

Fiesthumel v Peapod Transit LLC
2019 NY Slip Op 32105(U)
July 19, 2019
Supreme Court, New York County
Docket Number: 151220/2018
Judge: Adam Silvera
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA PART IAS MOTION 22

Justice

-----X

LAUREN FIESTHUMEL, IVAN DIRKX,

Plaintiff,

- v -

PEAPOD TRANSIT LLC, SIDIKE SIDIBE, ABBA LOCAL
TRANSPORTATION, THE CITY OF NEW YORK, GATEWAY
INDUSTRIES INC.

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40,
41, 42, 43, 44, 45, 46, 47, 48, 49, 51, 55

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is ORDERED that defendant, Abba Local Trasportation's
motion for an order to (1) pursuant to CPLR 3211(a)(1)(e), dismiss all claims and cross claims
against defendant Abba Local Transportation is granted. Plaintiffs oppose the motion.

The accident at issue allegedly occurred on November 13, 2016, at the intersection of
East Houston Street and its intersection with Mangin Street in the County, City, and State of
New York involving a livery vehicle in which plaintiffs were back seat passengers. Plaintiffs
allege that the vehicle at issue was owned by defendant Abba Local Transportation and leased to
defendant driver Sidike Sidibe.

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, defendant Abba avers that it is not the titled and registered owner of the vehicle in which plaintiffs were seated at the time of the accident. Defendant attaches the Affidavit of Abba Chief Operating Officer Max Rylov who attested that at no time on the date in question or any other time, has Abba ever been the titled, registered owner, or lessor of the vehicle in question, a 2015 Dodge bearing New York license plate number T6761254C (Aff in Op, Exh E). Mr. Rylov further attests that Abba never leased, operated, or gave permission to defendant Peapond Transit or driver defendant Sidike Sidibe (*id.*). Defendant Abba points to the Police Accident Report from the underlying accident and notes that the vehicle at issue is recorded as being registered to defendant Peapod Transit (Mot, Exh E). Defendant has submitted documentary evidence to conclusively establish a defense to plaintiffs' asserted claims as a matter of law.

In opposition plaintiff submits the affidavit of Max Pierre, a casualty adjuster affiliated with Richard Blaise & Associates, Inc. who were retained by counsel for plaintiff to investigate the facts and circumstances of the underlying accident (Aff in Op, Exh E). Mr. Pierre attested that he spoke with defendant Sibide who told him that the vehicle which he was operating at the time of the accident was obtained pursuant to a verbal lease with defendant Abba (*id.*). Defendants' attorney argues that summary judgment must be denied based upon defendant Sibide's alleged statements to Mr. Pierre. The Court finds such statements to be hearsay. The Appellate Division, First Department has held that "evidence otherwise excludable at trial may be considered in opposition to a motion for summary judgment as long as it does not become the sole basis for the court's determination". *Oken v A.C. & S.*, 7 AD3d 285, 285 (1st Dep't 2004). Here, the affidavit of Mr. Pierre containing defendant Sibide's hearsay statements is the sole evidence submitted by defendants in support of their opposition to plaintiff's motion for summary judgment. If considered, the hearsay evidence would be the sole basis for the court's

determination, and, thus, is inadmissible. Thus, plaintiff's motion to dismiss all claims and cross claims against defendant Abba Local Transportation is granted.

Accordingly, it is ORDERED that the motion of defendant Abba Local Transportation 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
 LAUREN FIESTHUMEL and IVAN DIRKX
 Plaintiffs,
 -against- Index No. 151220/2018
 PEAPOD TRANSIT, LLC, SIDIKE SIDIBE,
 THE CITY OF NEW YORK, and GATEWAY INDUSTRIES INC.,
 Defendants
 -----X

and it is further;

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

This constitutes the Decision/Order of the Court.

7/19/2019
DATE

ADAM SILVERA, J.S.C.

CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION

APPLICATION: GRANTED DENIED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER FIDUCIARY APPOINTMENT REFERENCE

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN