

Anglero v LLanif

2015 NY Slip Op 30723(U)

April 22, 2015

Supreme Court, Kings County

Docket Number: 505599/2014

Judge: Martin M. Solomon

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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DINORAH CARMEN ANGLERO, DARIO FERRER DE LA
CRUZ and RAMON DUARTE GARCIA,

Plaintiffs,

Decision/Order

- against -

Index No. 505599/2014

NAZIM HANIF, U-HAUL INTERNATIONAL, INC., and
JOSE D. ORTEGA,

Defendants.

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**RECITATION, AS REQUIRED BY CPLR 2219(A), OF THE PAPERS CONSIDERED ON THE REVIEW OF
THESE MOTIONS FOR SUMMARY JUDGMENT.**

PAPERS	NUMBERED
Notices of Motion and Affidavits Annexed	1
Affirmation in Opposition	2
Reply Affirmation	3
Memorandum of Law	4

UPON THE FOREGOING CITED PAPERS, THE DECISION/ORDER ON THESE MOTIONS IS AS FOLLOWS:

Plaintiffs bring this action for damages for alleged injuries suffered as a result of a car accident on October 9, 2013, between defendants Hanif and Ortega while Hanif was driving a vehicle rented from defendant U-Haul 2010 Titling 2, I.I.C, captioned here as U-Haul International, Inc. and while plaintiffs were passengers in Ortega’s vehicle. U-Haul now moves for dismissal of plaintiff’s complaint against U-Haul under CPLR §§ 3211(a)(1) and (7).

Plaintiffs’ Verified Complaint alleges that at the time of the accident, plaintiffs were passengers in Ortega’s 2007 Chevrolet when Ortega was involved in an accident at the intersection of Linden Boulevard and 96th Place in Queens County with Hanif, who was driving a 2013 Ford he rented from U-Haul. Plaintiffs claim that defendants’ negligence caused the accident and that defendants were “negligent, careless and reckless in the ownership, operation, maintenance, supervision, use and control” of their vehicles, and that this accident resulted in serious and permanent injuries to plaintiffs.

Ortega’s Verified Answer with Cross-Claim alleges that Ortega was “faced with a sudden emergency situation,” that the accident was the sole fault of defendants Hanif and U-Haul, and that plaintiffs’ injuries were caused by their failure to use seat belts.

U-Haul now moves to dismiss the complaint under CPLR §§ 3211(a)(1) and (7), claiming that it is protected from vicarious liability under 49 U.S.C.A. § 30106; that plaintiffs' "conclusory allegations of negligence are insufficient to establish any affirmative negligent acts on the part of a [sic] defendant;" and that a claim cannot be maintained against U-Haul as Hanif admits to staging the accident in an effort to commit insurance fraud.

In opposition, plaintiffs ask that this Court dismiss U-Haul's motion in its entirety, claiming that 49 U.S.C.A. § 30106 is inapplicable as U-Haul did not present any evidence that it was not negligent in maintaining the vehicle driven by Hanif, and that U-Haul did not present sufficient evidence that the accident was staged.

CPLR §§ 3211 (a)(1) and (7)

Under CPLR § 3211(a), a party may make a motion to dismiss a cause of action if "a defense is founded upon documentary evidence," CPLR § 3211(a)(1), or if "the pleading fails to state a cause of action." CPLR § 3211(a)(7).

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. [The court accepts] the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determin[e] only whether the facts as alleged fit within any cognizable legal theory. Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994) (internal citations omitted).

However, bare legal conclusions are not presumed to be true. Moreover, where evidentiary material is submitted and considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate. *Khan v. MMCA Lease, Ltd.*, 100 A.D.3d 833, 833 (2d Dep't 2012) (internal citations omitted).

49 U.S.C.A. § 30106

Vehicle and Traffic Law § 388(1) provides that, with the exception of bona fide commercial lessors of motor vehicles, which are exempt from vicarious liability by virtue of federal law (*see* 49 USC § 30106; *Vyrtil Trucking Corp. v. Browne*, 93 A.D.3d 716, 940 N.Y.S.2d 279; *Castillo v. Amjack Leasing Corp.*, 84 A.D.3d 1297, 924 N.Y.S.2d 277), the owner of a motor vehicle shall be liable for the negligence of one who operates the vehicle with the owner's express or implied consent (*see Sargeant v. Village Bindery*, 296 A.D.2d 395, 744 N.Y.S.2d 508; *Matter of Allstate Indem. Co. v. Nelson*, 285 A.D.2d 545, 728 N.Y.S.2d 82; *Headley v. Tessler*, 267 A.D.2d 428, 700 N.Y.S.2d 849). *Fuentes v. Virgil*, 119 A.D.3d 522, 522-23 (2d Dep't 2014).

