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| Messer v United Parcel Serv., Inc. |
| 2020 NY Slip Op 31884(U) |
| June 16, 2020 |
| Supreme Court, New York County |
| Docket Number: 151485/2017 |
| Judge: Barbara Jaffe |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

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|------------------------------------|-----------------|--------------------|
| PRESENT: <u>HON. BARBARA JAFFE</u> | PART | IAS MOTION 12EFM |
| <i>Justice</i> | | |
| -----X | | |
| GLORIA MESSER, | INDEX NO. | <u>151485/2017</u> |
| Plaintiff, | MOTION DATE | _____ |
| - v - | MOTION SEQ. NO. | <u>004</u> |

UNITED PARCEL SERVICE, INC., UNITED
 PARCEL SERVICE OF AMERICA, INC., UNITED
 PARCEL SERVICE GENERAL SERVICES CO.,
 UNITED PARCEL SERVICE CO., GIOVANNI
 GOMEZ,

 Defendants.

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 58-62, 63-79, 81-83 were read on this motion for discovery; cross motion for summary judgment.

By notice of motion, plaintiff moves for an order compelling defendants to provide discovery responses. Defendants oppose and cross-move pursuant to CPLR 3212 for an order summarily dismissing the complaint. Plaintiff opposes the cross motion.

I. BACKGROUND

In her summons and complaint, plaintiff alleges that on January 15, 2015, defendant Gomez was employed by defendants (collectively, UPS), with an employee identification number of "123-826-1774." On that date, she claims, Gomez was operating a UPS hand-delivery cart on the sidewalk between Ninth Avenue and 16th Street in Manhattan, when he caused the cart to collide with her while she was walking there, causing her injuries. (NYSCEF 1).

At a deposition held on February 19, 2019, plaintiff testified, as pertinent here, that on January 15, 2015 at approximately 1:30 pm, she observed a UPS truck parked on Ninth Avenue

and 16th Street as she waited to cross Ninth Avenue, which has a UPS store on the corner of the street. When plaintiff took a step off the sidewalk to cross the street, she was hit by a UPS cart which was loaded with packages, up to and above the employee's eye level. She stated that she could see that all of the packages on the cart were addressed to Armani Exchange, located at 111 Eighth Avenue. (NYSCEF 73).

After plaintiff was able to stand up, the employee identified himself to her as Giovanni Gomez and wrote down for her his name and identification (ID) number on a piece of paper; she did not know if he wrote his employee ID number or some other ID number. Plaintiff also did not remember what type of uniform Gomez wore. She recorded on the paper the tracking number, 772526489854, on one of the packages that she saw was addressed to Armani Exchange. (*Id.*).

At some point after the accident, plaintiff typed on a piece of paper the details of the accident. As pertinent here, she wrote that:

UPS confirmed that the accident was reported by the driver to his UPS Supervisor and turned the claim over to Liberty Mutual Insurance Company - Claim #AB220-221-674-02. UPS called a number of times and finally said that the UPS cart driver had reported the accident to his supervisor. Michael Kirby, Technical Claims Specialist with Liberty Mutual also called a number [of] times and sent me a letter dated February 9, 2015, with Liberty Mutual Claim Number P 220-131853-01.

June 5, 2014 - Receive letter from Michael Kirby, Technical Glaims (sic) Adjuster Liberty Mutual denying claim.

6-15-15 - Telephone Call from Tanya Coley, asking if I had a Lawyer. Health Claims Adjuster with Liberty Mutual 858.435.2966 - Claim # AB220 221 674-02 Adjuster on heath (sic) care invoices, Liberty Mutual P.O. Box 7214 London, Kentucky 40742

(*Id.*).

By affidavit dated March 15, 2018, a UPS District Safety Operations Manager states that he searched UPS's database for employment records and found no one named Giovanni Gomez

employed by UPS in January 2015 within the UPS North Atlantic district. Moreover, as UPS employee ID numbers are always seven digits, the manager was unable to search for or find an employee with the ID number given to plaintiff. (NYSCEF 74).

By discovery response dated April 26, 2019, defendants informed plaintiff that upon information and belief, the following UPS employees made deliveries/pick-ups at 111 Eighth Avenue on January 15, 2015: Wallace Brown and Juan Ventura. Defendants denied that UPS used contractors or subcontractors for deliveries at that location on January 15, 2015. (NYSCEF 70).

In a discovery response of the same date, defendants provided the employee ID numbers of Brown and Ventura, both of which were seven digits; neither one matched that allegedly given to plaintiff by Gomez. (NYSCEF 71).

In a third discovery response of that date, defendants provided certified Federal Express (FedEx) records, which reflect that on January 15, 2015, FedEx delivered packages to Armani Exchange at 111 Eighth Avenue, including one with the tracking number that plaintiff had recorded, 772526489854. (NYSCEF 76).

By affidavit dated January 6, 2020, a UPS manager accessed UPS's database of delivery records and searched for all transactions made at Armani Exchange on January 15, 2015. The records reflect that UPS was at Armani Exchange that day from 10:19 am to 10:20 am, during which six packages were delivered by Juan Ventura. She also searched for all transactions bearing the tracking number 772526489854 and found none, observing that UPS tracking numbers begin with "1Z." Moreover, she denies that UPS had a contractual relationship with FedEx for package pickups or deliveries, or that FedEx was its agent on January 15, 2015. (NYSCEF 75).

