

Alfonso v Trucar Leasing Corp.
2022 NY Slip Op 35178(U)
November 15, 2022
Supreme Court, Bronx County
Docket Number: Index No. 35820/2020E
Judge: Alison Y. Tuitt
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NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART 1A-5

CRISTIAN ALFONSO,

Index No.: 35820/2020E

Plaintiff(s),

Against

Present:

HON. ALISON TUITTJusticeTRUCAR LEASING CORP., DRY ICE CORP.,
AF & JR TRUCK REPAIRS, INC., and
AMERICAN COMPRESSED GASES INC.,

Defendant(s).

The following efiled papers numbered 20 – 26, 34 – 49; 63 – 88,Read on this Defendant's Dry Ice Corp. Motion to Dismiss pursuant to
CPLR § 3211 (a) (3) and CPLR § 3211(a)(7)
Defendant's Trucar Leasing Corp and American Compressed Gases, Inc.
Motion to Dismiss the Amended Complaint pursuant to CPLR § 3211On Calendar of 5/28/2021Notice of Motion (mot seq. 1) – Memorandum, Affirmation, Affidavits and Exhibits 1Affirmation in Opposition – Memorandum, Affirmation, Affidavit, and Exhibits 2Reply - Affirmation, Affidavits and Exhibits 3On Calendar of 9/20/2021Notice of Motion (mot seq. 3) – Memorandum, Affirmation, Affidavits and Exhibits 1Affirmation in Opposition – Memorandum, Affirmation, Affidavit, and Exhibits 2Reply - Affirmation, Affidavits and Exhibits 3Upon the foregoing papers, Defendant, Dry Ice Corp.'s motion to dismiss
pursuant to CPLR § 3211 (a) (3) and CPLR § 3211(a)(7) and Defendant, Trucar Leasing Corp.
and American Compressed Gases, Inc.'s motion to dismiss pursuant to CPLR § 3211 are

consolidated for purposes of this decision. For the reasons set forth herein, Defendants' motions are denied.

This case stems from a motor vehicle accident that occurred on September 21, 2018. Plaintiff was travelling eastbound on the Brooklyn Queens Expressway (I-78) at or near its intersection with Hamilton Avenue, in the County of Kings, New York. Plaintiff commenced the herein action with the filing of a Summons and Complaint on December 29, 2020.

Defendant, Dry Ice Corp., (hereinafter referred to as "Dry") filed the herein motion to dismiss on April 30, 2021 pursuant to CPLR § 3211 (a)(3) and (a)(7). On June 28, 2021, Defendant, Trucar Leasing Corp (hereinafter referred to as "Trucar") and American Compressed Gases, Inc. (hereinafter referred to as "American") also filed a motion to dismiss pursuant to CPLR § 3211.

Now, upon Defendant Dry's motion for an Order pursuant to CPLR § 3211(a)(3) and CPLR § 3211(a)(7), dismissing the Complaint. Plaintiff opposes the motion.

In its motion, Defendant Dry states that the matter should be dismissed in its entirety. Defendant Dry argues that Plaintiff lacks the capacity to sue under New York State Penal Law. Defendant Dry continues that Plaintiff lack standing as Plaintiff does not have a "sufficiently cognizable stake in the outcome of the litigation," and thus, the Court is unable to render a judgment in Plaintiff's favor. Defendant Dry avers that Plaintiff does not have standing to assert a penal law violation in a civil action as the New York Penal Laws do not provide for a private cause of action. Defendant attest that Plaintiff has an alternative remedy at law. Defendant Dry argues that Plaintiff does not have standing to seek a declaratory judgment as there is no justiciable controversy to which Plaintiff has "sufficient interest" and "present prejudice." Defendant concludes that Plaintiff's receipt of Worker's Compensation benefits bars any cause of action brought and this motion should be granted.

In its opposition, Plaintiff argues that the herein motion should be denied as Plaintiff seeks only to have the lease agreement/contract between the Defendants declared void and unenforceable. Plaintiff states it is not seeking damages against his employer, Defendant Dry, but argues, as Defendant Dry is an interested party to the contract, and in order to obtain a declaratory judgment, Defendant Dry must be named in the action. Plaintiff avers that the lease agreement/contract violates New York Law, as it was designed "in support of the defendants' heinous scheme to avoid liability" from their "very negligent, reckless and criminal actions." Plaintiff argues that the subject lease agreement was contracted, for the "sole purpose of evading

civil liability for negligent, reckless, and criminal failure to properly maintain the Subject Tractor-Trailer,” and limiting Plaintiff’s remedies for collection. Plaintiff further argues that he is not seeking to enforce the penal law but to illuminate the criminal conduct which voids the subject lease and serves as an exception to the Graves Amendment. Plaintiff avers since Defendant Trucar is in the business of renting/leasing motor vehicles, Plaintiff could recover damages based on the Graves Amendment. However, as the leasing agreement shifts the obligation of maintenance to Defendant Dry, Plaintiff’s employer, Plaintiff’s exclusive remedy lies within worker’s compensation benefits.

Plaintiff further explains Defendant’s conduct creates violations of the penal law making the lease unenforceable as against public policy. Plaintiff argues that contrary to Defendant’s assessment, he has standing to seek a declaratory judgment against the leasing agreement as he is likely to suffer a “direct harm flowing from the contract or is a third-party beneficiary of the contract.” Plaintiff reasoned that the “risk of negligently maintaining a tractor-trailer mandates finding a duty running to the truck driver,” which should be reviewed on a full “evidentiary record” rather than in a motion to dismiss. Plaintiff concludes that a purported alternative remedy at law or his acceptance of worker’s compensation benefits does not preclude him from pursuing a declaratory judgment claim.

An amended pleading, when served, takes the place of the original pleading. (100 Hudson Tenants Corp. v. Laber, 98 AD2d 692, 692 [1st Dept 1983] citing Branower & Son v. Waldes, 173 App. Div. 676.) However, “[a]n amended pleading does not ‘automatically abate a motion to dismiss that was addressed to the original pleading’ “ Fownes Bros. & Co., Inc. v. JPMorgan Chase & Co., 92 AD3d 582, 582-583 [1st Dept 2012] citing DiPasquale v. Security Mut. Life Ins. Co. of N.Y., 293 AD2d 394, 395, 740 NYS2d 626 [2002]. In so much as Defendant Dry addressed the amended Summons and Complaint in its Reply, and despite the amended pleadings being filed while a decision was pending, the Court will address the motion as if the motion was filed after the new pleadings as the causes of action has not changed.

On a motion to dismiss under CPLR § 3211, a court accepts as true the facts alleged in the complaint, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable legal theory. Leon v. Martinez, 84 NY2d 83, 87-88, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994]. A complaint should not be dismissed so long as a cause of action exists, when the plaintiffs are given the benefit of

every possible favorable inference. Rovello v. Orofino Realty Co., 40 NY2d 633, 634, 357 N.E.2d 970, 389 N.Y.S.2d 314 [1976].

A motion to dismiss, pursuant to CPLR 3211(a)(3), will be granted when the movant establishes that the party asserting the claim lacks the legal capacity to sue. "The issue of lack of capacity does not implicate the jurisdiction of the court; it is merely a ground for dismissal if timely raised as a defense." Security Pac. Natl. Bank v. Evans, 31 AD3d 278, 279, 820 N.Y.S.2d 2 [1st Dept 2006]

When reviewing a motion pursuant to CPLR § 3211 (a) (7), the Court determines "whether the proponent of the pleading has a cause of action, not whether he has stated one" (High Definition MRI, P.C. v. Travelers Cos., Inc., 137 AD3d 602, 602, 29 NY3d 23 [1st Dept 2016]) and "[a]ffidavits and other evidence may be used freely to preserve inartfully pleaded but potentially meritorious claims" (R.H. Sanbar Projects v. Gruzen Partnership, 148 AD2d 316, 318, 538 NYS2d 532 [1st Dept 1989]). Whether a plaintiff can ultimately establish its allegations is not taken into consideration in determining a motion to dismiss. (EBC I, Inc. v. Goldman, Sachs & Co., 5 NY3d 11, 19, 799 NYS2d 170, 175, 832 NE2d 26, 31 [2005]).

Here it is undisputed that Plaintiff was in the employ of Defendant Dry at the time of the accident on September 21, 2018, or that he received worker's compensation benefits. Upon review of the complaint and the arguments made herein, the Court finds that Plaintiff has legal capacity to include Defendant Dry on this suit through the alleged conduct between Defendants as an interested party on the declaratory judgment claim. Specifically, Plaintiff claims that Defendants' reliance on the purported leasing agreement allows them to circumvent liability which is against public policy. Plaintiff's allegations of what appears to be negligence by showing that Defendant's conduct was reckless, and a violation of public policy is sufficient to survive this motion to dismiss. However, discovery is pertinent to allow for further examination of Defendant Dry inter relationship with Defendant Trucar, and whether the law provides for resolution as an interested party and the implication of the lease under the declaratory judgment claim.

Motion Sequence 3:

Now, upon Defendants Trucar Leasing Corp (hereinafter referred to as "Trucar"), and American Compressed Gases (hereinafter referred to as "American"), Inc.'s motion for an Order pursuant to CPLR § 3211 (a) (3) and (a) (7) dismissing the Amended Complaint. Plaintiff opposes the motion.

Defendants argue that dismissal is warranted as against American as American did not own, lease, maintain or repair the truck nor did they owe a duty to Plaintiff. Defendants argue that as American maintained no relationship with the subject truck, the action should be dismissed as against it. Defendants further argue that the action is barred by the Graves Amendment (49 U.S.C. § 30106) as the subject truck was leased from Defendant Trucar, and Defendant Trucar is "engaged in the trade or business of renting or leasing motor vehicles," nor are they liable for the harm to persons that may arise as to its use, operation or possession. Defendant Trucar states that Defendant Dry Ice contractually assumed the maintenance and repair of the leased trucks. Defendants argue that they are free of criminal wrongdoing as they were not criminally charged or convicted in connection with the ownership or leasing of the subject truck. Defendants aver that as Defendant Dry leased the used vehicle, it was not in its possession during the period it was leased and was not leased to the general public which makes Plaintiff's claim for implied warranty and strict product liability inapplicable. Defendant Trucar states that it has been out of possession of the subject truck for three (3) years as the truck was leased to Dry Ice "as is" with 400,000 miles on it. Defendant Trucar continues that the sixth cause of action should be dismissed as Plaintiff lacks capacity or standing to sue on a violation of New York State criminal statute including Penal Law § 120.20. Defendant argues that the determination of criminal wrongdoing is left within the purview of "appropriate governmental authorities," and any recovery for civil damages from criminal statute violations to the Legislature. Defendant Trucar states as Plaintiff is not a governmental agency, he has no standing and/or capacity to sue under New York Penal Law. Defendant Trucar concludes that Plaintiff also does not have standing or the legal capacity to obtain a declaratory judgment as he is not a party to the contract nor was Plaintiff an intended third-party, and thus the seventh cause of action for declaratory relief should be dismissed.

