

Geronimo v New York City Transit Auth.

2014 NY Slip Op 33158(U)

October 30, 2014

Supreme Court, Queens County

Docket Number: 701067/14

Judge: Darrell L. Gavrin

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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN**
Justice

IA PART 27

DENNY GERONIMO,

Index No. 701067/14

Plaintiff,

Motion

Date June 19, 2014

- against-

Motion

NEW YORK CITY TRANSIT AUTHORITY,
METROPOLITAN TRANSIT AUTHORITY, MTA
CAPITAL CONSTRUCTION COMPANY, CRICKET
ENTERPRISES LLC, TNT EQUIPMENT SALES &
RENTALS, J-TRACK LLC, NORFOLK SOUTHERN
RAILWAY CO., and INDUSTRY SAFETY
CONSULTANTS, LLC,

Cal. No. 53

Motion

Seq. No. 1

Defendants.

The following papers numbered E19 to E51 read on this motion by defendant, Norfolk Southern Railway Co., sued herein as Northfolk Southern Railway Co. (Norfolk), for an order dismissing the complaint and all cross claims pursuant to CPLR 3211 (a) (1) and (7). Cricket Enterprises LLC (Cricket) cross-moves for an order dismissing plaintiff's complaint and denying Norfolk's motion to dismiss Cricket's cross claim for indemnification.

	<u>Papers Numbered</u>
Notice of Motion - Affirmation - Affidavit-Exhibits.....	E19-24
Notice of Cross Motion - Affirmation - Exhibits.....	E32-37
Opposing Affirmation.....	E38
Opposing Affirmation - Exhibits.....	E41
Opposing Affirmation - Exhibits.....	E42
Reply Affirmation.....	E45
Reply Affirmation - Exhibits.....	E46-50
Reply Affirmation.....	E51

Upon the foregoing papers, the motion and cross motion are determined as follows:

Plaintiff, Denny Geronimo, commenced the within action on February 17, 2014, and alleges that he sustained serious personal injuries on May 8, 2013 when a construction vehicle,

identified as a 2004 Ford F-350 pick-up truck, bearing Tennessee license plate number H248473 came into contact with him. He alleges that the accident occurred at the “A” subway track, track #3, located at or near Hamilton Beach Station and Broad Channel Station, location 618, Far Rockaway, New York. Plaintiff contends that on August 2, 2013, he served a Notice of Claim on the New York City Transit Authority (NYCTA), and on the same date he served a Notice of Claim on the Metropolitan Transit Authority (MTA). The complaint asserts claims for common law negligence and for violations of Sections 200 and 241 of the Labor Law against defendants, NYCTA, MTA, and MTA Capital Construction Company. Plaintiff asserts claims for negligence against all of the defendants in which he alleges that each of the defendants owned, leased, or rented the offending motor vehicle.

The court notes that defendant, Norfolk, is named in the summons as Northfolk Southern Railway Co. Defendant, Norfolk, in this pre-answer motion seeks an order dismissing the complaint and all cross claims, and asserts it had ceased to be the owner of the subject vehicle prior to plaintiff’s accident, as its broker, defendant, Cricket, sold the vehicle to defendant, TNT Equipment Sales & Rentals (TNT), on October 16, 2012. Defendant, Norfolk, in support of its motion, relies upon a copy of an invoice of sale, dated October 16, 2012, with a sale price of \$4,000.00, a used vehicle condition report, and a printout from LexisNexis pertaining to the registration of said motor vehicle, which indicates that the Tennessee registration expired on February 28, 2013.

Defendant, Cricket, in a pre-answer cross motion also seeks to dismiss the complaint on the grounds that it was not the owner of the subject vehicle, and that acting as Norfolk’s agent, it sold the vehicle to defendant, TNT, on October 16, 2012. Cricket, in support of the cross motion relies upon a copy of an invoice of sale, dated October 16, 2012, with a sale price of \$5,000.00, and a copy of a power of attorney dated May 2, 2012, from Norfolk and other companies, granting Cricket the authority to act on its behalf in all matters pertaining to the any motor vehicle assigned to Cricket for sale. Cricket also asserts that as it acted as Norfolk’s agent, it is entitled to be indemnified by its principal, and therefore its cross claims against Norfolk for indemnification should not be dismissed.