II. CONTENTIONS

Defendants allege that as it is undisputed that none of their employees was involved in plaintiff's accident on January 15, 2015, and as the packages on the cart were not being delivered or picked up by UPS but instead by FedEx, they neither owed nor breached a duty to plaintiff, and thus may not be held liable. (NYSCEF 64).

Plaintiff alleges that the labels that she observed on the packages addressed to Armani Exchange that day were UPS, not FedEx labels, and that defendants refuse to provide discovery responses that would show that UPS delivered packages to Armani Exchange the day of her accident. In arguing that Gomez worked for UPS, plaintiff relies on her communications with Liberty Mutual, defendants' insurance company, whereby she was told that Gomez had reported the accident to a UPS supervisor, but offers no supporting documentary evidence in support. (NYSCEF 81).

In reply, defendants argue that their personnel search reflects that Gomez was not employed by UPS, and that even if plaintiff's conversation with the Liberty Mutual representative warrants a finding that that Gomez was employed by UPS, an insurer's statements are not binding on its insured. In any event, the statement that Gomez reported the accident to a UPS supervisor constitutes inadmissible double hearsay. Moreover, plaintiff's contentions regarding the labels on the package, which have not been produced, are refuted by independent documentary evidence, namely, the records of FedEx that reflect that the tracking number on the package, as recorded by plaintiff, is a FedEx number, not UPS.

Defendants deny that they failed to provide required discovery responses or that any discovery sought by plaintiff will lead to relevant and material evidence sufficient to oppose dismissal of the complaint. (NYSCEF 82).

III. ANALYSIS

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 [2019]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; “conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient.” (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the “light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference.” (*O’Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

A cause of action for negligence requires a showing of a duty owed, a duty breached, and resulting damages. (*Kuti v Sera Security Svces.*, 182 AD3d 401 [1st Dept 2020] [finding of negligence requires finding that defendant breached duty owed to plaintiff]).

Here, defendants submit documentary evidence that Gomez was not their employee, namely, a personnel search that yielded no UPS employee by that name or ID number, along with their employee’s statement that UPS employee ID numbers are composed only of seven digits.

Plaintiff’s allegation that Gomez was a UPS employee based on the alleged admission by Liberty Mutual’s representative that Gomez had reported plaintiff’s accident to a UPS supervisor is inadmissible absent any showing that the representative had authority to speak on behalf of defendant (*Silvers v State*, 68 AD3d 668 [1st Dept 2009], *lv denied* 15 NY3d 705 [2010] [absent evidence that insurance representative authorized to speak on particular issue, statement made

not admission binding on principal]), even if her typewritten notes constitutes a past recollection recorded.

Defendants also show that the only deliveries UPS made to Armani Exchange on January 15, 2015 were completed hours before plaintiff's accident and by an employee named Juan Ventura, and plaintiff submits no evidence to controvert that documentary evidence. Moreover, although plaintiff was provided with Ventura's name during the exchange of discovery in April 2019, she made no effort to depose him.

Additionally, it is established by defendants that the tracking number that plaintiff recorded from one of the packages was not a UPS tracking number as it did not begin with "1Z." That exact tracking number was used on a delivery made by FedEx to Armani Exchange on January 15, 2015. Defendants thereby show that the packages on the cart being delivered to Armani Exchange that day were from FedEx.

That plaintiff believes or recalls that the labels on the packages were those of UPS and not FedEx is insufficient to refute the independent documentary evidence establishing that the tracking number belonged to FedEx and not UPS, and she thereby fails to raise a triable issue as to the identity of the company whose packages were on the cart which collided with her. (*See Bank of N.Y. v 125-127 Allen St. Assocs.*, 59 AD3d 220, 220 [1st Dept 2009] [allegations controverted by documentary evidence insufficient to raise triable issue]).

Defendants therefore prove, *prima facie*, that the accident was not caused by the negligence of one of their employees, and that, thus, they neither owed nor breached a duty to plaintiff. Plaintiff submits no proof that additional discovery will uncover evidence that could or would raise a triable issue. The contents of Liberty Mutual's insurance file are not discoverable. (*Veltre v Rainbow Convenience Store, Inc.*, 146 AD3d 416 [1st Dept 2017] [insurance file

created by defendant’s liability insurer immune from disclosure]). Nor does plaintiff establish that defendants failed to respond to her discovery requests.

Plaintiff thus fails to show entitlement to an order compelling defendants to provide additional discovery responses, and does not set forth a basis sufficient to preclude an award of summary judgment to defendant.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants’ cross motion for summary judgment is granted, and the complaint is dismissed in its entirety, and the clerk is directed to enter judgment accordingly; and it is further

ORDERED, that plaintiff’s motion to compel is denied.

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6/16/2020
DATE

BARBARA JAFFE, J.S.C.

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| CHECK ONE: | <input checked="" type="checkbox"/> | CASE DISPOSED | <input type="checkbox"/> | NON-FINAL DISPOSITION |
| | <input type="checkbox"/> | GRANTED | <input type="checkbox"/> DENIED | <input type="checkbox"/> GRANTED IN PART |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | | <input checked="" type="checkbox"/> OTHER |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> | FIDUCIARY APPOINTMENT |
| | | | <input type="checkbox"/> | REFERENCE |