In his Opposition, Plaintiff argues that Defendants' reliance on the leasing agreement and affidavits to evade liability are insufficient to dismiss the complaint as the documentary evidence submitted does not utterly refute Plaintiff's factual allegations. Plaintiff argues that Ramsdell's affidavit as provided is "not the type of 'documentary evidence' used to offer evidentiary support on a motion to dismiss under CPLR § 3211(a)(1)," unless the motion is converted to a motion for summary judgment. Plaintiff avers that Defendants' motion is unsupported as the affidavit of Ramsdell does not include a certificate of conformity, does not authenticate the lease. More importantly, the lease was not negotiated at arm's length as evidenced by the fact that Keith Ramsdell who signed the lease as the Vice President of Dry Ice Corp. and submitted the affidavit on behalf of both Defendants Trucar and American. Plaintiff argues that the lease offered does not utterly refute Plaintiff's allegations as the lease was entered into by "two closely affiliated entities." Plaintiff notes that Defendant Dry and Defendant Trucar operate out of the same shared business address, share at least one Officer, Keith Ramsdell, and pursuant to the provided lease, the lease which expired weeks prior to the accident, provided that the truck should have been returned to Defendant Trucar. Plaintiff argues though Defendant Trucar claims the leased truck was in the possession of Defendant Dry, the lease provisions belie this argument as the leased term expired weeks prior to the accident returning the truck to Defendant Trucar's possession at the share operation base/business address. Moreover, Plaintiff argues that though Defendant Trucar argues that the truck was leased to Defendant Dry and Defendant Dry was in charge of repairs, it is Defendant Trucar who is alleged to have paid over \$25,000.00 to tow the truck and Defendant American who is listed as the owner regarding the insurance claim. These facts and affiliation between Defendants demonstrate why it "cannot be said that the lease was negotiated at arm's length." Plaintiff argues that the Graves Amendment does not apply to Defendants because Defendant Trucar cannot shield itself from vicarious liability where it rented the truck to its own affiliate, and neither Defendant Trucar nor its affiliate is free from negligence.

In the opposition, Defendants argue that Plaintiff's claims are based on inapplicable or incorrect procedural arguments, and Plaintiff counsel's unsupported factual assertions. Defendants contend that Plaintiff's procedural objections are "ill founded" because the lease which Plaintiff's based their objection on, is the same lease used by Plaintiff to support the amended complaint. Moreover, Defendants argue that Plaintiff has alleged and pleaded that

Defendant Trucar owned the truck and had leased it to Defendant Dry, and that Defendant Dry was required pursuant to the lease to maintain and repair the truck. Furthermore, Defendants proffer that Plaintiff's objections to the use of Keith Ramsdell's affidavit lack merit as the Appellate Division has held that a lack of certificate of conformity is not a fatal defect, and Mr. Ramsdell is competent to authenticate and/or explain the vehicle lease as he executed the lease.

It has been established as follows:

"A CPLR § 3211 (a) (7) motion may be used by a defendant to test the facial sufficiency of a pleading in two different ways. On the one hand, the motion may be used to dispose of an action in which the plaintiff has not stated a claim cognizable at law. On the other hand, the motion may be used to dispose of an action in which the plaintiff identified a cognizable cause of action but failed to assert a material allegation necessary to support the cause of action. As to the latter, the Court of Appeals has made clear that a defendant can submit evidence in support of the motion attacking a well-pleaded cognizable claim (*see Rovello*, 40 NY2d 633, 357 NE2d 970, 389 NYS2d 314; *Guggenheimer*, 43 NY2d 268, 372 NE2d 17, 401 NYS2d 182; *see also Board of Managers of Fairways at N. Hills Condominium v. Fairways at N. Hills*, 150 AD2d 32, 545 NYS2d 343 [2d Dept 1989]).

