Rivera v City Way Limo Corp., Inc.
2009 NY Slip Op 33370(U)
July 2, 2009
Supreme Court, New York County
Docket Number: 110367/06
Judge: Paul Wooten
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1]

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

PRESENT: HON. PAUL WOOTEN PART 22
Justice

Freddie Rivera & Francis Torres,

Plaintiffs,

- v -

City Way Limo Corp., Inc., and Juan Sinchi,

Defendants.

INDEX NO. 110367/06

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO. 95

The following papers, numbered 1 to 6, were read on motion sequence 001 by defendants for summary judgment and on motion sequence 002 by plaintiff to strike City Way's answer.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 4
Answering Affidavits — Exhibits (Memo)	2 5
Replying Affidavits (Reply Memo)	3 6

Cross-Motion: ☒ Yes ☑ No

On April 1, 2006, co-plaintiff Freddie Rivera, a pedestrian, was struck on 1st Avenue near 119th Street in New York City, by a motor vehicle owned by co-defendant City Way Limo Corp., leased to non-party Edgar Sinchi by City Wide, and operated by Edgar's brother, co-defendant Juan Sinchi. On or about July 26, 2006, Rivera commenced this action to recover damages for his personal injuries. A note of issue has not been filed. Under motion sequence number 001, City Way moves for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the complaint under Vehicle and Traffic Law § 388 (1) on the grounds that the vehicle involved in the accident was driven without its permission. Under motion sequence number 002, Rivera moves for an order, pursuant to CPLR 3126, striking City Way's Answer for its failure to comply with 5 prior court orders. Motion sequence numbers 001 and 002 are

consolidated and decided in accordance with this decision and order.

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.*, 4 NY3d 373 [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*, 300 AD2d 10, 10, 751 NYS2d 433 [1st Dept 2002]; *Silverman v. Perlbinder*, 307 AD2d 230 [1st Dept 2003]). 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 party may also demonstrate a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman v City of New York*, *supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172, 692 NYS2d 67 [1st Dept 1999]).

Where the proponent of a the motion for summary judgment makes a *prima facie* showing of entitlement to summary judgment, the burden then shifts to the opposing party to demonstrate, by admissible evidence, the existence of a triable issue of fact, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY 2d 714 [1986]; *Zuckerman v City of New York*, *supra*; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003], *lv to appeal granted* 1 NY3d 506 [2004], *affd* 3 NY3d 295 [2004]). Opposing parties are required to

submit evidentiary proof in admissible form raising triable issues of material fact in order to defeat the motion for summary judgment (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 812 NYS2d 12 [1st Dept 2006]; *Perez v Brux Cab Corp.*, 251 AD2d 157, 674 NYS2d 343 [1st Dept 1998]; *Zuckerman v City of New York*, *supra*).

DISCUSSION

Motion Sequence 001

City Way is alleged to be a limousine car rental company. Non-party Jorge Encalada is alleged to be the president and operator of City Way (*see* Notice of Motion, Exhibit F, at 8, lines 10 - 16). Edgar stated that City Wide was the company he saw listed as the owner on the vehicle registration of the Lincoln Town car when Encalada "rented" the car to Edgar for the purpose of using it as a taxi. There was no written lease agreement or rental agreement between Encalada and Edgar, only an oral agreement. Edgar stated in his deposition testimony that Encalada did not give Edgar permission to allow any one other than Edgar to drive the car (id., at 9, lines 21-24). The rental period was from January 2006 until April 2006 (*id.*, Exhibit F, at 14, lines 8 - 25). Edgar stated that he had neither given his brother Juan permission to drive the car, nor specifically told him that he could not drive the car (*id.*, at 28, lines.3 - 12).

Juan states that he was on his way to visit his brother, Edgar, and saw the car parked a distance from his brother's apartment. He entered into his brother's apartment, saw his brother sleeping on the couch and also saw the keys for the Lincoln. He decided to move the car closer to his brother's apartment building. Without waking his brother, he took the keys, went to the car, started it and while driving the car had the accident which injured Rivera. The police report indicates Rivera was injured as he was

attempting to cross the street 50 feet before the crosswalk. The mirror on the City Way vehicle struck Rivera. Rivera suffered a broken ankle with an open reduction and internal fixation. Juan did not have a valid driver's license in either New York state or his native state of Ecquador at the time of the accident. Juan never told Edgar about the accident. Edgar learned about the accident three weeks later from Encalada.

Though City Way includes an affirmative defense of lack of permissive use and cites to *Barret v McNulty* (27 NY2d 928, 929 [1970]) for the proposition that the presumption of lack of permission has not been rebutted, Rivera presents copies of amended post accident City Way insurance policies for the vehicle involved in the accident (*see* July 28, 2008 Affirmation in Opposition, Exhibits H and I). The policy amendments are for the period of March 1, 2006 through March 1, 2007 and appear to have been amended on April 1, 2006. The court notes that the amended policies have included Juan Sinchi's name, but not Edgar Sinchi's name, as an insured on the policy amendment exhibits. The court reiterates that it was Edgar who testified that he had a specific rental agreement with Encalada which did not permit anyone but Edgar to drive the disputed vehicle, yet as noted, the absence of Edgar's name raises the issue of whether or not he himself was the only one given permission by Encalada to drive the City Way vehicle (*see* further discussion under motion sequence number 002, *infra*).

