Chandler v Alba Auto Repairs, Ltd.
2024 NY Slip Op 34086(U)
November 15, 2024
Supreme Court, Kings County
Docket Number: Index No. 532760/2021
Judge: Ingrid Joseph
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At an IAS 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 360 Adams Street, Brooklyn, New York, on the 15th day of November, 2024.

P R E S E N T: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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DAVID CHANDLER,

Plaintiff,

-against-

Index No.: 532760/2021

DECISION AND ORDER

ALBA AUTO REPAIRS, LTD., CARLOS JIMENEZ and DOMINGO TULL, JR.,

(Mot. Seq. Nos. 1, 3-4)

Defendants.

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The following e-filed papers read herein:	NYSCEF Doc. Nos.:
Motion Seq. No. 1	
Notice of Motion/Affirmation in Support/Exhibits	36 – 40
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In this action, Plaintiff David Chandler ("Plaintiff") alleges that Defendant Domingo Tull, Jr. ("Tull") brought his vehicle to Defendant Alba Auto Repairs, Ltd. ("Alba Auto") and this vehicle was at all times in the custody and control of Alba Auto. Plaintiff further alleges that Defendant Carlos Jimenez ("Jimenez") was employed by Alba Auto and was using or operating the subject vehicle with the express or implied permission and consent of Tull. Plaintiff avers that on September 24, 2021, he was on an electric scooter in the bicycle lane when Jimenez

opened the driver side door of Tull's parked vehicle into Plaintiff's lane of travel, striking Plaintiff and causing him injuries.

Tull moves, pursuant to CPLR 3212, for an order granting him summary judgment on liability and summary judgment against co-defendants for indemnification (Mot. Seq. No. 1). Plaintiff cross-moves for an order (a) granting Plaintiff summary judgment on the issue of liability against all defendants, (b) striking the affirmative defense asserted by defendants alleging culpable conduct on Plaintiff's part and (c) setting the matter down for an immediate trial on the issue of damages (Mot. Seq. No. 3). Defendants Alba Auto and Jimenez also seek an order granting them summary judgment pursuant to CPLR 3212 on the issue of liability, dismissing Plaintiff's complaint and all cross-claims against them (Mot. Seq. No. 4).

In his motion, Tull argues that he was a mere passive owner and that he did not cause or contribute to this accident. Tull further argues that he merely surrendered his vehicle to co-defendants for repairs and that his vehicle was in the exclusive control of Alba Auto when Jimenez struck Plaintiff; therefore, he is entitled to indemnification.

In his cross-motion, Plaintiff concedes that Tull was not actively negligence, but contends that Tull, as the owner of the vehicle, is still vicariously liable for Jimenez's conduct under Vehicle Traffic Law ("VTL") § 388. In addition, Plaintiff avers that Jimenez opened the door on the side of the Tull's vehicle adjacent to moving traffic when it was not reasonably safe to do so, violating VTL § 1214. Further, Plaintiff asserts that Alba Auto and Jimenez cannot offer a non-negligent explanation for the accident. According to Plaintiff, he is also free from any culpable conduct since he operated his scooter with due care and did not have time to avoid the door.

In support of their cross-motion and in opposition to Plaintiff's cross-motion, Alba Auto and Jimenez argue that Plaintiff was the sole proximate cause of the accident because he was traveling at an excessive rate of speed, in violation of VTL 1180 and Plaintiff breached his common law duty to make proper use of his senses, horn, braking and steering mechanisms. In addition, Alba Auto and Jimenez contend that there was no contact between Plaintiff or his scooter and Jimenez or the vehicle; accordingly, it cannot be said that Jimenez's conduct caused or contributed to the accident.

In partial opposition, Tull points out that Alba Auto and Jimenez do not place any liability on Tull. Thus, Tull argues that their motion further supports his motion for summary judgment on liability.