Norfolk, in opposition to Cricket’s cross motion, asserts that it had no duty to indemnify Cricket under the power of attorney, and therefore that branch of Cricket’s cross motion which opposes Norfolk’s request to dismiss Cricket’s cross claims for indemnification must be denied.

Plaintiff, in opposition to Norfolk’s motion and Cricket’s cross motion, asserts that the documentary evidence is insufficient to resolve all issues regarding ownership of the offending vehicle, as a matter of law. He asserts that the invoices submitted by these defendants, by themselves, are insufficient to establish that there was a sale or any transaction with respect to the subject vehicle; that the vehicle registration printout is not certified, and expressly states that “[t]his system should not be relied upon as definitely accurate.” Plaintiff also asserts that Cricket had some interest in the vehicle as evidenced by invoices. Plaintiff submits certified copies of subject vehicle’s records, issued by the Tennessee Department of Revenue Taxpayer

& Vehicle Service, showing that the subject motor vehicle's owner is Norfolk, and that the expiration date was February 28, 2013; that the certificate of title was issued to Norfolk on July 14, 2004; and that title to the vehicle was previously issued to Norfolk by Magic City Motor Corporation on June 21, 2004. Plaintiff asserts that the defendant's motion and cross motion are premature as discovery is required.

Norfolk, in reply, asserts that the documentary evidence is sufficient to establish that it did not own the subject vehicle at the time of the plaintiff's accident and further relies upon the documentary evidence submitted by Cricket which supports Norfolk's claim that the vehicle was sold to TNT. Norfolk further asserts that it is entitled to indemnification from Cricket, based upon Cricket's negligence. It is asserted that pursuant to the invoice agreement between Cricket and TNT, the purchaser was required to return the license plates to Cricket; that Cricket failed to follow-up on this transaction; and that Cricket was negligent in failing to recover the license plates from TNT and permitting TNT to operate the vehicle without obtaining a new license plate.

Cricket, in reply, submits a copy of TNT's answer in which it admitted to being the owner of the subject vehicle, and denied that "Northfolk" (Norfolk) is the owner of the subject vehicle. Cricket asserts that it certified the invoice dated October 16, 2012, for the sale of the vehicle as a business record, and that neither its principal, Norfolk, nor Cricket, owned the subject motor vehicle on the date of the accident.

On a pre-answer motion to dismiss pursuant to CPLR 3211 (a) (7), the court should "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88[1994]; *see Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 996 [2d Dept 2010]). Such a motion should be granted where, even viewing the allegations as true, the plaintiff cannot establish a cause of action (*see Parekh v Cain*, 96 AD3d 812 [2d Dept 2012]; *Morales v Copy Right, Inc.*, 28 AD3d 440, 441 [2d Dept 2006]). To prevail on a motion to dismiss a complaint pursuant to CPLR 3211 (a) (1), the documentary evidence which forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (*see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Barker v Amorini*, --- AD3d ---, 2014 NY Slip Op 06931, 2014 N.Y. App. Div. LEXIS 6909 [2d Dept 2014]; *Parekh v Cain*, 96 AD3d at 815).

It is well-settled that "[f]acts admitted by a party's pleadings constitute formal judicial admissions. Formal judicial admissions are conclusive of the facts admitted in the action in which they are made" (*Zegarowicz v Ripatti*, 77 AD3d 650, 653 [2d Dept 2010] [citations omitted]; *see also Naughton v City of New York*, 94 AD3d 1 [1st Dept 2012]), and "are binding on the parties throughout the entire litigation, unless modified or relieved in the discretion of the court" (Richardson, Evidence § 216 [Prince 10th ed]; Fisch, New York Evidence § 803 [2d ed 1977]). In the absence of amendment pursuant to CPLR 3025 (a) or (b), the pleading is

conclusive (*id.*).

