Bonney v Coach USA, Inc.
2020 NY Slip Op 32921(U)
September 4, 2020
Supreme Court, Kings County
Docket Number: 501504/2020
Judge: Lillian Wan

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17

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CHARLES BONNEY and CHARLENE MOORE,

Plaintiffs,

- against -

COACH USA, INC., COACH LEASING, INC., SUBURBAN TRAILS, INC. and MOHAMMAD MAQSOOD,

Defendants.

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Index No.: 501504/2020
Motion Date: 7-29-20
Motion Seq.: 01

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 01) 6, 7, 8, 9, 10, 11, 12, 17, 18, 19, 20, and 21 were read on this motion to dismiss.

In this action to recover damages for personal injuries, the defendants, COACH USA, INC., COACH LEASING, INC., SUBURBAN TRAILS, INC., and MOHAMMAD MAQSOOD move for an Order pursuant to CPLR §§ 3211(a)(1) and (a)(7) dismissing the complaint against COACH LEASING, INC., on the grounds that: 1) the complaint fails to state a cause of action upon which relief may be granted, asserting that 49 USC § 30106 (the "Graves Amendment") preempts and abolishes any cause of action the plaintiffs may have against the moving defendant; 2) dismissing the complaint against COACH USA, INC. for failure to state a cause of action as the defendant did not own, operate or control the subject vehicle and did not employ defendant Mohammad Maqsood on the date of the accident; and 3) pursuant to CPLR § 3211(a)(7) dismissing the plaintiffs' demand for exemplary damages, and for such other and further relief as this Court deems just and proper.

This action arises out of a vehicular collision that occurred on September 20, 2019. On the date of the accident, the plaintiffs allege that they were NYPD officers directing traffic in Battery Place when a bus driven by Mr. Maqsood struck them and pinned them against a metal barricade. The plaintiffs allege, *inter alia*, that the defendants were negligent in their ownership, operation, management, maintenance and control of the vehicle.

According to the defendants, on or about June 18, 2009, Fifth Third Equipment Finance Company leased a number of buses to Coach Leasing, Inc. (hereinafter Coach Leasing) pursuant to a Master Equipment Lease Agreement. Thereafter, on or about April 1, 2017, Coach Leasing, as lessor, entered into an Equipment Lease Agreement to lease certain buses, including the subject bus, to defendant Suburban Trails, Inc. (hereinafter Suburban Trails), as lessee. An additional Equipment Schedule was entered into between Fifth Third Equipment Finance Company and Coach Leasing, concerning the subject bus on or about June 23, 2017. The Master Equipment Lease Agreement of June 18, 2009, Equipment Lease Agreement of April 1, 2017 and Equipment Schedule dated June 23, 2017 are submitted in support of the motion. The

defendants acknowledge that Fifth Third Equipment Finance Company was the title owner of the vehicle, and that Coach Leasing was the registered owner on the date of the accident.

In support of their motion, the defendants also offer the affidavits of William Budds, the Vice President of Coach Leasing, and Brett Burke, the General Manager of Suburban Trails. Both individuals assert that on the date of the accident Coach Leasing was engaged in the business of leasing motor vehicles, and did not employ defendant driver Mohammad Maqsood. The defendants further contend that pursuant to the Equipment Lease Agreement, Suburban Trails was solely responsible for operating, managing, maintaining, controlling and repairing the buses when the accident occurred. The affidavit of Jerry Lunanuova, the Vice President of Risk Management at Coach USA, Inc. (hereinafter Coach USA), was also submitted by the defendants. Mr. Lunanuova's affidavit avers that on September 20, 2019, Coach USA was the parent company of Suburban Trails, a wholly owned subsidiary. The affidavit further contends that Coach USA was not the title holder or the registered owner of the bus, and had not repaired, maintained, serviced, operated, managed, possessed, supervised, used, controlled or inspected the vehicle prior to or on the date of the accident.

