

Ferguson v Dollar Rent A Car, Inc.

2012 NY Slip Op 30442(U)

February 23, 2012

Sup Ct, NY County

Docket Number: 110409/08

Judge: Saliann Scarpulla

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

PRESENT: Saliann Scarpulla

PART 19

Index Number : 110409/2008
FERGUSON, NATASHA
vs.
DOLLAR RENT A CAR
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

FEB 28 2012

NEW YORK COUNTY CLERK'S OFFICE

Dated: 2/23/12

Saliann Scarpulla
SALIANN SCARPULLA J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X
NATASHA FERGUSON,

Plaintiff,

- against-

Index No.: 110409/08
Submission Date: 11/30/11

DOLLAR RENT A CAR, INC., AUTO RENTAL,
LLC, AND RIDE SHARE SYSTEMS, LLC,

DECISION AND ORDER

Defendants.

----- X
For Plaintiff: Godosky & Gentile, P.C.
61 Broadway
New York, NY 10006
For Defendants Dollar Rent A Car, Inc. and Auto Rental, LLC:
Callan, Koster, Brady & Brennan, LLP
One Whitehall Street
New York, NY 10004

FILED

Papers considered in review of this motion for summary judgment:

- Notice of Motion 1
- Aff in Opposition 2
- Reply 3

FEB 28 2012

NEW YORK
COUNTY CLERK'S OFFICE

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for false arrest and false imprisonment, defendants Dollar Rent A Car, Inc. ("Dollar") and Auto Rental, LLC ("Auto") move for summary judgment dismissing the complaint.¹

Plaintiff Natasha Ferguson ("Ferguson") commenced this action seeking to recover damages for her false arrest and false imprisonment. Auto operated a rental car business as Dollar Rent A Car, Inc. Dollar rented a 2008 Jeep Cherokee vehicle to Kaia Shird ("Shird") on January 30, 2008. Pursuant to the rental agreement, the vehicle was

¹ The action has been discontinued against defendant Ride Share Systems, LLC.

supposed to be returned by January 31, 2008. On January 31, 2008, Shird reported the vehicle stolen to the Newark Police Department, indicating that her sister's boyfriend took the vehicle and left to an unknown destination. According to Dollar's station manager Marissa Gagliardi ("Gagliardi"), no one from Dollar contacted the police with respect to the subject vehicle between January 31, 2008 and February 4, 2008 and no one from the police department contacted Dollar during that time. On February 5, 2008, Gagliardi called Shird asking for the location of the vehicle. Shird stated that her sister's boyfriend took the car without her knowledge, then drove by her house and she called the police. The vehicle was later returned to Dollar on February 5, 2008.

On February 5, 2008, that same 2008 Jeep Cherokee vehicle was rented to Clarence Payne, with Altwaab Turner ("Turner") listed as an additional driver. On February 6, 2008, Turner drove the vehicle to his friend Ferguson's house. Ferguson got into the driver's seat of the vehicle to help Turner parallel park. As she was about to park, the vehicle was stopped by the New York City Police Department. Ferguson and Turner were arrested for criminal possession of stolen property based on the outstanding Newark Police Department stolen vehicle report. Ferguson spent approximately 15 hours in police custody, at which point her case was sealed without further consequence and she was released. Ferguson was not prosecuted and did not seek any medical treatment as a result of the incident.

In her complaint, Ferguson alleged causes of action for false arrest and wrongful imprisonment, sustaining “severe mental anguish, fright, humiliation, deprivation of her liberty, of her freedom, expense, as well as physical injury and suffering.” She also alleged that Auto and Dollar “fallaciously, recklessly, and negligently reported to law enforcement officials and authorities that the aforesaid motor vehicle was stolen.” In her bill of particulars, Ferguson further claimed that Auto and Dollar were negligent in “failing and omitting to promptly and properly notify law enforcement officials that said vehicle had been recovered” and “causing plaintiff to be held against her will for an extended period of time when defendants knew or, in the exercise of reasonable and prudent care, should have known that said vehicle was not stolen.”

Dollar and Auto now move for summary judgment dismissing the complaint. They first argue that the claims for false arrest and false imprisonment must be dismissed because they did not arrest, imprison or constrain her in any way. They were not aware of her and had no knowledge of her connection to Payne or Turner. They took no role in her arrest and were not even aware that a stolen vehicle report had been made. They submit the affidavit of Auto’s owner, Thomas Peera (“Pcera”), who maintains that no one advised any Dollar or Auto employee that a stolen vehicle report was made with respect to the subject vehicle. They also refer to Gagliardi’s testimony that no one from Dollar contacted the police with respect to the subject vehicle between January 31, 2008 and February 4, 2008 and no one from the police department contacted Dollar during that

time. Gagliardi also explained Dollar and Auto's procedures for dealing with vehicles that are returned after the contractual deadline.