Pursuant to Vehicle and Traffic Law § 420 (1), “[u]pon the transfer of ownership . . . of a motor vehicle . . . , its registration shall expire; and the seller . . . shall remove the number plates from the vehicle.” Consequently, “[a] registered owner who transfers a vehicle without removing the license plates is estopped as against an injured third party from denying ownership” (*Dairylea Coop. v Rossal*, 64 NY2d 1, 10 [1984]; see *Phoenix Ins. Co. v Guthiel*, 2 NY2d 584, 587-588 [1957] *Madafferi v Herring*, 104 AD3d 1293, 1294 [4th Dept 2013]; *Garcia v Davis*, 53 AD3d 525 [2d Dept 2008]).

Title to a motor vehicle is transferred when the parties intend such transfer to occur (*see Godfrey v G.E. Capital Auto Lease, Inc.*, 89 AD3d 471 [1st Dept 2011]; *Potter v Keefe*, 261 AD2d 864 [4th Dept 1999]). Therefore, title to a vehicle may pass to a purchaser when the purchaser takes delivery of it, notwithstanding that formal registration of the vehicle in the purchaser’s name occurs later, or not at all (*see Pearson v Redline Motor Sports*, 271 AD2d 222 [1st Dept 2000]; *Pugh v Hartford Ins. Group*, 68 Misc 2d 1014, 1016 [Sup Ct Monroe County, 1972]; *Horvath v Lindenhurst Auto Salvage*, 60 F3d 120, 122 [Ct Appeals, 2d Cir 1995]).

In the case at bar, the documentary evidence submitted by Norfolk and Cricket, consisting of an unsigned invoice of sale by Norfolk’s agent Cricket to TNT, on October 16, 2012, as well as the LexisNexis printout, by itself, is insufficient to establish that title to the subject motor vehicle had passed to TNT prior plaintiff’s accident. The documentary evidence submitted by the plaintiff, however, establishes that the 2004 Ford vehicle involved in plaintiff’s accident was registered to Norfolk in Tennessee, and that said registration expired on February 28, 2013, prior to plaintiff’s accident. There is no evidence that the vehicle’s registration in Tennessee was renewed, or that the vehicle was registered in any other state, after February 28, 2013. Therefore, as the subject vehicle was not registered in New York, the provisions of Vehicle and Traffic Law § 420 are not applicable here, and as the Tennessee registration had expired prior to the accident, Norfolk is not estopped from denying ownership of said vehicle.

Moreover, TNT in its answer admitted that it is the owner of the subject motor vehicle and that Norfolk is not the owner of said vehicle. Therefore, although the vehicle’s Tennessee registration had expired, and TNT had not registered the vehicle and removed the Tennessee license plates prior to the accident, TNT’s judicial admission is sufficient to establish that title to the subject motor vehicle had passed to TNT prior to the accident, and that Norfolk did not own the subject motor vehicle at the time of the accident.

Furthermore, the documentary evidence submitted herein sufficiently establishes that Cricket acted as Norfolk’s agent for the sale of the subject motor vehicle, pursuant to a power of attorney. Plaintiff, however, cannot establish that title to the subject vehicle was ever transferred to Cricket. Plaintiff, therefore, cannot maintain a claim against Cricket based upon its alleged ownership or lease of the subject motor vehicle.

Cricket's common-law and contractual indemnification claims against Norfolk must be dismissed because Norfolk cannot be held liable for the plaintiff's accident and there is no agreement under which Norfolk agreed to indemnify and hold harmless Cricket. Notably, the power of attorney which appointed Cricket as Norfolk's agent in connection with the sale of motor vehicles, does not contain an indemnification provision, and Cricket does not assert that any other agreement exists between the parties.

Accordingly, Norfolk's motion to dismiss the complaint, and all cross claims, is granted, and Cricket's cross motion is granted to the extent that it seeks to dismiss the complaint, and is denied in all other respects.

Dated: October 30, 2014

DARRELL L. GAVRIN, J.S.C.