Gray Line N.Y. Tours, Inc. v Big Apple Moving & Storage, Inc.
2013 NY Slip Op 33741(U)
August 29, 2013
Sup Ct, New York County
Docket Number: 114496/09
Judge: Arlene P. Bluth
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH
Justice

PART 22

Index Number : 114496/2009
GRAY LINE NEW YORK TOURS
vs.
BIG APPLE MOVING
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for Δ Big Apple's MSJ dismissing cpt

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1

Answering Affidavits — Exhibits _____ No(s). 2

Replying Affidavits _____ No(s). 3

Upon the foregoing papers, it is ordered that this motion is consolidation for joint disposition with seq. 004 and

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

FILED

SEP 06 2013

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 8/29/13

HON. ARLENE P. BLUTH J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NY
COUNTY OF NEW YORK: PART 22

Gray Line New York Tours, Inc. and
International Bus Services, Inc.,

Plaintiffs,

-against-

Big Apple Moving and Storage, Inc. and
Salvador Skerret,

Defendants.

Index No.: 114496/09
Mot Seq 004 and 005

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

Big Apple Moving and Storage, Inc.,

Third-Party Plaintiff,

-against-

Salvador Skerret,

Third-party Defendant.

Motion Seq. Nos. 04 and 05 are consolidated for joint disposition.

Plaintiffs' motion for summary judgment on liability as against Big Apple Moving and Storage Inc. (Big Apple) (seq. 04) is denied; defendant/third-party plaintiff Big Apple's motion for summary judgment dismissing the complaint against it (seq. 05) is also denied.

In this action, plaintiffs seek recovery for property damage arising out of a February 11, 2008 motor vehicle accident. It is uncontested that a truck owned by Big Apple hit plaintiffs' bus in the rear when it was stopped at a red light. Defendant Skerret, the driver of Big Apple's truck, has not answered or appeared in the main action; Big Apple obtained a default judgment against him in a third-party action pending in Kings County (opp., exh 1). The issues in contention are whether Skerret had permission to drive the truck and whether the brake failure was expected or unexpected.

In support of plaintiff's motion for summary judgment on liability, plaintiff has submitted Skerret's affidavit. Preliminarily, in opposition, Big Apple asserts that Skerret's affidavit is inadmissable because Skerret is a defaulting defendant in the main action, and that plaintiffs

should be precluded from offering this affidavit in support of their motion. Big Apple also claims that because Skerret defaulted in the third-party action, he admitted the allegations contained in the third-party complaint (para. 10-12), that he did not have permission or consent to use the truck when the accident took place and that he knew that he did not have the consent. However, the third-party action was not commenced until 2011, more than a year after Skerret executed this affidavit.

Moreover, the only allegations set forth in the instant complaint regarding Skerret were that he resided in Manhattan and that he was negligently operated the truck that hit plaintiffs' bus (paras. 9, 12, 15, 17). Thus, by defaulting in the instant action, it cannot be said that Skerret admitted that he did not have permission to drive the truck at the time of the accident. None of the cases cited by Big Apple require that this Court disregard Skerret's affidavit; accordingly, the Court will consider it in connection with plaintiffs' motion.

In order to prevail on its motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact. *Alvarez v Prospect Hospital,* 68 NY2d 320, 508 NYS2d 923 (1986). Once the movant demonstrates entitlement to judgment, the burden shifts to the opponent to rebut that prima facie showing. *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872, 433 NYS2d 1015 (1980). In opposing such a motion, the party must lay bare its evidentiary proof. Conclusory allegations are insufficient to defeat the motion; the opponent must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact. *Zuckerman v City of New York,* 49 NY2d 557 at 562, 427 NYS2d 595 (1980).

