

**Cropper v Stewart**

2009 NY Slip Op 30595(U)

March 17, 2009

Supreme Court, New York County

Docket Number: 114878/2006

Judge: Harold B. Beeler

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: \_\_\_\_\_

PART 21

Index Number : 114878/2006  
**CROPPER, CUMAN**  
VS.  
**STEWART, M.D.**  
SEQUENCE NUMBER : 005  
SUMMARY JUDGMENT

INDEX NO. 114878/2006  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:     Yes     No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE  
WITH THE ATTACHED MEMORANDUM DECISION.**

**FILED**  
MAR 20 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 3/17/09

[Signature]  
**HAROLD BEELER**    J.S.C.

Check one:     FINAL DISPOSITION     NON-FINAL DISPOSITION

Check if appropriate:     DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 21

-----X  
CUMAN CROPPER,

Plaintiff,

-against-

M.D. STEWART, NEW YORK CITY TRANSIT  
AUTHORITY, MANHATTAN AND BRONX  
SURFACE TRANSIT OPERATING AUTHORITY,  
METROPOLITAN TRANSIT AUTHORITY,  
PETER CAB CORPORATION, and SAID N. FAOUI  
Defendants  
-----X

Index No. 114878/2006  
SEQUENCE MS005  
DECISION & ORDER

**FILED**  
MAR 20 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

**HAROLD B. BEELER, J.S.C.:**

Plaintiff moves for summary judgment on liability against defendants M.D. Stewart ("Stewart") and New York City Transit Authority ("Transit Authority"). Peter Cab Corporation ("Peter Cab") and Said N. Faoui ("Faoui"), as cross-claimants, also move for summary judgment against Stewart and Transit Authority. Transit Authority opposes these motions. Stewart has defaulted on these motions.

At issue is whether summary judgment on default against Stewart, a bus driver employed by the Transit Authority at the time of the accident which led to plaintiff's alleged injuries, warrants summary judgment against Transit Authority as well. For reasons discussed herein, this court holds that summary judgment against the Transit Authority is not appropriate.

On June 19, 2006, there was a motor vehicle accident involving a Transit Authority bus operated by Stewart, a taxicab owned by Peter Cab and driven by Faoui, and plaintiff on his bicycle, on Tenth Avenue close to the intersection at West 44th Street.

Plaintiff timely filed a Summons and Complaint against all defendants. New York Transit

Authority answered for itself as well as Stewart. Peter Cab answered for itself and Faoui, and filed a cross-claim against Stewart and Transit Authority.

On October 8, 2007, Transit Authority’s counsel was relieved as counsel for Stewart. On May 30, 2008, after Stewart failed to comply with plaintiff’s discovery demands and orders of the Court to respond to these demands and appear for a deposition, plaintiff moved to strike Stewart’s answer.

On July 1, 2008, the motion to strike Stewart’s answer was conditionally granted by Justice Mills. The order reads in full:

“Upon the foregoing papers, it is ordered that this motion to strike the defendant Marvin Stewart’s answer for failure to comply with discovery demands, is granted on default, to the limited extent, that Mr. Stewart is Ordered to submit to a deposition within 15 days of receiving a copy of this Order with Notice of Entry. Failure of Mr. Stewart to comply with this Order will result in his answer being stricken.”

Plaintiff served Stewart with the Order and Notice of Entry as required by Justice Mills’s order, as well as a Notice of Deposition. Stewart did not respond.

Stewart’s answer is struck and all allegations against him are deemed to be admitted, because Stewart has failed to comply with previous orders to submit to deposition, and has thereafter defaulted on this motion for summary judgment. Accordingly, plaintiff’s and cross-claim plaintiffs’ motions for summary judgment are granted against Stewart as to liability only.

Plaintiff argues that because summary judgment is granted against Stewart, and the action against Transit Authority is predicated on vicarious liability based on respondeat superior, then summary judgment also must be awarded against Transit Authority. Transit Authority argues that summary judgment is inappropriate because Transit Authority should still have the opportunity to

present a defense at trial, on the issue of the bus operator's negligence as well as any comparative negligence of the plaintiff and co-defendants.