In his opposition, Plaintiff argues that Alba Auto and Jimenez's cross-motion must be denied as untimely since it was made 101 days after the Note of Issue was filed on January 30, 2023, without leave of court and upon good cause shown. Even if the Court considers the merits, Plaintiff argues that Alba Auto and Jimenez's motion misrepresents the deposition testimony, relies on an inadmissible police report and misstates controlling appellate authority.

As an initial matter, the Court will address the timeliness of Alba Auto and Jimenez's cross-motion. Pursuant to the Uniform Civil Term Rules of Kings County Supreme Court, Alba Auto and Jimenez were required to make their cross-motion no later than 60 days after the filing of the Note of Issue (Kings County Supreme Court Uniform Civil Term Rules, part C, rule 6). Though Tull filed a motion to vacate the note of issue on February 9, 2023 (Mot. Seq. No. 2), it was ultimately withdrawn (NYSCEF Doc No. 61). Thus, Alba Auto and Jimenez's cross-motion, filed on May 11, 2023, is untimely. However, the Court has discretion to consider an untimely cross-motion "where a timely motion was made on nearly identical grounds" (*Sikorjak v City of New York*, 168 AD3d 778, 780 [2d Dept 2019]). The Second Department has determined that where a plaintiff seeks summary judgment on the issue of whether she was at fault and also on the issue of liability against defendants, the trial court "providently exercised its discretion in considering the merits of that branch of the [] defendants' [untimely] cross-motion which was for summary judgment dismissing the complaint . . . and all cross-claims against them (*Lewinski v City of New York*, 229 AD3d 456, 458 [2d Dept 2024 [internal citations omitted]).

On a motion for summary judgment, the burden rests with the movant to demonstrate, through admissible evidence, that there are no triable issues of fact and that it is entitled to judgment as a matter of law (*see GTF Mktg., Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 967 [1985]; *Englington Med., P.C. v Motor Vehicle Acc. Indem. Corp.*, 81 AD3d 223, 230 [2d Dept 2011]; CPLR 3212 [b]). Once the movant has met its initial burden, summary judgment will only be granted if the opposition fails to establish the existence of questions of fact (*see Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014] [internal citation omitted]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to defeat a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The Court first turns to Tull's motion. Pursuant to Vehicle and Traffic Law § 388 (1), an owner of a vehicle is liable for injuries caused to a person "resulting from negligence in the use

or operation of such vehicle . . . by any person using or operating the same with the permission, express or implied, of such owner." Analyzing a predecessor version of VTL § 388, the Court of Appeals stated,

> [T]he statute makes the owner liable when the car is used with his implied permission, and that permission is implied when he leaves his car with a garage or repairman under such circumstances and for such work that he should have contemplated or anticipated that it would be used upon the street or roadway in the performance of that work (*Zuckerman v Parton*, 260 NY 446, 450 [1933]).

Here, it is undisputed that Tull owned the subject vehicle. It is further undisputed that Tull left his vehicle at Auto Alba and gave its staff permission to repair his vehicle. At his deposition, Tull acknowledged that one who takes a car to a mechanic "can assume that they are going to move the car somehow somewhere" (Tull tr. at 15, lines 11-13). In addition, Tull testified that he did not prohibit Alba Auto or Jimenez from moving his vehicle (*id.*, lines 6-16).

Under a common sense approach, it seems unfair to find an owner responsible where he or she has left their vehicle in the care of a mechanic and the vehicle is later alleged to be involved in an accident during that time. However, unfairness is not a legal argument grounded in statute or precedent, and this Court is bound to follow appellate caselaw. In *Scherer v N. Shore Car Wash Corp.* (32 AD3d 426 [2d Dept 2006]), the owner of a vehicle brought his vehicle to a car wash and upon exiting the car wash, an employee drove the vehicle forward and struck the plaintiff. The Second Department found that the employee was acting within the scope of his employment and as a passive owner of the vehicle, the owner was vicariously liable but entitled to common-law indemnification from the employer (*id.* at 427-428). Therefore, though Tull was a mere owner, he is vicariously liable under VTL § 388 (1).

"Common-law indemnification is warranted where a defendant's role in causing the plaintiff's injury is solely passive, and thus its liability is purely vicarious" (*Balladares v Southgate Owners Corp.*, 40 AD3d 667, 671 [2d Dept 2007]). The record here is devoid of evidence that Tull was negligent in causing the accident or was more than a passive owner. In fact, Plaintiff concedes that Tull was "not actively negligent here" and has a "strong argument for obtaining full common-law indemnification" (NYSCEF Doc No. 56, at 8).

Thus, Tull's motion for summary judgment on liability is denied. However, the branch of Tull's motion seeking summary judgment against co-defendants for common-law indemnification is granted.

The Court next turns to Plaintiff's cross-motion. ~~As an initial matter,~~ Since the Court already found that Tull was vicariously liable, the portion of Plaintiff's cross-motion seeking summary judgment against Tull, pursuant to VTL § 388 (1), is granted. Thus, the Court will proceed to substantively consider Plaintiff's motion to the extent it seeks summary judgment against Alba Auto and Jimenez.

"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" (*Tsyganash v Auto Mall Fleet Mgt., Inc.*, 163 AD3d 1033, 1033-1034 [2d Dept 2018]). "[T]he issue of a plaintiff's comparative negligence may be decided in the context of a plaintiff's motion for summary judgment on the issue of liability where, as here, the plaintiff also seeks dismissal of the defendant's affirmative defense alleging comparative negligence" (*Ramirez v Wangdu*, 195 AD3d 646, 646 [2d Dept 2021]).

Vehicle and Traffic Law § 1214 provides, in part, "[n]o person shall open the door of a motor vehicle on the side available to moving traffic unless and until it is reasonably safe to do so, and can be done without interfering with the movement of other traffic."

Here, Plaintiff established his prima facie entitlement to judgment as a matter of law by submitting, in part, his affidavit and the deposition transcript of Jimenez. In his affidavit, Plaintiff states that he was looking forward and in the 20 seconds prior to the accident, did not observe any people in the bike lane or any open door in front of him (NYSCEF Doc No. 47, ¶¶ 5-6). He further states that he was traveling 10 to 12 miles per hour when the car door suddenly opened into his path, striking his right forearm and causing him to fall (*id.* at ¶ 7). In addition, Plaintiff states that he tried to take evasive action by applying the hand brake immediately and turning to the left (*id.*). At his deposition, Jimenez testified that he was retrieving documents from Tull's vehicle and was sitting in the driver's seat (Jimenez tr. at 80, lines 3-11). Jimenez answered "No" when asked after he looked to his left before exiting if he recalled seeing any scooters in the bike lane (*id.* at 87, lines 6-11). Jimenez testified that he first became aware of the accident when he saw Plaintiff on the floor (*id.* at 87, lines 15-17).

Alba Auto and Jimenez contend that Jimenez was not a proximate cause of the accident since there was no contact with the vehicle and instead, Plaintiff lost control of his scooter because he was travelling at an excessive rate of speed, failed to observe Jimenez and failed to

utilize his horn, brakes and steering mechanism to avoid the accident. Alba Auto and Jimenez rely on Plaintiff's deposition transcript and a certified police report.[1]

While Plaintiff did testify that he did not believe his *scooter* made contact with the door, he testified that his right forearm did (Plaintiff tr. at 51, lines 10-15). Without more, Alba Auto and Jimenez argue that Plaintiff should have been traveling at most 5 miles per hour. This argument is unavailing. Further, Alba Auto and Jimenez's contention that Plaintiff did not take any action to avoid the accident is disingenuous and a misrepresentation of Plaintiff's deposition testimony. Plaintiff, in fact, testified that he applied the *hand* brake but did not have time to apply the *emergency* brake (Plaintiff tr. at 47, line 20-25; at 48; line 2). In addition, Plaintiff testified that he tried to take further evasive action by moving to the left (Plaintiff tr. at 47, lines 12-14, 21; at 54, lines 16-21).

