

Musso v Hsing Wei Chien

2009 NY Slip Op 30923(U)

April 15, 2009

Supreme Court, New York County

Docket Number: 110519/05

Judge: Paul Wooten

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

PRESENT: Paul Wooten
J.S.C.
Justice

PART 22

Robert S. Musso, as Trustee of The Estate
of Jon Lin Wu
- v -
Hsing Wei Chen, ET AL

INDEX NO. 110519/05
MOTION DATE _____
MOTION SEQ. NO. 007
MOTION CAL. NO. 118

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

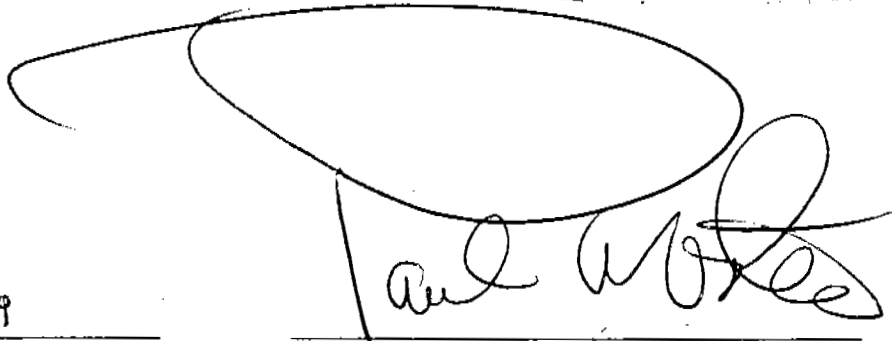
Upon the foregoing papers, it is ordered that this motion

Motion is resolved as per attached order

FILED

APR 22 2009

COUNTY CLERK'S OFFICE
NEW YORK



Dated: 4-15-09

APR 15 2009

Paul Wooten
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: 1AS PART 22

-----x
ROBERT J. MUSSO, as Trustee of the Estate of
TONG LIN WU,

Plaintiff,

-against-

HSING WEI CHIEN, M.T.P. AUTO LEASING &
SERVICES, INC. and DANIEL FERNANDEZ,

Defendants.

PAUL WOOTEN, J. :

FILED
APR 22 2009
COUNTY CLERK'S OFFICE
NEW YORK
Index No. 10519/05

Defendant M.T.P. Auto Leasing & Services, Inc. (MTP) moves for leave to amend its answer and for summary judgment dismissing the complaint and all cross claims brought against it. Defendants Hsing Wei Chien (Chien) and Daniel Fernandez (Fernandez) cross-move for similar relief as MTP.

This action arises from a motor vehicle accident that occurred on July 27, 2004. Tong Ling Wu (Plaintiff) was a passenger in a vehicle owned by MTP and operated by Chien. Plaintiff and Chien were both employees of non-party Photo Experts, Inc., which had leased the vehicle from MTP in April 2003, pursuant to a written agreement. While plaintiff and Chien were en route to the premises of a customer located in Irvington, New Jersey, their vehicle collided with a vehicle operated by Fernandez. As a result, plaintiff sustained serious injuries.

MTP states that when it served its verified answer, it was not aware that plaintiff, only four days earlier, had filed a Petition for Bankruptcy under Chapter 7 of the United States Bankruptcy Code. MTP was not aware of plaintiff's status as a bankrupt until March 1, 2007, when plaintiff testified at a deposition. MTP contends that because plaintiff declared bankruptcy

after commencing this action, but neglected to disclose this action as an asset in his bankruptcy filing, he lacks the capacity to sue. MTP seeks leave to serve an amended answer with the affirmative defense that plaintiff's failure as a bankrupt to include this action among his scheduled assets in his bankruptcy petition renders him incapable of prosecuting this action. Upon amendment of the answer, MTP seeks summary judgment dismissing the complaint on the ground that plaintiff lacks the legal capacity to sue.

MTP declares that summary judgment is also appropriate on the ground that plaintiff's action is barred by section 29 (6) of the Workers' Compensation Law. MTP asserts that plaintiff has publicly admitted that he received workers' compensation payments related to the accident. MTP argues that as a result of receiving payments, he is prevented from suing his co-worker Chien as well as MTP.

MTP seeks the dismissal of cross claims brought by Fernandez based upon a release furnished by him in consideration of \$1,500. In pertinent part, the release provides: "I specifically release the claims arising out of that certain sequence of events that occurred at the following time and place: 07/27/04 on 16th Ave. & 21st Street in Irvington, NJ." MTP contends that this release was furnished by Fernandez after plaintiff had commenced this action and after Fernandez served his answer containing cross claims against both MTP and Chien. MTP also contends that the release provided by Fernandez was knowingly given, with the advice of an attorney, and contains no ambiguities.

Chien seeks leave to amend his answer to allege that plaintiff lacks the capacity to sue him due to plaintiff's failure to include this suit in his bankruptcy filing. Chien also claims that plaintiff is barred from bringing this action due to the Worker's Compensation Law. The release

from Fernandez allegedly prevents him from bringing a cross claim against Chien.

Fernandez seeks leave to amend his answer to allege that plaintiff lacks the capacity to sue due to plaintiff's failure to include this suit in his bankruptcy filing. He states that the release does not prevent him from bringing cross claims against the other defendants. He asserts that he was not aware of this lawsuit when he executed the release. He also asserts that the release does not prevent him from bringing defenses or cross claims.

Plaintiff acknowledges that he did not include this lawsuit in his bankruptcy filing. He has proceeded to amend the caption of this action so that the plaintiff bringing this action is Robert J. Musso, as Trustee of plaintiff's estate. Plaintiff claims that a stipulation by all the parties resulted in this change in the caption.

Plaintiff contends that MTP is not exonerated from this action because of the Worker's Compensation Law. Plaintiff is claiming under section 29 (1), which allegedly permits him to collect benefits and bring an action against third parties. He states that, because his co-worker is not the sole proximate cause of the accident, MTP is not immune to this suit.

MTP, in its reply, argues that plaintiff's failure to name the real party in interest cannot be remedied by substitution. MTP claims that the attempt to substitute the bankruptcy trustee does not cure the defect that plaintiff lacks standing to sue.

MTP argues that because an action against a co-employee is barred by the Worker's Compensation Law, the action against MTP, whose liability is derivative of any liability on the co-employee's part, is likewise barred.

In a reply to Fernandez, MTP contends that Fernandez falsely disavowed knowledge of this pending lawsuit in his motion papers. MTP claims the release is unambiguous and that its

language leaves no room for doubt as to the intent of the parties.

Plaintiff submits a copy of the stipulation signed by counsel of the parties and so ordered by this court. As a result of this stipulation, the substitution of plaintiff in this action is valid and the trustee in bankruptcy has standing to bring this action. There is no need for plaintiff to recommence this suit whereas defendants do not dispute the validity of the stipulation.

The court finds that MTP is immune from the suit by virtue of section 29(6) of the Worker's Compensation Law, as is Chien. MTP, as owner of the vehicle operated by a co-worker of plaintiff, cannot be vicariously liable for the negligence of said co-worker who is immune from direct liability on the basis that both plaintiff and the co-worker are co-employees. *See Christiansen v Silver Lake Contracting Corp.*, 188 AD2d 507 (2d Dept 1992). There is no allegation of independent negligence by MTP. *See Rose v Gelco Corp.*, 261 AD2d 381 (2d Dept 1999). Fernandez, as a third party in this action, can be sued for negligence.

As for the release, it is settled that a valid release which is clear and ambiguous on its face and which is knowingly and voluntarily entered into will be enforced as a private agreement between the parties. *See Chaudhry v Garvale*, 262 AD2d 518 (2d Dept 1999). The release will be given effect, regardless of one party's claim that he intended something else. *Id.*

The court finds that the release contains sufficiently broad language to include cross claims related to this accident. Therefore, Fernandez is precluded from bringing cross claims against his co-defendants. The allegation that Fernandez was unaware of the pending litigation against him is countered by evidence that he was aware.

Accordingly, it is

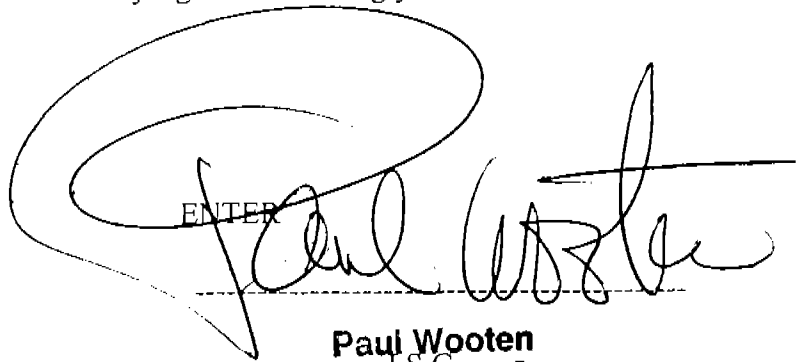
ORDERED that defendants MTP's motion and Chien's cross motion for leave to amend

their answers is granted and the motion and cross motion for summary judgment is granted and the complaint is dismissed as to these parties with costs and disbursements to defendants as taxed by the Clerk of the Court upon a submission of an appropriate bill of costs; and it is further

ORDERED that defendant Fernandez's cross motion for leave to amend his answer and for summary judgment is denied and his cross claims are hereby dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED: 4-15-09

ENTER

Paul Wooten
J.S.C. J.S.G.

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