

Zeng Ji Liu v Bathily

2016 NY Slip Op 31014(U)

June 2, 2016

Supreme Court, New York County

Docket Number: 150340/12

Judge: Arlene P. Bluth

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

**Index No.: 150340/12
Motion Seq. 03**

Zeng Ji Liu and Xi Jin Lin,
Plaintiffs,
-against-

DECISION/ORDER

**Djibril Bathily, Steph Taxi Corp. and All Taxi
Management, Inc.,**
Defendants.

HON. ARLENE P. BLUTH, JSC

Defendant All Taxi Management, Inc.'s (All Taxi) motion for summary judgment dismissing all claims and cross-claims against it is denied. Plaintiffs' cross-motion to amend the complaint and for a ruling on the Graves Amendment is denied in its entirety.

In this action, plaintiff Liu, a pedestrian, claims that on February 15, 2012 he was struck by a yellow 2012 Ford Escape operated by co-defendant Bathily; Liu's wife asserts only a derivative claim. In the complaint, plaintiffs asserts, *inter alia*, that All Taxi and co-defendant Steph Taxi Corp. (Steph) were (1) the owners of the subject taxi, (2) Bathily's employer, (3) negligent in the hiring, training, and supervision of Bathily, and (4) had a duty to maintain the subject taxi.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light

most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

In support of its motion, All Taxi claims that the documentary evidence submitted demonstrates that co-defendant Steph is the registered and titled owner of the subject taxi (affirmation of All Taxi's counsel, exh H), and that All Taxi is merely the management company and agent for Steph. All Taxi further asserts that Steph sold the taxi to Bathily and All Taxi provided Bathily with financing for the purchase. All Taxi points out that as set forth in the medallion management agreement between All Taxi and Steph in effect on the date of the accident (*id.* exh G), Steph leased two medallions to All Taxi. Steph requested that All Taxi manage the medallions by entering into leases with drivers, procuring a vehicle and insurance, and handling TLC related business. All Taxi argues that All Taxi's manager, Alpha Ba, testified that All Taxi does not and has never paid Bathily a salary; rather it collected money from Bathily, and that was for "the lease payments in accordance with the term of the lease agreements."

All Taxi further argues that Bathily is an independent contractor rather than an employee

of All Taxi.

In opposition, plaintiffs refer to Bathily's April 12, 2012 affidavit wherein he stated that he was employed by All Taxi, as well as his deposition testimony, in which he stated that he worked for All Taxi (*id.* exh P; exh T at 5). Additionally, plaintiffs assert, *inter alia*, that pursuant to the medallion lease agreements (*id.* exh J; exh K), All Taxi exhibited control over its drivers (*see* affirmation of plaintiffs' counsel Morris ¶ 19 [a] through [x]). For instance, plaintiffs claim that All Taxi pays drivers after deducting All Taxi's share of the profits, drivers are eligible to receive bonuses from All Taxi, and drivers must follow rules and regulations established by All Taxi.

Plaintiffs further point to All Taxi's website which states that "Not only do we provide the safest drivers available, but all vehicles are equipped with the latest meters and GPS systems. As the industry leader, we have implemented a Loss Control Program that insures that those driving vehicles with your medallion will have the safest driving record in the industry" (*id.* ¶ 11 [emphasis added]).

The doctrine of respondeat superior renders an employer vicariously liable for torts committed by an employee acting within the scope of the employment (*Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932, 933, 693 NYS2d 67 [1999]). However, "a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor's negligent acts" (*Brothers v New York State Elec. and Gas Corp.*, 11 NY3d 251, 257, 869 NYS2d 356 [2008] quoting (*Kleeman v Rheingold*, 81 NY2d 270, 273, 598 NYS2d 149 [1993])). The most crucial factor for determining whether an employment or independent contractor relationship exists is the control over the methods or the means by which the work was to be performed (*Chaouni v Ali*, 105 AD3d 424, 425, 963 NYS2d 27 [1st Dept

2013]). “Factors relevant to assessing control include whether the worker (1) worked at his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll and (5) was on a fixed schedule” (*Bynog v Cipriani Group, Inc.*, 1 NY3d 193, 198, 770 NYS2d 692 [2003]).

