

Gomez v Malek

2020 NY Slip Op 32031(U)

May 22, 2020

Supreme Court, Bronx County

Docket Number: 31082/2019E

Judge: John R. Higgitt

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA PART 14

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YOMARY E. GOMEZ,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 31082/2019E

GIZELA MALEK, NISSAN INFINITI LT and CESAR
MENA LIMA,

Defendants.

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Present: John R. Higgitt, J.S.C.

Upon the January 15, 2020 notice of motion of defendant Nissan-Infiniti LT, sued herein as Nissan Infiniti LT (Nissan), and the affirmation, affidavits, exhibits and memorandum of law submitted in support thereof; plaintiff's March 2, 2020 affirmation in opposition and the exhibit submitted therewith; defendant Nissan's April 15, 2020 affirmation in reply; and due deliberation; defendant Nissan's motion pursuant to CPLR 3211(a)(7) for dismissal of the complaint as against it, on the ground that the claims against it are barred by the Graves Amendment, is granted.

Plaintiff's complaint alleges that defendant Nissan was the registered and titled order of one of the vehicles involved in the subject motor vehicle accident, that defendant Malek operated the vehicle owned by defendant Nissan in the course of her employment with defendant Nissan, and that

"defendants were negligent in failing to keep their vehicles under proper control; in operating said vehicles at an excessive rate of speed under the existing traffic conditions; in failing to keep said vehicles at a safe and proper distance from each other; in failing to make use of a proper horn or other signal or warning device; in operating said vehicle at an improper rate of speed on the said roadway; in failing to yield to the right of way; in disregarding the traffic conditions then and there existing; in disregarding a traffic device; in causing, allowing and permitting their vehicles to come into contact with each other; in failing to keep a proper lookout; in failing to give any signal or warning of approach; in failing to make proper use of the brakes or braking equipment; and in failing to make proper use of the steering mechanism" (complaint at para. 23).

In support of the motion, defendant Nissan submits the police accident report, the January 24 2018 39-month vehicle lease between King's Infinity and Gizela Braun, the February 2, 2018 State

of New Jersey Motor Vehicle Commission certificate of title listing defendant Nissan as the vehicle owner, defendant Malek's January 10, 2020 response to defendant Nissan's notice to admit in which she admitted all items in the notice, the affidavit of a supervisor of the consumer collections department of defendant Nissan's servicer, and the affidavit of a senior paralegal employed in the legal department of Nissan North America, Inc., which performs certain legal and human resources functions for its subsidiaries, including defendant Nissan's lease servicer.

The servicer averred that defendant Nissan is in the business of leasing Infiniti motor vehicles, and takes assignments of leased vehicles and is the title holder and owner of Infiniti motor vehicles leased to consumers in New York, including the leased vehicle at issue in this case. The servicer further averred that, pursuant to the terms of the subject lease and custom and practice, the lease and title were immediately assigned from the dealership to defendant Nissan upon execution of the lease. Pursuant to the terms of the lease, the lessee is solely responsible for vehicle maintenance and repair.

The paralegal affirms, upon a search of the relevant records, that defendant Malek was not affiliated with defendant Nissan or its related entities.

In her response to the notice to admit, defendant Malek admitted, as is relevant here, to entering into the subject vehicle lease and that she was not an employee or agent of defendant Nissan.

"On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), it is well settled that courts must liberally construe a pleading, accept all the facts alleged therein to be true, and accord those allegations the benefit of every possible favorable inference in order to determine whether those facts fit within any cognizable legal theory" (*Molina v Phoenix Sound, Inc.*, 297 AD2d 595, 596 [1st Dept 2002]). "A CPLR 3211 dismissal 'may be granted where documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law'" (*Goldman v Metro. Life Ins. Co.*, 5 NY3d 561, 571 [2005] [citations omitted]). "[A] defendant can

submit evidence[, such as affidavits or testimony,] in support of [a CPLR 3211(a)(7)] motion attacking a well-pleaded cognizable claim” (*Basis Yield Alpha Fund (Master) v Goldman Sachs Grp., Inc.*, 115 AD3d 128, 134 [1st Dept 2014]). The affidavits or testimony submitted in support of a motion to dismiss must conclusively establish the lack of a claim or cause of action (*see Godfrey v Spano*, 13 NY3d 358 [2009]; *Anonymous v Anonymous*, 165 AD3d 19 [1st Dept 2018]).

