

Chyanna Chang v PV Holding Corp.

2021 NY Slip Op 31024(U)

March 26, 2021

Supreme Court, Kings County

Docket Number: 505889/2018

Judge: Richard Velasquez

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.

At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 26th day of MARCH, 2021

P R E S E N T:
HON. RICHARD VELASQUEZ, Justice.

-----X
CHYANNA CHANG,

Plaintiff,

-against-

Index No.: 505889/2018
Decision and Order

PV HOLDING CORP., BIOREFERENCE LABS,
KEVIN ALLUM and EAN RICHARDS

Defendants,

-----X

The following papers NYSCEF Doc #'s 135-248 read on this motion:

<u>Papers</u>	<u>NYSCEF DOC NO.'s</u>
Notice of Motion/Order to Show Cause	
Affidavits (Affirmations) Annexed _____	135-149; 168-184; 190-195; 215-236
Opposing Affidavits (Affirmations) _____	214; 237
Reply Affidavits (Affirmations) _____	238; 248

After having heard Oral Argument on JANUARY 6, 2021 and upon review of the foregoing submissions herein the court finds as follows:

Defendant KEVIN ALLUM moves pursuant to CPLR 602 to consolidate for trial and discovery a property damage suit pending in Queens County Civil Court styled as, *Progressive Specialty Insurance Company as subrogee of Sunniali Alleyne vs. PV Holding Corp., Bioreference Laboratories, Kevin Allum and Ean Richards*, bearing index number 33957/2019, with the currently consolidated actions pending before this Court. (MS#4). Defendant EAN RICHARDS moves pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that defendant did not breach any duty

owed to plaintiff. (MS#9) Plaintiff's moves pursuant to CPLR 3126 and 3124 for an order (1) striking the answer of defendant PV HOLDING CORP; (2) compelling defendant, PV HOLDING CORP to produce a witness with knowledge for deposition. (MS#10) Defendant PV HOLDING CORP moves pursuant to CPLR 3212 dismissing the plaintiff's complaint upon the ground that it is not liable as the vehicle was in a state of theft at the time of the incident. (MS#11). Defendants BIOREFERENCE LABS move pursuant to CPLR 3212 for an order granting summary judgment and dismissing Plaintiff CHYANNA CHANG's Complaint and all cross-claims asserted over and against Defendant BIOREFERENCE LABS on the issue of liability. (MS#12)

This action arises from an alleged motor vehicle accident occurring on December 2, 2017.

First the Court will address, Defendant EAN RICHARDS motion pursuant to CPLR 3212 for summary judgment dismissing the complaint. Defendant Richards undisputed affidavit establishes that he was travelling on Bedford Avenue, with a steady green light, approximately halfway through the intersection of Church Avenue and Bedford Avenue, when he his vehicle was struck, by the vehicle owned by PV HOLDING CORP. See Exhibit H NYSCEF Doc. No 148, p. 1 at ¶4-7. This undisputed testimony establishes that when defendant EAN RICHARDS entered the intersection the light was green and the other driver's light was red. Additionally, plaintiff's own testimony, establishes the driver of the car she was a passenger in went through the red light (p. 82 lines 22-24) and did not stop at the red light (See Exhibit G NYSCEF Doc No. 145, (p. 82 lines 22-25) p.83 line 3). It is well established, when "a driver enters the intersection when the traffic light was red, it establishes a prima facie case that his or

her negligence caused the accident. (*King v Dalton*, 267 AD2d 208 [2d Dept 1999]). As such, defendant EAN RICHARDS motion is granted.

Next the Court will address the plaintiff's motion to strike defendant PV HOLDING CORP's answer. It is well established that pursuant to CPLR 3126; "If any party, or a person who at the time a deposition is taken or an examination or inspection is made is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or **willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article**, the court may make such orders with regard to the failure or refusal as are just. It is also well settled that a court has broad discretion in determining the nature and degree of the penalty to be imposed where a party has refused to comply with discovery demands (see, CPLR 3126[2]; *Robustelli v. Robustelli*, 262 AD2d 390, 691 NYS2d 159; *Maillard v. Maillard*, 243 AD2d 448, 663 NYS2d 67); quoting *Pearl v. Pearl*, 266 AD2d 366, 366, 698 NYS2d 160 (2 Dept. 1999); (see *Nicoletti v. Ozram Transp.*, 286 AD2d 719, 730 NYS2d 165; *Pearl v. Pearl*, 266 AD2d 366, 698 NYS2d 160; *DeJulio v. Wulf*, 260 AD2d 425, 687 NYS2d 727; *Brady v. County of Nassau*, 234 AD2d 408, 650 NYS2d 802). "Absent an improvident exercise of discretion, a determination to impose sanctions for conduct which frustrates the disclosure scheme of the CPLR should not be disturbed" (see *Miller v. Duffy*, 126 AD2d 527, 528, 510 NYS2d 651), quoting *Jaffe v. Hubbard*, 299 AD2d 395, 396, 751 NYS2d 491, 491-92 (2nd Dept. 2002).

Striking an answer is a drastic remedy. Courts have found, it must be shown that a defendant's failure to comply with disclosure was the result of willful, contumacious and deliberate conduct (see CPLR 3126; *Cianciolo v. Trism*

Specialized Carriers, 274 AD2d 369, 370, 711 NYS2d 441; *Vancott v. Great Atl. & Pac. Tea Co.*, 271 AD2d 438, 705 NYS2d 640). Additionally, “the penalty of preclusion is extreme and should be imposed only when the failure to comply with a disclosure order is the result of willful, deliberate, and contumacious conduct or its equivalent” (see, *Halley v Winnicki*, 255 AD2d 489, 681 NYS2d 60; *Garcia v Kraniotakis*, 232 AD2d 369, 648 NYS2d 156; *Vatel v City of New York*, 208 AD2d 524, 617 NYS2d 61).

In the present case, contrary to the plaintiff's contentions, the defendants have made effort to comply. Moreover, defendants contend they have turned over to the plaintiff all of the documents in their possession requested, and if they have not turned over the same, they have informed the plaintiff that those documents do not exist, or are not in their control. Thus, it is not clear that the defendant's failure to produce was willful (see, *Malcolm v Darling*, 233 AD2d 425, 426, 649 NYS2d 480, 426; see also, *Bermudez v Laminates Unlimited*, 134 AD2d 314, 520 NYS2d 791). Furthermore, the defendant has a continuing obligation to provide such information as it becomes available to him (see, CPLR 3101 [h]). In the event the defendant does not provide further information, and nevertheless, attempts to introduce at trial any documents regarding the disclosures that were not previously disclosed, the plaintiff may seek preclusion of that evidence at that time, see *Brown v. United Christian Evangelistic Ass'n*, 270 AD2d 378, 379, 704 NYS2d 621 (2000). As such, this court will not strike Defendant PV HOLDINGS CORP's Answer.

As to defendant PV HOLDING CORP's motion for summary judgement. It is well established, “the defendant, on its motion for summary judgment, has the burden of demonstrating its prima facie entitlement to judgment as a matter of law”

(see *Zuckerman v. City of New York*, 49 NY2d 557, 567, 427 NYS2d 595, 404 NE2d 718). Thus, to obtain summary judgment on its defense that the vehicle was used without its permission, the defendant is required to present **substantial evidence** that the vehicle was used without its permission (see *Vinueza v. Tarar*, 100 AD3d 742, 743, 954 NYS2d 160). “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” (*Marino v. City of New York*, 95 AD3d at 841, 943 NYS2d 564 [internal quotation marks omitted]; see *Ellis v. Witsell*, 114 AD3d 636, 979 NYS2d 826). The question of consent is ordinarily one for the jury (see *Country–Wide Ins. Co. v. National R.R. Passenger Corp.*, 6 NY3d 172, 178, 811 NYS2d 302, 844 NE2d 756; *Marino v. City of New York*, 95 AD3d at 841, 943 NYS2d 564). 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.*, 6 NY3d at 179, 811 NYS2d 302, 844 NE2d 756); quoting *Minuk Han v. BJ Laura & Son, Inc.*, 122 AD3d 591, 592–93, 996 NYS2d 132, 134 (2014).

In the present case, there is no evidence in this record to establish that the vehicle was in a state of theft at the time of the accident. Specifically, the vehicle was never reported stolen to the police, there is no record that the vehicle was missing or stolen, there is no testimony that the vehicle was stolen. Therefore, PV HOLDING has failed to establish that the vehicle was stolen (*cf. Fuentes v. Virgil*, 119 AD3d 522, 989 NYS2d 498; *McDonald v. Rose*, 37 AD3d 781, 783, 830 NYS2d 765), as such their motion must be denied as questions of fact exist, and are best left for a jury.

Defendant KEVIN ALLUM's motion pursuant to CPLR 306 is hereby granted, as all matters arise from the same motor vehicle accident, please refer to consolidation order dated March 26, 2021. (MS#4) Consolidation for the purpose of joint trial and joint discovery is appropriate, where as here, it will avoid unnecessary duplication of discovery and trials, save unnecessary expense and prevent injustice which would result from divergent decisions based on the same facts. See Mideal Homes Corp. v. L&C Concrete Work, Inc. 90 AD2d 789, 455 NYS2d 394 (2 Dep't 1982).

Defendant Defendants BIOREFERENCE LABS motion for summary judgment dismissing plaintiffs complaint as against them is hereby granted without opposition. (MS#12).

Accordingly, Defendant KEVIN ALLUM motion pursuant to CPLR 602 is hereby granted. (MS#4) Defendant EAN RICHARDS motion pursuant to CPLR 3212 for summary judgment is hereby granted, for the reasons stated above. (MS#9) Plaintiff's motion pursuant to CPLR 3126 and 3124 is hereby denied, for the reasons stated above. (MS#10). Defendant PV HOLDING CORP motion pursuant to CPLR 3212 dismissing the plaintiff's complaint is hereby denied, for the reasons stated above. (MS#11). Defendants BIOREFERENCE LABS motion for summary judgment dismissing plaintiffs complaint as against them is hereby granted without opposition. (MS#12). Any requests not specifically addressed are hereby denied.

This constitutes the Decision/Order of the court.

Dated: Brooklyn, New York
MARCH 26, 2021

ENTER FORTHWITH


HON. RICHARD VELASQUEZ