In *James v R&G Hacking Corp.*, (39 AD3d 385, 835 NYS2d 61 [1st Dept 2007]), the First Department held that summary judgment dismissing the complaint was warranted where a taxicab agent demonstrated that it was not the registrant or title owner of the cab, did not own the medallion attached thereto, did not employ the driver operating the cab at the time of the accident and did not control the day-to-day operation of the vehicle.

Here, plaintiffs have raised issues of fact relating to Bathily's employment and the degree of control All Taxi exercised over him (and its other drivers) regarding the operation of the cab. Further, All Taxi's witness acknowledged at a deposition that All Taxi manages medallions for owners so that the actual owners do not have to do the day-to-day work of running a taxi (affirmation of plaintiffs' counsel Morris, ¶ 12). All Taxi claims that it forwards Bathily all fares paid to him by credit card and subtracts lease payments, car loan repayments and applicable fees and taxes (affirmation of All Taxi's counsel, ¶ 20). Accordingly, All Taxi's motion for summary judgment is denied.

Plaintiffs' Cross-Motion

The branch of plaintiffs' cross-motion to amend the summons and complaint to add a sixth cause action alleging that as owner of the cab, All City is vicariously liable pursuant to Vehicle and Traffic Law §388 for any negligence on the part of Bathily is denied. In support, plaintiffs assert that paragraphs 34, 51 and 66 of the verified complaint already allege that All Taxi was the owner of the cab so “no prejudice will inure to the Defendants.”

In opposition, All Taxi claims that the documentary evidence shows that Steph has been the owner of the cab and that the motion to amend the complaint should be rejected because the new allegation has no chance of success on the merits.

“Leave to amend a pleading is freely given, absent prejudice or surprise resulting directly from the delay” (*Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405, 875 NYS2d 8 [1st Dept 2009]). “The determination of whether to allow such an amendment is reserved for the court’s discretion and exercise of that discretion will not be overturned without a showing that the facts offered for the amendment do not support the new claim(s)” (*id.*). “Where a court concludes that an application to amend a pleading clearly lacks merit, leave is properly denied” (*id.*).

Plaintiffs’ proposed amended complaint naming All Taxi as owner of the vehicle clearly lacks merit given the documentary evidence in this matter. All Taxi produced the bill of sale showing that *Manhattan Ford, Lincoln-Mercury, Inc.* sold the taxi to *Steph* (affirmation of All Taxi’s counsel, exH) and DMV abstracts showing that the vehicle was titled and registered to Steph (*id.* exH). Plaintiffs are unable to point to any evidence that suggests that All Taxi, rather than Steph, was the owner of the taxi on the date of the accident. The fact that the 2/14/12 invoice for the sale of the taxi was not signed by Steph (affirmation of All Taxi’s counsel, exH) or the fact that the notary stamp on the power of attorney from Steph to All Taxi (*id.* exG) is not entirely legible does not provide support for plaintiffs’ new allegation that All Taxi owned the cab.

Finally, the branch of the cross-motion seeking “summary judgment that the Graves Amendment does not apply to All Taxi” is denied. The Graves Amendment defense, which prohibits the imposition of vicarious liability on vehicle lessors for injuries resulting from the

negligent use or operation of the leased vehicle, has not been raised by any of the parties (including All Taxi) and is thus not properly before the Court.

Accordingly, it is hereby

ORDERED that defendant All Taxi's motion for summary judgment dismissing all claims and cross-claims against it is denied; and it is further

ORDERED that plaintiffs' cross-motion seeking to amend the complaint and for "summary judgment that the Graves Amendment does not apply to All Taxi" is also denied.

This is the Decision and Order of the Court.

Dated: June 2, 2016
New York, New York



HON. ARLENE P. BLUTH, JSC