SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. JUDITH J. GISCHE** PART _____
J.S.C.

Index Number : 102961/2006

MOU, MINNIE

VS

ALAMO FINANCING LP

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this ~~motion~~

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 3/23/07

_____ J.S.C.
HON. JUDITH J. GISCHE

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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WINNIE MOU,

Plaintiff,

-against-

ALAMO FINANCING LP and RICHARD C. LANCER,

Defendants.

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Decision/Order
Index No.: 102961/06
Seq. No. : 001

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Dfdt's motion [sj/mt] w/MEP affirm in support, exhs	1
Pltf's PJM affirm in opp	2
Dfdt's reply w/ MJL affirm	3

Upon the foregoing papers, the decision and order of the court is as follows:

Plaintiff brought this action against defendant-driver Richard C. Lancer ("Lancer") and defendant-vehicle owner, Alamo Financing LP ("Alamo") to recover for personal injuries resulting from a motor vehicle accident. Presently before the court is Alamo's motion seeking an order granting summary judgment dismissing the claims against it.

Since issue has been joined, and the note of issue has not yet been filed, summary judgment relief is available. CPLR § 3212. Brill v. City of New York, 2 N.Y.3d 648 (2004). The court's decision follows.

Background

The material facts relevant to this motion are undisputed. Alamo is in the

business of renting or leasing motor vehicles. Pursuant to a Rental Agreement, dated August 19, 2005, Alamo rented a motor vehicle, which it owned, to Lancer. While Lancer was operating the motor vehicle, he struck plaintiff at the intersection of East 27th Street and Third Avenue in New York, New York.

Without distinguishing between either defendant, Plaintiff generally alleges in its complaint that the defendants were negligent in their ownership, operation, maintenance, management and control of their motor vehicle. Plaintiff argues that the accident and her resulting injuries were proximately caused by the defendants' negligence. On March 3, 2006, plaintiff filed a Summons and Verified Complaint. On April 17, 2006, Alamo and Lancer jointly served and filed a verified answer.

Alamo now moves for an order granting summary judgment on the basis that it is not vicariously liable for the negligent actions of the renter of one of its motor vehicles. It relies on the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU").[1] Alamo specifically argues that plaintiff's claim, made under N.Y. Veh. & Traf. Law § 388 ("VTL § 388"), is preempted by SAFETEA-LU. Lancer has taken no position on this motion.

Plaintiff opposes the instant motion and argues that the court should deny summary judgment in favor of Alamo, so that plaintiff may conduct discovery which may uncover facts which may remove Alamo from the protection of SAFETEA-LU. Plaintiff states "[w]ithout a scintilla of discovery, it is impossible to determine whether movant was negligent in entrusting its vehicle to the defendant driver."

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[1] 49 U.S.C.A. § 30106.

Discussion

On a motion for summary judgment, it is the movant's burden to set forth evidentiary facts to prove its *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. Only if this burden is met, must the party opposing the motion then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for his/her failure to do so. CPLR § 3212; Winegrad v. NYU Medical Center, 64 N.Y.2d 851 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Where, however, the proponent fails to make out its *prima facie* case for summary judgment, then the motion must be denied, regardless of the sufficiency the opposing papers. Alvarez v. Propect Hospital, 68 N.Y.2d 320 (1986); Ayotte v. Gervasio, 81 N.Y.2d 1062 (1993).

When issues of law are the only issues raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 A.D.2d 459 (2nd Dept. 2003).

Under VTL § 388, New York made car rental and leasing companies vicariously liable for the negligent actions of car renters or lessors. Murdza v. Zimmerman, 99 N.Y.2d 375 (2003). The intent of the New York State Legislature in adopting this provision was "to assure injured plaintiffs that there will be a financially responsible party to provide compensation for negligent driving." Tikhonova v. Ford Motor Co., 4 N.Y.3d 621 (2005).

However, in 2005, Congress enacted SAFETEA-LU which provides that any person who rents or leases a vehicle to a person cannot be held vicariously liable "under the laws of any state" for any harm their vehicles cause, as long as they are

"engaged in the trade or business of renting or leasing motor vehicles" and there is no "negligence or criminal wrongdoing" by the leasing company itself. SAFETEA-LU applies to all lawsuits filed on or after August 10, 2005, the day it was enacted.

To date, most New York courts have either supported or relied on SAFETEA-LU's preemption of state imposed vicarious liability laws in this context. Infante v. U-Haul Co. of Florida, 11 Misc.3d 529 (Sup. Ct. Queens Cty. 2006); King v. Car Rentals, Inc., 29 A.D.3d 205 (2 Dept. 2006); Roper v. Team Fleet Financing Corp., 814 N.Y.S.2d 892 10 Misc.3d 1080(A) (Sup. Ct. Bronx Cty. 2006); and Leuchner v. Cavanaugh, 13 Misc.3d 654 (Sup. Ct. Erie Cty. 2006). See also Murphy v. Pontillo, 12 Misc.3d 1146 (Sup. Ct. Nassau Cty. 2006). However, at least one lower court has held that SAFETEA-LU was an unconstitutional exercise of Congress' power under the Commerce Clause and consequently declined to dismiss the plaintiff's cause of action based on VTL § 388. Graham v. Dunkley, 13 Misc.3d 790 (Sup. Ct. Queens Cty. 2006). Since no argument is made by plaintiff regarding the constitutionality of SAFETEA-LU, the court does not reach the issue.

Therefore, the sole inquiry before the court is whether there are factual disputes precluding Alamo from coming within the protection of SAFETEA-LU. In other words, did Alamo itslelf act negligently or criminally when it entered into the Rental Agreement with co-defendant Lancer.

Plaintiff argues, in its opposition papers, that Alamo is liable based upon a theory of negligent entrustment. However, plaintiff has not alleged in its complaint negligent entrustment or any facts that would support such a cause of action. Rather, the complaint seeks only imposition of vicarious liability on Alamo. Plaintiff has not sought

to amend its complaint to assert a cause of action for negligent entrustment, and it has not set forth any facts on this motion which would support this new claim.

Plaintiff also contends that Alamo's motion should be denied because discovery has not even begun and she lacks information essential to vigorously oppose this motion. CPLR § 3212 (f) broadly provides that "[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just." That is not the case here. Plaintiff has not shown any facts or theories which would support any finding of negligence by Alamo. Nor has it shown what information it could obtain from Alamo to support its generalized allegations. CPLR § 3212(f) was not intended to alter the rule prohibiting discovery as a fishing expedition.

While plaintiff states "there is nothing but issues of fact since discovery has not even commenced," this court finds no triable issue of fact herein. Plaintiff has not offered any theory or any fact to support its claims against Alamo. Assertions, unsupported by any factual proof whatsoever, are of no probative value, and therefore, fail to raise a triable issue of fact. Lewis v. Safety Disposal System of Pennsylvania, Inc., 12 A.D.3d 324 (1st dept. 2004).

For these reasons, Alamo's motion for summary judgment dismissing this action against it, must be, and hereby is GRANTED in all respects. The Verified Complaint with respect to Alamo is hereby severed and dismissed. The Clerk shall enter judgment in favor of defendant Alamo, against plaintiff Winnie Mou, dismissing the Verified

Complaint, and any other claims against Alamo.

Since Lancer has not taken a position on the instant motion, plaintiff's claims against Lancer survive and may proceed. All remaining parties shall appear for a preliminary conference on **April 26, 2007 at 9:30 a.m.** in Part 10, 80 Centre Street, Room 122.

Conclusion

In accordance herewith, it is hereby:

ORDERED that the motion by Alamo Financing LP, for summary judgment is hereby granted and this action is hereby severed and dismissed as to Alamo Financing LP; and it is further

ORDERED that all remaining parties shall appear before the Hon. Judith J. Gische, on **April 26, 2007 at 9:30 a.m.**, in Part 10, 80 Centre Street, Room 122.

Any relief not expressly addressed herein has nonetheless been considered by the Court and is denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
March 23, 2007

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.