Pursuant to Vehicle and Traffic Law § 388(1), an owner of a motor vehicle is jointly and severally liable for the negligence of the vehicle’s driver. The Graves Amendment (49 USC § 30106[a]) exempts from liability under Vehicle and Traffic Law § 388(1) those vehicle owners and their affiliates “engaged in the trade or business of renting or leasing motor vehicles.”

The foregoing was sufficient to meet defendant Nissan’s prima facie burden on the claims of vicarious liability (*see Hall v Elrac, Inc.*, 52 AD3d 262 [1st Dept 2008]) and, to the extent such a claim is discernable from the complaint, respondeat superior (*see Freibaum v Brady*, 143 AD 220 [1st Dept 1911]; *cf. Cassidy v DCFS Tr.*, 89 AD3d 591 [1st Dept 2011]). Furthermore, defendant Nissan established that, because the lessee was obligated to maintain the vehicle throughout the term of the lease, the accident was not due to defendant Nissan’s independent negligence in the maintenance of the vehicle (*see Reifsnnyder v Penske Truck Leasing Corp.*, 140 AD3d 572, 573 [1st Dept 2016]; *Villa-Capellan v Mendoza*, 135 AD3d 555 [1st Dept 2016]; *see also Costello v Panavision of N.Y.*, 8 AD3d 143 [1st Dept 2004], *lv den* 4 NY3d 703 [2005]).

Defendant Nissan established its entitlement to dismissal of the complaint as against it pursuant to CPLR 3211(a)(7) (*see Cukoviq v Iftikhar*, 169 AD3d 766 [2d Dept 2019]; *Aviaev v Nissan Infiniti LT*, 150 AD3d 807 [2d Dept 2017]), and plaintiff failed to raise an issue of fact.

Plaintiff asserts that defendant Nissan failed to submit a certificate of title demonstrating its ownership of the vehicle; same was appended to the motion at Exhibit D.

Plaintiff also asserts that defendant Nissan failed to demonstrate its freedom from independent negligence because it did not demonstrate that it did not perform vehicle maintenance.

Plaintiff, however, asserted no allegations of negligence related to vehicle maintenance in her complaint (*see infra*). “The function of a bill of particulars is to amplify a pleading, limit proof and prevent surprise at trial” (*345 E. 69th St. Owners Corp. v Platinum First Cleaners, Inc.*, 158 AD3d 452, 453 [1st Dept 2018]), and not to change or add theories of recovery (*see Paterra v Arc Dev. LLC*, 136 AD3d 474 [1st Dept 2016]). In any event, defendant Nissan established that maintenance was solely the obligation of the lessee, and defendant Malek admitted to having entered into the subject vehicle lease. Notably, this accident occurred nearly a year and a half into the 39-month lease term.

Accordingly, it is

ORDERED, that defendant Nissan’s motion pursuant to CPLR 3211(a)(7) for dismissal of the complaint as against it, on the ground that the claims against it are barred by the Graves Amendment, is granted; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendant Nissan-Infiniti LT, sued herein as Nissan Infiniti LT, dismissing the complaint as against it and all cross claims against it; and it is further

ORDERED, that the 9:30 a.m. May 8, 2020 status conference before the undersigned is adjourned to **September 4, 2020** in Part 14, courtroom 407.

This constitutes the decision and order of the court.

Dated: May 22, 2020


Hon. John B. Jaggitt, J.S.C.