

Friedman v Herway

2019 NY Slip Op 34553(U)

September 11, 2019

Supreme Court, Rockland County

Docket Number: Index No. 031592/2019

Judge: Sherri L. Eisenpress

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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BRUCHA FRIEDMAN and FEIGE FRIEDMAN,,

DECISION AND ORDER

Plaintiffs,

-against-

Index No. 031592/2019

CATHERINE HERWAY, YTIZCHOK FRIEDMAN, NILT TRUST, as Grantor and UTI Beneficiary, NISSAN MOTOR ACCEPTANCE CORPORATION, as Services, NILT, INC. as Titling Trustee, WILMINGTON TRUST COMPANY, as Delaware Trustee, and as Trust Agent 2017-B SUBI SUPPLEMENT and TRANIE FRIEDMAN,

(Motion #1)

Defendants.

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Sherri L. Eisenpress, J.

The following papers, numbered 1 to 7, were considered in connection with the Notice of Motion for an Order, pursuant to Civil Practice Law and Rules § 3211(A)(7), dismissing Plaintiffs' Complaint and all cross-claims as to Defendants Nissan-Infiniti LT i/s/h/a "NILT TRUST, as Grantor and UTI Beneficiary", NILT, Inc. I/s/h/a "NILT, Inc., as Titling Trustee", Nissan Motor Acceptance Corporation i/s/h/a "Nissan Motor Acceptance Corporation, as Servicer", and Wilmington Trust Company i/s/h/a "Wilmington Trust Company, as Delaware Trustee, and as Trust Agent 20170B SUBI Supplement (collectively referred to as "Moving Defendants"), for failure to state a cause of action due to the applicability of the "Graves Amendment":

<u>PAPERS</u>	<u>NUMBERED</u>
NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXHIBITS "A-M"/AFFIDAVIT OF ALLISON EDOND/AFFIDAVIT OF LEIGH STEINBERG/MEMORANDUM OF LAW/EXHIBITS "1-2"	1-5
AFFIRMATION IN OPPOSITION/EXHIBITS "A-B"	6
AFFIRMATION IN REPLY/EXHIBIT "A"	7

Upon a careful and detailed review of the foregoing papers, the Court now rules

as follows:

This action arises out of a two-vehicle accident, which occurred on November 20, 2018, on eastbound Route 59 approximately 100 feet east of its intersection with Besso Street, in Clarkstown, New York. Plaintiffs, passengers in the vehicle operated by defendant Ytizchok Friedman, and leased by Tranie Friedman¹, claim to have sustained serious personal injuries when that vehicle came into contact with a vehicle operated by defendant Catherine Herway. Plaintiff commenced an action on March 27, 2019 and moving defendants filed an Answer on April 11, 2019. On April 15, 2019, plaintiffs served an Amended Complaint, adding defendant Tranie Friedman, the lessee, as a direct defendant. On April 19, 2019, moving defendants served a Verified Answer to the Amended Complaint denying all allegations of negligence and asserting the affirmative defense of failure to state a cause of action based upon the Graves Amendment.

Moving Defendants assert that the action against them must be dismissed because Plaintiffs have failed to state a cause of action due to the Graves Amendment. They point out that on May 30, 2019, they served a Notice to Admit on defendant Tranie Friedman requesting that she admit she entered into a Lease Agreement for the vehicle at issue and that she was not acting within the authority or any scope of any duty or employment on behalf of moving defendants on the date of the accident. On the same date, moving Defendants also served a Notice to Admit on Defendant Yizchok Friedman requesting he admit that he was not acting within the authority or any scope of any duty or employment on behalf of moving defendants on the date of the accident. On or about June 5, 2019, defendants Yitzchok Friedman and Tranie Friedman, each served a Response to Notice to Admit admitting all allegations contained in those documents.

Additionally, moving Defendants also submit affidavits from employees with

¹On or about December 27, 2017, Tranie Friedman entered into a lease agreement with Nissan 112 Sales Corp for the subject vehicle herein.

knowledge that moving Defendants are engaged in the business of leasing motor vehicles and do not engage in the repair, maintenance, delivery, service, operation, management inspection, marketing or advertising of the vehicles that are leased through authorized Nissan dealerships.

In opposition to the motion, Plaintiffs argue that the motion must be denied as premature, as they have not received any response to their discovery demands. Additionally, they argue that the affidavit of Leigh Steinberg should not be considered or treated as probative, as the notary stamp is from Texas and there is no certificate of conformity accompanying the affidavit. In reply, moving Defendants assert that Plaintiffs cannot defeat a dispositive motion based upon speculative assertions and expressions of hope that further discovery may produce more favorable evidence as to the existence of a cause of action. With respect to the certificate of conformity, moving Defendants argue that the Second Department has consistently held that out-of-state affidavits that are sworn to before a notary public are admissible in the absence of a Certificate of Conformity. Betz v. Daniel Conti, Inc., 69 A.D.3d 545, 892 N.Y.S.2d 477 (2d Dept. 2010)

