

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CHARLES J. MARKEY IA Part 32
Justice

	x	Index Number 10642 2008
AMIRA MEAWAD		Motion Date July 23, 2009
-against-		Motion Cal. Number 11
HVT, INC., et al.		Motion Seq. No. 3
	x	

Papers Numbered

Notice of Motion - Affidavits - Exhibits.....1

CHARLES J. MARKEY, J.:

The defendants move for leave to renew a cross motion that resulted in an order of this Court dated December 17, 2008, and, upon renewal, for dismissal of plaintiff’s complaint against defendant HVT, Inc. (“HVT”), on the ground that it is barred by the Federal Transportation Equity Act, 49 U.S.C. section 30106, referred to as the Graves Amendment. Upon the foregoing papers it is ordered that the motion is determined as follows:

A motion for leave to renew must be based upon new facts not offered on a prior motion that would change the prior determination, and set forth a reasonable justification for the failure to present such facts on the earlier motion (*see*, CPLR 2221[e]; *Holland v. W.M. Realty Mgt., Inc.*, 64 AD3d 627 [2nd Dept. 2009]; *Lutheran Med. Ctr. v. Daines*, 65 AD3d 551 [2nd Dept. 2009]; *Swedish v Beizer*, 51 AD3d 1008 [2nd Dept. 2008]). However, the requirement that a motion for leave to renew be based upon newly-discovered facts is a flexible one (*see, Matter of Surdo v Levittown Pub. School Dist.*, 41 AD3d 486 [2nd Dept. 2007]).

A court, in its discretion, may grant renewal, in the interest of justice, upon facts which were known to the moving party at the time of the original motion where the movant offers a reasonable excuse for failing to submit them on the prior motion (*see, Lafferty v*

Eklecco, LLC, 34 AD3d 754 [2nd Dept. 2006]). Moreover, it is improvident to deny leave to renew where it may fairly be said that the new matter was not raised because of excusable mistake or inadvertence (*see, MBNA America Bank, N.A. v. Anastasio*, 35 AD3d 474, 475 [2nd Dept. 2006]; *DeLeonardis v. Brown*, 15 AD3d 525 [2nd Dept. 2005]; *Mollin v County of Nassau*, 2 AD3d 600 [2nd Dept. 2003]).

Defendants herein are granted leave to renew their prior cross motion to dismiss the complaint insofar as asserted against defendant HVT. The Court denied defendants' earlier cross motion to dismiss. The Court reasoned that the defendants failed to meet their prima facie burden because the affidavit of Diane Adams upon which they relied did not comply with CPLR 2309(c) and did not constitute competent evidence since the affidavit failed to set forth the basis of the affiant's personal knowledge of the facts. However, in support of their motion for leave to renew, defendants offered the new affidavit of Ms. Adams, which clearly states the basis of her personal knowledge and includes a certificate of conformity in compliance with CPLR 2309(c), thereby correcting the inadvertent procedural errors (*see generally, Darwick v Paternoster*, 56 AD3d 714 [2nd Dept. 2008]; *Simpson v Tommy Hilfiger U.S.A., Inc.*, 48 AD3d 389 [2nd Dept. 2008]).

Upon renewal, the Court hereby vacates its prior order dated December 17, 2008, with respect to defendants' cross motion to dismiss the complaint insofar as asserted against defendant HVT. Defendants established, prima facie, their entitlement to judgment as a matter of law that the claim against defendant HVT is precluded by 49 U.S.C. section 30106, or the Graves Amendment. The Graves Amendment, when it applies, preempts the vicarious liability imposed on commercial lessors by New York Vehicle and Traffic Law section 388 in the absence of any negligence or criminal wrongdoing (*see, Graham v Dunkley*, 50 AD3d 55, 57-58 [2nd Dept.], *appeal dismissed*, 10 NY3d 835 [2008]). To claim immunity to vicarious liability under the Graves Amendment, the owner of the vehicle must be engaged in the trade or business of renting or leasing motor vehicles, the vehicle must have been rented or leased to a person, and harm to persons or property must have occurred during the period of the rental or lease (*see, 49 U.S.C. § 30106[a]*).

In her affidavit, Ms. Adams, the manager of the Procedures and Regulations Department of American Honda Finance Corporation, the service provider of the leasing program for defendant HVT stated that HVT's primary business function is leasing motor vehicles. She further averred that defendant HVT, Inc., was the owner and lessor of the vehicle operated by defendant Lauren Fradella, as lessee, on the date of the subject accident, which allegedly caused plaintiff to sustain personal injuries. Plaintiff did not oppose defendants' motion for leave to renew and, thus, failed to raise a triable issue of fact.

Accordingly, defendants' motion for leave to renew is granted in its entirety and plaintiff's claim against defendant HVT is dismissed.

The foregoing represents the decision, order, and opinion of the Court.

Hon. Charles J. Markey
Justice, Supreme Court, Queens County

Dated: Long Island City, New York
September 14, 2009

Appearances:

For the Defendants: Martin, Fallon & Mulle, by Richard C. Mulle, Esq., 100 East Carver St., Huntington, NY 11743

For the Plaintiff [No opposition to this Motion]: Block, O'Toole & Murphy, by Jeffrey A. Block, Esq., One Penn Plaza, suite 5315, New York, NY 10119