

Mun Loong Khor v Caesar

2019 NY Slip Op 33378(U)

November 7, 2019

Supreme Court, Kings County

Docket Number: 508784/2018

Judge: Loren Baily-Schiffman

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At an IAS Part 65 of the Supreme Court of the State of New York, County of Kings at a Courthouse Located at 360 Adams Street, Brooklyn, New York on the 7th day of November, 2019.

PRESENT: HON. LOREN BAILY-SCHIFFMAN
JUSTICE

MUN LOONG KHOR, Administrator of the Estate of CHOOI PENG TAN, Deceased and
MUN LOONG KHOR, Individually
Plaintiffs,
- against -

QUEINTON A. CAESAR,
JAYSON JOSEPH,
PATRICK J. EDWARDS, and
MELANIE DOWE
Defendants.

Index No.: 508784/2018

Motion Seq. # 4

DECISION & ORDER

2019 NOV -8 AM 10:29
KINGS COUNTY CLERK
FILED

As required by CPLR 2219(a), the following papers were considered in the review of this motion:

	<u>PAPERS NUMBERED</u>
Notice of Motion, Affidavits, Affirmation and Exhibits	1
Mun Loong Khor's Affidavit in Opposition	2
Jayson Joseph's Affidavit in Opposition	3
Queinton A Caesar's Affirmation in Support	4

Upon the foregoing papers Defendant, Queinton A Caesar ("Caesar"), moves this Court for an Order pursuant to CPLR § 3212 granting summary judgment dismissing the Complaint against him as the undisputed evidence establishes that no liability for the occurrence of the accident that gave rise to this action exists as against this defendant, and for such other and further relief as this Court deems just and proper.

Background

This action arises out of a multi car accident which occurred on May 1, 2016, at the intersection on East 94th Street and Avenue K in Brooklyn, New York. During the collision, a 1997 Toyota 4Runner ("the Toyota"), collided with another vehicle owned by Defendant Melanie

Dowe and operated by Defendant Patrick Edwards. The Toyota then struck decedent resulting in her death, while her husband, Mun Loong Khor ("Plaintiff"), saw the accident.

The Toyota was owned by Defendant Caesar and operated by Defendant Jayson Joseph ("Joseph") at the time of the accident. However, the primary user of the Toyota, as listed on the insurance policy was Caesar's cousin, nonparty Jean Pearson. Caesar maintains that the Toyota was stolen from nonparty Jean Pearson on April 29, 2016 at 9:55 PM, the theft was reported to the police, and Joseph did not have Caesar's permission or consent to drive the Toyota.

On April 30, 2018, Plaintiff commenced a wrongful death action, on behalf of decedent's estate, by filing a Summons and Complaint. On March 26, 2019, Plaintiff commenced a second action, on behalf of himself, for the emotional distress of being in the zone of danger and seeing his wife struck and killed. On August 8, 2019, the two actions were consolidated under the current caption and Index Number.

Discussion

Caesar moves for summary judgment on the basis that vicarious liability for the owner of a vehicle does not apply in the instant case, as the Toyota was stolen prior to the accident. Under Vehicle and Traffic Law § 388 (1):

Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same *with the permission, express or implied, of such owner.* (Emphasis added).

"This statute creates a presumption that the driver was using the vehicle with the owner's express or implied permission," however, "[e]vidence that a vehicle was stolen at the time of the accident will rebut the presumption of permissive use." *Fuentes v Virgil*, 119 AD3d 522, 522-523 (2nd Dept. 2014) *internal citation omitted*. A motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law. *CPLR 3212(b)*; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 (1988); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). On such a motion, the evidence will be construed in a light most favorable to the party against whom summary judgment is sought. *Spinelli v Procassini*, 258 AD2d 577 (2nd Dept. 1999); *Tassone v Johannemann*, 232 AD2d 627, 628 (2nd Dept. 1996); *Weiss v Garfield*, 21 AD2d 156, 158 (3rd Dept. 1964).

In the present case, Caesar has introduced sufficient evidence to rebut the presumption that Joseph was using the Toyota with Caesar's permission. Specifically, Caesar submitted an Affidavit wherein he stated that the Toyota was stolen from Jean Pearson, and that he did not know the driver of the Toyota or give him permission to use the Toyota when the accident occurred. Additionally, Caesar attached a Stolen Vehicle Report and a Police Accident Report, both of which state that the Toyota was stolen before the accident.

Plaintiff's arguments in opposition are unavailing. First, Plaintiff argues that because the accident happened approximately 38 hours after the alleged theft of the Toyota, the short period between the theft of the Toyota and the accident is insufficient to prove that Caesar's negligence was not a proximate cause of the accident. Plaintiff has provided no evidence that Caesar was in any way negligent for this accident and Caesar rebutted any presumption of vicarious liability by

demonstrating the Toyota was stolen. Second, Plaintiff argues because Jean Pearson, a permitted user of the Toyota, violated Vehicle and Traffic Law § 1210(a) when she left the keys in the ignition of the Toyota when she entered a bodega, summary judgment should not be granted. Vehicle and Traffic Law § 1210(a) states in relevant part, “[n]o person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, removing the key from the vehicle, and effectively setting the brake thereon. . . .” Nevertheless, “[o]ne who inadvertently facilitates the theft of a vehicle by neglecting to comply with the statute is not answerable in perpetuity for the criminal and tortious conduct of others who may come into possession of the stolen vehicle in the distant future.” *Devellis v Lucci*, 266 AD2d 180, 181 (2nd Dept. 1999). Additionally, even if Jean Pearson, as a permitted user of the Toyota, was negligent for leaving the keys in the Toyota’s ignition, she is not a party to this case and her negligence is not attributable to Caesar.

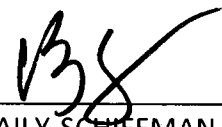
Caesar established his entitlement to judgment as a matter of law by presenting evidence that the Toyota was stolen about 38 hours before the accident and was being operated without his permission or consent at the time. In opposition, Plaintiff failed to raise a triable issue of fact. Accordingly, it is HEREBY:

ORDERED that Queinton A. Caesar’s motion for summary judgment is granted, dismissing the Complaint as against him.

Plaintiff’s remaining contentions are without merit.

This is the Decision and Order of the Court.

ENTER,



 LOREN BAILY-SCHIFFMAN

JSC

HON. LOREN BAILY-SCHIFFMAN

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