In deciding the motion, the court must draw all reasonable inferences in favor of the non-

moving party and must not decide credibility issues. (*Dauman Displays, Inc. v Masturzo,* 168 AD2d 204, 562 NYS2d 89 [1st Dept 1990], *lv. denied* 77 NY2d 939, 569 NYS2d 612 [1991]). As summary judgment is a drastic remedy which deprives a party of being heard, it should not be granted where there is any doubt as to the existence of a triable issue of fact (*Chemical Bank v West 95th Street Development Corp.,* 161 AD2d 218, 554 NYS2d 604 [1st Dept 1990]), or where the issue is even arguable or debatable (*Stone v Goodson,* 8 NY2d 8, 200 NYS2d 627 [1960]).

In his moving affidavit, Skerret swears that Big Apple generally gave him (and other drivers) permission to use its trucks for personal use after hours (and he had his own key to the truck he was using on the evening of the accident). He did not have to ask permission each time and the only thing Big Apple's owner requested was that the drivers replace the fuel used. While Skerret acknowledges that he was drinking vodka before the accident, he claims that he saw the stopped traffic and tried to stop but the truck had brake problems and, despite pumping the brakes, the brakes failed and he could not stop. Therefore, by submitting evidence showing a possible non-negligent reason for the collision (brake failure), plaintiffs themselves have rebutted the presumption of negligence on the part of the following driver (Skerret). A driver may be exonerated where there is a non-negligent explanation, such as brake failure; whether the brake failure was expected or unexpected is also an issue of fact (*LaSalle v. J & T Sand and Gravel, Inc.*, 177 AD2d 265, 576 NYS2d 9, *lv. denied* 79 NY2d 755, 581 NYS2d 665).

While plaintiffs create an issue of fact as to defendant driver's negligence, in opposition, defendant Big Apple demonstrates that there is an issue of fact regarding Skerret's permission to use the truck. Big Apple submits the affidavits of its owner, Joseph Clements, and its dispatcher

on the date of the accident, Donna Gagg, who both vigorously deny that Skerret had permission to operate the vehicle on the day of the accident, precisely because a problem with the brakes had been identified that morning, and the subject truck had been taken out of commission.

However, there is an issue of fact as to whether Big Apple took the truck out of commission and reported the brake problem to their mechanic. On one hand, Donna Gagg, Big Apple's dispatcher on the date of the accident, testified that she reported the brake problem to Victor, the mechanic, and asked him to come take a look at the truck (Gagg deposition, page 40). However, that mechanic, Victor Semidey, was deposed and he testified that he never worked on brakes of any Big Apple Truck, including the subject truck (deposition, p. 30). Mr. Semidey testified that no one called him on the date of the accident to ask him to look at the truck and they called him two days later to look at the wreckage (deposition p. 39-40). From the deposition, it is clear that Mr. Semidey, an older man who had a heart condition and was told in 1975 not to lift more than ten pounds, only did very light work like changing windshield wipers and oil changes (but not oil changes on the subject truck). Many times during the deposition he informed the questioner that he hardly ever saw the subject truck (because he doesn't wake up before ten and that truck is usually gone by 7AM), that he didn't do heavy work like brakes, and that Brooklyn Truck was the garage that worked on the trucks.

Mr. Semidey, who has been doing jobs for 52 years for Big Apple, only works for cash and only does very handyman-type vehicle work; he is not licensed or certified, he brings his own tools, he doesn't like to work on trucks in Big Apple's warehouse because there is too much paper and garbage around and he doesn't work in the rain. This Court got the definite impression that Big Apple throws very minor work his way because they like him, because he has been

around a long time and because he can use some extra cash - that is, they call him more out of a sense of loyalty and nostalgia than for his current abilities. Therefore, not only is there a question of fact as to whether Ms. Gagg called him the day of the accident to come check the brakes (which he specifically denied) but there is a question as to whether she would have even called him at all for brake work on the subject truck, as he repeatedly denied that he did any brake work and that he hardly ever worked on that truck at all. If the jury finds that Ms. Gagg never called him (or anyone else) to work on the brakes, the jury may find that the brake problem was unexpected.

Accordingly, because there are issues of fact as shown above, it is hereby

ORDERED that plaintiffs' motion and Big Apple's cross-motion for summary judgment are both denied.

This is the Decision and Order of the Court.

Dated: August 29, 2013
New York, New York

HON. ARLENE P. BLUTH, JSC