They further argue that Ferguson's negligence claim, which is asserted for the first time in her bill of particulars, must be dismissed because it was not pled in her complaint. In any event, they can not be held liable for negligence because they owed her no duty. The vehicle was rented to Payne, and allowed Turner to operate the vehicle as an additional driver. There was no mention of Ferguson in the rental agreement, and in fact, the rental agreement clearly provided that no drivers in addition to Turner or Payne were permitted to operate the vehicle. In addition, Dollar and Auto could not have breached any purported duty owed to Ferguson because they were not even aware of the stolen vehicle report until after the arrest. Finally, they maintain that Ferguson has not alleged any damages suffered.

In opposition, Ferguson argues that (1) Peera's affidavit must be disregarded because it is an out of state affidavit not notarized by a person commissioned to do so in this state or even in the state of the making of the affidavit; (2) the deposition transcripts submitted in support of the motion must be disregarded because they are unsigned; (3) a new cause of action was not alleged in the bill of particulars, rather the claims asserted in the complaint were merely expanded and explained in the bill of particulars; (4) Dollar and Auto were negligent in that they knew or should have known that a stolen vehicle report had been filed with the police and then allowed the subject vehicle to be returned

and then immediately rented out again without informing the police of its proper return; and (5) Dollar and Auto, by entering into the vehicle rental contract, assumed a duty of care to certain persons outside the contract, including Ferguson who was a person invited into the vehicle, and breached that duty.

Discussion

First, Ferguson's argument that the deposition transcripts must be disregarded because they are unsigned is without merit. The transcripts were all certified by the court reporter, Ferguson does not challenge any parts of the transcripts as inaccurate, and she relied on these transcripts in her opposition to the motion. Therefore, they shall not be disregarded. *See* CPLR §3116; *Bennett v. Berger*, 283 A.D.2d 374 (1st Dept. 2001); *Morchik v. Trinity Sch.*, 257 A.D.2d 534 (1st Dept. 1999).

However, Ferguson properly argues that Peera's out-of-state (New Jersey) affidavit, which was notarized by a person commissioned to do so in Ohio, should have been accompanied by a certificate authenticating the authority of the one administering the oath. *See* CPLR 2309(c); *Moccia v. Carrier Car Rental, Inc.*, 40 A.D.3d 504 (1st Dept. 2007). This was not a fatal defect, and as discussed below, Dollar and Auto have met their burden of establishing entitlement to judgment as a matter of law even without the submission of Peera's affidavit.

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any

material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

To sustain a cause of action for false arrest and false imprisonment, a plaintiff must show that the defendant took an active role in the prosecution of the plaintiff, such as giving advice and encouragement or importuning the authorities to act, and that the defendant intended to confine the plaintiff. See *Martinez v. City of Schenectady*, 97 N.Y.2d 78 (2001); *Celnick v. Freitag*, 242 A.D.2d 436 (1st Dept. 1997). The facts of this case do not support a false arrest or false imprisonment cause of action. The evidence presented establishes that Dollar and Auto had no intent to arrest or imprison Ferguson and did not even have knowledge of her arrest until after it occurred.

In her opposition papers, Ferguson appears to focus her efforts on her negligence cause of action, specifically asserting that Dollar and Auto knew or should have known that the vehicle was stolen and that a police report was filed, and should not have permitted the subject vehicle to be rented thereafter without first notifying the police of its return. To establish a prima facie case of negligence, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. *Solomon v. New York*, 66 N.Y.2d 1026 (1985). Auto and Dollar made a prima facie showing that they owed no direct duty to Ferguson.

However, Ferguson argues that Auto and Dollar assumed a duty of care to her as a result of its rental agreement with Clarence Payne pursuant to the court's holding in *Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136 (2002). In *Espinal*, the court explained that a contractor's duty of care to non-contracting third parties may arise out of a contractual obligation or the performance thereof in three circumstances: (1) where the contractor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk; (2) where the plaintiff has suffered injury as a result of reasonable reliance upon the contractor's continuing performance of a contractual obligation; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely.

Here, Ferguson fails to submit evidence sufficient to raise a triable issue of fact as to whether Auto or Dollar launched a force or instrument of harm by failing to exercise reasonable care in the performance of their contractual duties or whether Ferguson detrimentally relied on the continued performance of their contractual duties. The evidence submitted establishes that Auto and Dollar had no knowledge that the vehicle was reported stolen to the police or of Ferguson's arrest and imprisonment until after her release. No evidence has been submitted that Auto and Dollar failed to follow proper procedures for dealing with vehicles that have been returned late or otherwise created an unreasonable risk of harm to others or increased a risk.

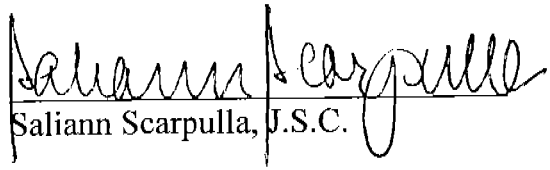
In accordance with the foregoing, it is hereby

ORDERED that defendants Dollar Rent A Car, Inc. and Auto Rental, LLC's motion for summary judgment dismissing the complaint is granted, the complaint is dismissed, and the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: New York, New York
February 23, 2012

ENTER:


Saliann Scarpulla, J.S.C.

FILED

FEB 28 2012

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