

Colon v City of New York
2019 NY Slip Op 30462(U)
January 3, 2019
Supreme Court, Bronx County
Docket Number: 307864/2012
Judge: Mary Ann Brigantti
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 15

C

ERICA COLON,

Index No. 307864/2012

-against-

Hon. MARY ANN BRIGANTTI

CITY OF NEW YORK, et al.

Justice Supreme Court

The following papers numbered 1 to 2 were read on this motion (Seq. No. 14)
for SUMMARY JUDGMENT noticed on August 29, 2017.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).	1,2
Answering Affidavit and Exhibits	No(s).	
Replying Affidavit and Exhibits	No(s).	

Motion is Respectfully Referred to Justice:
Dated:

Upon the foregoing papers, the defendants Tremel F. Rosario and EAN Holdings, LLC move for an order in Action Number 3 (Bronx County Index No. 304498/2013) dismissing the complaint of plaintiff Latoya Spand as Administratrix of the Estate of Lashanda Spand ("Plaintiff") against EAN Holdings LLC ("EAN") pursuant to CPLR 3212 and 3211 on the grounds that the action against EAN is based solely on vicarious liability and is barred by the Federal Transportation Equity Act of 2005, codified as 49 USCA Sec. 30106.

Standard of Review

On a motion to dismiss pursuant to this section of the CPLR 3211(a)(7), a court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v. DaimlerChrysler Corp.*, 292 AD2d 118 [1st Dept. 2002]). In other words, the determination is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (See *Stendig, Inc. v. Thom Rock Realty Co.*, 163 AD2d 46 [1st Dept. 1990]; *Leviton Manufacturing Co., Inc. v. Blumberg*, 242 AD2d 205 [1st Dept. 1997][on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (see, CPLR 3026). The court must "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 into any cognizable legal theory" (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). The motion should be denied if, from the pleading's four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law (*McGill v. Parker*, 179 AD2d 98 [1st Dept. 1992]).

To be entitled to the “drastic” 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 University Medical Center*, 64 NY2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*id.*, see also *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC*, 101 AD3d 490 [1st Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 NY3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 NY2d 738 [1993]).

Applicable Law and Analysis

“Under the Graves Amendment, the owner of a leased or rented motor vehicle cannot be held vicariously liable ‘for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if—(1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and (2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner)’ (see *Villa-Capellan v. Mendoza*, 135 A.D.3d 555 [1st Dept. 2016], citing 49 U.S.C. §30106]; *Jones v. Bill*, 10 N.Y.3d 550 [2008], cert dismd 555 U.S. 1028, 129 S.Ct. 593, 172 L.Ed.2d 451 [2008]).

In this case, Defendants failed to carry their initial burden to show prima facie entitlement to summary judgment and/or dismissal of Plaintiff’s complaint against EAN. Defendants allege that “it is undisputed that at the time of the accident and for some time prior thereto, [EAN] was a corporate entity in the business of renting and/or leasing motor vehicles.” However, the complaint does not allege such facts, and Defendants have submitted no admissible evidence in support of their motion establishing, prima facie, that EAN was indeed “in the business of renting and/or leasing motor vehicles” at the time of this accident. Without such competent proof, Defendants failed to carry their initial summary judgment burden of demonstrating that Plaintiff’s complaint against it is barred by the Graves Amendment (see *Cassidy v. DCFS Trust*, 89 A.D.3d 591 [1st Dept. 2011]; CPLR 3212[b]). Defendants’ motion is therefore denied even though it is unopposed (see generally *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853).

Accordingly, it is hereby

ORDERED, that Defendants' motion to dismiss pursuant to CPLR 3211 is denied, and its motion for summary judgment pursuant to CPLR 3212 is denied without prejudice with leave to renew upon a proper evidentiary showing of entitlement to the relief requested.

This constitutes the Decision and Order of this Court.

Dated: 1/3/19

Hon. *Mary Ann Briganti*
Hon. Mary Ann Briganti J.S.C.

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- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
 - 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
 - 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
 - FIDUCIARY APPOINTMENT REFEREE APPOINTMENT