offered it in support of summary judgment, rather than in opposition (*see Xuezhen Dong v Cruz-Marte*, 189 AD3d 613, 614 [1st Dept 2020]; *Yassin v Blackman*, 188 AD3d 62, 67 [2d Dept 2020]).[3] However, even if considered, the report merely confirms that the parking attendant struck

[3] Although correct on the issue of admissibility, plaintiff's objection to the report is puzzling. As noted, it weighs in favor, rather than against, Brinkmann's liability.

plaintiff and that Brinkmann was not on the scene. As noted, Brinkmann's freedom from active negligence does not dispose of the question of his vicarious liability.

The Motion for Summary Judgment on the Third-Party Complaint

Brinkmann's motion for summary judgment on his third-party claims for indemnification is denied. As a preliminary matter, it is true that "a passive owner of a vehicle vicariously liable pursuant to VTL § 388 is entitled to common-law indemnification from the employer of an active tortfeasor acting within the scope of his employment (*Scherer v N. Shore Car Wash Corp.*, 32 AD3d 426, 427 [2d Dept 2006]). There is also no dispute that Brinkmann's role was passive, as he was indisputably not driving, and not even at the parking lot at the time of accident.

Nevertheless, the motion is premature.[4] "Where a defendant's alleged liability is purely statutory and vicarious, conditional summary judgment in that defendant's favor on the basis of common-law indemnification is premature absent proof, as a matter of law, that [the party from whom indemnification is sought] was negligent ..." (*Nasuro v PI Assocs., LLC*, 49 AD3d 829, 832 [2d Dept 2008] [internal quotation marks and citations omitted]; *see also Jamindar v Uniondale Union Free Sch. Dist.*, 90 AD3d 612, 616 [2nd Dept 2011] ["where a triable issue of fact exists regarding the indemnitee's negligence, a conditional order of summary judgment for contractual indemnification must be denied as premature"]). Thus, Brinkmann's right to indemnification will not ripen until the liability of the active tortfeasors has been adjudicated.

Although the Co-Defendants' liability to plaintiff has been fixed by this Court's prior order granting a default judgment against them, that judgment is not binding as to Brinkmann's vicarious liability (*see Gallivan v Pucello*, 38 AD2d 876, 876 [4th Dept 1972] ["even under the expanded concept of collateral estoppel, the prior assessment of damages against the driver will not be given res judicata effect because the owner will not have had a full and fair opportunity to litigate the issue of damages"] [internal quotation marks and citation omitted]; *see also Rojas v. Romanoff*, 186 AD3d 103, 109 (1st Dept 2020) ["we find that the default nature of the judgment rendered in the prior declaratory judgment action prevents application of issue preclusion to the instant personal injury action"]). At trial, Brinkmann may dispute whether Santana-Felipe was negligent

[4] Although also correct on the issue of indemnification, plaintiff's standing to and motive for challenging Brinkmann's right to indemnification is unclear. The motion was not directed as against plaintiff and any recovery Brinkmann receives from an indemnitor would presumably inure to plaintiff's benefit.

or whether plaintiff was contributorily negligent. Plaintiff has not moved for summary judgment on those questions.

In view of this determination, it appears that the Court in its Order from September 20, 2022, may have improvidently granted Brinkmann's unopposed motion for a default judgment as to indemnification as against 800 Brady. Accordingly, that Order is hereby vacated. Finally, as to Kathclara Garage, Interparking Garage, and Sabine, summary judgment would be additionally inappropriate as the docket does not reflect that they were ever served with the third-party complaint.

The motion for indemnification as against MSK is also denied. An out-of-possession parking garage landlord cannot be held liable for injuries occurring on premises unless the accident was caused by some significant structural or other defect that the landlord was legally or contractually obligated to remedy (*Brown v Shurgard Storage Ctrs. LLC*, 203 AD3d 453 [1st Dept 2022]; *Morrone v Chelnik Parking Corp.*, 268 AD2d 268 [1st Dept 2000]; *Rosado v. Neubert Realty Corp.*, 254 AD2d 209 [1st Dept1998]). In this case, the accident is not alleged to have been caused by a structural defect, but by the negligence of a parking lot attendant who MSK did not employ or control.

The Motion to Dismiss MSK's Counterclaim

The motion to dismiss MSK's Counterclaim for indemnification against Brinkmann is granted. As discussed above, MSK cannot be held liable for the injuries to plaintiff and therefore would not be subject to a judgment for which it would require indemnification. The only damages it could suffer would be the costs of defending against this litigation. However, although MSK has a right to indemnification from its tenant under paragraph 11 of the Lease, including costs and attorney's fees, Brinkmann is not a party bound to that agreement. Nor has MSK articulated a common law basis to seek indemnification from Brinkmann, or for that matter, meaningfully addressed the issue at all.

Accordingly, it is hereby:

ORDERED that the part of defendant/third-party plaintiff Frederick Brinkmann's motion for summary judgment dismissing the complaint is denied; and it is further,

ORDERED that the part of Brinkman's motion for summary judgment on his third-party claims for indemnification is denied; and is further,

ORDERED that this Court's September 20, 2022, Order granting Brinkmann a default judgment against 800 Brady is vacated; and it is further,

ORDERED that the part of Brinkmann's motion for summary judgment as against third-party defendant MSK Realty Enterprises, Inc. is denied, and it is further,

ORDERED that the part of Brinkmann's motion seeking to dismiss MSK's counterclaim against him is granted.

This constitutes the Decision and Order of the Court.

8/28/2024
DATE

JAMES G. CLYNES, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE