

Anderson v Keon

2011 NY Slip Op 32043(U)

July 11, 2011

Supreme Court, Nassau County

Docket Number: 12136/10

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____x

**LINDA D. ANDERSON and DAVID W.
ANDERSON,**

Plaintiff(s),

-against-

PATRICK KEON and ROYAL RENT A CAR INC.,

Defendant(s).

_____x

Index No. 12136/10

Motion Submitted: 5/17/11

Motion Sequence: 001

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....X
- Answering Papers.....
- Reply.....
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

Defendants move this Court unopposed for an Order dismissing the complaint for failure to state a claim against Royal Rent A Car, Inc. ("Royal").

This action arises from a collision that occurred on April 26, 2010, between plaintiffs' vehicle and the rental car, owned by Royal, and operated by defendant Keon.

Both defendants are represented by the same law firm, Morenus, Conway, Goren & Brandman. Defendants interposed a joint answer on or about July 19, 2010. A Preliminary Conference Stipulation and Order was signed by this Court on May 17, 2011. Pursuant to that Order, all discovery is to be completed by January 3, 2012. The first compliance conference of this matter is scheduled for September 27, 2011. According to the Order, depositions are to take place on September 12, 2011.

The complaint alleges that the accident and injuries to plaintiff Linda Anderson were “due to the carelessness and negligence of defendant[s] . . . Keon and Royal” Plaintiff David Anderson alleges that his derivative claim for loss of services is “by reason of the negligence of the defendants”

Aside from the foregoing allegations, none of the parties to this action have submitted a Bill of Particulars, or any other product of the discovery process, for the Court’s consideration in the determination of this motion.

The Court will first address Royal’s claim that the complaint should be dismissed for failure to state a cause of action (*CPLR § 3211[a][7]*) based on what is commonly known as the Graves Amendment (*49 USC § 30106*). Royal asserts that, because plaintiffs’ complaint is “asserting vicarious liability based on [Royal’s] ownership of the vehicle,” the claim against it “is barred by the . . . Graves Amendment.”

The Graves Amendment, enacted in 2005, is federal legislation preempting vicarious liability imposed by states on commercial lessors of vehicles (*Vehicle and Traffic Law § 388*). The Graves Amendment has been found to be constitutional, and it acts as a bar to an action against a rental or leasing company for injuries and/or damages based solely on a theory of vicarious liability (*see Graham v. Dunkley*, 50 A.D.3d 55, 852 N.Y.S.2d 169 [2d Dept., 2008]).

The legislation reads, in pertinent part:

(a) In general. 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).

(*49 USC § 30106*, emphasis added).

Some New York State courts have held that there is an inherent conflict of interest in an attorney representing both the rental/leasing company and the driver of the vehicle involved in the accident because if the case is dismissed as against one defendant (the

company), the other defendant (driver) is left to bear full liability for the claims alleged in the complaint (*see Vinokur v. Radhunandan*, 27 Misc.3d 1239A, 2010 N.Y. Slip Op. 51108U (Sup. Ct. Kings County 2010); *Meigel v. Schulman*, 24 Misc.3d 1242A, 901 N.Y.S.2d 900 (Sup Ct. Kings County 2009); *Graca v. Krasnik*, 20 Misc.3d 1127A, 872 N.Y.S.2d 690 [Sup Ct. Kings County 2008]).

A federal court has held that no conflict of interest exists where a plaintiff alleges only vicarious liability against the company, but does not allege any basis for independent negligence against a rental/leasing company (*see Drake v. Karahuta*, 2010 U.S. Dist. LEXIS 5703 [W.D.N.Y. 2010]). In that case, discovery had been completed and plaintiff did not seek to prove any theory other than vicarious liability of the leasing company.

