

Lexington Ins. Co. v G&K Taxi Inc.

2008 NY Slip Op 32648(U)

September 22, 2008

Supreme Court, New York County

Docket Number: 104496-2007

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 22

LEXINGTON INSURANCE COMPANY, as
subrogees of FLATIRON LEASING PARTNERS,
LLC. And all other Insureds under policy number
7478058,

Plaintiffs,

- v -

G&K TAXI INC. and ALASHKAR KUNDLAS,
Defendants.

INDEX NO. 104496-2007

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. 31

The following papers, numbered 1 to 4, were read on the motions by defendant Kundlas for summary judgment on liability, cross-motion by defendant G&K Taxi Inc. dismissing the complaint as against it and cross-motion by plaintiff to amend the complaint

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

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

Cross-Motion: Yes No

PAPERS NUMBERED

1, 2, 3

4

FILED
OCT 02 2008
COUNTY CLERK'S OFFICE
NEW YORK

BACKGROUND

On or about April 3, 2007, plaintiff Lexington Insurance Company commenced this action to recover damages for insurance proceeds for property damage paid to the Flatiron Leasing Partners, LLC., who sustained property damage at 175 Fifth Avenue, New York, New York, resulting from a two in a car motor vehicle accident. The complaint alleges that on August 13, 2006, a taxicab owned by the defendant Kundlas and driven by the co-owner Paraqmjit Singh, struck the taxicab owned by the defendant G&K Taxi Inc. and driven by Evi Soon Kim, pushing the later cab into the building and causing damage in th amount of \$106,399.38. The building was insured by the plaintiff Lexington Insurance Company, which paid the insured the sum of \$106,399.38., less

the \$25,000.00 deductible on the policy.

Defendant Kundlas moves on January 29, 2008, for an order pursuant to CPLR § 3212, granting summary judgment on the issue of liability. On March 7, 2008, defendant G&K Taxi Inc. cross-moves for an order seeking summary judgment dismissing the complaint pursuant to CPLR § 3212, asserting that the Transportation Equity Act of 2005 (49 U.S.C. § 30106) or so called "Graves Amendment," preempts the New York Vehicle and Traffic Law § 388. On March 28, 2008, plaintiff cross-moves to serve an amended complaint to add additional defendants.

SUMMARY JUDGMENT STANDARD

The proponent of a motion for summary judgment is required to make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*JMD Holding Corp. v Congress Fin. Corp.*, 795 NY2d 502 [2005]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Medical Center*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Thomas v Holzberg*, 751 NY2d 433, 434 [1 Dept 2002]; *Silverman v. Perlbinde*, 762 NY2d 386 [1 Dept 2003]). The failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Medical Center, supra*). The motion must be supported "by affidavit...from a person having knowledge of the facts, by a copy of the pleadings and by other available proof . . ." (CPLR § 3212 [b]). A conclusory affidavit, expressions of hope, unsubstantiated allegations or an affidavit by an individual without personal knowledge

of the facts does not establish the proponent's prima facie burden (*Winegrad v New York Univ. Medical Center, supra*).

Where the proponent of the motion has made a *prima facie* showing, the burden then shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a triable issue of fact (*Vermette v Kenworth Truck Co.*, 68 NY2d 714 [1986]; *Zuckerman v City of New York, supra*; *Forrest v Jewish Guild for the Blind*, 765 NY2d 326 [1 Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in to sufficiently establish the existence of a "serious injury," which mandate's resolution by trial.

DISCUSSION

a. Defendant Kundlas's motion for an order seeking summary judgment on liability, pursuant to CPLR § 3212.

In support of defendant Kundlas' motion he has submitted, the pleadings, an affirmation by his counsel, and a partial deposition testimony of nonparty Paraqmjit Singh. In addition, defendant Kundlas Counsel's affirmation refers to the deposition of "non-party Mr Kundlas" (See attorney affirmation, p. 4, para. 5), however, this reference appears to be a error. Kundlas is clearly not a nonparty, but a named defendant and the referenced testimony is of non-party Singh. In opposition to the motion, the defendant G & K Taxi Inc. proffers, counsel's affirmation, a certified copy of the police accident report, an uncertified copy of the New York State Motor Vehicle Accident Report and the *full* deposition of the nonparty witnesses, taxi cab drivers Singh and Evi Soon Kim.

In this instance defendant Kundlas has not produced sufficient evidence in admissible form to make a *prima facie* showing of entitlement to judgment as a matter of law. (*Winegrad v New York Univ. Med. Ctr., surpa; Zuckerman v City of New York, surpa; Silverman v Perlbinder, surpa; Thomas v Holzberg, surpa*). A excerpt of Singh's deposition testimony is not in admissible form and thus will not be considered on this motion (CPLR § 3116; *Pina v. Flik Intern. Corp.*, 808 NYS2d 752 [2 Dept 2006]; *Santos v. Intown Associates*, 793 NYS2d 477 [2 Dept 2005]).

