Pagan v Little Man Parking LLC
2011 NY Slip Op 34144(U)
February 1, 2011
Sup Ct, Bronx County
Docket Number: 304226/2009
Judge: Robert E. Torres

NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 29

Case Disposed ❑
Settle Order ❑
Schedule Appearance ❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

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PAGAN,JONATHAN

Index №. **0304226/2009**

-against-

Hon. **ROBERT E. TORRES** ,

LITTLE MAN PARKING LLC

Justice.

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The following papers numbered 1 to 3 Read on this motion, **VACATE ORDER/JUDGMENT**
Noticed on **September 14 2010** and duly submitted as No. ____ on the Motion Calendar of 9/28/2010

	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 motion is denied in accordance with the attached decision

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FEB 15 2011

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 2/1/2011

Hon. _____
ROBERT E. TORRES, J.S.C.

 FILED Mar 18 2011 Bronx County Clerk

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 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 149th 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.

The defendant WORLD COPY INC. moved 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 moved 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 opposed said motion. By Order dated July 8, 2010, the Court granted the motion and dismissed the complaint as against moving defendant, holding that there was no evidence to support a claim of negligence against defendant WORLD COPY INC. . Additionally, the Court held that it was evident from the record that the subject van was stolen at the time of the underlying accident and that plaintiff knew the same. As such, the

Court also held that the action as to Defendant WORLD COPY INC was frivolous and awarded said defendant $1,500 in costs for defending said frivolous lawsuit.

Plaintiff now moves for an Order pursuant to C.P.L.R. § 2221 vacating the Court's July 8, 2010 decision that dismissed this action against defendant WORLD COPY INC.. Plaintiff's motion to reargue pursuant to C.P.L.R. § 2221 is based on this Court overlooking or misapprehending one matter of fact and one matter of law in determining the prior motion. Specifically, plaintiff argues that this Court overlooked an issue of law which provides the owner of a motor vehicle owes a duty under Vehicle and Traffic Law § 1210(a). Said statute provides that "no person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, removing the key from the vehicle, and effectively setting the brake thereon." See, Vehicle and Traffic Law § 1210(a). Additionally, plaintiff also argues that this Court overlooked or misapprehended an issue of fact, that the keys were in the ignition at the time of the theft. In support of this argument, plaintiff cites Johnson v. Manhattan & Bronx Surface Transit Operating Authority, 71 N.Y.2d 198, 524 N.Y.S.2d 415 (1988).

Defendant WORLD COPY INC. opposes the instant motion. Said defendant states that plaintiff did not advance the argument regarding Vehicle and Traffic Law § 1210(a) in opposition to defendant's previous motion and since this is a new theory of law, reargument is not available. Defendant WORLD COPY INC. also argues that the Court directly addressed the issue of the key in the ignition in its July 8, 2010 decision where it held, "Although plaintiff argues that the key were in the ignition at the time of the theft, he fails to provide any factual basis from which to reach said conclusion." See, This Court's July 8, 2010 decision, Exhibit A of the moving papers. Finally, defendant WORLD COPY INC. contends that plaintiff's reliance on the Johnson v. Manhattan &

Bronx Surface Transit Operating Authority, 71 N.Y.2d 198, 524 N.Y.S.2d 415 (1988) is completely misplaced.

It is well settled that a motion for reargument is addressed to the sound discretion of the Court and may be granted upon a showing that the Court overlooked or misapplied the relevant facts or misapprehended the relevant facts or misapplied any controlling principles of law. *McGill v. Goldman*, 261 AD2d 593, 594 (2d Dept 1999).

In the case at bar, the plaintiff has failed to articulate any basis for the relief sought. The plaintiff has failed to establish that the Court overlooked or misapprehended any fact or matter of law. In fact, the plaintiff simply attempts to make additional arguments in opposition to the defendant's original motion. Additional arguments can not be the basis for the instant motion. See, C.P.L.R. §2221(d)(2).

