

Shulgin v USB Leasing LT

2023 NY Slip Op 32285(U)

July 5, 2023

Supreme Court, Kings County

Docket Number: Index No. 525230/2022

Judge: Francois A. Rivera

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At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 5th day of July 2023

HONORABLE FRANCOIS A. RIVERA

-----X
VLADIMIR SHULGIN

Plaintiff,

-against-

DECISION & ORDER

Index No.: 525230/2022

USB LEASING LT, EUGENE TSUI and
EUGENIA TSUI.

Defendants
-----X

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed on February 9, 2023, by defendant USB Leasing LT (hereinafter USB), under motion sequence number one, for an order pursuant to CPLR 3212 granting summary judgment in USB’s favor on the issue of liability and dismissing the complaint of plaintiff Vladimir Shulgin (hereinafter the plaintiff) pursuant to 49 USC § 30106. This motion is opposed by the plaintiff.

- ◆ Notice of Motion
- ◆ Affirmation in Support
 - Exhibits A-I
- ◆ Statement of Material Facts
- ◆ Affidavit in Opposition
- ◆ Affirmation in Reply

BACKGROUND

On August 30, 2022, the plaintiff commenced the instant action for damages for personal injury by filing a summons and complaint with the Kings County Clerk’s Office (KCCO). On September 30, 2022, defendants Eugene Tsui and Eugenia Tsui (hereinafter collectively as the Tsui defendants) joined issue by interposing and filing their joint answer

with the KCCO. On November 21, 2022, defendant USB joined issue by interposing and filing an answer with the KCCO.

The complaint alleges the following salient facts. On July 14, 2019, Eugenia Tsui (hereinafter Eugenia T.) was operating a Honda motor vehicle bearing a New York State license plate on a public roadway at the intersection of West Street and Albany Street in New York County in the State of New York. At the same time, date and place, the plaintiff was operating a Toyota motor vehicle bearing a New York State license plate. On that day, the Honda and Toyota vehicle collided (hereinafter the subject accident) due to Eugenia T.'s negligent operation of the Honda motor vehicle. As a result of the collision the plaintiff sustained serious physical injury.

The complaint also alleges, among other things, that USB and Eugene Tsui (hereinafter Eugene T.) are the owners of the Honda motor vehicle. It further alleges that USB and Eugene T. managed, maintained, and controlled the Honda motor vehicle. It alleges that at the time of the subject accident Eugenia T. was employed by USB and was operating the vehicle within the scope of that employment and with the consent of USB. It also alleges that Eugenia T. was operating the vehicle with the consent Eugene T.

LAW AND APPLICATION

It is well established that summary judgment may be granted only when no triable issue of fact exists (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). The burden is upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as

a matter of law by presenting evidence in admissible form demonstrating the absence of any material facts (*Giuffrida v Citibank*, 100 NY2d 72 [2003]).

A failure to make that showing requires the denial of that summary judgment motion, regardless of the adequacy of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 923 [1993]). If a prima facie showing has been made the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez*, 68 NY2d 320 at 324 [1986]).

A party opposing a motion for summary judgment is obligated to lay bare his proofs to sufficiently demonstrate, with admissible evidence, that a triable issue of fact will exist (*Friends of Animals, Inc. v Associated for Manufacturers, Inc.*, 46 NY2d 1065 [1979]). A genuine issue of fact may not be demonstrated by using mere conclusions, expressions of hope or unsubstantiated allegations or assertions (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525 [1991]).

Pursuant to CPLR 3212(b) a court will grant a motion for summary judgment upon a determination that the movant's papers justify holding, as a matter of law, that there is no defense to the cause of action or that the cause of action or defense has no merit. Further, all of the evidence must be viewed in the light most favorable to the opponent of the motion (*People ex rel. Spitzer v Grasso*, 50 AD3d 535, 544 [1st Dept 2008], citing *Marine Midland Bank v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2nd Dept 1990]).

49 USCA § 30106, otherwise known as the Federal Transportation Equity Act of 2005 or Graves Amendment, enacted on August 10, 2005, states in pertinent part:

“(a) In general—An owner of a motor vehicle that rents or leases the vehicle to a person (or an affiliate of the owner) shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner), 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).”

USB claims that the Graves Amendment bars the plaintiff’s claim against it because the statute was meant to abolish vicarious liability of automobile lessors based solely on ownership of the vehicle involved in an accident. In support of this portion of the motion USB has annexed, among other things, a notice to admit, an affirmation of its counsel, the affidavit of Pamela Fountain (hereinafter Fountain) and a document denominated as a motor vehicle lease agreement.

