

Pantzer v Perkal

2008 NY Slip Op 31370(U)

May 5, 2008

Supreme Court, New York County

Docket Number: 0109309/2006

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

JERRY PANTZER

INDEX NO. 109309/06

- v -

HARRY PERKAL, et al.

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. 80

FILED

MAY 15 2008

COUNTY CLERK'S OFFICE
NEW YORK

The following papers, numbered 1 to _____ were read on this motion and cross-motions for summary judgment.

PAPERS NUMBERED

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

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

Cross-Motion: Yes No

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SUPPORT OFFICE

Upon the foregoing appears, it is

ORDERED that the motion of defendants Belrose Cab Corp. and Jana Stroe is denied in its entirety, and it is further,

ORDERED that the cross-motion of defendants Wendy Dale and Peter Miller is denied in its entirety, and it is further,

ORDERED that the cross-motion of defendants Harry Perkal and VM Credit Leasing Corp. is granted in regard to defendant VM Credit Leasing Corp. only, and the complaint and all cross-claims against that defendant are dismissed, and the cross-motion is otherwise denied, in accordance with the attached Opinion of the Court, and it is further,

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: May 5, 2008

Deborah Kaplan

Deborah A. Kaplan J.S.C.

DEBORAH A. KAPLAN

J.B.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MMAF

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 22

-----x
JERRY PANTZER,

Plaintiff,

Index No.: 109309/06

- against -

HARRY PERKAL, V.M. CREDIT LEASING,
TIMOTHY TWOMEY, RETOUCHABLES GROUP
INC., JANA STROE, BELROSE CAB CORP.,
WENDY DALE and PETER MILLER,

FILED

MAY 15 2008

Defendants.

-----x
DEBORAH KAPLAN, J:

COUNTY CLERK'S OFFICE
NEW YORK

This is a negligence action brought by plaintiff, Jerry Pantzer, to recover for personal injuries allegedly sustained as a result of a four-car collision that occurred on January 8, 2006 (the Accident).

Defendants Belrose Cab Corp. (Belrose) and Jana Stroe move, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint, as against them on the ground that plaintiff failed to establish liability.

Defendants Wendy Dale and Peter Miller cross-move, pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint against them on the same ground.

Defendants Harry Perkal and VM Credit Leasing (VM Credit) cross-move, pursuant to CPLR 3212, for an order granting them summary judgment dismissing the complaint and any and all cross claims against them on the grounds that no triable issue of fact exists on the issue of liability; and further, with respect to VM Credit that it cannot be held vicariously liable pursuant to 49 U.S.C. § 30106, as amended on August 10, 2005.

Plaintiff and defendants Twomey and Retouchables Group, Inc. (Retouchables) oppose the motions.

For the following reasons, the motions made by defendants Belrose, Stroe, Dale Miller and Perkal are denied and the cross motion by VM Credit is granted in part.

Background

The Accident

On January 8, 2006, plaintiff was involved in a four-car collision on the northbound side of the West Side Highway in the county, city and State of New York (the Accident). At the time of the Accident, plaintiff was riding as a passenger in a taxi, owned by Belrose and driven by Stroe. The accident occurred at the intersection near West 59th Street.

Plaintiff's testimony regarding the Accident

As noted above, on the day of the Accident, plaintiff was riding as a passenger in a taxi cab, when he felt and heard an impact from the rear of the vehicle (Plaintiff's dep., p. 29, Exhibit F, at Trivedi Affirmation in Support). Plaintiff has no knowledge of which car struck the cab (*id.*, p. 31). As a result of the Accident, plaintiff sustained a number of injuries.

Perkal's testimony regarding the Accident

Perkal testified that on the day of the Accident, he was proceeding northbound on the West Side Highway, driving in the

extreme left lane, at all times up until the Accident (Perkal dep., pp. 18-19, 25, Exhibit J to the Eisenman Affirmation in Opposition). According to Perkal, a dark colored pick-up truck [which was allegedly driven by Twomey] rear-ended his vehicle twice, with both impacts occurring within "two seconds" of each other, forcing Perkal's vehicle to strike the concrete divider to his left (id., pp. 25, 27-30).

Following the second impact, Perkal witnessed the pick-up truck proceed from the extreme left lane to the extreme right lane of the West Side Highway, striking the rear of the taxi (id., pp. 37-40). The pick-up truck then flipped over numerous times (id., p. 40). Perkal testified that he did not observe the taxi make contact with any other vehicle after being rear-ended by the pick-up truck (id., pp. 44, 83-85).

Twomey's testimony regarding the Accident

Twomey, owner of Retouchables, testified that on the day in question he was driving a pick-up truck (Twomey dep., pp. 8- 10, Exhibit K to Eisenman Affidavit in Opposition). Contrary to Perkal's testimony, Twomey testified that he remained in the extreme right lane from the time he entered the West Side Highway until the Accident (id., pp. 16, 20). At the time of the Accident, Twomey's vehicle was rear-ended by an unknown vehicle causing his truck to flip (id.) Twomey does not recall whether his vehicle was involved in additional impacts, or if any other vehicles were involved in the accident (id., pp. 21, 23, 34-35).

Stroe's testimony regarding the Accident

Stroe testified that when she entered the West Side Highway, she proceeded north in the extreme right lane until the time of the Accident (Stroe dep., pp. 18 - 21, Exhibit H to Eisenman Affidavit in Opposition). The taxi was rear-ended by a dark colored vehicle while she was traveling in the extreme right lane (id., pp. 34-35). After the initial impact, the dark colored vehicle flipped numerous times and struck the top portion of the taxi before coming to a rest upside down at or near the divider (id., pp. 26-27). Stroe testified that her vehicle did not make contact with any other vehicle at any point during the Accident (id., p. 20), but that the right side of the taxi came into contact with the cement barrier along the highway (id., pp. 29-30).

Report of Motor Vehicle Accident filed by Stroe (Motor Vehicle Report)

According to the Motor Vehicle Report, Stroe reported that she "was traveling [northbound] on [sic] West Side Highway in middle lane [sic] [Twomey's vehicle] came running down and rear-ended [Stroe's vehicle] and made [Stroe's vehicle] crush into the wall and then [Twomey's vehicle] fell upside down on top of [Stroe's vehicle] and slid [sic] in front of [Stroe's vehicle]" (see Exhibit E, Trivedi Affirmation in Support [emphasis added]). During her deposition, when presented with the document, Stroe testified that she never filled out the report and denied that

the signature on the document was hers (Stroe dep., pp. 58-61).

Dale's testimony regarding the Accident

Dale testified that on the day in question, she was driving a van (Dale dep., p. 8, Exh. I to Eisenman Affidavit in Opposition). On that day, she was driving northbound on the West Side Highway in the middle lane when she was rear-ended by another vehicle (id., p. 14). Dale recalls overhearing that she was rear-ended by a taxi, but she has no independent knowledge as to which vehicle hit her car (id., pp. 18-19). Dale testified that after being hit, she did not come into contact with any other vehicle (id., p. 15). After the accident Dale observed that: (1) the taxi cab was about 100 to 200 feet behind her car (id., p. 17); (2) the cab was to the left of Dale's car (id., p. 27); and (3) that a dark colored car had flipped over the guardrail (id., pp. 24, 28).

Police Accident Report dated January 8, 2006

According to the Police Accident Report:

"[Perkal] states he was travelling [sic] [northbound] on West Side Hwy. at [approximately] 59th St. when he was struck from behind by [Twomey]. [Perkal] states he continued travelling [sic] northbound when [Twomey] hit him again from behind, at [approximately] 66 St. causing damage to the back of [Perkal's vehicle]. [Twomey] states [Perkal] then swerved around his car and sped past [sic] them ramming into back of [the vehicle driven by Stroe] causing [Twomey] to flip over and sending [Stroe's vehicle] into back of [Dale's vehicle] causing front and rear damage to [Stroe's vehicle] and damage to the back of [Dale's vehicle]. [Dale]

states she heard brakes screech and thinks it was [Stroe's vehicle] that hit her."

(see Exhibit D, Trivedi Affirmation in Support).

Discussion

In order to grant summary judgment, there must be no material or triable issues of fact presented (Ayotte v Gervasio, 81 NY2d 1062 [1993]; Esteve v City of New York, 30 AD3d 212 [1st Dept 2006]). The movant must proffer admissible evidence to make a prima facie showing that establishes the cause(s) of action "succinctly to warrant the court as a matter of law in directing judgment" (CPLR 3212; see also Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Esteve, 30 AD3d 212). Once the moving party has made this showing, the burden is on the opposing party to demonstrate "the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so" (Zuckerman, 49 NY2d at 562). That is, summary judgment may only be granted if there is no triable issue of fact presented (id.).

In deciding a summary judgment motion, the court must bear in mind that issue finding rather than issue determination is the key (see Sillman v Twentieth Century Fox Film Corp., 3 NY2d 395 [1957]). Since summary judgment is a drastic remedy which deprives a litigant of his or her day in court, the evidence adduced on the motion must be liberally construed in the light most favorable to the opposing party (see Kesselman v Lever House Restaurant, 29 AD3d 302 [1st Dept. 2006]; Goldman v Metropolitan

Life Ins. Co., 13 AD3d 289 [1st Dept. 2004]).

In order to establish a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and that the breach was a proximate cause of the plaintiff's injury (Kenney v City of New York, 30 AD3d 261, 262 [1st Dept 2006], citing Palsgraf v. Long Is. R.R. Co., 248 NY 339 [1928]; see also Wayburn v Madison Land Ltd. Partnership, 282 AD2d 301, 302 [1st Dept 2001]).

Similar to the case at bar, in Spuhler v Kahn (14 AD3d 693, 694 [2d Dept 2005]), the Second Department "note[d] that in this hit-in-the-rear case involving four vehicles [t]he Supreme Court properly denied summary judgment to the remaining defendants, as the deposition testimony of those parties raises a triable of [sic] issue of fact as to the role of each of them in the happening of the accident". Here, it is clear that each of the deponents offer a different version of the events, and it is not for the court to decide upon which of those facts are more accurate or credible.

The conflicting deposition testimony raises an issue of credibility which is a factual determination for the jury (see Ramos v Rojas, 37 AD3d 291 [1st Dept 2007]; see also Elamin v Roberts Express, Inc., 290 AD2d 291, 291 [1st Dept 2002] [conflicting deposition testimony "raises an issue of credibility inappropriate for resolution on a motion for summary judgment"], citing Sanchez v Finke, 288 AD2d 122 [1st Dept 2001]).

As there exists numerous questions of fact with respect, inter alia, as to how the Accident occurred and which party or parties may have been wholly or partly responsible for the Accident and the plaintiffs' injuries, summary judgment on the issue of liability as to defendants Perkal, Twomey, Retouchables Group Inc., Stroe, Belrose, Dale and Miller is denied.

Liability as to VM Credit

VM Credit cross-moves for an order dismissing the complaint and any and all cross claims against it on the grounds that it cannot be held vicariously liable pursuant to 49 U.S.C. § 30106, as amended August 10, 2005 (Graves Amendment). This court agrees.

New York's Vehicle and Traffic Law § 388, provides, in relevant part:

"Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner."

However, in 2005, 49 U.S.C. § 30106, known as the Graves Amendment, was enacted, and provides that any owner of a motor vehicle that rents or leases the vehicle shall not be liable under the law of any State by reason of being an owner of the vehicle, for harm to any persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease so long as the owner is

owner. The federal statute preempts Vehicle and Traffic Law §388 and bars State law vicarious liability actions commenced on or after August 10, 2005 (see Graham v Dunkley, 50 AD3d 55 [2d Dept 2008]; Hernandez v Sanchez, 40 AD3d 446 (1st Dept. 2007); Kuryla v Halabi, 39 AD3d 485 [2d Dept 2007]; Jones v Bill, 34 AD3d 741 [2d Dept 2006]).

Here, plaintiff commenced the action after August 10, 2005, there is no dispute that the moving defendant is engaged in the trade or business of renting or leasing motor vehicle and the complaint alleges no claim of negligence as against that defendant. As the Second Department held in Graham, supra, "actions against rental and leasing companies based solely on vicarious liability may no longer be maintained." Therefore, the Graves Amendment bars the instant claims against defendant VM Credit. Accordingly, VM Credit's motion to dismiss the complaint and cross-claims against it is granted.

Conclusion

Accordingly, it is

ORDERED that the motion for summary judgment by defendants Belrose Cab Corp. and Jana Stroe is denied; and it is further,

ORDERED that the cross motion for summary judgment by defendants Wendy Dale and Peter Miller is denied; and it is further,

ORDERED that the cross motion for summary judgment by defendants Harry Perkal and VM Credit Leasing is granted to the

extent that the Complaint and any cross claims against defendant VM Credit Leasing are dismissed, and the motion is denied as to defendant Perkal; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: May 5, 2008

ENTER:

Deborah Kaplan

J.S.C.
DEBORAH A. KAPLAN
J.S.C.

FILED
MAY 15 2008
COUNTY CLERK'S OFFICE
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