SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. R. BRUCE COZZENS, JR.
Justice.

TRIAL/IAS PART 5
NASSAU COUNTY

JAMES CHETTAYIL,

Plaintiff(s),

-against-

MOTION # 002
INDEX # 1354/10
MOTION DATE:
September 3, 2010

NATIONAL CAR RENTAL, ENTERPRISE RENT-A-CAR, JONATHAN CHARLES STEELMAN, AGL CORPORATION, ALAMO FINANCING, LP,

Defendant(s).

The following papers read on this motion:

Notice of Motion.....2
Reply Affirmation.....1
Affirmation in Opposition.....1

Upon the foregoing papers, it is ordered that plaintiff's motion for summary judgment and defendants' cross-motion for summary judgment are determined as hereinafter set forth.

The plaintiff has moved for a partial summary judgment on the issue of liability pursuant to CPLR §3212. Defendants National Car Rental, Enterprise Rent-a-Car, and Alamo Financing, LP filed a cross-motion for summary judgment to have all claims against them dismissed, pursuant to CPLR §3212, citing the Federal Transportation Equity Act (49 U.S.C. §30106) which precludes any such claims against them.

In his motion for partial summary judgment, plaintiff argues that defendant violated Vehicle and Traffic Law §§1151, 1146, and 1172 when defendant did not yield to and struck plaintiff, and therefore is negligent as a matter of law.

In his sworn affidavit, plaintiff indicated that he was walking westbound across Vernon Boulevard, when defendant made a left turn from 45th Avenue onto Vernon Boulevard striking plaintiff. In plaintiff's motion he indicated that he was "standing at the curb" and that before

stepping off the curb "he looked for vehicles entering the intersection as well as for vehicles coming from either direction on Vernon Boulevard." Plaintiff started to cross the street when he witnessed defendant driver Jonathan Charles Steelman run the stop sign on 45th Avenue and make a left turn onto Vernon Boulevard, striking plaintiff.

In defendant's sworn affidavit he indicates that he stopped at the stop sign at 45th Avenue before making a left turn onto Vernon Boulevard. In his affidavit, defendant indicated that "without warning, and after I began my turn, the plaintiff walked out from between the parked cars on the right side of Vernon Boulevard towards my vehicle ...."

The role of the court on a motion for summary judgment is "not to determine credibility, but whether there exists a factual issue, or if arguably there is a genuine issue of fact " *J. Capelin Associates, Inc. v. Globe Mfg. Corp.,* 34 NY2d 338, 313 NE2d 776, 357 NYS2d 478 (1974). 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 demonstrate the absence of any material issues of fact [citations omitted]. 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 Hospital,* 68 NY2d 320, 508 NYS2d 923, 925, 501 NE2d 572 (1986).

Here, the plaintiff has met its burden and shifted the burden to the defendant (*Zuckerman v City of New York,* 49 NY2d 557, 427 NYS2d 595 (1980)).

The defendant even if "undoubtedly guilty of actionable negligence, is entitled, nonetheless, to have that negligence, if established, measured against the negligence of the plaintiff pedestrian, if any be found. This process involves questions as to the degree that the parties' respective conduct may have contributed to the accident which are fact questions and clearly within the province of the jury." *Schmidt v. S. M. Flickinger Co., Inc.,* 88 AD2d 1068, 1069, 452 NYS2d 767, 769 (3rd Dept., 1982), citing *Wartels v. County Asphalt,* 29 NY2d 372, 328 NYS2d 410, 278 NE2d 627; *Cosentino v. Consolidated Edison Co. of N.Y.,* 62 AD2d 1028, 404 NYS2d 26.

Questions of fact with respect to liability for the happening of the subject accident preclude summary judgment on liability.

In turning to defendants' cross motion to dismiss the claim pursuant to the Federal Transportation Equity Act (49 U.S.C. §30106), defendants submit an affidavit from National Car Rental's Regional Risk Manager, Scott Matzner, wherein he states that the vehicle identified in plaintiff's complaint was a car owned by National Car Rental and was "being rented to a member of the general public" and that National Car Rental, Enterprise Rent-a-Car, and Alamo Financing, LP "were and are all engaged in the business of renting and leasing motor vehicles to the general public." Plaintiff's complaint is premised on an automobile accident that occurred between plaintiff's automobile and a rental vehicle operated by defendant Jonathan Charles Steelman, and owned by National Car Rental, Enterprise Rent-a-Car, or Alamo Financing, LP. Moving defendants provide sufficient information regarding the

maintenance and performance of the rental car prior to the accident. Defendant driver Steelman was not, nor is currently, an employee of National Car Rental.

The Federal Transportation Equity Act (FTEA), "and specifically the 'Graves Amendment,' resolved a long-standing debate as to the propriety of imposing vicarious liability on car owners who rent or lease their vehicles which are subsequently involved in motor vehicle accidents. By enacting the Graves Amendment, Congress has prohibited vicarious liability against these owners and preempted the laws in states, such as New York, that previously permitted it" *Graham v. Dunkley*, 50 A.D.3d 55, 852 N.Y.S.2d 169 (2d Dept, 2008), *Infante v. U-Haul Co. of Florida*, 11 Misc.3d 529, 815 NYS2d 921, 2006 NY Slip Op. 26020. The FTEA and the Graves Amendment "provision applies to all actions commenced after August 10, 2005. It provides that an owner engaged in the trade or business of renting or leasing motor vehicles shall not be liable for damages in the absence of any negligence or criminal wrongdoing. Thus, an action based solely on vicarious liability is barred" *Murphy v. Pontillo,* 12 Misc.3d 1146, 820 NYS2d 743 (2006) N.Y. Slip Op. 26289; citing *Infante v. U-Haul*, 11 Misc.3d 529, 815 NYS2d 921 (2006).

As such, plaintiff's motion for partial summary judgment on liability is denied and defendants' cross motion to dismiss National Car Rental, Enterprise Rent-a-Car, and Alamo Financing, LP is granted.

Dated: MAR 0 9 2011

J.S.C.