Notice to Admit

USB’s counsel has averred the following facts regarding the Notice To Admit. On December 8, 2022, USB, served a Notice to Admit on the plaintiff and the Tsui defendants, a copy of which is annexed as exhibit E to USB’s motion. Neither Eugene T. nor Eugenia T. responded to USB’s Notice to Admit. The plaintiff responded and claimed no knowledge of the facts stated therein. More than 20 days have passed since USB’s Notice to Admit was served.

USB’s Notice to Admit stated that (1) the Tsui defendants were not agents, servants or employees of USB; (2) the Tsui defendants did not operate the Honda motor vehicle within the scope of their employment with USB; (3) the collision on July 14, 2019, did not occur within the course of the Tsui defendants’ employment with USB; and (4) on July 14, 2019, the Tsui

defendants were lessees and permissive drivers not engaged in business for USB. USB contends that the statements in the Notice to Admit are deemed admitted pursuant to CPLR 3123 by the Tsui defendants' failure to respond.

The legislative policy underlying CPLR 3123(a) is to promote efficiency in the litigation process by eliminating issues in litigation matters that will not be in dispute at trial. It is not intended to cover ultimate conclusions, which can only be made after a full and complete trial. A notice to admit which goes to the heart of the matters at issue is improper" (*Altman v Kelly*, 128 AD3d 741, 742 [2d Dept 2015], citing *DeSilva v Rosenberg*, 236 AD2d 508, 508 [2d Dept 1997]). In the instant action, USB's liability may depend on the acts of Eugenia T. under the doctrine of respondeat superior. USB's requests to admit were addressed to the core legal and factual issues pertaining to its own liability.

The notice to admit served by USB upon the plaintiff was clearly beyond the purview of appropriate demands pursuant to CPLR 3123. Moreover, a notice to admit may not seek information which would not reasonably be expected to be within the personal knowledge of the party served (*Vasquez v Vengroff*, 295 D2d 421, 422 [2d Dept 2002], citing *Taylor v Blair*, 116 AD2d 204, 206 [1st Dept 1986]). The plaintiff would not be expected to know the relationship between USB and the Tsui defendants regarding the operation of the Honda motor vehicle. Under these circumstances, USB's Notice To Admit is disregarded in assessing the instant motion.

Affirmation of USB's Counsel

The affirmation of USB's counsel demonstrates no personal knowledge of any of the transactions or occurrences alleged in the complaint. An attorney's affirmation that is not based upon personal knowledge is of no probative or evidentiary significance (*Nerayoff v Khorshad*, 168 AD3d 866, 867 [2d Dept 2019], citing *Warrington v Ryder Truck Rental, Inc.*, 35 AD3d 455, 456 [2d Dept 2006]). The affirmation, therefore, does not authenticate the lease agreement annexed as exhibit F to USB's motion papers.

Affidavit of Pamela Fountain

Fountain has averred that she is the Vice President of Dealer Services, Strategic Operation of U.S. Bank. She has also averred that the U.S. Bank is the duly appointed servicer of leases held by USB and that she is familiar with U.S. Bank's business and leasing program. USB annexed as exhibit F to its motion a document denominated as a lease agreement. Fountain did not aver personal knowledge of the lease agreement or offer any facts to authenticate the lease agreement. Although Fountain averred knowledge of U.S. bank's business and leasing programs, Fountain did not aver personal knowledge of the business practices and procedures of USB.

Fountain has also averred that USB had no relationship to Eugene T. or Eugenia T., other than as lessor and lessee and that Eugenia T. did not perform any work on behalf of USB at the time of the subject accident. Fountain demonstrated no personal knowledge of these alleged facts. Assuming Fountain gained knowledge of these facts obtained from business records of U.S. Bank, USB did not annex the business records from which the information was

obtained. Without submission of the business records, a witness's testimony as to the contents of the records is inadmissible hearsay (*Wells Fargo Bank, N.A. v Atedgi*, 189 AD3d 934, 936, [2d Dept 2020]). Based on the foregoing, USB's motion must be denied.

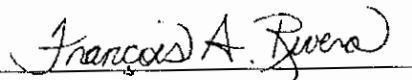
It is noted that the affirmation of the plaintiff's counsel submitted in opposition to the instant motion and filed as NYSCEF document No. 38 raised the issues addressed by this Court. The Court agrees with the plaintiff that USB did not make a prima facie showing of entitlement to dismissal of the complaint as asserted against them pursuant to the Graves Amendment.

CONCLUSION

The motion by defendant USB Leasing LT for an order pursuant to CPLR 3212 granting summary judgment in the USB Leasing LT's favor on the issue of liability and dismissing the complaint of Vladimir Shulgin pursuant to 49 USC § 30106 is denied.

The foregoing constitutes the decision and order of this Court.

ENTER:



J.S.C.

HON. FRANCOIS A. RIVERA
J.S.C.