

Topping v Cab E. LLC
2019 NY Slip Op 33766(U)
December 6, 2019
Supreme Court, Kings County
Docket Number: 507606/2019
Judge: Richard Velasquez
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At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 6th day of December, 2019.

P R E S E N T:
HON. RICHARD VELASQUEZ

Justice.

-----X
JAMES TOPPING,

Plaintiff,

Index No.: 507606/2019

-against-

Decision and Order

CAB EAST LLC and FRAY LUIS ABREU NUNEZ,

Defendants.
-----X

The following papers numbered 5 to 27 read on this motion:

Papers

Numbered

Notice of Motion/Order to Show Cause

Affidavits (Affirmations) Annexed _____

5-12

Opposing Affidavits (Affirmations) _____

15-22

Reply Affidavits (Affirmations) _____

23-27

After oral argument and a review of the submissions herein, the Court finds as follows:

Defendant, CAB EAST LLC moves to dismiss the complaint against CAB EAST LLC as well as any cross-claims pursuant to CPLR 32111 Plaintiff opposes the same.

MS
#1

KINGS COUNTY CLERK
FILED
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Facts

Plaintiff brings this action for personal injuries allegedly arising from a motor vehicle accident that occurred on September 7, 2017. Plaintiff was the operator of a motor vehicle that was stopped at a red traffic light on the southbound lane of McDonald Avenue, at the intersection with Avenue O, in Brooklyn, New York. Plaintiff's vehicle was allegedly struck in the rear by a vehicle operated by defendant, FRAY LUIS ABREU NUNEZ, said vehicle is owned by defendant CAB EAST LLC on the date of the accident.

Arguments

Defendant, CAB EAST LLC asserts it is a membership based limited liability Company. CAB EAST LLC alleges that they are the holder of legal title to the vehicle and were not responsible for the maintenance or repairs of the vehicle under the terms of the Lease. Defendant's contend they are protected by the Graves Amendment, based on the application of Federal Law 49 USC 30106 because they are in the business of leasing cars and as a result this action and all cross-claims against them should be dismissed.

In opposition, plaintiff contends defendants have failed to state in their notice of motion under what grounds of CPLR 3211 they are moving to dismiss and as such this motion is procedurally defective. Plaintiffs further contend the defendants self-serving affidavit does not establish that the Graves Amendment applies. Plaintiff further contends neither the lease nor the affidavit submitted by the defendant CAB EAST LLC establish that they were engaged in the business of renting or leasing motor vehicles, so as to afford it the protection of the Graves Amendment. Plaintiffs further contend that the affidavit acknowledges the sole purpose of CAB EAST LLC is to hold title to the car not lease or rent, therefore the Graves Amendment would not apply.

Analysis

Pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see, CPLR 3026). We 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 within any cognizable legal theory (*Morone v. Morone*, 50 NY2d 481, 484, 429 NYS2d 592, 413 NE2d 1154; *Rovello v. Orofino Realty Co.*, 40 NY2d 633, 634, 389 NYS2d 314, 357 NE2d 970). In assessing a motion under CPLR 3211(a)(7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*Rovello v. Orofino Realty Co.*, 40 NY2d at 635, 389 NYS2d 314, 357 NE2d 970) and **“the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one”** (*Guggenheimer v. Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17; *Rovello v. Orofino Realty Co.*, 40 NY2d at 636, 389 NYS2d 314, 357 NE2d 970). “[B]are legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on such a motion” (*Palazzolo v. Herrick, Feinstein, LLP*, 298 AD2d 372, 751 NYS2d 401). If the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action (see *McGuire v. Sterling Doubleday Enters., LP*, 19 AD3d 660, 661, 799 NYS2d 65).

The Graves Amendment provides; “(a) In general.—An owner of a motor vehicle that rents or leases the vehicle to a person (or an affiliate of the owner) shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner), 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)” (49 USC § 30106 [a] [1], [2]). “The legislative history of the Graves Amendment indicates that it was intended to ‘protect the vehicle rental and leasing industry against claims for vicarious liability where the leasing or rental company's only relation to the claim was that it was the technical owner of the [vehicle]’ ” (*Cioffi v S.M. Foods, Inc.*, 129 AD3d 888, 893 [2015], quoting *Rein v CAB E. LLC*, 2009 WL 1748905, 2009 US Dist LEXIS 52617, [SD NY, No. 08 Civ 2899 (PAC)], citing *Statement of Representative Graves*, 151 Cong Rec H1034, H1200 [Mar. 9, 2005]).

It is well settled that “an accident occurring during the period of the rental or lease,” is required to obtain the protection of the Graves Amendment. The present case is similar to that of the *Lynch* case, wherein the “Hertz defendants' own submissions failed to eliminate triable issues of fact as to whether the Graves Amendment applied to shield Hertz from vicarious liability” (see *Cioffi v S.M. Foods, Inc.*, 129 AD3d at 892; *Davidov v Salazar*, 89 AD3d 463, 463 [2011]). “An express element of the Graves Amendment is the existence of a lessor-lessee relationship (49 USC § 30106 [a]; cf. *Cioffi v S.M. Foods, Inc.*, 129 AD3d at 892; *Davidov v Salazar*, 89 AD3d at 463).” *Lynch v. Baker*, 138 AD3d 695, 696–97, 30 NYS3d 126 (2d Dept. 2016).

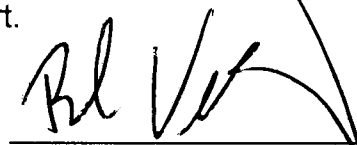
In the present case, the defendant is seeking to shield itself with the Graves Amendment claiming they are in the business of leasing automobiles. In a traditional and or a conventional auto lease, identification of the lessee is clear. The lease submitted by

the defendants in this case states that the "lessee" is defendant Fray Abreu Nunez, and that the "lessor" is a Malo Automotive Group, not the defendant CAB EAST LLC. The lease submitted goes on to state that the finance company is Ford Motor Credit Company and that the Holder of the finance note is defendant CAB East LLC. This does not establish that defendant CAB EAST LLC is in the business of leasing or renting vehicles. Moreover, there are no maintenance records attached and where a leasing company fails to submit admissible evidence to demonstrate the accident was not caused by the condition of the vehicle, as a consequence of its negligent failure to maintain, a motion to dismiss must be denied. Furthermore, even if the Graves Amendment does apply, which the defendants have not established, as among other things, they have failed to attach any proof that they are registered with the Secretary of State of New York as a business leasing cars, nor do they attach any proof that they are licensed to do so in the State of New York, it does not absolve an entity from its own negligence. Here, the defendants fail to attach any maintenance records or procedures to establish they were not negligent. Additionally, this motion is premature at best, as there has been no discovery.

Accordingly, Defendants motion to dismiss is hereby denied in its entirety as the Plaintiff has stated a cause of action, for reasons stated above.

This constitutes the Decision/Order of the Court.

Date: December 6, 2019


RICHARD VELASQUEZ, J.S.C.

So Ordered
Hon. Richard Velasquez

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