Under the Graves Amendment (49 USC § 30106), the owner of a leased or rented motor vehicle cannot be held liable for personal injuries resulting from the use of such vehicle if the owner (i) is engaged in the trade or business of renting or leasing motor vehicles, and (ii) engaged in no negligence or criminal wrongdoing. *Bravo v. Vargas*, 113 A.D.3d 579, 580 (2d Dep't 2014).

With respect to U-Haul's CPLR § 3211 (a)(1) motion, the documentary evidence submitted by U-Haul in its motion includes a title application for the subject vehicle, an Arizona Apportioned Registration Card for the subject vehicle, an equipment rental contract, and a document titled "Rental Contract Addendum." The documentary evidence submitted by U-Haul in its Reply Affirmation consists of a claims withdrawal form and a statement certification. Of these documents, only the equipment rental contract and the rental contract addendum tend to show that U-Haul is engaged in the trade or business of renting or leasing motor vehicles. However, none of the documents presented by U-Haul refutes plaintiffs' claims of negligence on U-Haul's part. Therefore, U-Haul's motion to dismiss under CPLR § 3211(a)(1) with respect to 49 U.S.C.A. § 30106 must be denied.

With respect to U-Haul's CPLR § 3211(a)(7) motion, U-Haul also submits affidavits from Jennifer Settles and Kevin Tolan, and in its Reply Affirmation, affidavits from Tolan, with an affidavit from Hanif annexed to it.

Settles' affidavit states that she is the Secretary of 2010 U-Haul Titling 2, LLC and U-Haul International, that U-Haul is in the business of renting motor vehicles, and that 2010 U-Haul Titling 2, LLC, but not U-Haul International, is the owner of the vehicle driven by Hanif. However, Ms. Settles' Affidavit does not refute plaintiff's claims of negligence on U-Haul's part.

The Tolan affidavit submitted with the Notice of motion claims that Hanif admitted in an interview that he staged the accident in order to commit insurance fraud, and that Tolan would be willing to testify to what Hanif said in the interview. Annexed to the affidavit is an exhibit that alleges to be the interview referred to by Tolan's affidavit. However, this affidavit is defective. First, the affidavit purports to be signed in New Jersey by a Notary Public who is licensed in Massachusetts. Massachusetts Notaries Public have no authority to witness documents signed

outside of Massachusetts. *See Notary Public Frequently Asked Questions, available at <http://www.mass.gov/governor/constituent-services/notary/notary-public-frequently-asked-questions.html> (last accessed April 22, 2015 2:26PM).* Therefore, Tolan's affidavit is unattested and has no probative value. Even if it were attested to, the alleged Hanif interview transcript is neither sworn to nor notarized, and also has no probative value.

The Tolan affidavit submitted with U-Haul's Reply Affirmation again states that Tolan would testify that Hanif admitted to Tolan that Hanif staged the accident to commit insurance fraud. Annexed to this affidavit is an affidavit from Hanif stating that Hanif staged the accident. However, Hanif's affidavit is defective. The affidavit has no state or county, is neither sworn to nor notarized. As a result, neither is of any probative value.


Because U-Haul presents nothing to refute plaintiffs' claims, its motion to dismiss under CPLR § 3211(a)(7) with respect to 49 U.S.C.A. § 30106 must be denied.

With respect to U-Haul's claim that plaintiff's claims are conclusory, the complaint specifically alleges that the accident was the result of defendants' negligent "ownership, operation, management, supervision, use and control" of the vehicle driven by Hanif. These are not conclusory allegations and the motions must be denied.

With respect to U-Haul's claim that U-Haul Hanif staged the accident in an attempt to commit insurance fraud, as stated above, U-Haul presents no admissible evidence that Hanif staged the accident. Therefore, the motions must be denied.

For the foregoing reasons, defendant U-Haul's motion is denied in its entirety.

Dated:
April 22, 2015


Martin Solomon, J.S.C.