

Felder v Special Touch Home Care Servs., Inc
2022 NY Slip Op 31393(U)
April 29, 2022
Supreme Court, New York County
Docket Number: Index No. 153606/2020
Judge: Lisa Headley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LISA HEADLEY PART 22M

Justice

-----X

CHANDRA FELDER,

Plaintiff,

- v -

SPECIAL TOUCH HOME CARE SERVICES, INC., MONICA PERERA, CITI BIKE, NYC BIKE SHARE, LLC, LYFT, INC., CHRISTINA COOPER

Defendant.

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INDEX NO. 153606/2020
MOTION DATE 03/16/2022
MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76

were read on this motion to/for JUDGMENT - SUMMARY .

In this personal injury action arising out of an alleged motor vehicle accident, defendants Citi Bike, NYC Bike Share, LLC, (collectively, NYCBS) and Lyft, Inc. (Lyft) move (Motion Seq. No. 003) (Doc No. 44)1 for summary judgment (CPLR 3212) dismissing with prejudice the Summons and Complaint (the Complaint) (Doc No. 48) and any cross claims asserted against it.

Plaintiff, Chandra Yates Felder, cross-moves2 (Doc No. 62) for an Order: (a) amending the Complaint3 to add Neutron Holdings, Inc., and Neutron Holdings Inc., d/b/a Lime-E, (collectively, Neutron) as party defendants to this action; (b) deeming the proposed Amended Complaint (Doc No. 67) duly served upon the Clerk of the Court; (c) permitting ordinary mail service of the Amended Complaint upon the attorneys for the existing named defendants; and (d) allowing service pursuant to CPLR upon the proposed named defendants, Neutron.

FACTUAL AND PROCEDURAL BACKGROUND

The Complaint alleges that on November 8, 2018 plaintiff was a passenger in a motor vehicle registered as "LOVEJOSI," operated by defendant Monica Perera (Perera) and owned by Perera's employer defendant, Special Touch Home Care Services, Inc. (STHCS) (Complaint at ¶

1 References to "Doc No." followed by a number refers to documents filed in NYSCEF.

2 In the absence of a statutory reference upon which relief is sought, this court is considering plaintiff's application as one made pursuant to CPLR 3025.

3 A prior application (Motion Seq. 002) (Doc No. 33) to amend the Complaint was granted by Decision & Order dated 8/20/21 (Doc No. 40) wherein Personal Touch Aides of New York, Inc., was removed as a party defendant in accordance with a Stipulation of Voluntary Discontinuance (Doc No. 26) and defendant, Special Touch Home Care Services, Inc., was added as a party defendant to this action.

¶ 17 and 18). At the intersection of Bay Street and Grant Street in Staten Island, New York, the motor vehicle collided with a bicycle (the Accident) bearing the number 921-912 (id. at ¶ 28 and 52), operated by defendant Christina Cooper (Cooper), and owned by Cooper's alleged employers, defendants NYCBS and Lyft (id. at ¶¶ 27, 28, 29, 34, 35 and 36). Plaintiff claims to have suffered severe and permanent personal injuries as a result of the Accident caused by defendants' "negligent, careless and reckless ... operation, management, maintenance, supervision, use and control of the aforesaid [motor] vehicle and bicycle" (id. at ¶ 55).

The general manager for Lyft, Laura Fox (Fox), asserts in a September 1, 2021 affidavit (Fox Aff) (Doc No. 52) that defendant Cooper was not employed by NYCBS, that no record exists that a user named "Christina Cooper" operated a bicycle owned by NYCBS on the date of the Accident, and that NYCBS has no record of a bicycle identified as number "921-912" (Fox Aff at ¶¶ 4-8). Additionally, Fox attests that Lyft did not own or operate NYCBS on the date of the Accident, having only acquired NYCBS on November 30, 2018 - approximately twenty-two (22) days after the purported Accident.

NYCBS and Lyft submit a police report (Doc No. 51) to prove that there is "no identifying information related to the bicycle operated by defendant" Cooper (see Movants' Statement of Facts at ¶3) (Doc No. 46). The police report identifies the motor vehicle operated by Perera as bearing plate number "LOVEJOSI," however the police report does not identify a "License ID Number" for the bicycle operated by Cooper though it is noted that the "State of Reg" for the bike is "NY." The police report states the "Accident Description/ Officer's Notes" as follows:

"[Perera] states traveling [west bound] on Grant St attempting to make a right turn onto [north bound] Bay St when bicyclist collided into her. Bicyclist [Cooper] states she was riding [south bound] on Bay St on sidewalk and collided with [Perera's vehicle]..."