Accordingly, defendant Kundlas has not met his burden.

b. Defendant G&K Taxi Inc.'s cross-motion for an order seeking summary judgment dismissing the complaint pursuant to CPLR § 3212, asserting that the Transportation Equity Act of 2005 (49 U.S.C. § 30106) or so called "Graves Amendment," preempts the New York Vehicle and Traffic Law § 388.

The New York Vehicle and Traffic Law § 388, imposes vicarious liability upon the lessor of a vehicle for the negligence of the driver. The Graves Amendment, 49 U.S.C. § 30106, enacted on August 10, 2005, provides that "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 (or an affiliate of 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 an affiliate of the owner)."

There can be no question that the Graves Amendment preempts Vehicle and Traffic Law § 388 which imposes vicarious liability on businesses that rent or lease

motor vehicles in certain circumstances. First, by the Application of the Supremacy Clause of Article IV of the United States Constitution (U.S.C.A. Const. Art. VI cl. 2; *Graham v Duckley*, 852 NYS2d 169 [2 Dept 2008], *appeal dismissed*, 10 NY3d 835 [2008]). Second, the New York State Court of Appeals has held to enforce the preemption of Vehicle and Traffic Law § 388 by the Graves Amendment (see *Graham v Duckley*, *supra*; *Johnson v Kling*, 854 NYS2d 648 [2 Dept 2008], *reversed on other grounds*, 10 NY3d 887 [2008]; *Hernandez v Sanchez*, 836 NYS2d 577 [1 Dept 2007]; *Kuryla v Halabi*, 835 NYS2d 230 [2 Dept 2007]; *Jones v Bill*, 825 NYS2d 508 [2 Dept 2006], *reversed on other grounds*, 10 NY3d 550 [2008]). Third, this Court is further guided by the recent Federal Court decision in *Flagler v Budget Rent a Car Systems*, 538 F. Supp. 2d 557 [E.D.N.Y. 2008], *citing United States v Locke*, 529 U.S. 89, 109, 120 [2000], which found the Graves Amendment Constitutional.

However, the "Graves Amendment" does not apply to taxi medallions which are leased. New York Administrative Code Sec. 19-530(1) provides in part that the owner of the taxicab medallion, is fully responsible for the operation of the taxicab (see, *James v. R & G Hacking Corp.*, 39 A.D.3d 385 [1 Dept 2007]; *Piaseczny v. Bartolo*, 271 A.D.2d 267 [1 Dept 2000]).

Accordingly, defendant G&K Taxi Inc.'s motion to dismiss dismissing the complaint pursuant to CPLR § 3212. is denied.

c. Plaintiff's cross-motion to serve an amended complaint to add additional defendants.

Plaintiff Lexington Insurance Company moves to amend the complaint to add an

additional defendants Evi Soon Kim and Paramjit Singh, the driver and co-owner of the two taxicabs in the subject accident. CPLR Rule § 3025 provides that leave to amend a pleading shall be freely given absent prejudice. Defendants have not submitted any opposition. Thus, the motion is granted.

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

ORDERED that the motion of defendant Kundlas for summary judgement is denied, and it is further,

ORDERED that the motion of defendant G&K Taxi Inc. to dismiss the complaint as against it is denied, and it is further,

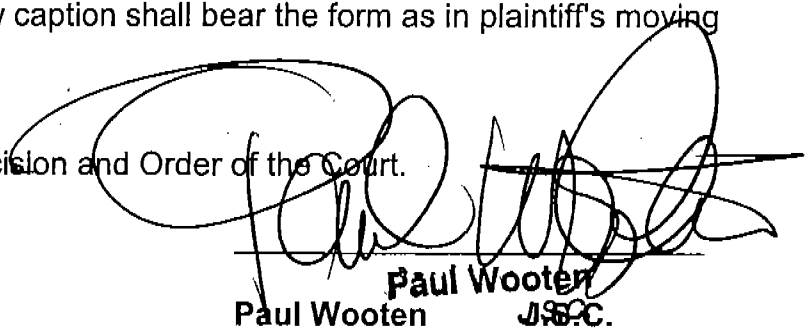
ORDERED that the motion of plaintiff for leave to amend the summons and verified complaint, pursuant to CPLR 3025(b), to amend the pleadings to add additional defendants Evi Soon Kim and Paramjit Singh is granted; and It is further,

ORDERED that the plaintiff will serve a copy of the proposed supplemental summons and amended complaint on defendants Evi Soon Kim and Paramjit Singh in accordance with the CPLR; and it is further,

ORDERED that the new caption shall bear the form as in plaintiff's moving papers.

This constitutes the Decision and Order of the Court.

Dated: September 22, 2008


Paul Wooten
Paul Wooten
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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