On a motion to dismiss for failure to state a cause of action [§ 3211(a)(7)], the Court initially must accept the facts alleged in the complaint as true and then determine whether those facts fit within any cognizable legal theory, irrespective of whether the plaintiff will likely prevail on the merits. Campaign for Fiscal Equity, Inc. v. State, 86 N.Y.2d 307, 318, 631 N.Y.S.2d 565 (1995); Leon v. Martinez, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972 (1994); People v. New York City Transit Authority, 59 N.Y.2d 343, 348, 465 N.Y.S.2d 502 (1983); Morone v. Morone, 50 N.Y.2d 481, 429 N.Y.S.2d 592 (1980); Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 274-275, 401 N.Y.S.2d 182 (1977); Cavanaugh v. Doherty, 243 A.D.2d 92, 98, 675 N.Y.S.2d 143 (3d Dept. 1989); Klondike Gold, Inc. v. Richmond Associates, 103 A.D.2d 821, 478 N.Y.S.2d 55 (2d Dept. 1984). The complaint must be given a liberal construction and will be deemed to allege whatever cause of action can be implied by fair and reasonable reading of same. Shields v. School of Law of Hofstra University, 77 A.D.2d 867, 431 N.Y.S.2d 60 (2d

Dept. 1980); Penato v. George, 52 A.D.2d 939, 383 N.Y.S.2d 900 (2d Dept. 1976).

The Graves Amendment, addressing rented or leased motor vehicle safety and responsibility, preempted vicarious liability imposed on commercial lessors by New York statute, and thus actions against rental and leasing companies based solely on vicarious liability could no longer be maintained. Graham v. Dunkley, 50 A.D.3d 55, 852 N.Y.S.2d 169 (2d Dept. 2008). Under the Graves Amendment, in order for recovery to be barred, the owner, or an affiliate of the owner, must be engaged in the trade or business of renting or leasing motor vehicles, and the owner, or its affiliate, must not be negligent. Aviaev. V. Nissan Infiniti LT, 150 A.D.3d 807, 808, 55 N.Y.S.3d 297 (2d Dept. 2017). A defendant may demonstrate that it is entitled to the protections of the Graves amendment through an affidavit of an employee with sufficient knowledge to authenticate the lease for the subject vehicle and to demonstrate that it was the owner of the subject vehicle and engaged in the business of renting or leasing motor vehicles. Antoine v. Kalandrishvili, 150 A.D.3d 941, 56 N.Y.S.2d 142, 144 (2d Dept. 2017); Burrell v. Barreiro, 83 A.D.3d 984, 922 N.Y.S.2d 465 (2d Dept. 2011).

In the instant matter, moving Defendants have met their burden with respect to the Graves Amendment based upon the Notices to Admit and the affidavits of their employees. In Reply, moving Defendants submit a Certificate of Conformity, thereby curing any potential defect with regard to the affidavits of their employees. In opposition, Defendants have failed to raise an issue of fact as to the moving defendants sufficient to deny dismissal of the action against them based upon the Graves Amendment. Nor have they have pointed to any facts which they believe discovery might reveal which would demonstrate that moving Defendants' negligence is anything other than vicarious, so as to render the Graves Amendment inapplicable.

Accordingly, it is hereby

ORDERED that Defendants Nissan-Infiniti LT i/s/h/a "NILT TRUST, as Grantor and UTI Beneficiary", NILT, Inc. I/s/h/a "NILT, Inc., as Titling Trustee", Nissan Motor

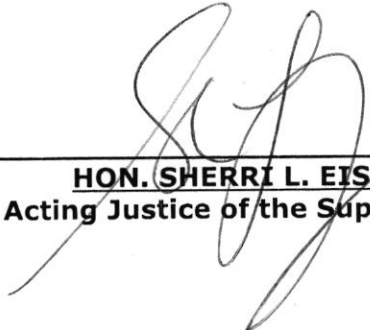
Acceptance Corporation i/s/h/a "Nissan Motor Acceptance Corporation, as Servicer", and Wilmington Trust Company i/s/h/a "Wilmington Trust Company, as Delaware Trustee, and as Trust Agent 20170B SUBI Supplement's" Notice of Motion to dismiss the action and all cross-claims against them is GRANTED; and it is further

ORDERED that the action is hereby dismissed as against Defendants Nissan-Infiniti LT i/s/h/a "NILT TRUST, as Grantor and UTI Beneficiary", NILT, Inc. I/s/h/a "NILT, Inc., as Titling Trustee", Nissan Motor Acceptance Corporation i/s/h/a "Nissan Motor Acceptance Corporation, as Servicer", and Wilmington Trust Company i/s/h/a "Wilmington Trust Company, as Delaware Trustee, and as Trust Agent 20170B SUBI Supplement; the dismissed action is hereby severed from the remaining action and the Clerk of the Court is directed to enter Judgment and accordance with this Decision and Order; and it is further

ORDERED that the remaining parties are ordered to appear for a Compliance Conference on **FRIDAY, DECEMBER 20, 2019** at 9:45 a.m.

The foregoing constitutes the Decision and Order of this Court on Motion # 1.

Dated: New City, New York
September 11, 2019



HON. SHERRI L. EISENPRESS
Acting Justice of the Supreme Court

TO:

All Parties (via- NYSCEF)