

E.C. v Safe Coach Inc.
2019 NY Slip Op 30699(U)
March 12, 2019
Supreme Court, New York County
Docket Number: 451540/2018
Judge: Adam Silvera
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 22

-----X
E.C., an infant by his mother and natural guardian,
NISHI KALIA

INDEX NO. 451540/2018

Plaintiff,

MOTION DATE 12/12/2018

- v -

MOTION SEQ. NO. 001

SAFE COACH INC., GUYEVENS SULLY,

Defendant.

DECISION AND ORDER

-----X
HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64 were read on this motion to/for DISMISS.

Upon the foregoing documents, it is ORDERED that defendants' motion for an order to (1) pursuant to CPLR 3211(a)(1)(e), dismiss plaintiffs' claims as to defendant Safe Coach Bus Service Inc., and amend the caption to reflect dismissal of Safe Coach Bus Service Inc., from the action; and (2) extend the time to serve the pleading until fourteen days after service of notice of entry of this order is granted. Plaintiffs oppose the motion.

Background

The accident at issue allegedly occurred on May 8, 2018, at Hillside Avenue and 256th Street in Queens County, City and State of New York, when a vehicle operated by defendant Guyevens Sully struck and seriously injured plaintiff, E.C., an infant by his mother and natural guardian, Nishi Kalia. Plaintiffs commenced this action on May 10, 2018, in Supreme Court, Kings County, with service of Summons and Complaint naming only defendant Safe Coach Inc. and defendant Guyevens Sully as defendants in the action (Mot, Exh A). An Amended Summons

and Complaint was filed on May 15, 2018 and named only defendant Safe Coach Inc. and defendant Guyevens Sully as defendants in the action (*id.*, Exh B). On May 16, 2018 plaintiffs filed a Second Amended Verified Summons and named defendant Safe Coach Bus Service Inc. as defendant for the first time.

On June 13, 2018, defendant Safe Coach Inc. and defendant Guyevens Sully served Answer and admitted that defendant Safe Coach Inc. was the registered owner of the automobile involved in the accident at issue. On July 25, 2018, the Honorable Dawn Jimenez Salta issued an Order in Supreme Court, Kings County to change venue from Kings County to New York County and held defendants' motion to dismiss defendant Safe Coach Bus Service, Inc. in abeyance to be decided by the New York County Judge.

Dismissal

Pursuant to CPLR 3211, “[a] party may move for judgment dismissing one or more causes of action asserted against him on that grounds that: 1. a defense is founded upon documentary evidence.” The Court of appeals has held that “dismissal may be granted where documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*Held v Kaufman*, 91 NY2d 972 ([1994])).

Here, defendants submit a certified copy of Safe Coach Inc., New York State Corporation Records, the affidavit of Robert Dimino, copies of the New York State Registration and Title of the automobile at issue, and an affidavit from both of Safe Coach Bus Service, Inc.'s presidents Alphonse DiMino and Robert DiMino, and an affidavit of defendant driver Sully (Mot, Exh J, K, L, M, N). In their Affidavits, Robert DiMino and Alphonse DiMino attest that defendant driver is not an employee of defendant Safe Coach Bus Service, Inc. and that defendant Safe Coach Bus Service, Inc. does not own the automobile involved in the accident at issue (*id.*, Exh K & N). The

Registration and Title both demonstrate that defendant Safe Coach Inc. is the owner of the vehicle and that defendant Safe Coach Bus Service, Inc. is not affiliated with the vehicle (*id.*, Exh L). Further, defendant Sully testified that he is an employee of defendant Safe Coach Inc. and that he has never been employed by defendant Safe Coach Bus Service, Inc. (*id.*, Exh M).

Thus, defendants have provided the necessary documentary evidence to provide a complete defense to plaintiffs' claims against defendant Safe Coach Bus Service, Inc. in that said defendant did not own, lease, manage, maintain, control, repair, operate, or otherwise grant permission to defendant driver Sully to operate the vehicle at issue.

In opposition, plaintiffs claim that defendants' motion is premature, and that defendant Safe Coach, Inc. and defendant Safe Coach Bus Service Inc. are insured under the same insurance policy (Aff in Op, ¶ 6, 8-9). As to plaintiffs' assertion that the instant case is premature for the present motion, the Court has continuously held that substantive motions are permissible notwithstanding the fact that depositions have yet to be held (*Avant v Cepin Livery Corp.*, 74 AD3d 533 [1st Dep't 2010]; *see also Rosario v Vasquez* 93 AD3d 509 [1st Dep't 2012]).

Regarding plaintiffs' argument concerning the insurance policy used by defendants, the Court disagrees with plaintiffs that dismissal is improper simply because defendant Safe Coach, Inc. and defendant Safe Coach Bus Service, Inc. are insured under the same insurance policy. Defendant Safe Coach Bus Service Inc. has demonstrated that it operates completely separate and independent from defendant Safe Coach, Inc. Thus, defendants' motion to dismiss the Complaint as against defendant Safe Coach Bus Service, Inc. and to amend the caption to reflect said dismissal is granted.

The branch of defendants' motion for an order to extend the time to serve the pleading until 14 days after service of notice of entry of this order is granted. Pursuant to CPLR 3012(d), the court has "discretionary power to extend the time to plead" (*Mufalli v Ford Motor Co.*, 105 AD2d 642, 643 [First Dep't 1984]). Thus, the branch of defendants' motion to amend is granted.

Accordingly, it is ORDERED that the motion of defendant Safe Coach Bus Service, Inc. to dismiss the complaint herein is granted and the complaint is dismissed in its entirety against said defendant, with costs and disbursement 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;

ORDERED that the action is severed and continued against the remaining defendants; 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 read as follows:

-----X
E.C., an infant by his mother and natural guardian,
NISHI KALIA
Plaintiffs,
-against- Index No. 451540/2018
SAFE COACH INC., and GUTEVENS SULLY
Defendants
-----X

and it is further;

ORDERED that the branch of defendants' motion for an order granting an extension to serve the pleading until fourteen days after service of notice of entry of this Order is granted; and it is further

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

This constitutes the Decision/Order of the Court.

3/12/2019

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