

Glickman v City of New York

2008 NY Slip Op 31507(U)

May 29, 2008

Supreme Court, New York County

Docket Number: 0110545/2007

Judge: Eileen A. Rakower

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

PRESENT: EILEEN A. HAKOWER
J.S.C.

PART 5

Index Number : 110545/2007

GLICKMAN, MEYER

INDEX NO. 110545/07

vs

CITY OF NEW YORK

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. 001

DISMISS ACTION

MOTION CAL. NO. _____

is motion to/for _____

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

6, 3, 4

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

FILED
JUN 03 2008
COUNTY CLERK'S OFFICE
NEW YORK

ACCOMPANYING DECISION / ORDER

Dated: 5/29/08

[Signature]
J.S.C.

EILEEN A. HAKOWER

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
MEYER GLICKMAN and BEATRICE SOURY-LAVERGNE,

Plaintiffs,

Index No.
110545/07

Mot. Seq. No. :
001

- against -

Decision and
Order

CITY OF NEW YORK, ARTHUR N. ABBEY,
HORACE A. CREARY, GEORGE TAWIA,
CAR RENTALS, INC. and PHUNG T. PHAM,

Defendants.

FILED
JUN 03 2008
COUNTY CLERK'S OFFICE
NEW YORK

HON. EILEEN A. RAKOWER

Plaintiffs bring this action for personal injuries allegedly sustained when plaintiff Meyer Glickman tripped and fell over a tree grate in front of the premises known as 212 East 39th Street in the County and State of New York on January 7, 2007. Beatrice Soury-Lavergne brings a derivative action. The defective tree grate was allegedly damaged when a car accident occurred between two vehicles five days earlier. Defendant Car Rentals, Inc. ("Rentals"), owner of one of the vehicles involved in that accident, moves to dismiss pursuant to CPLR 3211(a)(7). The vehicle in question was rented to NBC Universal Inc. ("NBC") in connection with the production of "The Bourne Ultimatum." Plaintiffs and defendant Phung T. Pham ("Pham"), driver of Rentals' vehicle, oppose. Defendants the City of New York, Arthur N. Abbey, Horace A. Creary, and George Tawia do not submit papers.

Rentals argues that it is not liable for Mr. Glickman's injuries pursuant to the federal statute known as the Graves Amendment (*see* 49 U.S.C. §30106) which was

signed into law on August 10, 2005.

The Graves Amendment states, in relevant part:

In general. An owner of a motor vehicle that rents or leases the vehicle to a person (or an affiliate of the owner) shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner) for harm to 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, if -

- (1) the owner . . . is engaged in the trade or business of renting or leasing motor vehicles; and
- (2) there is no negligence or criminal wrongdoing on the part of the owner (or and affiliate of the owner).

Plaintiff and Pham, in opposition, argue that as no discovery has yet been conducted, the motion is premature. Specifically, they argue that Rentals has not established that it was neither negligent nor guilty of criminal wrongdoing. Plaintiff points out that Rentals has not provided the rental agreement between it and NBC, which would show that there was a “legal” rental agreement. However, Rentals did include the agreement in its motion papers.

Initially, the sole criterion when deciding a motion to dismiss based on failure to state a cause of action is whether there is any cause of action cognizable at law from the four corners of the complaint. However, when the party opposing the motion submits evidentiary material to be considered in addition to the complaint, the question becomes whether the proponent of the pleading *has* a cause of action, not whether he has stated one. (Guggenheimer v. Ginzburg, 43 N.Y.2d 268[1977]).

In a recent decision by the Appellate Division, Second Department, the Graves Amendment was upheld as constitutional. (Graham v. Dunkley, 50 AD3d 55[2nd Dept. 2008]). There, the court dismissed the complaint as against the defendant car rental company because plaintiff did not allege any affirmative negligence on the part of the rental company. Rather the action was based solely on vicarious liability. Here, as in Graham, plaintiffs do not allege in their complaint that Rentals was negligent or committed any wrongdoing. Thus, their claim is barred by the Graves Amendment and

the complaint is dismissed as to Rentals.

That discovery is not complete does not mandate a different result. Where facts essential to justify opposition to a motion for summary judgment are within the exclusive knowledge and possession of the moving party, summary judgment should be denied. Yet, neither Pham nor plaintiff have asserted facts suggesting Rentals was negligent. No such negligence is alleged in the plaintiff's complaint, and no cross claim by Pham was pleaded or provided to the Court with Pham's submissions.

Wherefore it is hereby

ORDERED that the motion to dismiss is granted and the complaint is hereby severed and dismissed as against defendant Car Rentals, Inc., and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the remainder of the action shall continue.

DATED: May 29, 2008


EILEEN A. RAKOWER, J.S.C

FILED
MAY 29 2008
COUNTY CLERK'S OFFICE
NEW YORK