

Cangiano v Penske Truck Leasing Co.

2020 NY Slip Op 35768(U)

December 21, 2020

Supreme Court, Bronx County

Docket Number: Index No. 28544/2020E

Judge: Ben R. Barbato

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 14

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

Case Disposed	<input type="checkbox"/>
Settle Order	<input type="checkbox"/>
Schedule Appearance	<input type="checkbox"/>

-----X
CANGIANO

Index No. 28544/201E

-against-

Hon. HON. BEN. R. BARBATO, J.S.C.

-----X
PIENSKIE LEASING CO. ET AL

Justice.

The following papers numbered 1 to _____ Read on this motion,
Noticed on _____ and duly submitted as No. _____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

Motion is decided in accordance
with memorandum decision filed
herewith

CE# 001

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 12/21/2020

Hon. *Ben R Barbato*
HON. BEN. R. BARBATO, J.S.C.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 14**

CEH 001

-----X

ANGELICA M. CANGIANO

Index No. 28544/2020E

-against-

Hon. BEN R. BARBATO

PENSKE TRUCK LEASING CO and RICHARD W.
ORNELLAS

Justice Supreme Court

-----X

The following NYSCEF docs numbered 6 to 12 and 19 to 28 were read on this motion (NYSCEF and CASE MANAGEMENT Seq. No. 1) for **DISMISSAL** noticed and submitted on October 23,2020.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	NYSCEF No(s). 6-12
Answering Affidavit and Exhibits	NYSCEF No(s). 19-20
Replying Affidavit and Exhibits	NYSCEF No(s). 21-28

Upon the foregoing papers, defendant Penske Truck Leasing Co. (“Penske”) moves for an order pursuant to CPLR §3211(a)(1) and (2), dismissing the plaintiffs’ complaint against Penske on the ground that plaintiff’s complaint is preempted by federal law provided under 49 USC § 30106 (the Graves Amendment). The motion is opposed.

The cause of action is for personal injuries allegedly sustained by the plaintiff in a motor vehicle accident that occurred on September 17, 2019 on East Fordham Road at its intersection with Lorillard Avenue in Bronx County.

Penske asserts that at the time of the accident, defendant Richard W. Ornellas (“Ornellas”) was operating a vehicle owned by Penske while in the scope of his employment with HD Supply Inc. Penske refers to plaintiff’s complaint and argues that the complaint only alleges that Penske was the owner of the subject vehicle. There are no claims that Penske was negligent or involved in any criminal wrongdoing.

Penske entered into a Vehicle Lease Service Agreement with HD Supply Inc., on November 14, 2014, to lease the subject motor vehicle which bore a State of Indiana registration number 23521251. Penske claims that it is entitled to dismissal because it was the title owner of the vehicle involved in the accident. However, the Graves Amendment preempts any vicarious liability imposed on commercial lessors by Vehicle and Traffic Law §388. Therefore, Penske contends that based upon the facts of this case, the cause of action sounding in violation of Vehicle and Traffic Law §388, for negligent entrustment and permissive use of the motor vehicle must be dismissed against Penske.

Penske further contends that it did not employ Ornellas and since plaintiff asserted no claims as to negligent maintenance and/or specific criminal wrongdoing in her complaint, the claims against Penske are barred and must be dismissed.

Plaintiff opposes the motion and argues that in her complaint, she alleged, among other things, that Penske was negligent in the maintenance of the freightliner vehicle operated by Ornellas and owned by

Penske. Plaintiff asserts that no depositions have been taken and no discovery has been exchanged and Penske has not yet answered the complaint. Plaintiff further asks this court to consider whether defendants' counsel, who represents both Penske and Ornellas, has an "inherent conflict of interest" requesting dismissal based on the Graves Amendment. Plaintiff contends that if the claims against Penske are dismissed, the driver would be left to bear full liability and no written waiver of conflict from Ornellas has been submitted. Therefore, plaintiff contends that the motion should be denied and this court should direct that the insurance carrier retain separate counsel to represent Ornellas

In addition to the conflict-of-interest issue, plaintiff contends that the documentary evidence herein does not conclusively establish a defense as a matter of law. The Graves Amendment does not apply where a plaintiff seeks to hold a vehicle owner liable for the alleged failure to maintain a rental vehicle. Since the deposition of Ornellas has not yet been taken and Penske has not been deposed either, it is not known whether any maintenance issues contributed to the accident. A service agreement alone is insufficient to dismiss this action and even copies of maintenance records and affidavits concerning maintenance practices would be insufficient to dismiss this action. Therefore, the motion should be denied.

In reply, Penske points out that plaintiff concedes that Penske is protected under the Graves Amendment if it can show that Penske was not negligent in the maintenance of the subject vehicle. Penske argues that its maintenance records show that the vehicle was "meticulously" maintained and that the vehicle did not have any mechanical defects that could have contributed to the accident. With its reply papers, Penske submits a copy of the regular preventive maintenance report dated one month before the accident. Penske claims that it shows the vehicle was properly maintained and in good working order prior to the accident. Penske also submits a copy of the driver's vehicle inspection report dated nine (9) days prior to the accident and the only concern was a deflated tire which was "immediately addressed." Penske further submits four (4) years of maintenance reports from April 20 2015 to August 17, 2019 and an affidavit from Kresten Hansen ("Ms. Hansen"), a litigation claims examiner with Penske.

Moreover, the police report was submitted in reply and Penske asserts that it indicates that maintenance of the subject vehicle was not a contributing factor to the accident. Penske argues that plaintiff failed to submit any evidence whatsoever that Penske was negligent and a mere allegation as to the maintenance of a vehicle is not enough.

Penske argues with respect to the conflict-of-interest allegation that none exists because Ornellas is aware that counsel represents both him and Penske and he has not objected. Penske's counsel asserts that Ornellas will not be left bearing full responsibility because his employer, HD Supply, Inc., is potentially liable under respondeat superior. Moreover, even if Penske remained in this matter, it is indemnified from liability both contractually and by common law.

Pursuant to the Graves Amendment, U.S.C. §30106, "An owner of a motor vehicle that rents or leases the vehicle to a person...shall not be liable under the law of any State or political subdivision

thereof, by reason of being the owner of the vehicle...for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, 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..."

Penske seeks to dismiss the action as against it pursuant to CPLR §3211(a)(1) on the ground that a defense is founded upon documentary evidence. In support of the motion, Penske submitted a purported lease between Penske and Ornella's employer HD Supply Inc. to show that it was in the business of leasing vehicles and is therefore covered under the Graves Amendment. However, the lease agreement that was annexed to the moving papers is between Penske and White Cap Construction Supply Inc. and not HD Supply Inc. Moreover, even though plaintiff alleged negligent maintenance in the complaint, Penske claims that she did not and as a result, Penske did not annex any of the maintenance records nor an affidavit from someone at Penske with respect to the maintenance of the subject vehicle to support its motion. Therefore, the evidence submitted in support of the motion to dismiss is insufficient.

It was not until its reply and in response to plaintiff pointing out that she did in fact claim negligent maintenance in her complaint, that Penske submitted maintenance records and an affidavit from Ms. Hansen, a litigation claims examiner at Penske. Said documentation should have been provided with Penske's moving papers and not in reply to "remedy the basic deficiencies" in its moving papers. (see, Migdol v. City of New York, 291 A.D.2d 201 [1st Dept. 2002]). Nevertheless, the affidavit of the claims examiner is insufficient to explain the lease because she states that the lease was entered into between Penske and White Cap Construction Supply Inc. on February 18, 2000. She further states that the subject vehicle was leased to White Cap Construction Supply Inc, effective November 14, 2014. Then Ms. Hansen states that on July 15, 2009, "HD Supply assumed all right, title, and interest of the Lease Agreement and Schedule A" and as such, HD Supply Inc. was responsible for operating the subject vehicle throughout the term of the lease agreement. However, the lease that was submitted makes no mention of HD Supply Inc. Therefore, the documentary evidence is insufficient to support Penske's claim for dismissal.

Accordingly, Penske's motion to dismiss plaintiff's complaint against it, is denied.

This constitutes the Decision and Order of this Court.

Dated: 12/21/2020

Hon.  J.S.C.

1. CHECK ONE.....	<input type="checkbox"/> CASE DISPOSED IN ITS ENTIRETY	<input type="checkbox"/> CASE STILL ACTIVE
2. MOTION IS.....	<input type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED
3. CHECK IF APPROPRIATE.....	<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> SCHEDULE APPEARANCE	<input type="checkbox"/> SCHEDULE
	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFEREE APPOINTMENT