

Astudillo v Nissan of Hawthorne LLC
2018 NY Slip Op 32514(U)
October 5, 2018
Supreme Court, New York County
Docket Number: 155751/2015
Judge: Adam Silvera
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 22**

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ANGELYN ASTUDILLO,

Plaintiff,

- v -

NISSAN OF HAWTHORNE LLC, JOSE PAULA

Defendant.

INDEX NO. 155751/2015

MOTION DATE 09/17/2018,
09/17/2018

MOTION SEQ. NO. 001 002

DECISION AND ORDER

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HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 76, 77, 78, 79, 80, 81, 82, 84, 86, 90, 91

were read on this motion to/for

JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 68, 69, 70, 71, 72, 73, 74, 75, 83, 85, 87, 88, 89, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104

were read on this motion to/for

DISMISSAL

Background

The underlying action stems from a May 23, 2014 pedestrian knockdown motor vehicle incident in which plaintiff alleges she was seriously injured when she was walking on Wadsworth Avenue towards 192nd in the County, City, and State of New York and struck and seriously injured by a vehicle owned by defendant Nissan of Hawthorne LLC (Hereinafter “Nissan”) and operated by Jose Jeffrey Paula (Hereinafter “Paula). Nissan claims that Paula did not have Nissan’s permission and/or consent to drive the vehicle involved in the incident. Nissan alleges that the vehicle was fraudulently obtained by non-party Luis Berrios, a now former Nissan employee. Berrios allegedly engaged in a rental scheme in which he used Nissan owned

vehicles and “rented” the vehicles for cash (Mot at 2-3, ¶ 6-9). Berrios has since pled guilty to second degree theft for the rental scheme (*id.* at 4, ¶ 10).

Relief Sought

This decision and order addresses two motions, motion sequences 001 and 002. In motion sequence 001, defendant Paula moves to dismiss plaintiff’s Complaint and all claims asserted by plaintiff on the grounds that plaintiff has failed to establish a “serious injury” as required by New York Insurance Law 5104(a). Plaintiff opposes the motion.

In motion sequence 002, defendant Nissan moves pursuant to CPLR 3025(b) for leave to serve an amended answer and include the affirmative defense of non-permissive use, to grant defendant Nissan summary judgment on the issue of non-permissive use, to grant summary judgment in favor of defendant Nissan summary judgment to afford defendant protections of the Graves Amendment, and for summary judgment against plaintiff on the issue of “serious injury” for failure to show the existence of a serious injury as defined under Insurance Law 5102(d). Plaintiff opposes the motion. The decision and order are as follows:

Summary Judgment

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to “demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure ... to do [so]” (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

Serious Injury

In order to satisfy their burden under Insurance Law § 5102(d), a plaintiff must meet the “serious injury” threshold (*Toure v Avis Rent a Car Systems, Inc.*, 98 NY2d 345, 352 [2002] [finding that in order establish a prima facie case that a plaintiff in a negligence action arising from a motor vehicle accident did sustain a serious injury, plaintiff must establish the existence of either a “permanent consequential limitation of use of a body organ or member [or a] significant limitation of use of a body function or system”]).

The Court of Appeals has held that to meet the “serious injury” threshold, a plaintiff must suffer an injury “which prevents the injured person from performing substantially all of the material acts which constitute such person’s usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident” (*Licari v Elliot*, 57 NY2d 230, 230-231 [1982]).

The Court notes that summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility” (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 [1st Dep’t 1992], citing *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 [1st Dep’t 1990]). As such, summary judgment is rarely granted in negligence actions unless there is no conflict at all in the evidence (*See Ugarriza v Schmieder*, 46 NY2d 471, 475-476 [1979]).

Here, Defendant Paula was precluded from submitting affidavits as to substantive motions and thus relies on those of co-defendant Nissan. Defendants allege that plaintiff did not sustain a serious injury and provide the medical report of Dr. Martin Barschhof who opined that

the alleged injuries are pre-existing and arise from degenerative conditions (Nissan Mot, Exh H). Defendants further allege that there was a month-long gap in treatment after the accident (*id.*, Exh Q). Defendants point to the deposition of plaintiff to argue that plaintiff has failed to meet the 90/180-day Insurance Law requirement as she testified that she only missed one day of work as a result of the incident (*id.*, Exh P at 38, ¶ 22-25; at 39, ¶ 1-2).

In support of their motions, Defendants attach the medical report of Dr. DeLys E. St. Hill, however Dr. St. Hill's report notes findings of decreased range of motion of the cervical spine and the lumbar spine (Paula Mot, Exh I). Defendants' motion contains evidence of a restriction in plaintiff's range of motion. Thus, defendants have failed to satisfy their burden as defendants fail to meet their initial burden when one of their examining physicians find a limited range of motion (*Servones v Toribio*, 20 AD3d 330 [1st Dep't 2005] citing *McDowall v Abreu*, 11 Ad3d 590 [2d Dep't 2004] [finding that "defendants' examining doctor found that the plaintiff continued to have restrictions in motion of her lower back ... in light of this finding by the defendants' expert, the defendants did not meet their initial burdens"])).

Graves Amendment

The branch of Nissan's motion for summary judgment in favor of Nissan for an order to dismiss all claims against Nissan due to the protections of the Graves Amendment is granted. Nissan claims argues that plaintiff's claims against Nissan are barred pursuant to the Graves Amendment. Pursuant to 49 U.S.C. 30106, an owner engaged in the trade or business of renting or leasing motor vehicles, who has not engaged in any acts of negligence or criminal wrongdoing, is shielded from state statutory and common law vicarious liability actions involving the negligence of the vehicle's driver.

Here, Nissan affirms that it is in the business of leasing and selling motor vehicles.

Nissan has demonstrated that it did not engage in acts of negligence and was in fact the victim of criminal wrongdoing. Plaintiff contests the applicability of the Graves Amendment and argues that were it to apply in this action, “plaintiff’s claims against Nissan based upon Nissan’s negligent maintenance of the vehicle . . . survives the Graves Amendment because the Graves Amendment does not absolve leasing companies of their own negligence” (Aff in op to Nissan at 22, ¶62). Plaintiff’s Bill of Particulars contends that Nissan negligently entrusted the vehicle operated by Paula (Nissan Mot, Exh K, ¶ 3).

Plaintiff alleges that Nissan has failed to submit “any admissible evidence to demonstrate that the accident was not caused by the condition of the vehicle as a consequence of [owner-lessor]’s allegedly negligent failure to maintain it” (Aff in op to Nissan at 22-23, ¶ 63 quoting *Olmann v Neil*, 132 AD3d 744, 745-746 [2nd Dept 2015]). However, Nissan has demonstrated that the accident was not caused by their negligent failure to maintain the vehicle, as the vehicle was stolen from Nissan (Nissan Mot at 18-19, ¶¶ 62-65). Nissan attaches the affidavit of John Stefanidis, a principal/owner of Nissan, a police report filed by Mr. Stefanidis, and the plea hearing transcript of Berrios in support of their claim that the vehicle at issue was stolen at the time of the accident (Nissan Mot at 18-19, ¶¶ 62-65).

Nissan avers that the subject vehicle was listed on the “Hawthorne Police Department Declaration of Lost/Stolen Property” (*id.*, Exh BB, exh 5). Upon review of the papers, the court notes that the vehicle listed in the complaint, a 2012 Nissan with a New Jersey license plate K22DXB, does indeed match a vehicle on the list of stolen property (*id.*, Exh H). Thus, Nissan has successfully demonstrated that, being in the business of leasing motor vehicles, it is not

vicariously liable for co-defendant Paula and that plaintiff's claims against Nissan are barred by the Graves Amendment. Defendant Nissan's motion is granted.

Permissive Use

Even assuming arguendo, that Nissan is not eligible for a Graves Defense, the court notes that Nissan has demonstrated that it would be shielded by the defense of non-permissive use. The Court of Appeals has held that "proof of ownership of a motor vehicle creates a rebuttable presumption that the driver was using the vehicle with the owner's permission, express or implied" (*Leotta v Plessinger*, 8 NY2d 499 [1960]). Presumption of permissive use of such a vehicle may be rebutted with substantial evidence to show that the vehicle was not operated with the owner's consent (*Murzda v Zimmerman*, 99 NY2d 375, 380-381 [2003] [finding that in order to prove constructive consent, there must be a consensual link between the negligent operator and one whose possession of the vehicle is authorized]).

Here, Nissan claims that no such constructive consent existed between Paula and Nissan. The vehicle at issue, according to Nissan, was one of the vehicles used in the rental scheme for which non-party Berrio pleaded guilty to second degree theft. Nissan points to *Fuentes v Virgil*, 119 AD3d 522, 523 [2d Dept 2014] in which the court found that "evidence that a vehicle was stolen at the time of the accident will rebut the presumption of permissive use." Defendant has demonstrated, through the aforementioned documented evidence and affirmations, that the vehicle was stolen at the time of the accident. Thus, Nissan has demonstrated that it is entitled to dismissal.

Accordingly, it is

ORDERED that the defendants' motion for summary judgment to dismiss the Complaint on the grounds that plaintiff failed to establish a serious injury as required by the Insurance Law is denied; and it is further

ORDERED that defendant's motion for an order to dismiss all claims against defendant Nissan of Hawthorne LLC is granted; and it is further

ORDERED that the complaint is dismissed in its entirety as against defendant Nissan of Hawthorne LLC, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendant Jose Jeffrey Paula; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that within 30 days of entry, defendant Nissan shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court.

<u>10/5/2018</u>			
DATE		ADAM SILVERA, J.S.C.	
CHECK ONE:	☐ CASE DISPOSED	☒ NON-FINAL DISPOSITION	
	☐ GRANTED ☐ DENIED	☒ GRANTED IN PART	☐ OTHER
APPLICATION:	☐ SETTLE ORDER	☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE