

Rabadi v Budget Rental Co.

2008 NY Slip Op 30760(U)

February 26, 2008

Supreme Court, New York County

Docket Number: 0111733/2006

Judge: Deborah A. Kaplan

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

PRESENT: HON. DEBORAH A. KAPLAN
Justice

PART 22

HANNA RABADI

INDEX NO. 111733-06

- v -

MOTION DATE 12-06-07

BUDGET RENTAL CO, et al.

MOTION SEQ. NO. 002

MOTION CAL. NO. 80

The following papers, numbered 1 to 3 were read on this motion by the plaintiff for summary judgment on the issue of liability and cross-motion by defendant Budget Rental Co. and Garden State Car Rental Corp. d/b/a Budget Rent A Car of Newark International Airport.

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

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED

1, 2

FILED

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Cross-Motion: Yes No

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As he was driving through the intersection of Eighth Avenue and West 19 Street in Manhattan on May 27, 2005, the plaintiff's vehicle was struck by a vehicle owned by defendants Budget Rental Co. and Garden State Car Rental Corp. d/b/a Budget Rent A Car of Newark International Airport and operated by defendant Jay Scott Lebowitz. A police report indicates that the defendant stated to an officer at the scene that he ran a red light at the subject intersection. The plaintiff commenced the instant action seeking damages for personal injuries she allegedly sustained in the accident. She now moves, pursuant to CPLR 3212, for summary judgment on the issue of liability. Defendants cross-move to dismiss the complaint as to Budget Rental Co. and Garden State Car Rental Corp. d/b/a Budget Rent A Car of Newark International Airport.

It is well settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. See Alvaraz v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). The moving party must demonstrate his or her entitlement to judgment as a matter of law by tendering proof in admissible form. See Friends of Animals, Inc. v Associated Fur Manufacturers, Inc., 46 NY2d 1065(1979). If moving party meets that burden, the opposing party, in order to

defeat the motion, must come forward with evidentiary proof in admissible form that would raise a triable issue of fact. See Alvaraz v Prospect Hospital, supra; Zuckerman v City of New York, supra. "The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet the strict requirement of tender in admissible form." Friends of Animals, Inc. v Associated Fur Manufacturers, Inc. supra at 1068.

In support of her motion, the plaintiff maintains that at the time of impact, she was driving through the subject intersection with the traffic light in her favor. She proffers the pleadings in this action, her attorney's affirmation, her own affidavit, and the police report which contains the statement attributed to the defendant Lebowitz. The plaintiff argues that the defendant's statement is admissible as an admission.

In opposition, the defendants argue that Lebowitz's statement contained in the police report constitutes inadmissible hearsay and therefore may not serve as the basis for summary judgment. It is not disputed that the defendant Lebowitz's statement contained in the police report, as an out-of-court statement offered for the truth of the fact asserted therein, constitutes hearsay and must, therefore, fall within one of the exceptions to the hearsay rule in order to be admissible. See generally Prince, Richardson on Evidence, § 8-101 et seq. [Farrell 11th ed.]

In the First Department, police reports are admissible as business records (CPLR 4518[a]) but only if the report is made based upon the officer's personal observations and while carrying out their police duties. See Holliday v Hudson Armored Car & Courier Service, Inc., 301 AD2d392 (1st Dept. 2003); Yeargans v Yeargans, 24 AD2d 280 (1st Dept. 1965). If the information contained in the report came from witnesses not engaged in the police business in the course of which the report was made, or it came from a witness who had no duty to report the information, the report is not admissible. See Johnson v Lutz, 226 App Div 772 (1930); Holliday v Hudson Armored Car & Courier Service, Inc., supra; Yeargans v Yeargans, supra; see also State Farm Mutual Automobile Insurance Co. v Langan, 18 AD3d 860 (2nd Dept. 2005); Connors v Duck's Cesspool Service, Ltd., 144 AD2d 329 (2nd Dept. 1988); Casey v Tierno, 127 AD2d 727 (2nd Dept. 1987). While the driver of an offending vehicle is required to provide the responding police officer with proof of registration of the vehicle (see Lopez v Ford Motor Credit Company, 238 AD2d 211 [1st Dept. 1997]), he or she has no duty to report the circumstances or the causes of the accident. See Cover v Cohen, 61 NY2d 261

