

Almeida v Bordenave

2024 NY Slip Op 32259(U)

July 2, 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 12/05/2023

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38

were read on this motion for JUDGMENT - DEFAULT.

Upon the foregoing documents, plaintiff’s motion for leave to enter a default judgment as against defendant Amaral Bordenave is granted, in part, as set forth below.

Plaintiff, a New York City Police Department (“NYPD”) police officer, alleges that on June 1, 2020, he and other officers effected a traffic stop of a 2011 Mercedes-Benz motor vehicle, based upon Bordenave’s negligent operation of that vehicle (NYSCEF Doc. No. 1 [Compl. at ¶¶10-13]). Plaintiff further alleges that, during this traffic stop, he sustained serious injuries due to a “lack of cooperation” by Bordenave (*Id.* at ¶13). Plaintiff’s complaint sets out claims against Bordenave for: (1) assault, (2) battery, and (3) negligence under GML §205-e, based on Bordenave’s alleged violation of Penal Law sections 120.00 (assault in the third degree), 120.05 (assault in the second degree), 120.11 (aggravated assault upon a police officer or peace officer), 120.08 (assault on a peace officer), 195.05 (obstructing governmental administration in the second degree), 145.25 (reckless endangerment of property) and 205.30 (resisting arrest) as well as

Vehicle & Traffic Law sections 375(12-a) (equipment), 376-a (defective equipment), 382c (occupant compartments), 386 (motor vehicle sound level limits), 388 (vicarious liability), 600 (leaving scene of an incident without reporting), 1140 (vehicle approaching or entering intersection), 1141 (vehicle turning left), 1144 (operation of vehicles on approach of authorized emergency vehicles), 1144a (operation of vehicles approaching emergency vehicles), 1180-a (maximum speed limits), and 1212 (reckless driving).

Plaintiff now moves for a default judgment, submitting an affidavit of service attesting to service of the summons and complaint on Bordenave pursuant to CPLR 308(2)¹ (NYSCEF Doc. 34) and two affidavits of merit.

In one affidavit of merit, he states that:

... on June 1, 2020, at approximately 10:15 p.m., in front of 216 West 40th Street, County, City and State of New York ... [t]he defendant BORDENAVE operated a vehicle in such a fashion as to cause a lawful car stop. I was injured when I was attempting to place defendant BORDENAVE into custody to affect a lawful arrest and the defendant resisted the arrest. As a result of the above-described accident and due to the negligence and carelessness of the defendants, I was caused to suffer serious and permanent injuries to my right shoulder, left elbow and cervical spine.

(NYSCEF Doc. No. 32 [Almeida Aff.])

In his other affidavit, initially submitted in opposition to defendant AW Auto's summary judgment motion, plaintiff states that:

I was working on June 1, 2020 in an unmarked police vehicle when I was going to a location with three other police officers ... During the course of a lawful car stop leading to an arrest, the defendant AW Auto & Truck Wholesalers Inc.'s 2011 Merced Benz's front drivers [sic] side window was broken. 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

¹ Coincidentally, service was effected on a "Mrs. Almeida."

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 ...

(NYSCEF Doc. No. 27 [Almeida Aff. at ¶5] [emphasis added]).

DISCUSSION

To establish his entitlement to a default judgment pursuant to CPLR § 3215, plaintiff is required to submit proof of: (i) service of the summons and complaint; (ii) the facts constituting the claim; and (iii) defendant's default in answering or appearing (See Gordon Law Firm, P.C. v Premier DNA Corp., 165 NYS3d 691 [1st Dept 2022]). Plaintiff has established service of the summons and complaint on Bordenave as well as Bordenave's default (NYSCEF Doc. No. 31 [Buzzeo Affirm. at ¶8]).

As an initial matter, plaintiff's affidavits fail to set forth facts supporting his third and fourth causes of action, for assault and battery. Civil assault requires that defendant intentionally placing another in fear of imminent harmful or offensive conduct while civil battery requires an intentional and wrongful physical contact with another person without consent (See e.g., Corcoran v City of New York, 186 AD3d 1151 [1st Dept 2020] [internal citations and quotations omitted]). Plaintiff's assertion that Bordenave resisted arrest is not, in and of itself, sufficient to satisfy the elements of these claims (See Dougherty v Weinert, 10 Misc 3d 62 [App Term, 1st Dept 2005] [defendant's prior guilty plea to misdemeanor offense of resisting arrest based upon "struggle" with police officer attempting to arrest her brother, did not have collateral estoppel effect in civil assault action

brought against her by officer]). Neither has plaintiff established that Bordenave intentionally made contact (or threatened physical contact) with plaintiff—the narrative set out in his affidavits is at least equally susceptible to the interpretation that Bordenave simply refused to cooperate with the officers’ efforts to remove him and that plaintiff’s injuries resulted from his exertions in pulling Bordenave’s arms while in an awkward position (leaning in through the car’s window).

