

<b>Gordon v Gortenberg</b>
2021 NY Slip Op 32631(U)
November 30, 2021
Supreme Court, Kings County
Docket Number: Index No. 504960/2021
Judge: Carl J. Landicino
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At an IAS Term, Part 81 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 30th day of November, 2021.

PRESENT:

CARL J. LANDICINO, J.S.C.

-----X  
DULCIEBELL GORDON,

Index No.: 504960/2021

*Plaintiff,*

-against-

DECISION AND ORDER

MICHAEL GORTENBERG, ARIELLA APPLEBAUM,  
TOYOTA LEASE TRUST, DOROTHY GORDON,  
MAYRA WOLFSON and "JOHN DOE",

Motions Sequence #1

*Defendants.*  
-----X

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion:

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and	
Affidavits (Affirmations) Annexed .....	3-13,
Opposing Affidavits (Affirmations).....	28,
Reply Affirmation or Affidavit .....	30, 32-34,
Memorandum of Law.....	14-18

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KINGS COUNTY CLERK  
FILED

After a review of the papers and oral argument the Court finds as follows:

This is an action for personal injuries allegedly sustained by the Plaintiff, Dulciebell Gordon (hereinafter the "Plaintiff") on September 28, 2019. The Plaintiff alleges in her Complaint that she suffered personal injuries when the vehicle, in which she was a front seat passenger, was involved in a motor vehicle collision with a vehicle operated by Defendant Ariella Applebaum and owned by Defendant Michael Gortenberg. Plaintiff's vehicle was operated by Defendant Dorothy Gordon and was purportedly leased from Defendant Toyota Lease Trust at the time of the accident. The Plaintiff alleges that her vehicle was also involved in a second collision with a vehicle owned and

operated by Defendant Mayra Wolfson in or around the same time. The collision purportedly occurred on the east bound side of the George Washington Bridge in New York, New York.

Defendant Toyota ("Toyota") now moves (motion sequence #1) for an order pursuant to CPLR 3211(a)(7) dismissing the complaint as against it on the grounds that the pleadings fail to state a cause of action upon which relief may be granted. Toyota argues that it is not a proper party to the action as it is immune from claims of vicarious liability pursuant to 49 U.S.C. §30106 (hereinafter "the Graves Amendment"). In support of its motion Toyota provides an affidavit from Richard Torres, the Lease Collections Manager for Toyota Motor Credit Corporation ("TMCC"), a purported servicer for Toyota. Defendant Toyota also provides a Lease Agreement purportedly between Defendant Dorothy Gordon and Toyota.

In opposition, the Plaintiff contends that the motion should be denied as Defendant Toyota failed to submit meet its *prima facie* burden. Specifically, the Plaintiff argues that neither the affidavit of Richard Torres, the lease agreement nor the Police Report are admissible. As a result, the Plaintiff argues that Toyota has failed to establish, 1) the identity of the vehicle involved in the subject accident, 2) that Toyota was in the business of leasing vehicles pursuant to a leasing business, and 3) that Toyota was not responsible for the maintenance of the vehicle. Further, the Plaintiff contends that since there have been no depositions conducted in this matter, the motion should be denied as premature.

Turning to the merits of Toyota's motion seeking dismissal pursuant to CPLR 3211(a)(7), the Court finds that Toyota has failed to proffer sufficient evidence. "Where evidentiary material is adduced in support of the motion, the court must determine whether the proponent of the pleading has a cause of action, not whether the proponent has stated one. A motion to dismiss based on documentary evidence may be appropriately granted only where the documentary

evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Feggins v. Marks*, 171 AD3d 1014, 1015-6, 99 N.Y.S.3d 45, 47 [2d Dept 2019]; *Meyer v. N. Shore-Long Island Jewish Health Sys., Inc.*, 137 AD3d 880, 881, 27 N.Y.S.3d 188, 189 [2d Dept 2016].

In the instant matter, Toyota has failed to provide sufficient evidence to identify its vehicle, which it claims was involved in the accident at issue. As an initial matter, the lack of a certificate of conformity accompanying the affidavit of Richard Torres is not a fatal defect. *See Fredette v. Town of Southampton*, 95 AD3d 940, 941, 944 N.Y.S.2d 206, 208 [2d Dept 2012]. What is more, the Court, in its discretion has the ability to consider the Reply Affirmation of Toyota wherein it has sufficiently cured this defect. *See Midfirst Bank v. Agho*, 121 AD3d 343, 345, 991 N.Y.S.2d 623, 625 [2d Dept 2014].<sup>1</sup> Toyota argues that this Court has previously granted a motion involving a Police Officer's identifying observations of a leased vehicle. However, the Police Report in that matter (*Fournarakis v. Toyota Lease Trust*, Index No. 512511/2020 (Sup. Ct, Kings County, Dec. 11, 2020)) was certified. The statements made in the instant Police Accident Report are not admissible as the instant Police Report is not certified. *See Yassin v. Blackman*, 188 AD3d 62, 64, 131 N.Y.S.3d 53, 55 [2d Dept 2020]. This is significant, as without this evidence Toyota is unable to properly show that the vehicle described in the affidavit of Richard Torres or the lease agreement is the same vehicle as the vehicle that was involved in the in the subject alleged collision. Accordingly, Defendant Toyota's motion pursuant to CPLR 3211(a)(7) to dismiss the complaint is denied.

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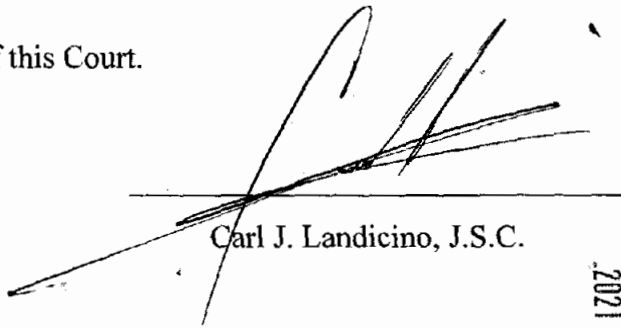
<sup>1</sup> Moreover, the failure of the movant to provide a word count (Uniform Rule 202.8-b) can be cured in Reply and the Court accepts the late filing.

It is hereby ORDERED as follows:

Defendant Toyota's motion to dismiss pursuant to CPLR 3211 (a) (7) (motion sequence #1) is denied, with leave to renew upon proper papers, unless Plaintiff voluntarily discontinues this action as against Toyota with prejudice.

This constitutes the Decision and Order of this Court.

ENTER:



Carl J. Landicino, J.S.C.

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FILED