In opposition, the plaintiffs argue that the defendants' motion is premature, and that discovery is needed before this Court can make a determination on these issues. Depositions have not taken place, and the parties have not yet exchanged any discovery. The plaintiffs assert that questions of fact remain concerning the defendants' submissions, and that the affidavits are self-serving, and submitted in an attempt to circumvent discovery. The plaintiffs further contend that the moving defendants have failed to submit pre or post inspection trip sheets for the vehicle, or inspection, maintenance and repair records showing that the vehicle was in good working order prior to and on the date of the accident. The plaintiffs argue that even assuming *arguendo* that the defendant, Coach Leasing, is simply a lessor, the moving defendants have not established that Coach Leasing did not negligently maintain the subject vehicle. The plaintiffs also point out that the defendants have exclusive knowledge, possession and control of the records governing the resolution of the motion, and therefore discovery is necessary.

A party seeking dismissal pursuant to CPLR § 3211(a)(1) on the ground that its defense is founded upon documentary evidence has the burden of submitting documentary evidence that resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim. *Mazur Bros. Realty, LLC v State of New York*, 59 AD3d 401 (2d Dept 2009); *Epifani v Johnson*, 65 AD3d 224 (Dept 2009); *see also Leon v Martinez*, 84 NY2d 83 (1994). A motion to dismiss based on CPLR § 3211(a)(1) may be granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law. *Porat v Rybina*, 177 AD3d 632 (2d Dept 2019); *see also Phillips v Taco Bell Corp.*,152 AD3d 806 (2d Dept 2017); *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314 (2002). However, not all printed materials constitute documentary evidence under CPLR § 3211(a)(1). *See Fontanetta v John Doe 1*, 73 AD3d 78 (2d Dept 2010). In order to be considered documentary, the evidence must be "unambiguous and of undisputed authenticity" and "essentially unassailable." *Torah v Dell Equity, LLC*, 90 AD3d 746, 746–747 (2d Dept 2011) (internal quotation marks omitted); *see also Yue Fung USA Enterprises, Inc. v Novelty Crystal Corp.*, 105 AD3d 840, 841-842 (2d Dept 2013).

Materials that clearly qualify as "documentary evidence" include "documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable." *J.P. Morgan Chase Bank, N.A. v Klein*, 178 AD3d 788, 790 (2d Dept 2019) (internal quotation marks omitted); *see also Sands Point Partners Private Client Group v Fidelity Natl. Tit. Ins. Co.*, 99 AD3d 982, 983-984 (2d Dept 2012); *Fontanetta*, at 84–85, quoting Siegel; Practice Commentaries; McKinney's Cons Laws of NY; Book 7B; CPLR C3211:10; at 22. Affidavits do not constitute "documentary evidence" upon which a motion to dismiss may be made on the ground of a defense founded upon documentary evidence. *Flushing Sav. Bank, FSB v Siunykalimi*, 94 AD3d 807, 809 (2d Dept 2012). "An affidavit is not documentary evidence because its contents can be controverted by other evidence, such as another affidavit." *Phillips*, at 807.

The defendants also seek dismissal based on CPLR § 3211(a)(7). In considering a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), a court "must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Lubonty v U.S. Bank N.A.*, 159 AD3d 962, 963 (2d Dept 2018) (internal quotation marks omitted); *Nonnon v City of New York*, 9 NY3d 825, 827 (2007) (internal quotation marks omitted). "[A]ffidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211 unless they establish conclusively that [the plaintiffs have] no cause of action." *Phillips*, at 808 (internal quotation marks omitted). Moreover, affidavits received on a motion to dismiss for failure to state a cause of action are not to be examined for the purpose of determining whether there is evidentiary support of the pleading. *Anglero v Hanif*, 140 AD3d 905 (2d Dept 2016); *see also Hinrichs v Youssef*, 214 AD2d 604 (2d Dept 1995). The motion must be denied "unless it has been shown that a material fact claimed by the [plaintiffs] is not a fact at all and unless it can be said that no significant dispute exists regarding it." *Porat*, at 634 (internal quotations omitted).

The Graves Amendment shields the owner of a motor vehicle from liability for personal injuries arising from the use, operation or possession of a vehicle during the period of the rental or lease of the vehicle if: (1) 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. 49 USC § 30106. The Graves Amendment has been enforced as preempting the vicarious liability imposed on commercial lessors by Vehicle and Traffic Law § 388. *Graham v Dunkley*, 50 AD3d 55 (2d Dept 2008). However, where the plaintiff's complaint alleges that the vehicle owner failed to maintain a leased vehicle, the vehicle owner is not afforded protection under the Graves Amendment unless it has demonstrated that its maintenance of the vehicle was not negligent. *Couchman v Nunez*, 180 AD3d 645 (2d Dept 2020); *see also Casine v Wesner*, 165 AD3d 749 (2d Dept 2018).

In the instant case, the defendants have not met their *prima facie* burden demonstrating their entitlement to dismissal of the complaint. The complaint alleges that the defendant, Coach Leasing, negligently maintained the subject vehicle, and the defendants have failed to submit admissible evidence demonstrating that Coach Leasing did not negligently maintain the vehicle prior to leasing it to Suburban Trails. *See Nelson v Citiwide Auto Leasing, Inc.*, 154 AD3d 863 (2d Dept 2017). As the plaintiffs argue, the defendants have not submitted any inspection,

maintenance or repair records or files in support of their motion. Similarly, the defendants have not submitted evidence of the condition of the vehicle at the time of delivery to Suburban Trails, or at any time up to the occurrence of the accident. The affidavits of defendants' employees, William Budds and Brett Burke, are insufficient to support a motion to dismiss pursuant to CPLR § 3211(a)(1). Therefore, the defendants have not conclusively established that Coach Leasing was not negligent in the maintenance of the vehicle, as required by the Graves Amendment, and genuine issues of fact exist concerning whether the vehicle was negligently maintained, precluding dismissal. *See Anglero* at 906-907; *see also Olmann v Neil*, 132 AD3d 744 (2d Dept 2015). As the Court finds that the defendants have failed to establish that there was no negligence as a matter of law with their submissions, the Court need not address whether they have sufficiently met their burden of establishing that they are in fact in the business of leasing vehicles.

Likewise, construing the plaintiffs' pleadings liberally, affording the plaintiffs the benefit of every possible favorable inference, and accepting all facts as alleged in the complaint to be true, the defendants have failed to establish that the complaint should be dismissed against defendant Coach Leasing, pursuant to CPLR § 3211(a)(7). The defendants have failed to submit evidence sufficient to show that the facts as alleged in the complaint do not fit within any cognizable legal theory. *See Lubonty* at 963; *see also Phillips* at 808.

The defendants' submissions also fail to establish that defendant Coach USA is entitled to dismissal pursuant to CPLR § 3211(a)(1) or (a)(7). The basis of defendants' motion to dismiss is that Coach USA did not own, operate or control the subject vehicle, and did not employ the defendant driver, Mohammad Maqsood. However, the complaint also alleges that Coach USA managed, maintained, serviced, and repaired the vehicle. The defendants have failed to submit documentary evidence that is "essentially undeniable" which resolves all factual issues as a matter of law, and conclusively disposes of the plaintiffs' claims, as required by CPLR § 3211(a)(1). *See J.P. MorganChase Bank, N.A.* at 790. Moreover, the defendants' submissions are insufficient to support dismissal pursuant to CPLR § 3211(a)(7), as they have not established that "a material fact claimed by the [plaintiffs] is not a fact at all and that no significant dispute exists regarding it." *Porat* at 634. The affidavits submitted by the defendants in support of their motion cannot be considered for the purpose of determining whether there is evidentiary support for the complaint. *See Anglero* at 907. As such, dismissal under CPLR 3211(a)(1) and (a)(7) must be denied.

Lastly, the remaining prong of the defendants' motion seeking dismissal of exemplary damages is denied as premature. In the instant matter, there are allegations in the complaint that could prove to be the proper basis for an award of exemplary damages, namely the allegation of "wanton and reckless" behavior of the defendant Mohammad Maqsood in striking the plaintiffs. *See Chiara v Dernago*, 128 AD3d 999 (2d Dept 2015). At this stage, it would be premature to conclude that the allegations in the complaint are insufficient to support a claim that Mr. Maqsood acted so recklessly or wantonly as to warrant an award of punitive damages. *See Gershman v Ahmad*, 156 AD3d 868 (2d Dept 2017); *see also Felton v Tourtoulis*, 87 AD3d 983 (2d Dept 2011).

Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss is DENIED in its entirety.

This constitutes the decision and order of the Court.

Dated: September 4, 2020

Hon. Lillian Wan, J.S.C.
Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated 4/20/20.