Plaintiff’s affidavits are sufficient, however, to establish the elements of his fifth cause of action, for statutory negligence pursuant to GML §205-e. That statute provides that:

In addition to any other right of action or recovery under any other provision of law, in the event any accident, causing injury ... occurs directly or indirectly as a result of any neglect, omission, willful or culpable negligence of any person or persons in failing to comply with the requirements of any of the statutes, ordinances, rules, orders and requirements of the federal, state, county, village, town or city governments or of any and all their departments, divisions and bureaus, the person or persons guilty of said neglect, omission, willful or culpable negligence at the time of such injury ... shall be liable to pay any officer, member, agent or employee of any police department injured, or whose life may be lost while in the discharge or performance at any time or place of any duty imposed by the police commissioner, police chief or other superior officer of the police department...

(GML §205-e).

In order to recover under this statute, “a police officer must demonstrate injury resulting from negligent noncompliance with a requirement found in a well-developed body of law and regulation that imposes clear duties” (Williams v City of New York, 2 NY3d 352, 363-64 [2004]). Specifically, an officer must “(1) identify the statute or ordinance with which the defendant failed to comply, (2) describe the manner in which the police officer was injured, and (3) set forth those facts from which it may be inferred that the defendant’s negligence directly or indirectly caused the harm” (Id. at 352 [2004] [internal citations omitted]). An “‘indirect cause’ is simply a factor that—though not a primary cause—plays a part in producing the result” (Giuffrida v Citibank Corp., 100 NY2d 72, 80 [2003]).

Plaintiff's affidavits set forth facts supporting plaintiff's cause of action under GML §205-
e based upon Bordenave's violation of PL §195.05 (obstructing governmental administration in
the second degree) and PL §205.30 (resisting arrest). As pertinent here, a "person is guilty of
obstructing governmental administration when ... [s]uch person intentionally obstructs, impairs or
perverts the administration of law or other governmental function or prevents or attempts to
prevent a public servant from performing an official function, by means of intimidation, physical
force or interference, or by means of any independently unlawful act ..." (PL §195.05[1]) while
"a person is guilty of resisting arrest when he intentionally prevents or attempts to prevent a police
officer or peace officer from effecting an authorized arrest of himself or another person" (PL
§205.30). Here, it is undisputed that Bordenave refused officers' directives to lower his window
and unlock his car door and refused to exit his vehicle² (See e.g., People v Mims, 42 Misc 3d
1213(A) [Crim Ct, NY County 2014] ["there is no legal impediment to charging a defendant with
violating both §195.05 and §205.30 for resisting his own arrest"]).

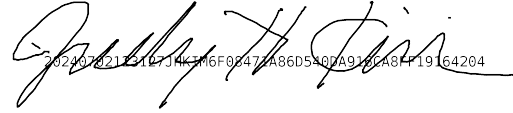
Accordingly, it is

ORDERED that plaintiff's motion is granted in part, to the limited extent that plaintiff is
granted leave to enter default judgment as against Amaral Bordenave on his fifth cause of action
on the issue of liability, with damages to be determined at an inquest to be held following trial or
other disposition of the action as against defendant AW Auto & Truck Wholesalers Inc., and is
otherwise denied; and it is further

² While not dispositive, the Court notes that the facts set forth in plaintiff's affidavits do not establish a reasonable
connection between the VTL provisions cited in his complaint and the harm allegedly sustained (See Randall v
Morand, 47 Misc 3d 1229(A) [Sup Ct, Queens County 2015] [VTL violations for which plaintiff was stopped—having
excessively tinted windows and obscured license plate—had no practical or reasonable connection to the injuries
sustained, which occurred after the vehicle was stopped and defendant refused to obey officer's lawful commands]).

ORDERED that plaintiff is directed to serve a copy of this decision and order, with notice of entry, upon defendants within ten days of the date of this decision and order.

This constitutes the decision and order of the Court.



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7/2/2024
DATE

HON. JUDY H. KIM, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					REFERENCE
					OTHER
					DENIED