

Spencer v Penske Truck Leasing Co., L.P.
2017 NY Slip Op 31299(U)
March 22, 2017
Supreme Court, Queens County
Docket Number: 9176/14
Judge: Cheree A. Buggs
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, CHEREÉ A. BUGGS IAS PART 30
Justice

TERRANCE J. SPENCER,

Plaintiff(s),

-against-

PENSKE TRUCK LEASING CO., L.P., PENSKE
TRUCK LEASING CORPORATION, PEARSON
MOVING INC. and LEONARDO MAS,

Defendant(s).

Index No.: 9176/14

Motion Date:
October 13, 2016

Cal. No.: 167

Mot. Seq. No.: 5

FILED
MAR 29 2017
COUNTY CLERK
QUEENS COUNTY

The following papers numbered 1-9 submitted and considered on this motion by defendants Penske Truck Leasing Co. and L.P., and Penske Truck Leasing Corporation pursuant to CPLR sections 3211 and 3212 dismissing the complaint and all claims against them based upon 49 USC § 30106 (Graves Amendment) and by defendants Leonardo Mas, Penske Truck Leasing Co, L.P. and Penske Truck Leasing Corporation for summary judgment dismissing all claims pursuant to CPLR 3212 due to plaintiff failure to sustain a serious injury under the New York Insurance Law.

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits	1-4
Answering Affidavits-Exhibits.....	5-7
Replying Affidavits.....	8-9

The portion of the motion of defendants Penske Truck Leasing Co. and L.P. and Penske Truck Leasing Corporation for an Order dismissing the action against them pursuant to CPLR sections 3211 and 3212 dismissing the complaint and all claims against them based upon 49 USC § 30106, the Graves Amendment is granted without opposition. The remaining portion of the motion for summary judgment by defendants Leonardo Mas, Penske Truck Leasing Co., L.P. and Penske Truck Leasing Corporation pursuant to CPLR 3212 against plaintiff Terrence J. Spencer due to his failure to have sustained a serious injury under the New York Insurance Law is denied as

academic as to Penske Truck Leasing Co., L.P., and Penske Truck Leasing Corporation and denied as to defendant Mas in its entirety.

Plaintiff Terrence J. Spencer (hereinafter "Spencer") commenced this action by filing and service of a summons and verified complaint on June 23, 2014 alleging that he sustained personal injuries as a result of an accident which occurred on March 8, 2014 at the intersection of West 52nd Street and 5th Avenue, County of New York, due to the negligence of the defendants, Penske Truck Leasing Co., L.P., Penske Truck Leasing Corporation, (hereinafter referred to collectively as "Penske", unless stated otherwise) and Leonardo Mas (hereinafter "Mas"). Penske and Mas served a verified answer with affirmative defenses on September 3, 2014, essentially denying the material allegations of the Spencer's verified complaint.

On November 3, 2015, plaintiff served a supplemental summons and amended complaint adding defendant Pearson Moving, Inc. (hereinafter "Pearson") as an additional defendant. Penske and Mas served a verified answer to the amended verified complaint on November 19, 2015. By Order of the undersigned dated July 11, 2016, Spencer's motion for a default judgment against Pearson Moving Inc. is granted.

Now, Penske moves pursuant to CPLR 3211 and 3212 for an Order dismissing the verified complaint and all claims against them under 49 USC §30106 (Graves Amendment) and by Penske and Mas for an Order pursuant to CPLR 3212 for summary judgment against Spencer, dismissing all claims on the grounds that he failed to sustain a serious injury under the New York Insurance Law.

In support of the motion, defendants submitted the pleadings; the affirmation of attorney Mark J. Agin, Esq. dated July 14, 2016; Order of Justice Duane A. Hart dated August 21, 2015; notice of issue dated January 28, 2016; So-Ordered Stipulation of Court Attorney Referee Anna M. Grimaldi dated March 14, 2016, (which extended the time for the parties to move for summary judgment to July 15, 2016); certificate of title for vehicle issued February 13, 2013. Rental Agreement between Penske and Pearson dated March 7, 2014; Penske Rental Inspection Report dated March 4, 2014; deposition transcript of Mas dated August 18, 2015; affidavit of Karen Rea dated July 13, 2016; deposition transcript of Spencer May 13, 2015; deposition transcript of Mas dated August 18, 2015; independent medical examination report of Dr. Eial Faierman dated March 31, 2016; Spencer's verified bill of particulars dated November 3, 2014.