In addition to the insurance exhibits, Rivera has sought a deposition of City Way and other written documentation related to the rental arrangements of the vehicle in question in five prior court orders. To date these have not been complied with. The insurer's investigators have submitted affidavits in opposition to Rivera's motion to strike which state that they are not able to locate Encalada or the City Way offices in

order to comply with this court's discovery orders (*see* further discussion under motion sequence 002, *infra)*. Encalada would be able to substantiate Edgar's claim that only he and not Juan had permission to drive the vehicle in question. Due to the absence of Edgar's name on the insurance policy amendments, Rivera has raised a triable question of fact regarding whether City Way has immunity to the imposition of liability under Vehicle and Traffic Law § 388 (1) (*compare Countrywide Insurance Company v National Railroad Passenger Corporation*, 6 NY2d 172, 179, 811 NYS3d 302 [2006]; *Murdza v Zimmerman*, 99 NY2d 375, 756 NYS2d 505, 508 [2003]). The raising of material questions of fact mandates the denial of summary judgment (*see* CPLR 3212 [b]).

Motion Sequence Number 002

Defendants have failed to fully comply with the Case Scheduling Order dated January 23, 2007 and court orders dated July 23, 2007, October 10, 2007, November 13, 2007 and February 29, 2008, which provided that City Way was to appear for a deposition within thirty days, with the failure to comply resulting in possible sanctions. The April 29, 2008 order extended the note of issue to June 20, 2008 and allowed for Rivera to make this motion to strike the note of issue. The Court has held that the disobeying of three successive orders directing them to appear for a deposition constitutes the type of dilatory obstructive and contumacious behavior warratning the striking of an answer (*see Reidel v Ryder TRS, Inc.*, 13 AD3d 170, 786 NYS2d [1st Dept 2004]). The court has broad discretion to issue a conditional order striking defendant's answer unless he appear by a date certain (*Rocco v KCL Protective Services, Inc.*, 383 AD2d 317, 724 NYS2d 419 [1st Dept 2001]).

In its opposition papers, City Way submits an affidavit from Gary Laroche, an insurance administrator for City Way's insurer wherein he states that it is the custom and practice in the insurance industry with regard to commercial policies, except in certain exceptions alleged to not be applicable to the situation before the court, that when a claim is reported involving a driver who is not listed on an insured's policy, that non-listed driver is automatically added to the policy as a listed driver, retroactive to the date of the accident. This is done regardless of whether or not the driver had permission to operate the vehicle (*see* July 25 Affirmation in Opposition, Exhibit A, ¶ 2). The underwriting department issued such a retroactive amendment to the policy which listed Juan Sinchi as a driver on City Way's commercial automobile policy. Mr. Laroche further states that the fact, of whether or not Juan Sinchi had permission to drive the car, was not a consideration in listing him as a driver on City Way's policy. Thus, they infer that Rivera's inclusion of the insurance policy amendments in his opposition to City Way's summary judgment motion is mere speculation. However, the court reiterates that this explanation, of how Juan's name was added as an additional insured, still does not explain why Edgar's name, the only man who Encalada allegedly gave permission to drive the car, is missing from that same amendment.

Lincoln General Insurance Company was the insurer for City Way. Lincoln has been unable to communicate with or locate Encalada. The court notes the City Way insurer's good faith efforts to locate Encalada and provide a witness for City Way's deposition (*see* July 25, 2008 Affirmation, Exhibits B,C and D). The court further notes that City Way has a duty, pursuant to its insurance policy, to cooperate with the insurer in the investigation settlement and defense of any lawsuit (*see* July 25, 2008

Affirmation, February 13, 2008 Malone letter attached as part of Exhibit B). The record reflects that City Wide, through Encalada, its alleged president, has failed to cooperate with its insurer, Lincoln General. This court finds that City Wide's failure to comply with the aforementioned court orders constitutes "precisely the sort of dilatory and obstructive, and thus contumacious, conduct" warranting a striking of the answer (*Couri v Siebert*, 48 AD3d 370, 853 NYS2d 296 [1st Dept 2008]; *Reidel v Ryder TRS, Inc., 13 AD3d 170,* 786 NYS2d 487 [1st Dept 2004]; *Kutner v Feiden, Dweck & Sladkus, 223 AD2d 488,* 637 NYS2d 15 [1996]).

Accordingly, upon the foregoing papers it is

ORDERED that City Way Limo Corp's motion for summary judgment, under motion sequence number 001, is denied; and it is further

ORDERED that this motion by Freddie Rivera, under motion sequence number 002, to strike City Way's answer is granted, and the answer is stricken; and it is further,

ORDERED that the plaintiffs shall serve a copy of this order with notice of entry upon all parties. Conference To Be Held On July 19, 2009, @ Noon 103, 80 Centre St. 9th fl.

This constitutes the Decision and Order of the Court.

Dated: 7-2-09

JUL 02 2009

Paul Wooten, J.S.C.

Paul Wooten
J.S.C.

Check one: ☒ **FINAL DISPOSITION** ☑ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**

FILED
JUL 08 2009
COUNTY CLERK'S OFFICE
NEW YORK