Assuming, *arguendo*, that this Court did grant the motion to reargue, upon reargument, the Court would nevertheless adhere to its original decision. Contrary to the plaintiff's contentions, the Court did not overlook or misapprehend the facts or law in determining the prior motion. Upon reviewing the prior motion and defendant WORLD COPY, INC.'s submissions in support[1], this Court determined there was no evidence to support a claim of negligence against defendant WORLD COPY INC. . Although plaintiff argued that the keys were in the ignition at the time of the theft, he failed to provide any factual basis from which to reach said conclusion. Notably, there was nothing in the police report to support said contention. Moreover, plaintiff's contention that there was insufficient evidence to establish that the defendant driver did not have defendant WORLD

[1] Defendant World Copy, Inc. submitted the following as exhibits in its prior motion: 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.

COPY INC.'s permission to operate the van at the time of the accident was 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 established 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.

Also telling is the fact, that aside from counsel's affirmation, plaintiff did not submit any exhibits in support of his argument in his opposition to the original motion. Plaintiff merely referenced Exhibit D of defendant WORLD COPY, INC.'s original moving papers, the affidavit of John Deri, Owner and President of defendant WORLD COPY, INC.. In support of the instant motion, plaintiff only submits a copy of this Court's July 8, 2010 decision; a copy of the case, Johnson v. Manhattan & Bronx Surface Transit Operating Authority, 71 N.Y.2d 198, 524 N.Y.S.2d 415 (1988); the affidavit of John Deri, Owner and President of defendant WORLD COPY, INC.[2], and a copy of defendant WORLD COPY, INC's original motion.

Finally, plaintiff's reliance on Johnson v. Manhattan & Bronx Surface Transit Operating Authority, 71 N.Y.2d 198, 524 N.Y.S.2d 415 (1988) is misplaced and inapplicable. In Johnson, the Court held that the defendant violated Vehicle and Traffic Law § 1210(a) by leaving the bus he was driving unattended; the windows unlocked; with the safety switch not engaged thereby allowing a thief to enter said bus; push the button starter; and drive the bus which eventually culminated in the deaths of two pedestrians. Johnson, *supra*. Those facts are in no way analogous to the facts herein. In the case at bar, defendant WORLD COPY INC.'s employee, David Silva, parked the vehicle in

[2] This affidavit was annexed to the original moving papers as Exhibit "D".

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. stated it is customary for its employees to hand the keys to the attendant since said defendant have been parking their business vehicles in defendant's LITTLE MAN PARKING LLC's facility since July of 2000. On May 6, 2008, defendant WORLD COPY INC. reported the vehicular theft to the 14th Precinct and on May 12, 2008, said vehicle was involved in the subject accident. Based on this aforementioned facts, it is abundantly clear that defendant WORLD COPY INC. did not provide the opportunity for theft of the subject vehicle and therefore, did not violate Vehicle and Traffic Law § 1210(a), nor did defendant WORLD COPY INC. owe plaintiff a duty; breach said duty, or play any part in the proximate cause of plaintiff's injuries.

Finally, as to plaintiff argument regarding the Court awarding said defendant $1,500 in costs for defending said frivolous lawsuit, the Court finds plaintiff has failed to articulate any basis for a vacating said award. Again, additional arguments can not be the basis for the relief sought. See, C.P.L.R. §2221(d)(2). However, had this Court granted the motion to reargue, upon reargument, the Court would nevertheless adhere to its original decision in awarding movant defendant 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 (2nd Dept. 2000). Even if plaintiff initially filed the instant action in good faith, once plaintiff's attorney became aware that the subject van was stolen at the time of the underlying accident, it was incumbent upon plaintiff's counsel to discontinue the instant action as to the moving defendant. See, Fritze v. Versailles, 158 A.D.2d 669, 551 N.Y.S.2d 854 (2nd Dept. 1990). Equally evident is the fact that 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 the subject accident.

Accordingly, plaintiff's motion seeking an Order pursuant to C.P.L.R. § 2221 vacating the Court's July 8, 2010 decision that dismissed this action against defendant WORLD COPY INC. Is hereby denied.

Plaintiff 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: February 1, 2011

Hon. Robert E. Torres

JUDGE ROBERT E. TORRES