When documentary evidence is submitted by a defendant "the standard morphs from whether the plaintiff stated a cause of action to whether it has one" (John R. Higgitt, CPLR § 3211 [A] [7] and [A] [7] Dismissal Motions—Pitfalls and Pointers, 83 NY St BJ 32, 33 [2011] [emphasis omitted]; John R. Higgitt, CPLR 3211 [A] [7]: Demurrer or Merits-Testing Device?, 73 Albany L Rev 99, 110 [2009]). (*Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc.*, 115 AD3d 128, 134-135 [1st Dept 2014]). If the defendant's evidence establishes that the plaintiff has no cause of action (i.e., that a well pleaded cognizable claim is flatly rejected by the documentary evidence), dismissal would be appropriate [citations omitted]." *Id.* Here, the affidavit of Keith Ramsdell does not conclusively establish a defense to the allegations that it was negligent in its ownership, supervision, or maintenance of the vehicle given the allegations made regarding Defendants' lease agreement, leased term, and the questioned relationship between Defendant companies. (*see Leon v. Martinez*, 84 NY2d 83, 88 [1994])

In any common-law negligence case brought pursuant to New York law, "a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom" (*Ferreira v. City of Binghamton*, 38 NY3d 298

[2022]]; (Solomon v. City of New York, 66 NY2d 1026, 1027, 489 N.E.2d 1294, 499 N.Y.S.2d 392 [1985]). Thus, a threshold issue that the court must resolve "is whether the defendant owed a legally recognized duty to the plaintiff" Ferreira at 298 citing (Gilson v. Metropolitan Opera, 5 NY3d 574, 576, 841 N.E.2d 747, 807 N.Y.S.2d 588 [2005]; see Lauer v. City of New York, 95 NY2d 95, 100, 733 N.E.2d 184, 711 N.Y.S.2d 112 [2000]).

Under the Graves Amendment, the owner of a leased or rented motor vehicle cannot be held vicariously liable "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 (or an affiliate of 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 (or an affiliate of the owner)" (49 USC § 30106 [a]; (Villa-Capellan v. Mendoza, 135 AD3d 555, 556 [1st Dept 2016])

The Court finds that Defendant Trucar and American's application is denied. Plaintiff has provided sufficient evidence as to the inter dependence/ possible co-dependence of Defendants' companies. Questions of fact exist as to whether Defendants are indeed three separate entities, whether the tractor trailer was returned pursuant to the lease agreement, and whether the leasing agreement was executed as an arm's length transaction. These questions cannot be fleshed out at this early stage of the litigation. The affidavit of Keith Ramsdell does not conclusively establish a defense to the allegations that it was negligent in its ownership, supervision, or maintenance of the vehicle given the allegations made regarding Defendants' lease agreement, leased term, and the questioned relationship between Defendant companies. (see Leon v. Martinez, 84 NY2d 83, 88 [1994]). Furthermore, the Court notes that should it be discovered that the truck was in Defendant Trucar's custody at the time of the accident or that the companies are one entity appearing to function separately, the claim for negligent maintenance is not barred by the Graves Amendment since the statute does not absolve leasing companies of their own negligence. (Collazo v MTA-New York City Tr., 74 AD3d 642, 643 [1st Dept 2010]). Moreover, to the extent that Defendants are not separate entities and are shells of each other, the duty to Plaintiff is profound given the allegations within the complaint. The Court further notes that Defendant American's allegation that they are not a part of the lease is unavailing given their apparent ownership of the truck as listed on an evaluation report compiled for Safeco Insurance Company.

Accordingly, the motions to dismiss the action are denied as premature as there is an evidentiary basis to suggest that discovery may lead to relevant information. See, (Bailey v. New York City Transit Authority, 704 N.Y.S.2d 582 (1st Dept 2000); Jeffries v. New York City Housing Authority, 780 N.Y.S.2d 1 (1st Dept. 2004)). It is

ORDERED that Defendant Dry's motion seeking an Order of dismissal as and against it is denied; and it is

ORDERED that Defendant Trucar and Defendant American's motion seeking an Order of dismissal as and against them is denied; and it is

ORDERED that Defendants are directed to file an Answer in accordance with the time constraints set forth in the CPLR; and it is

ORDERED that movant must serve a copy of this Order with Notice of Entry on Plaintiff and on the Clerk's Office within ten (10) days.

The foregoing constitutes the Decision/Order of the court.

Dated: November 15, 2022


Hon. Alison Y. Tuitt, J.S.C.