[* 3]
(1984); Hatton v Gassler, 219 AD2d 697 (1st Dept. 1995); see also Mooney v Osowiecky, 235 AD2d 603 (3rd Dept. 1997). Indeed, the First Department has consistently held that a police report which contains hearsay statements regarding the ultimate issues of fact may not be admitted into evidence for the purpose of establishing the cause of the accident. See Figueroa v Luna, 281 AD2d 204 (1st Dept. 2001); Aetna Casualty & Surety Co. v Island Transportation, 233 AD2d 157 (1st Dept. 1996); Sansevere v United Parcel Service, Inc., 181 AD2d 521 (1st Dept. 1992); Kajoshaj v Greenspan, 88 AD2d 538 (1st Dept. 1982); Murray v Donlan, 77 AD2d 337 (2nd Dept. 1980).

Since the plaintiff makes no persuasive argument for admission of the defendant's statement under any exception to the hearsay rule, she may not rely upon it to meet her burden on this motion. Nor does the remainder of the plaintiff's proof establish prima facie entitlement to judgment as a matter of law.

The defendants point out that they have not been provided with any discovery including a deposition of plaintiff. As such, the plaintiff's motion may simply be premature. It appears to the court that "facts essential to justify opposition [to the motion] may exist but cannot then be stated" without further discovery. CPLR 3212(f). See Downey v Local 46 2nd Holding Company, 34 AD3d 318 (1st Dept. 2006); Denby v Pace University, 294 AD2d 156 (1st Dept. 2002); Schachat v Bell Atlantic Corp., 282 AD2d 329 (1st Dept. 2001). "A party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment." Amico v Melville Volunteer Fire Company, 39 AD3d 784 (2d Dept. 2007); see Martinez v Fernandez, 37 AD3d 373 (1st Dept. 2007).

Defendants cross-move to dismiss the complaint as to Budget Rental Co. and Garden State Car Rental Corp. d/b/a Budget Rent A Car of Newark International Airport on the basis that they were lessors of the offending vehicle and thus, are barred pursuant to 49 U.S.C. 30106.

49 U.S.C. 30106, known as the "Graves Amendment" to the "Safe Accountable, Flexible, Efficient Transportation Equity Act", provides that a leasing company shall not be held vicariously liable under any State law for damages sustained in a motor vehicle accident arising from the negligence of the driver of the leased vehicle. The federal statute preempts Vehicle and Traffic Law 388 to all actions commenced after August 10, 2005.

In opposition plaintiff cites Graham v. Dunkley, 827 N.Y.S.2d 513 (Sup. Ct. Queens Co. 2006), which is unpersuasive in light of the Second Department's reversal of the lower court ruling which held that the "Graves Amendment" is constitutional. Graham v. Dunkley, -- N.Y.S.2d -- (2 Dept. 2008). Therefore, the complaint must be dismissed as to defendants Budget Rental Co. and Garden State Car Rental Corp. d/b/a Budget Rent A Car of Newark International Airport.

For these reasons and upon the foregoing papers, it is,

ORDERED that the plaintiff's motion for partial summary judgment on the issue of liability is denied, without prejudice to renew upon the completion of discovery, and it is further,

ORDERED that the motion of defendants for summary judgment to dismiss the complaint as to defendants Budget Rental Co. and Garden State Car Rental Corp. d/b/a Budget Rent A Car of Newark International Airport is granted, and it is further,

ORDERED that the remainder of the action as against defendant Lebowitz is severed and will continue, and it is further,

FILED

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendants Budget Rental Co. and Garden State Car Rental Corp. d/b/a Budget Rent A Car of Newark International Airport, dismissing the complaint only as to them, with costs and disbursements to defendants as taxed by the Clerk, and it is further,

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ORDERED that plaintiff and the remaining defendant Lebowitz are to appear at DCM at 80 Centre St., Room 103, on Monday, March 17, 2008, at 9:30 a.m. for a compliance conference.

This constitutes the Decision and Order of the Court.

Dated: February 26, 2008

Deborah Kaplan

Deborah A. Kaplan, KARLAN
DEBORAH A. KARLAN
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST