Lopez v South
2020 NY Slip Op 33653(U)
September 14, 2020
Supreme Court, Queens County
Docket Number: 714470/19
Judge: Timothy J. Dufficy

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY PART 35
Justice

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MARIO LOPEZ,

Plaintiff,

Index No.: 714470/19
Mot. Date: 9/8/20

-against-

Mot. Seq. 1

DEBBIE A. SOUTH and MARTIAL HENRYS,

Defendants.

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The following papers were read on this motion by defendant Martial Henrys for an order, pursuant to CPLR 3212, dismissing the plaintiff's Complaint against him on the grounds of lack of permissive use.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits	EF 10-13
Answering Affidavits-Exhibits	EF 15-19
Answering Affidavits.....	EF 20-21
Replying Affidavits.....	EF 25

Upon the foregoing papers, it is ordered that the motion is granted.

In this action, plaintiff Mario Lopez seeks damages for personal injuries allegedly sustained in a two-car motor vehicle accident, that occurred on March 14, 2018, on Powells Lane, at or near its intersection with McKenna Road in Westbury, New York. On that date, plaintiff, Mario Lopez operated a motor vehicle that collided with the vehicle owned by moving defendant Martial Henrys and operated by defendant Debbie A. South. As will be discussed below, movant maintains that he dropped his vehicle off at

an auto repair shop, known as Mike's Volvo Clinic, located in Queens Village, New York, on March 12, 2018, to be repaired, and that he never gave permission for anyone at the repair shop to use his vehicle for any purpose other than what would be necessary to repair the heating core. Thereafter, on March 14, 2018, defendants' vehicle collided with the plaintiff's vehicle in Westbury, New York, while it was being operated by defendant Debbie A. South.

Defendant Martial Henrys moves for summary judgment on the grounds that defendant Debbie A. South was operating his vehicle without his consent, and, therefore he is not liable to plaintiff, pursuant to VTL § 388(1). Hence, it is argued that the defendant operator, Debbie A. South, did not have permission and consent of the owner to operate the vehicle.

"Vehicle and Traffic Law § 388 creates a strong presumption' (*Matter of State Farm Mut. Auto. Ins. Co. v Ellington*, 27 AD3d 567, 568 [2006]) of permissive use which can only be rebutted with substantial evidence sufficient to show that the driver of the vehicle was not operating the vehicle with the owner's express or implied permission" (*Talat v Thompson*, 47 AD3d 705 [2008]; *see Matter of New York Cent. Mut. Fire Ins. Co. v Dukes*, 14 AD3d 704 [2005]). "The uncontradicted testimony of a vehicle owner that the vehicle was operated without his or her permission, does not, by itself, overcome the presumption of permissive use' " (*Talat v Thompson*, 47 AD3d at 706, *quoting Matter of State Farm Mut. Auto. Ins. Co. v Ellington*, 27 AD3d at 568; *see Matter of General Acc. Ins. Co. v Bonefont*, 277 AD2d 379, 716 NYS2d 596). Additionally, "[i]f the evidence produced to show that no permission has been given has been contradicted or, because of improbability, interest of the witnesses or other weakness, may reasonably be disregarded by the jury, its weight lies with the jury' " (*Country-Wide Ins. Co. v National R.R. Passenger Corp.,* 6 NY3d 172, 177 [2006] *quoting St. Andrassy v Mooney*, 262 NY 368, 372 [1933]; *see also Amex Assur. Co. v Kulka*, 67 AD3d 614, 615 [2009].)

In support of the motion, moving defendant Martial Henrys establishes a *prima facie* case that there are no triable issues of fact. In support of the motion, Mr. Henrys submits, *inter alia*, his own affidavit wherein he avers that: he was not operating the vehicle at the time of the accident, nor was it being operated with his permission or consent. He further avers, that on March 12, 2018: he dropped the subject vehicle off at

Mike's Volvo Clinic, an auto repair business, located at 216-02 Hempstead Turnpike, Queens Village, New York, to repair a faulty heating core; and that he never gave anyone at the repair shop permission to use the vehicle for any purpose other than what would be necessary to repair the heating core. He concludes: "[a]t no time did I give any individual at MIKE's VOLVO CLINIC the authority or permission to operate or test-drive my car in any manner not necessary for this minor repair. At no time did I give any permission to take the car on a road trip to Westbury, and at no time did I ever give anyone named DEBBIE SOUTH permission or consent to operate my car for any reason."

Plaintiff has failed to present a triable issue of fact in opposition to the motion. Here, the plaintiff has submitted no affidavit of anyone with personal knowledge of the facts in this matter. It is well settled that an affirmation from a party's attorney who lacks personal knowledge of the facts, is of no probative value (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Wisnieski v Kraft*, 242 AD2d 290 [2d Dept 1997]; *Lupinsky v Windham Constr. Corp.*, 293 AD2d 317 [1st Dept 2002]). An attorney's affirmation consisting of unsubstantiated hypothesis and suppositions, is legally insufficient to oppose the relief sought in this motion. Ultimately, "whether summary judgment is warranted depends on the strength and plausibility of the disavowals [of permission], and whether they leave room for doubts that are best left for the jury" (*Country-Wide Ins. Co. v National R.R. Passenger Corp., supra* at 179; *State Farm Fire & Cas. Co. v Sajewski, supra* at 1298 [2017].) In this motion, movants disavowals of permission are not rebutted. The attorneys' affirmations fail to raise any evidentiary proof to rebut defendant Henrys' position, as the attorneys do not state that they have personal knowledge of the facts. *See* CPLR 3212.

Plaintiff and co-defendant also oppose the motion on the grounds that the motion should be denied because discovery is not complete and depositions have not yet been held. However, they have failed to demonstrate that facts essential to oppose the motion may exist but cannot then be stated. "Mere hope that somehow [a party] will uncover evidence that will prove a case provides no basis pursuant to CPLR 3212(f) for postponing a determination of a summary judgment motion." (*Plotkin v Franklin*, 179 AD2d 746 [2d Dept 1992]) (internal citations omitted). Thus, the prematurity

argument is based on mere speculation (*see Lopez v WS Distrib., Inc.,* 34 AD3d 759 [2d Dept 2006]), which is insufficient to defeat the motion.

Accordingly, the the movant sufficiently rebutted the strong presumption, pursuant to Vehicle and Traffic Law § 388, that his vehicle was operated with his permission (*see Amex Assur. Co. v Kulka, supra* at 615; *State Farm Fire & Cas. Co. v Sajewski, supra* at 1298 [2017].). No triable issues of fact have been raised in opposition. As such, a trial is unwarranted as to defendant Martial Henry.

Accordingly, it is

ORDERED that the motion by defendant Martial Henrys for an order granting summary judgment dismissing the plaintiff's complaint against him is granted; and it is further

ORDERED that the plaintiff's Complaint is dismissed as against defendant Martial Henrys only.

This constitutes the decision and order of the Court.

FILED

9/18/2020
12:46 PM

COUNTY CLERK
QUEENS COUNTY

Dated: September 14, 2020

TIMOTHY J. DUFFICY, J.S.C.