On or about May 29, 2020, plaintiff filed and served the Complaint. Defendants' Answers⁴ generally denies the allegations in the Complaint, asserts affirmative defenses, and interposes cross claims (see NYCBS and Lyft's Answer, Doc No. 17; Perera's Answer, Doc No. 19; STHCS' Answer, Doc No. 78; and NYCBS and Lyft's Responsive Pleading to STHCS' Cross Claims, Doc No. 80). Specifically, defendants have asserted cross claims against each other for contribution and/or indemnification.

ARGUMENTS

Plaintiff contends that it's cross motion to amend the Complaint to add Neutron Holdings, Inc., and Neutron Holdings Inc., d/b/a Lime-E, (collectively, Neutron) as party defendants, must be granted, on grounds that: (1) plaintiff was made aware by counsel for defendant Perera that the subject bicycle bike "may have been owned by" Neutron (emphasis added); and (2) discovery is ongoing and the current named defendants are not prejudiced by the relief sought to add Neutron as party defendants to this action.

None of the defendants submitted papers in opposition to the relief sought in plaintiff's cross motion.

Defendants NYCBS and Lyft contend that its motion-in-chief application (Motion Seq. 003) for summary judgment (CPLR 3212) dismissing the Complaint and any cross claims against

⁴ Defendant Christina Cooper has not filed an Answer to the Complaint, nor otherwise appeared in this action.

it must be granted because: (1) no factual issues exist necessitating a trial of this action against NYCBS and Lyft; (2) plaintiff cannot establish that NYCBS and Lyft owed plaintiff a duty of care, or that an act or omission by NYCBS and Lyft proximately caused the Accident and/or any claimed damages thereof; (3) defendant Cooper was not and is not employed by NYCBS and Lyft; (4) defendant Cooper was not, on the date of the Accident, operating a bicycle owned by NYCBS and Lyft, nor is there any record showing a user of NYCBS and Lyft's bike as "Christina Cooper;" (5) the alleged bicycle involved in the Accident was not owned by movants; (6) NYCBS and Lyft have no record of owning a bicycle identified as number "921-912;" (7) defendant Lyft was not an owner or operator of NYCBS bike sharing program at the time of the Accident because Lyft acquired NYCBS on November 30, 2018 which was approximately twenty-two (22) days after the date of the Accident on November 8, 2018; (8) NYCBS' attorney affirms that defendant "Citi Bike" is not an "entity" and cannot be held liable since it does not "own, operate, maintain or manage" NYCBS' bike sharing program and "Citi Bike" is "merely a name – created as a result of a licensing agreement" (see NYCBS's Attorney Affirmation at pg. 2 and 3) (Doc No. 47); and (9) plaintiff failed to specify the alleged proximate cause of the Accident, including what aspect of the bicycle and/or its operation and/or its use contributed to the Accident.

In opposition, plaintiff argues that NYCBS and Lyft's application to dismiss must be denied because: (1) party depositions have not been conducted rendering the within application for summary judgment premature; (2) movants failed to provide any admissible evidence in support of its factual assertions; (3) movants failed to verify and submit proof of the "search" it performed, if any, to substantiate the factual claims asserted in support of its motion to dismiss the Complaint, including the allegation that it neither owned, nor operated the bicycle in question, nor had any connection to defendant Cooper.

In further opposition, defendants Perera and STHCS contend that NYCBS and Lyft's summary judgment motion to dismiss the Complaint on grounds that they are essentially improper parties to this action must be denied because: (1) NYCBS and Lyft submitted an inadmissible and uncertified copy of the police accident report; (2) Citi Bike is a proper party to this action as movants admit that that defendant NYC Bike Share, LLC was doing business as CITI BIKE at the time of the accident as evidenced by their own moving papers; (3) there is a factual dispute as to when exactly Lyft acquired NYCBS because a news article (Doc No. 61) claims that Lyft acquired NYCBS as early as the summer of 2018 - several months before the Accident; (4) the within application for summary judgment is premature as discovery is not complete since party depositions have yet to be held; and (5) allegations of negligence, by their very nature, necessitates a trial as there is "often a question as to whether [defendants] acted reasonably under the circumstance."

In reply to the opposition papers, NYCBS and Lyft contend that its application to dismiss the Complaint must be granted because: (1) plaintiff and co-defendants Perera and STHCS failed to raise a triable issue of fact; (2) Perera and STHCS "do not even include the affidavit of a single person or party with knowledge to rebut the substance of" this application to dismiss and the submission of an attorney affirmation alone is insufficient to raise a triable issue of fact; (3) the assertions that the within application is premature on grounds that discovery is not complete is baseless as discovery demands were not served on movants by Perera and STHCS and discovery in this case would not change the current set of facts; (4) plaintiff's opposition papers were untimely pursuant to CPLR 2214; (5) co-defendants Perera and STHCS' submission of an online news article to support the claim that Lyft acquired NYCBS on a date in time earlier than the actual date of November 30, 2018, is inadmissible and even so, another article from "The Verge" (Doc

No. 70) entitled, “Citi Bike to triple in size, thanks to \$100 million from new owner Lyft” dated November 29, 2018 proves that Lyft had not acquired NYCBS on the date of the Accident; (6) Perera and STHCS failed to provide evidence that NYCBS and Lyft were the owner of the bicycle in question or the employers of defendant Cooper; (7) plaintiff’s cross-motion relief to add Neutron as party defendants on grounds that defendant Perera’s own counsel communicated to plaintiff’s counsel that the bike in question was owned by Neutron (see Cross Motion ¶ 8) proves that Perera and STHCS do not believe NYCBS and Lyft are proper parties to this action and undermines their assertion that further discovery is needed and that the instant application is premature.

DISCUSSION

“The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion’s opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see also *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]).

The evidence presented in a summary judgment motion must be examined “in the light most favorable to the non-moving party” (*Schmidt v One New York Plaza Co. LLC*, 153 AD3d 427, 428 [2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). “The court’s function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility” (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-511 [1st Dept 2010] [internal citations omitted]).

Here, NYCBS and Lyft failed to set forth a *prima facie* entitlement to summary judgment. In support of its application, movants submit an affidavit from Fox, Lyft’s general manager, who does not specify how long Fox has been with Lyft and/or the basis upon which the factual assertions therein were made. Notably, Fox claims to be “personally familiar with the personnel records, policies and procedures, inventory records and user agreements for NYCBS,” (Fox Aff at ¶ 5) but never affirms that Fox personally reviewed and researched said documents to support the factual statements made in the affidavit. Indeed, there was allegedly a “search of the NYCBS system” and “no record of a bicycle, identified as bearing the number ‘921-912’” was found (Fox Aff at ¶ 8), but Fox never attested to personally conducting this alleged “search.” Fox’s affidavit lacks admissible evidentiary foundation, is speculative, lacks details and without more is merely a self-serving statement.

Fox presented no corporate documentation(s) to substantiate the factual claim that Lyft did not acquire NYCBS until after the date of the Accident. Instead, the parties present inadmissible hearsay “news” articles to prove or disprove the date of Lyft’s acquisition of NYCBS (see *Chong Min Mun v. Soung Eun Hong*, 109 AD3d 732, [1st Dept, 2013]). Moreover, movants’ attorney affirmation that Citi Bike is not an “entity” cannot be considered as a basis to dismiss this action against defendant Citi Bike because a mere attorney’s affirmation is insufficient to entitle movants to summary judgment since generally attorneys do not have personal knowledge of the facts presented (see, *Gaeta v. New York News*, 62 NY2d 340 [1984]). The attorney affirmation could have been considered if the application was based on documentary evidence such as the purported

licensing agreement relevant to the issues raised in support of the relief sought but such was not the case here where no documents were submitted to support the dismissal of this action against Citi Bike as a non-entity (see generally, *First Interstate Credit Alliance, Inc., v Abraham Sokol and Robyn L. Sokol*, 179 AD2d 583 [1st Dept., 1992]).

Additionally, although a police report may be admissible as a public record pursuant to *CPLR 4540* if it contains a party admission and bears a notation that the police report is a “true and correct copy” (see generally, *Jackson v Trust*, 103 AD3d 851, [2nd Dept, 2013]), the police report submitted to this Court contains an insufficient certification statement at the bottom of its page which states that “[t]his is to certify that this document is a true and complete copy of a record on” and nothing more. In other words, the required certification is incomplete and cannot serve as a business record as it is inadmissible hearsay as presented (see *CPLR 4518*; and, *Silva v Lakins*, 118 AD3d 556, 557 [1st Dept. 2014]; and, *Nationwide Gen. Ins. Co. v Linwood Bates III*, 130 AD3d 795, 796 [2d Dept. 2015]) and NYCBS and Lyft submitted this document to support its assertion that the police report lacked identifying information for the subject bicycle, rather than for statements of admission by a party.

The assertion that plaintiff must prove the proximate cause of the Accident at this pre-discovery juncture of the litigation, is misguided – particularly in light of the fact that it is hornbook law that only the trier of fact can determine the proximate cause of an accident (see generally, *Peter McKinnon v Bell Security*, 268 AD2d 220 [1st Dept 2000]). Consequently, NYCBS and Lyft are not entitled to the relief sought and its motion for summary judgment must be denied (see *Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; and, *Tortorello v Carlin*, 260 Ad2d 201 [1st Dept 1999]).