This evidence demonstrates that Jimenez violated VTL § 1214 "by opening the door on the side of [the] vehicle adjacent to moving traffic when it was not reasonably safe to do so, and was negligent in failing to see what, by the reasonable use of his senses, he should have seen, and that this negligence was the sole proximate cause of the accident" (*Dowd v Kharieh Bros., Inc.*, 216 AD3d 739, 741 [2d Dept 2023]; *see also Do Soon Gil v Frisina*, 223 AD3d 878, 878-879 [2d Dept 2024]; *Rincon v Renaud*, 186 AD3d 1551, 1551 [2d Dept 2020]).

The Court also finds that Plaintiff established prima facie entitlement to summary judgment dismissing defendants' affirmative defenses alleging culpable conduct by showing that Jimenez was the sole proximate cause of the accident and that Plaintiff was not at fault for the happening of the accident (*see Do Soon Gil, 223 AD3d at 879*; *Alfaro v Access-A-Ride*, 229 AD3d 503, 505 [2d Dept 2024]).

Alba Auto and Jimenez have failed to set forth a non-negligent explanation for the happening of the accident or proffer admissible evidence raising a triable issue of fact as to

[1] With respect to police reports, courts will deem them admissible as a business record if the report is made upon the police officer's personal observations and while carrying out police duties (*Memenza v Cole*, 131 AD3d 1020, 1021 [2d Dept 2015] [internal citations omitted]; see CPLR 4518 [a]). Even if the report is certified, unless the information contained therein is provided by a person under a business duty, such information must constitute an exception to the hearsay rule (*Memenza*, 131 AD3d at 1021-1022). The subject police report contains statements attributed to "mechanic," but does not identify the individual by name. Where the source of information is unidentified, the statements are inadmissible (*see Noakes v Rosa*, 54 AD3d 317, 318 [2d Dept 2008]). Defendants Alba Auto and Jimenez attempt to overcome the hearsay hurdle by arguing that these statements satisfy the party admission exception. Even assuming Jimenez is the "mechanic" referenced in the police report, his statements are "exculpatory and thus does not fall within the hearsay exception for a party admission" (*Huff v Rodriguez*, 45 AD3d 1430, 1432 [4th Dept 2007], citing *Cover v Cohen*, 61 NY2d 261, 274 [1984]).

whether Plaintiff's actions contributed to the occurrence of the accident (*see Alfaro*, 229 AD3d at 505).

Therefore, Plaintiff is entitled to summary judgment on the issue of liability and summary judgment striking defendants' affirmative defenses alleging culpable conduct on his part.

Accordingly, it is hereby

ORDERED, that Defendant Domingo Tull, Jr.'s motion (Mot. Seq. No. 1) is granted only to the extent it seeks summary judgment against co-defendants for indemnification; and it is further

ORDERED, that Plaintiff's cross-motion (Mot. Seq. No. 3) for summary judgment on the issue of liability and to strike defendants' affirmative defenses alleging culpable conduct is granted; and it is

ORDERED, that Defendants Alba Auto Repairs Ltd. and Carlos Jimenez's cross-motion for summary judgment on the issue of liability (Mot. Seq. No. 4) is denied.

All other issues not addressed herein are without merit or moot.[2]

This constitutes the decision and order of the Court.

Hon. Ingrid Joseph, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice

[2] Defendants correctly contend that Elena De Fex, as a joint tenant, is a necessary party to this action (*Weinstein v Bd. of Directors of 12282 Owners' Corp.*, 2021 NY Slip Op 50338[U], *2). In their reply, Plaintiff seeks leave to amend the complaint to add Elena De Fex if the Court finds she is an indispensable party. The proposed second amended complaint refers to Mrs. De Fex, but the substance of the allegations remain the same. Ordinarily, leave to amend is freely given absent prejudice or surprise to the opposing party (*Ferriola v DiMarzio*, 83 AD3d 657, 657 [2d Dept 2011]). Considering the Court's findings, granting leave to amend would not remedy the deficiencies in Plaintiff's case.