Where there is a claim of independent negligence asserted against the rental/leasing company, the Graves Amendment is inapplicable, and cannot be asserted as a defense to the action (*see generally Park v. Edge Auto Inc.*, 2009 N.Y. Misc. LEXIS 2427 (Sup Ct. Nassau County 2009); *Sigaran v. ELRAC*, 22 Misc.3d 1101A, 875 N.Y.S.2d 824 (Sup Ct. Bronx County 2008); *Murphy v. Pontillo*, 12 Misc.3d 1146, 820 N.Y.S.2d 743 [Sup Ct. Nassau County 2006]).

Once the Graves Amendment is determined to be inapplicable to a matter, or that a particular action falls outside the ambit of Graves, it is reasonable to conclude that the potential for a conflict of interest exists between the interests of the rental/leasing company and the driver of the vehicle, both of whom are defendants in the same negligence action, with foreseeable cross-claims against one another (*see Drake, supra; New York Rules of Professional Conduct, Rule 1.7*).

In this case, there are several factors that appear to make the Graves Amendment inapplicable. In the first instance, discovery is not complete. No one has thus far been deposed. Furthermore, plaintiffs' complaint does not allege a theory of vicarious liability on the part of Royal. Plaintiffs' broad allegations contained in their complaint allege "carelessness and negligence" (first cause of action) and "negligence" (second cause of action) on the part of both defendants. Based on these allegations, without at least a Bill of Particulars, it is impossible for this Court to determine whether plaintiffs are asserting a claim of independent negligence against the rental/leasing company.

Furthermore, the Court has reviewed the rental agreement supplied by Royal in support of the instant motion. It appears from the rental agreement that the rental period was commenced on March 23, 2010, and that the car was to be returned on April 13, 2010. The accident giving rise to this action is alleged to have occurred on April 26, 2010.

The Graves Amendment protects rental/leasing companies “during the period of the rental.” It appears that the accident in this case occurred outside the parameters of the rental period. The affidavit of Matthew A. Puma, Royal’s president, utterly fails to address this apparent violation of the rental agreement. The fact that the car was being operated thirteen (13) days after the scheduled return date also raises questions about what efforts, if any, Royal made to retrieve its property in order to prevent it from being operated in violation of the rental agreement. The answers to these questions may sound in independent negligence committed by Royal considering that the rental agreement (Exhibit C) states that, “[a]fter 48 hours late, vehicle will be considered stolen and will be handled accordingly.” The agreement calls for any extensions of the rental period to be in writing, but defendants have not offered proof of a written extension, further sounding in the possibility of independent negligence committed by Royal.¹

At this juncture, the Court finds that defendants’ motion is premature in light of the fact that discovery has not been completed; however, it does not appear that these issues can be fully explored, or discovery completed, in light of the existence of a potential conflict of interest in this case.

A party is entitled to be represented by counsel of his or her own choosing. This is a valued right which should not be abridged without a clear showing that disqualification is warranted. (See, *Eisenstadt v. Eisenstadt*, 282 A.D.2d 570, 723 N.Y.S.2d 395 [2d Dept., 2001]).

Accordingly, all parties, including Patrick Keon, are directed to appear before this Court on August 4, 2011 for a conference, and, if necessary, a hearing with respect to the possible existence of an irreparable conflict of interest in the representation of both defendants by one attorney.

Defendants’ motion is denied as premature, without prejudice to renewal following the resolution of the possible conflict of interest issue, and the completion of discovery.

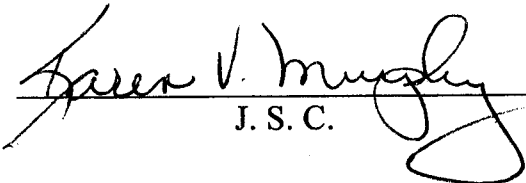
The foregoing constitutes the Order of this Court.

Dated: July 11, 2011
 Mineola, N.Y.

ENTERED

JUL 14 2011

**NASSAU COUNTY
 COUNTY CLERK’S OFFICE**


 J. S. C.

¹Additionally, Royal has omitted from its Exhibit C the back side of the rental agreement containing the terms and conditions thereof. Thus, it is unknown what the exact terms of the lease were governing the rental transaction in this case.