NYCBS and Lyft’s claim that plaintiff’s cross motion to amend the Complaint to add Neutron as a party defendant proves that the instant matter must be dismissed as against movants, is unfounded. A proposed supplemental amended complaint is not admissible evidentiary “proof.” Indeed, plaintiff’s counsel made clear that the proposed defendants, Neutron, may have owned the bicycle in question but this allegation has not been proven to be the fact at this juncture of the litigation. Plaintiff admits that this information was obtained by Perera’s counsel though it is unclear to the Court how this discussion came about with plaintiff’s counsel, when this information was relayed and what documents, if any, were relied upon to allege that Neutron may have owned the bicycle operated by the non-appearing defendant, Cooper, at the time of the Accident.

As NYCBS and Lyft have not made out a *prima facie* showing of entitlement to summary judgment as a matter of law, plaintiff and the remaining co-defendants are under no obligation to come forward with evidentiary proof creating a triable issue of fact (see *Cugini v System Lumber Co.*, 111 AD2d 114 [1st Dept, 1985]). Nevertheless, opposition arguments asserting that NYCBS and Lyft’s application is premature in that discovery is incomplete, is meritorious (see, *Djelina Lekutanovic et al. v City of New York*, 279 AD2d 378 [1st Dept 2001]). The existence of a disputed fact as to when Lyft acquired NYCBS remains unresolved and the submitted news articles on this issue only serves to bolster and support plaintiff and co-defendants’ contentions that the instant summary judgment motion was not ripe for summary disposition given the lack of deposition testimony and document exchange.

To the extent that NYCBS and Lyft assert that no discovery would change the facts of this case, insisting that summary judgment was appropriate at this stage of the litigation, and in so far as the Court addressed the merits of the grounds upon which NYCBS and Lyft sought relief herein, movants are precluded from interposing another summary judgment motion on these same grounds in so far as “multiple summary judgment motions in the same action [are] discouraged in the

absence of newly discovered evidence or sufficient cause” (*Public Serv. Mut. Ins. Co. v. Windsor Place Corp.*, 238 AD2d 142, 143 [1st Dept,1997]). Here, NYCBS and Lyft were fully aware that discovery on this matter has yet to commence and erroneously argued that based on Fox’s affidavit and the police report, the Court had enough facts to dismiss the Complaint and any cross claims against them.

Plaintiff’s cross motion application to amend the Complaint to add party defendants to this action, is granted. CPLR 3025(b) specifies:

“Amendments and supplemental pleadings by leave. A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.”

Here, plaintiff’s cross motion application is submitted without opposition and therefore defendants have not claimed to be prejudiced by the proposed amendment to add Neutron as party defendants to this action (*see, Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [1st Dept. 2007]). Moreover, a proposed Supplemental Summons and Complaint is annexed to the cross-moving papers (see Doc No. 67).

The Court has considered any remaining arguments by the parties and find them unavailing, without merit and/or moot.

Accordingly, it is

ORDERED that the application (Motion Seq. No. 003) by defendants Citi Bike, NYC Bike Share, LLC, and Lyft, Inc. for summary judgment (CPLR 3212) dismissing the Complaint and any cross claims asserted against it, with prejudice, is denied; and it is further

ORDERED that the cross-motion application by plaintiff, Chandra Yates Felder, to amend the Complaint (CPLR 3025) to add Neutron Holdings, Inc., and Neutron Holdings Inc., d/b/a Lime-E as party defendants to this action, is granted, in its entirety; and it is further

ORDERED that the Supplemental Summons and Amended Verified Complaint (Doc No. 64) in the proposed form annexed to the cross-moving papers shall be deemed served upon all current named defendants upon service of a copy of this Order with notice of entry within 30 days; and it is further

ORDERED that the defendants shall serve an answer to the Supplemental Summons and Amended Verified Complaint or otherwise respond thereto within 30 days from the date of said service; and it is further

ORDERED that plaintiff shall serve the proposed defendants Neutron Holdings, Inc., and Neutron Holdings Inc., d/b/a Lime-E, in accordance with the CPLR; and it is further

ORDERED that the action shall bear the following caption:

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

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CHANDRA YATES FELDER,
Plaintiff,

- against -

Index No.: 153606/2020
AMENDED VERIFIED
COMPLAINT

SPECIAL TOUCH HOME CARE SERVICES, INC.,
MONICA PERERA, CITI BIKE, NYC BIKE SHARE, LLC,
LYFT, INC., CHRISTINA COOPER, NEUTRON HOLDINGS,
INC., and NEUTRON HOLDINGS INC., D/B/A LIME-E

Defendants.

-----X

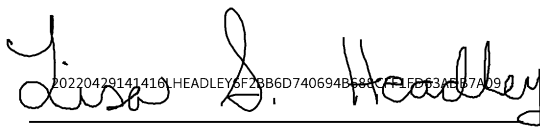
And it is further

ORDERED that plaintiff’s counsel shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the parties being added pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website at the address.

This constitutes the Decision/Order of the Court.

4/29/2022
DATE


LISA HEADLEY, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE