

Gordon v New York City Tr. Auth.

2007 NY Slip Op 31032(U)

April 19, 2007

Supreme Court, New York County

Docket Number: 0110425/2006

Judge: Donna Marie Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 21

GORDON, MYLES

INDEX No. 110425/06

Plaintiff

MOTION DATE _____

-v-

MOTION SEQ. No. 001

NEW YORK CITY TRANSIT AUTHORITY, et. al.,

Defendants.

MOTION CAL No. _____

The following papers, numbered 1 to _____ were read on this motion to amend.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits....

1+3

Answering Affidavits- Exhibits _____

2

Replying Affidavits _____

4

CROSS-MOTION: YES _____

NO _____

FILED
MAY 03 2007
NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion to amend and cross motion for summary judgment is decided as follows:

This action arises out of a motor vehicle accident which occurred on January 2, 2006 in New York County. It is alleged that at the subject location, plaintiff while waiting for a signal to cross the street, a bus operated by defendant Joseph Englanoff and owned by the New York City Transit Authority (NYCTA) collided with a vehicle operated by defendant Tricia M. Cipriani and owned by Volkswagen. The collision resulted in the Cipriani vehicle jumping the curb, entering the sidewalk and striking the plaintiff.

The defendant Volkswagen, now moves for leave to amend its answer to assert the affirmative defense of 49 U.S.C. § 30106 as it was, as they claim, inadvertently left out of its original answer. Leave to amend a pleading should be freely granted unless the amendment sought is palpably improper as a matter of law unless prejudice or surprise directly results from the delay (Uliano v Entenmann's Inc., 148 AD2d 604 [2d Dept. 1989]).

Volkswagen seeks leave to amend as a result of the Transportation Equity Act (49 USC § 30106) which expressly preempts New York State VTL § 388 which imposes vicarious liability upon owners of motor vehicles for negligent acts of permissive users. In opposition to the motion, plaintiffs are unable to show prejudice or surprise to the proposed amendment. The mere fact that the statute Volkswagen is seeking to rely upon to support the proposed amendment was available to them for quite some time, is not a bar to the proposed amendment in the absence of prejudice to plaintiff (see Alber Investment Company v Chatsworth Realty Corp., 186 AD2d 92 [1st Dept. 1992]).

The City of New York cross moves for summary judgment on the grounds that they are not a proper party to this action. They contend that plaintiff's cause of action arises out of injuries allegedly sustained from a motor vehicle accident which a City vehicle was not involved.

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (Rotuba Extruders v Ceppos, 46 NY2d 223 [1978]). "But when there is no genuine issue to be resolved at trial, the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the trial calendar and thus deny to other litigants the right to have

their claims promptly adjudicated” (Andre v Pomeroy, 35 NY2d 361 [1974]).

“To obtain summary judgment it is necessary that the movant establish his cause of action or defense ‘sufficiently to warrant the court as a matter of law in directing judgment’ in his favor (CPLR 3212[b]), and must do so by tender of evidentiary proof in admissible form.

Plaintiff has made a prima facie case for summary judgment by submitting the MV-104 accident report which shows that the subject vehicle which hit the Cipriani vehicle was registered to and owned by the NYCTA. It should be noted that the NYCTA does not oppose the cross-motion. The plaintiffs however oppose and contend that the cross motion should be denied because pre-discovery summary judgment notions are premature. “A plaintiff who opposes summary judgment on the basis of a need for discovery should support his position by attaching copies of notices, preliminary conference orders, letters requesting information or abstract searches. The court will not deny summary judgment because plaintiff has a speculative “hope” of finding needed information through discovery” (Moran v Regency Savings Bank, F.S.B., 20 Ad3d 902 [3d Dept. 2005]).


Accordingly it is

ORDERED that the defendant Volkswagen’s motion for leave to amend their answer is granted, and the amended answer in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the complaint and any cross-claims are dismissed against the defendant City of New York; and it is further

ORDERED that the remainder of the action shall continue.

Dated: 4-19-07



J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

FILED
MAY 03 2007
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