This Court agrees with Transit Authority. The same question was presented in *Balanta v. Stanlaine Taxi Corp.*, 307 A.D.2d 1017, 763 N.Y.S.2d 840 (2d Dep't 2003). In *Balanta*, a vehicle owned by defendant Stanlaine Taxi Corp. ("Stanlaine") and driven by defendant Ranjit Singh ("Singh") crashed into a vehicle driven by plaintiff. Plaintiff driver and her passenger brought suit against defendants. Stanlaine asserted a counterclaim against plaintiff driver. Singh defaulted, and a default judgment was granted against him. Plaintiffs moved for summary judgment against Stanlaine, arguing that because default judgment was granted against the driver, summary judgment was also warranted against the vehicle's owner based on Vehicle and Traffic Law § 388 (1). The Second Department held that summary judgment as to Stanlaine must be denied, because Stanlaine should not be precluded from contesting Singh's negligence, as well as to whether plaintiff driver's own negligence contributed to the plaintiffs' injuries. *See also Rucker v. City of New York*, 14 Misc.3d 1218(A), 836 N.Y.S.2d 489 (Sup. Ct. Queens Co. 2007) (holding that a "default judgment against the operator of a motor vehicle does not preclude the owner of the vehicle from contesting the issue of the driver's negligence").

The Second Department's reasoning is sound. Although this Court has stricken defendant Stewart's answer as a result of his default, this default is not attributable to Transit Authority, and the latter must be permitted to argue the case on the merits. Transit Authority may contest issues of Stewart's liability, as well as any negligence by the co-defendants, or plaintiff himself. Plaintiff and co-claimants retain the right and ability to prove the driver's negligence and Transit Authority's liability under respondeat superior.

Plaintiff argues that the relevant facts in the instance case are distinct from *Balanta*. Plaintiff notes that while *Balanta* was based on Vehicle and Traffic Law § 388, plaintiff's action is grounded in vicarious liability based on respondeat superior. However, Vehicle and Traffic Law § 388 holds an owner of a vehicle, in certain circumstances, vicariously liable: "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." See, e.g. *Mowczan v. Bacon*, 92 N.Y.2d 281, 703 N.e.2d 242, 680 N.Y.S.2d 431 (1988) (noting that an owner of a vehicle is vicariously liable under § 388).<sup>1</sup> There is no legal difference between a vicarious liability theory grounded on § 388 from one based on respondeat superior.

Plaintiff also seeks to distinguish *Balanta* on the grounds that in *Balanta* the co-defendant driver defaulted on plaintiff's complaint, whereas in the instant case default judgment was granted against co-defendant Stewart after issue was joined and Stewart's answer was struck on plaintiff's motion. There is no legal significance to this distinction. Where a defendant's answer is struck, all allegations in plaintiff's complaint are held to be true as to that defendant. It is essentially the same as if the defendant had not submitted an answer.

For the reasons discussed above, plaintiffs and cross-claimants are awarded summary judgment against Stewart only.

---

<sup>1</sup> Several courts have held that § 388 is preempted by the Graves Amendment. 49 U.S.C. § 30106. See, e.g. *Graham v. Dunkley*, 50 A.D.3d 55, 852 N.Y.S. 169 (2d Dept 2008), *appeal dismissed*, 10 N.Y.3d 835, 889 N.E.2d 484, 859 N.Y.S.2d 607 (2008). Although the present validity of § 388 is irrelevant to the instant action, it is worth noting that these decision support this Court's position. See *Id.* at 58, 852 N.Y.S.2d at 173 (holding that the Graves Amendment preempted the "vicarious liability imposed on commercial lessors by" § 388).

Accordingly it is hereby

ORDERED that defendant M.D. Stewart's answer to plaintiff's complaint is stricken, and summary judgment is granted to plaintiff as to Stewart's liability only;

ORDERED that defendant M.D. Stewart's answer to Peter Cab Corporation's and Said N. Faoui's cross-claim is stricken, and summary judgment is awarded to cross-claimants as to Stewart's liability only;

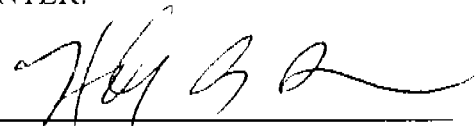
ORDERED that plaintiff's and cross's claimants' motions for summary judgment against defendant New York City Transit Authority are denied, and its

ORDERED that an inquest for damages attributed to Stewart be held at trial of Transit Authority, Peter Cab and Faoui.

This constitutes the decision and order of the court.

Dated: New York, New York  
March 17, 2009

ENTER:



Harold B. Beeler, JSC

**FILED**  
HAROLD BEELER  
J.S.C.  
MAR 20 2009  
COUNTY CLERK'S OFFICE  
NEW YORK