

**Delacruz v Penske Truck Leasing Co. L.P.**

2025 NY Slip Op 35380(U)

January 23, 2025

Supreme Court, Westchester County

Docket Number: Index No. 64521/2024

Judge: Thomas Quiñones

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER – I.A.S. PART

PRESENT: HON. THOMAS QUIÑONES, J.S.C.

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JOSE DELACRUZ,

Plaintiff(s)

-against-

PENSKE TRUCK LEASING CO. L.P. A/K/A PENSKE,  
AND ALREMAWI AHMAD IBRAHIM,

Defendant(s).

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**DECISION AND ORDER**

Index No. 64521/2024  
Motion Sequence No.

The following papers filed to the New York State Court Electronic Filing System (NYSCEF) as NYSCEF Doc. 3-28 were read and considered on the motion filed by the Moving Defendant, PENSKE TRUCK LEASING CO., L.P. (“PENSKE”) for a court order pursuant to CPLR §3211(a)(1) and (b) dismissing the Complaint herein; and for such other and further relief as this Court deems just and proper.

Upon the foregoing papers, the motion is determined as follows:

This motor vehicle action was commenced by filing pleadings on June 25, 2024. The Complaint alleges causes of action sounding in: (i) negligence; (ii) negligent maintenance and/or repair of Defendant’s vehicle and/or failure to supervise and/or monitor the operation/lessee of such vehicle; (iii) “property damage and loss of use” on Plaintiff’s vehicle; and (iv) “punitive, exemplary, and/or compensatory damages.”<sup>1</sup> The following facts are asserted in the Verified Complaint.

On May 11, 2024 at approximately 7:49a.m., Plaintiff JOSE DELACRUZ, while traveling on Meadowbrook Place in City of Yonkers, came to a full stop to allow the Defendant’s truck (owned by PENSKE and driven by IBRAHIM) to drive passed Plaintiff, at which time Plaintiff’s vehicle was negligently sideswiped/struck in the rear driver side and/or by Defendant’s truck. The Complaint cited to the Police Incident Report “MV104A report no. 24066674”, stating that said police report notes that the driver of the truck IBRAHIM related to the responding police officers “that while traveling... on Meadowbrook Place, he sideswiped Veh 2 (Plaintiff) with his vehicle’s rear driver’s side bumper.”<sup>2</sup>

<sup>1</sup> NYSCEF Doc. 2, Verified Complaint.

<sup>2</sup> *Id.* at ¶6.

The Complaint further cited to the police report to the extent that “Veh 1 was impounded due to vehicle being reported stolen out of Hackensack, NJ (see YPD1) YPD-5 were issued to both parties involved.”<sup>3</sup> Said truck operated by defendant IBRAHIM and owned and/or leased by defendants PENSKE on Meadowbrook Place where, according to the Plaintiff, “[t]ruck traffic is prohibited from operating at the location of the accident. It is a residential area. On information and belief, the truck was operating at an excessive rate of speed, while the driver was on his cell phone or otherwise preoccupied.”<sup>4</sup> Plaintiff alleges that, as a result of the collision, Plaintiff sustained serious personal injuries and property loss of Plaintiff vehicle.

PENSKE’s Motion:

Defendant PENSKE filed this pre-answer motion pursuant to CPLR §3211(a)(1) for dismissal of the Complaint base upon documentary evidence. Counsel proffers, amongst other evidence, South Hackensack Stolen Auto Report, the Yonkers Police Department Incident Report, and the affidavit of merit of PENSKE Litigation Claims Examiner Janelle Shenk.<sup>5</sup> It is PENSEK’s contention that it is not liable for the motor vehicle collision insofar as PENSKE rented the subject truck to a customer (Nico Casper) for a period of March 21, 2024 through March 23, 2024 and PENSKE reported the subject truck as stolen on April 25, 2024, a few days prior to the subject collision that occurred on May 11, 2024. PENSKE further contends that IBRAHIM, the driver of the truck on the date of the incident, is not employed nor otherwise affiliated with PENSKE.

PLAINTIFF’s Opposition:

Plaintiff filed opposition to the instant motion, submitting, amongst other evidence, an attorney affirmation and Plaintiff’s affidavit along with other documentary evidence referenced therein in support of the following arguments in opposition to Defendant’s motion.

First, Plaintiff’s counsel contends that PENSKE’s motion failed to provide an admissible affidavit of an individual with personal knowledge of the facts giving rise to the claim. It is alleged that the affirmation of an attorney who has no personal knowledge of the facts is not admissible and is otherwise insufficient as a matter of law. It is further alleged that the affidavit of merit of PENSKE Litigation Claims Examiner Janelle Shenk is insufficient insofar as Shenk lacks personal knowledge of the PENSKE-Casper rental agreement. Counsel argues that “[t]herefore the defendant moving party must rely on the affirmations they supply and respectfully would have to attach to the moving papers the alleged denial of claim letter that they allegedly sent which is blatantly absent from the attached exhibits and the failure to attach same in and of itself should require denial of the motion.”<sup>6</sup>

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<sup>3</sup> *Id.* at ¶7.

<sup>4</sup> *Id.* at ¶6.

<sup>5</sup> *See*, NYSCEF Doc. 7-9.

<sup>6</sup> NYSCEF Doc. 17, Shaw Aff. ¶4.

Second, Plaintiff's counsel contends that PENSKE's motion "failed to attach admissible evidence in the way of the police reports (MV104A) that defendants rely on since they are not certified as required by New York Law; all purported evidence submitted must meet trial standards."<sup>7</sup>

Third, as it relates to the Shenk affidavit of merit, counsel states that said affidavit fails to comply with CPLR §2106 by failing to state such affidavit was made and affirmed "under the laws of New York." Counsel asserts that Shenk did not execute the affidavit in New York, and it is unclear whether same was executed in Pennsylvania (Shenk's location) or New Jersey (PENSKE's place of business). Counsel concludes that the Shenk affidavit is inadmissible for the sheer fact that the affidavit was executed in Pennsylvania (and not in the State of New York) and the allegedly stolen truck has an Illinois license plate and rented in New Jersey.

Fourth, turning to the content of the Shenk Affidavit, Plaintiff's counsel states that Shenk does not aver that she reported the truck stolen and does not allege to be the one that filed the stolen vehicle report. Moreover, to the extent that the Shenk Affidavit states that "the Penske truck was... recovered on the date of the Accident, May 11, 2024,"<sup>8</sup> counsel states that such statement "can only be interpreted to mean that the driver returned the truck to Penske and that is why he was not arrested."<sup>9</sup> Counsel challenges the characterization that the PENSKE truck was 'stolen', posing the following queries: (i) why did PENSKE let the driver of the truck drive it back to PENSKE's New Jersey agent unless it was not stolen; and (ii) why didn't PENSKE have the Yonkers Police arrest the driver to recover the alleged 'stolen' truck.

This Court advises that all arguments raised in the motion papers were duly considered by the Court, irrespective of the absence of reference thereto,

#### Decision:

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction. A court must accept the facts as alleged in the complaint as true, accord the plaintiff (as the nonmoving party) the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). A motion to dismiss a complaint pursuant to CPLR § 3211(a)(1) may be granted only where the documentary evidence utterly refutes the complaint's factual allegations, conclusively establishing a defense as a matter of law (*Gorbatov v Tsirelman*, 155 AD3d 836 [2d Dept 2017], citing *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Cavaliere v 1515 Broadway Fee Owner, LLC*, 150 AD3d 1190, 1191 [2d Dept 2017]).

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<sup>7</sup> *Id.* at ¶5.

<sup>8</sup> *Id.*, citing Shenk Aff. ¶12.

<sup>9</sup> NYSCEF Doc. 17, Shaw Aff. ¶7.

Based on the foregoing, it is hereby

**ORDERED THAT, THE PRE-ANSWER MOTION FILED BY THE MOVING DEFENDANT, PENSKE TRUCK LEASING CO., L.P. (REFERRED TO HEREIN AS “PENSKE”) PURSUANT TO CPLR §3211(A)(1) REQUESTING DISMISSAL OF PLAINTIFF’S COMPLAINT IS GRANTED.**

The documentary evidence submitted by PENSKE, which includes the Shenk Affidavit, that Hackensack police report related to the subject truck reported stolen on April 25, 2024 (shortly prior to the May 11, 2024 collision at issue), and the Yonkers Police Report (responding to the May 11, 2024 collision which, in part, confirms the Defendant’s truck was previously reported stolen and recovered at the scene to be returned to the lawful owner, PENSKE). Plaintiff failed to submit any admissible evidence to raise a genuine issue of fact as it related thereto and/or to issues of liability. It is further

**ORDERED** that, the Judge’s Court Clerk will issue a separate court notice scheduling a court conference shortly.

The foregoing constitutes the Decision and Order of this Court.

Dated: January 23, 2025  
White Plains, New York

ENTER :



HON. THOMAS QUIÑONES, J.S.C.

TO: *Filed to NYSCEF*