

<b>Pagan v Little Man Parking LLC</b>
2010 NY Slip Op 33954(U)
July 8, 2010
Sup Ct, Bronx County
Docket Number: 0304226/2009
Judge: Robert E. Torres
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L.W.

PART 29

Case Disposed	<input type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

PAGAN, JONATHAN

Index No. 0304226/2009

-against-

Hon. ROBERT E. TORRES

LITTLE MAN PARKING LLC

Justice.

The following papers numbered 1 to 3 Read on this motion, **SUMMARY JUDGMENT DEFENDANT**  
Noticed on March 08 2010 and duly submitted as No. \_\_\_\_\_ on the Motion Calendar of 3/29/2010

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2	
Replying Affidavit and Exhibits	3	
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this This motion is granted  
in accordance with the attached  
decision

RECEIVED  
BRONX COUNTY CLERK'S OFFICE

JUL 12 2010

PAID

NO FEE

Motion is Respectfully Referred to:  
Justice: \_\_\_\_\_  
Dated: \_\_\_\_\_

Dated: 7, 8, 2010

Hon. [Signature]  
ROBERT E. TORRES, J.S.C.

HON. ROBERT E. TORRES

CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF BRONX, PART 29  
PRESENT: HONORABLE ROBERT E. TORRES, J.S.C.

\_\_\_\_\_  
JONATHAN PAGAN,

INDEX NUMBER:304226/2009

Plaintiff,

-against-

Present:  
HON. ROBERT E. TORRES

LITTLE MAN PARKING LLC, WORLD COPY INC.  
and MICHAEL F. SEVILLA,  
Defendants.

\_\_\_\_\_  
The defendant WORLD COPY INC. moves for an order pursuant to CPLR § 3212 for an order dismissing the plaintiff's complaint with prejudice on the grounds that plaintiff can not make a prima facie case of negligence against the aforementioned defendant. Defendant WORLD COPY INC. also moves for an Order pursuant to C.P.L.R. § 8303-a awarding costs and fees for the filing of the frivolous action as against said defendant. Plaintiff opposes said motion. For the reasons set forth below, defendant WORLD COPY, INC.'s motion is granted.

The within action arises from a motor vehicle accident on May 12, 2008 at approximately 4:50 P.M. when plaintiff was a pedestrian crossing the street at the intersection of Brook Avenue and East 149<sup>th</sup> Street in Bronx County he was struck by a vehicle owned by defendant WORLD COPY INC. but operated by the co-defendant, MICHAEL S. SEVILLA. As a result of the accident, plaintiff alleges that he sustained serious injuries.

In the Verified Bill of Particulars, plaintiff alleges negligent and reckless operation and control of the vehicle as well as negligent ownership and entrustment

According to defendant WORLD COPY INC., their employee, David Silva, parked the

vehicle in question in defendant's LITTLE MAN PARKING LLC's facility and gave the keys to the van to the parking lot attendant. Defendant WORLD COPY INC. states it is customary for its employees to hand the keys to the attendant since said defendant has been parking their business vehicles in defendant's LITTLE MAN PARKING LLC's facility since July of 2000. Defendant WORLD COPY INC. states that in the early morning hours of May 6, 2008, defendant MICHAEL F. SEVILLA entered defendant's LITTLE MAN PARKING LLC's facility and remained seated in the aforementioned subject vehicle for an hour. Subsequently, defendant MICHAEL F. SEVILLA got the keys from the attendant and drove it out of the aforementioned facility. That same morning, defendant WORLD COPY INC. reported the vehicular theft to the 14<sup>th</sup> Precinct. On May 12, 2008, the vehicle was involved in the aforementioned accident.

Defendant WORLD COPY INC. now moves for an order pursuant to CPLR § 3212 for an order dismissing the plaintiff's complaint with prejudice on the grounds that plaintiff can not make a prima facie case of negligence against the aforementioned defendant. Defendant WORLD COPY INC. also moves for an Order pursuant to C.P.L.R. § 8303-a awarding costs and fees for the filing of the frivolous action as against said defendant. In support of his motion, defendant submits a copy of the pleadings, an affidavit of John Deri, Owner and President of defendant WORLD COPY, INC., a copy of the police report, the incident reporting slip, and the deposition testimony of the plaintiff.

