

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2
Justice

ALBERT FELBERG and SONDRAL FELBERG

Plaintiff,

-against-

ELRAC INC. and "JOHN DOE" said name
being factitious, true name unknown

Defendant

Index No: 23695/06

Motion Date: 3/7/07

Motion Cal. No.: 8

Motion Seq. No.: 1

The following papers numbered 1 to 8 read on this motion by
defendant for an order dismissing the complaint pursuant to CPLR
3211 and/or 3212

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits	1 - 4
Answering Affidavits-Exhibits.....	5 - 6
Replying Affidavits.....	7 - 8

Upon the foregoing papers it is ordered that this motion is granted to the extent that the cause of action to hold defendant vicariously liable as the owner of the vehicle is dismissed as being barred by 49 USC 30106. In all other respects the motion is denied.

This action arises out of an automobile accident which occurred on October 28, 2003, when the vehicle owned and operated by the plaintiffs was struck in the rear by a vehicle owned by the defendant, ELRAC, INC. (hereinafter Elrac) and operated by an unknown driver who fled the scene.

Elrac moves to dismiss the complaint on the ground that this action against Elrac, in its capacity as the owner, is barred by 49 USC 30106, commonly known as "the Graves Amendment." In support of its motion, the defendant submitted the affidavit of Eric Margolis, employed as a loss manager for Elrac asserting that he is aware that the defendant is in the business of renting and leasing automobiles, that based upon a review of Elrac's

records the vehicle bearing New York State license plate number BNJ6602 was owned by Elrac and rented to the "general public" on the date of the accident. He also asserts that based on his review of Elrac's file concerning the accident, it is his understanding that Elrac was in no way negligent. Defendant did not provide a copy of the rental agreement or the documents which the affiant reviewed. Plaintiff opposes the motion arguing that as pleaded, the defendant's liability is not based solely upon the theory of vicarious liability as the owner of the vehicle, but also for its alleged negligence in failing to properly maintain the vehicle.

On a motion to dismiss pursuant to CPLR 3211 the court must construe the complaint liberally and accept the facts alleged as true, afford the plaintiff the benefit of every favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory (Leon v. Martinez, 84 NY2d 83, 87-88 [2004]; Morone v. Morone, 50 NY2d 481, 484 [1980]; Guggenheimer v. Ginzburg, 43 NY2d 268, 275 [1977]; Rovello v. Orofino Realty Co., 40 NY2d 633, 634 [1976]). The motion should be granted only when, even viewing the allegations as true, the plaintiff still cannot establish a cause of action (McGuire v. Sterling Doubleday Enterprises, L.P., 19 AD3d 660, lv denied 7 NY3d 701 [2006]) or where the defendant adduces documentary proof which disproves an essential allegation of the complaint (see Leon v. Martinez, 84 NY2d 83, 87 [1994]; McGuire v. Sterling Doubleday Enterprises, L.P., supra).

Applying these principals the complaint is sufficient to withstand dismissal pursuant to CPLR 3211(a) insofar as it asserts a cause of action against the defendant for its affirmative negligence which is not barred by the Graves Amendment (49 USCA §30106[a][2]). The defendant's conclusory affidavit is insufficient to resolve the issue of its own alleged negligence.

To the extent that the defendant's motion seeks to dismiss the complaint pursuant to CPLR 3212, the defendant has failed to establish its entitlement to summary judgment as a matter of law (Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; Zukerman v. City of New York, 49 NY2d 55 [1980]). The affidavit of Margolis is insufficient to sustain the defendant's burden since he has no personal knowledge of, inter alia, the facts regarding the maintenance of the vehicle or its condition on the day of the accident.

In addition, the motion for summary judgment is premature. While the defendant correctly points out that ordinarily, a motion for summary judgment should not be denied on the "mere

hope" that evidence sufficient to defeat the motion may be uncovered during the discovery process (see generally Morissaint v. Raemar Corp., 271 AD2d 586 [2000]), this case is distinguishable. It is undisputed that absolutely no discovery has taken place in this case (see Mazzaferro v. Barterama Corp., 218 AD2d 643, 644 [1995]). Moreover, the fact that the driver of the Elrac vehicle fled the scene, and it appears that Elrac has been less than forthcoming, even in this motion, regarding the identity of the renter or the terms of the rental agreement, which information is exclusively in its possession, the plaintiff should be afforded the opportunity to conduct discovery.

Dated: March 19, 2007
D# 30

.....
J.S.C.