SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

785

CA 22-01758

PRESENT: SMITH, J.P., LINDLEY, MONTOUR, GREENWOOD, AND DELCONTE, JJ.

JOSEPH R. OISHEI, JR., PLAINTIFF-RESPONDENT,

V MEMORANDUM AND ORDER

STEPHEN J. GEBURA, DEFENDANT, AND
PAUL J. BRINK, DEFENDANT-APPELLANT.

PILLINGER MILLER TARALLO, LLP, BUFFALO (KENNETH A. KRAJEWSKI OF COUNSEL), FOR DEFENDANT-APPELLANT.

SHAW & SHAW, P.C., HAMBURG (LEONARD D. ZACCAGNINO OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeal from an order of the Supreme Court, Erie County (E. Jeannette Ogden, J.), entered November 2, 2022. The order denied the motion of defendant Paul J. Brink for summary judgment.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Plaintiff, a police officer with the Town of Amherst Police Department, commenced this action seeking damages for injuries he sustained when he attempted to stop a vehicle driven by defendant Stephen J. Gebura. Gebura had stolen the vehicle, owned by Paul J. Brink (defendant), the day before from the parking lot of defendant's place of employment. Defendant had left his vehicle unlocked with a spare key inside the vehicle, which Gebura found and used to steal the vehicle. Supreme Court denied defendant's motion for summary judgment dismissing the complaint against him. We affirm.

As defendant correctly contends and plaintiff does not dispute, Vehicle and Traffic Law § 388 (1), which makes an owner of a vehicle liable for the injuries to a person resulting from the negligence in the use or operation of such vehicle by any person using or operating the same with the owner's permission (*see Murdza v Zimmerman*, 99 NY2d 375, 379-380 [2003]), is inapplicable here. The vehicle was stolen and was therefore not being used or operated with defendant's express or implied permission (*see Holmes v McCrea*, 186 AD3d 1043, 1044-1045 [4th Dept 2020]). Plaintiff, however, relied on Vehicle and Traffic Law § 1210 (a), i.e., the "key in the ignition statute," to support his negligence claim (*see Raczka v Ramirez*, 70 AD3d 1480, 1482 [4th Dept 2010]).

Defendant contends that Vehicle and Traffic Law § 1210 (a) is

inapplicable here inasmuch as his vehicle was not parked in a parking lot as that term is defined in section 129-b (*see* § 1100 [a]). That contention is unpreserved for appellate review inasmuch as defendant failed to raise that issue before the motion court (*see* CPLR 5501 [a] [3]; *Panaro v Athenex, Inc.*, 207 AD3d 1069, 1070 [4th Dept 2022]; *see generally Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]). Defendant's further contention that section 1210 (a) is inapplicable because the key to the vehicle was sufficiently hidden inside the vehicle (*see generally Banellis v Yackel*, 49 NY2d 882, 884 [1980]; *Gore v Mackie*, 278 AD2d 879, 880 [4th Dept 2000]) is raised for the first time on appeal and is therefore not properly before us (*see generally Ciesinski*, 202 AD2d at 985). In any event, defendant failed to meet his initial burden on the motion of demonstrating that the key was sufficiently hidden because his own submissions raised a triable issue of fact with respect thereto (*see generally Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Although defendant submitted his deposition testimony in which he testified that the key was hidden underneath the passenger seat, he also submitted the deposition testimony of Gebura, who testified that the key was on the console of the vehicle, which he saw "pretty quickly" after entering the unlocked vehicle.

Finally, defendant contends that the passage of time between the theft of his vehicle and the accident vitiated any proximate cause as a matter of law. As a general rule, the issue of proximate cause is for the factfinder to resolve (*see Derdiarian v Felix Constr. Corp.*, 51 NY2d 308, 315 [1980], *rearg denied* 52 NY2d 784 [1980]), and this case does not present an exception to the general rule (*see Hahn v Tops Mkts., LLC*, 94 AD3d 1546, 1548 [4th Dept 2012]; *see generally Johnson v Manhattan & Bronx Surface Tr. Operating Auth.*, 71 NY2d 198, 207 [1988]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court