Plaintiff opposes the motion on the grounds that even though the van was reported stolen, there is a strong presumption that the van was being operated with defendant WORLD COPY INC.'s consent. Therefore, plaintiff argues that issues of law exists requiring further factual discovery. Plaintiff also argues that this action is not frivolous since the keys were handed to the thief and the keys were found in the ignition of the car. Aside from counsel's affirmation, plaintiff does not

submit any exhibits in support of his argument. However, plaintiff references Exhibit D of movant's papers, the affidavit of John Deri, Owner and President of defendant WORLD COPY, INC..

On motions for summary judgment, the court's function is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957); Rose v. DaEcib USA, 259 A.D.2d 258, 686 N.Y.S.2d 19 (1<sup>st</sup> Dept., 1999). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978); Sillman v. Twentieth Century Fox Film Corp., *supra.* Additionally, when reviewing a motion for summary judgment, the Court is not to determine credibility. Quinn v. Krumland, 179 A.D.2d 448 (1<sup>st</sup> Dept. 1992).

In order to establish a prima facie case of negligence a plaintiff must establish that a duty was owed by the defendant to the plaintiff; that there was a breach of said duty; and that said breach was the proximate cause of plaintiff's injuries. See, Murray v. New York City Housing Authority, 269 A.D.2d 288 (1<sup>st</sup> Dept. 2000).

In reviewing the papers, it is evident that there is no evidence to support a claim of negligence against defendant WORLD COPY INC. . Although plaintiff argues that the keys were in the ignition at the time of the theft, he fails to provide any factual basis from which to reach said conclusion. Notably, there is nothing in the police report to support said contention. Moreover, plaintiff's contention that there is insufficient evidence to establish that the defendant driver did not have defendant WORLD COPY INC.'s permission to operate the van at the time of the accident is meritless. During his deposition, plaintiff admitted knowing that the subject van was stolen at the time of the underlying accident. Said testimony when combined with the police report, the incident reporting slip, and the affidavit of John Deri, Owner and President of defendant WORLD COPY,

INC., clearly establish that defendant WORLD COPY INC. did not owe plaintiff a duty; did not breach said duty, and therefore did not play a part in the proximate cause of plaintiff's injuries. Accordingly, plaintiff's claim as to defendant WORLD COPY INC. is hereby dismissed with prejudice.

It is well settled that if an action is found to be frivolous actions, Courts can award costs and attorney's fees pursuant to C.P.L.R. § 8303-a. See, C.P.L.R. § 8303-a; Doone v. Reiser, 272 A.D.2d 368, 707 N.Y.S.2d 908 (2<sup>nd</sup> Dept. 2000). Moreover, even if an action is initially filed in good faith, once a plaintiff's attorney becomes aware that the claim lacks a reasonable basis, said attorney should promptly discontinue the action. See, Fritze v. Versailles, 158 A.D.2d 669, 551 N.Y.S.2d 854 (2<sup>nd</sup> Dept. 1990). In the case at bar, it is evident from the record before the Court that the subject van was stolen at the time of the underlying accident and that plaintiff knew the same. As such, it was incumbent upon plaintiff's counsel to discontinue the instant action as to the moving defendant. Defendant WORLD COPY INC. had no reason to believe that the act of leaving its business vehicle in defendant's LITTLE MAN PARKING LLC's facility, where it had been parking its vehicle since July of 2000, would result in its theft and then, be involved in an accident. Accordingly, the Court finds that the action as to Defendant WORLD COPY INC was frivolous and awards said defendant \$1,500 in costs for defending said frivolous lawsuit.

Accordingly, it is hereby

ORDERED that defendant WORLD COPY INC.'s motion for summary judgment pursuant to CPLR § 3212 is granted and the plaintiff's complaint as to Defendant WORLD COPY INC. is hereby dismissed with prejudice;

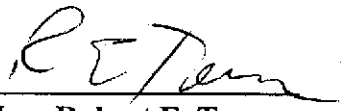
ORDERED that defendant WORLD COPY INC.'s motion pursuant to C.P.L.R. § 8303-a for

an Order awarding it costs and fees for the filing of the frivolous action as against said defendant is granted and said defendant is awarded \$1,500;

ORDERED that the defendant WORLD COPY INC shall serve a copy of this order with Notice of Entry within thirty (30) days of entry of this Order.

This constitutes the decision and order of this Court.

Dated: July 8, 2010

  
Hon. Robert E. Torres

**HON. ROBERT E. TORRES**