Spencer alleged in his verified bill of particulars dated November 3, 2014, that the accident occurred on March 8, 2014 at the intersection of West 52nd Street and 5th Avenue, County of New York. He alleged that as a result of the accident he sustained injuries, including to his left shoulder, cervical spine, lumbar spine, right hip, legs, and head contusion. He alleged that as a result of the accident, he missed three months from work. Spencer alleged that he suffered serious injuries under the permanent loss of use of a body organ, member, function or system; permanent consequential limitation or use of a body organ or member; significant limitation of use of a body function or system and the 90/180 day categories of the Insurance Law.

Karen Rea (hereinafter "Rea") Rea stated in her affidavit dated July 13, 2016 that she was employed by Penske Truck Leasing Co., L.P. as a Litigation Claims Examiner and has been in her position for three years. She attested that she had been employed by Penske Truck Leasing Co., L.P. for the past twenty-five years, performing various duties. She stated that she reviewed Spencer's verified complaint and bill of particulars. According to Rea, Penske Truck Leasing Co., L.P. is a limited partnership consisting of three member groups with a total of seven (7) related legal entities. Further, Penske Truck Leasing Co., L.P. is in the business of leasing and renting motor vehicles to the public in the United States and has rented or leased hundreds of thousands of vehicles present and in the year 2014 and that it was the registered and titled owner of the defendant vehicle driven by Mas and leased by Pearson, involved in Spencer's accident. She also stated that defendant Penske Truck Leasing Corporation does not have nor ever had any ownership interest in the vehicle and that the vehicle was rented by Pearson on March 7, 2014 pursuant to a written agreement, which was in effect on the date of the subject accident, March 8, 2014. She reviewed the maintenance records related to the vehicle and stated that there were no complaints or maintenance issues, related to said vehicle, including up to the time which the vehicle was rented. She also attested that she reviewed the database of Penske Truck Leasing Co., L.P. and Penske Truck Leasing Corporation and stated that defendant Mas has never been employed by these defendants or their affiliates.

Mas testified at his deposition that he was driving the Penske vehicle which was rented by Pearson on the date of the accident.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering admissible evidence to eliminate any material issues of fact from the case. (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]).

The portion of the motion of defendants Penske Truck Leasing Co. and L.P. and Penske Truck Leasing Corporation for an Order dismissing the action against them pursuant to CPLR sections 3211 and 3212 dismissing the complaint and all claims against them based upon 49 USC § 30106, the Graves Amendment is granted without opposition (49 USC 30106; *Khan v MMCA Lease, LTD*, 100 AD3d 833 [2d Dept 2012]; *Graham v Dunkley*, 50 AD3d 55 [2d Dept 2008]; compare *Anglero v Hanif* 140 AD3d 905 [2d Dept 2016]; *Lynch v Baker*, 138 AD3d 695 [2d Dept 2016]).

The remaining portion of the motion for summary judgment by defendants Leonardo Mas, Penske Truck Leasing Co., L.P. and Penske Truck Leasing Corporation pursuant to CPLR 3212 against plaintiff Terrence J. Spencer due to his failure to have sustained a serious injury under the New York Insurance Law is denied as academic as to Penske Truck Leasing Co., L.P. and Penske Truck Leasing Corporation and denied as to defendant Mas in its entirety. Based upon the independent orthopedic examination report of Dr. Eial Faierman dated March 31, 2016, upon examination, Dr. Faierman failed to state what Spencer's normal range of motion was in flexion of the cervical spine or range of motion of internal rotation of his left shoulder and make a comparison to normal ranges; Dr. Faierman failed to state the results of Spencer's straight leg raising and make a comparison to normal values (see *Shirman v Lawal*, 69 AD3d 838 [2d Dept 2010]). Also, Spencer alleged in his verified bill of particulars that he missed ninety days from work and testified that as a result of the accident he missed twelve weeks from work, thus defendants failed to demonstrate that Spencer did not suffer a serious injury under the 90/180 day category of the Insurance Law (see *Gaddy v Eyler* 79 NY2d 955 [1992]; *Licari v Elliott*, 57 NY2d 230 [1982]).

Therefore the portion of the motion of defendants Penske Truck Leasing Co. and L.P. and Penske Truck Leasing Corporation for an Order dismissing the action pursuant to CPLR sections 3211 and 3212 dismissing the complaint and all claims against them based upon 49 USC § 30106, the Graves Amendment is granted without opposition. The remaining portion of the motion for summary judgment by defendants Leonardo Mas is denied in its entirety and as to defendants Penske Truck Leasing Co., L.P. and Penske Truck Leasing Corporation pursuant to CPLR 3212 it is denied as academic.

The foregoing constitutes the decision and Order of the Court.

Dated: March 22, 2017



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J.S.