

Cuman Cropper v M.D. Stewart

2009 NY Slip Op 33271(U)

July 17, 2009

Sup Ct, NY County

Docket Number: 114878/2006

Judge: Harold B. Beeler

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

PRESENT: HAROLD BEELER
J.S.C.
Justice

PART 21

CUMAN CROPPER

- v -

M.D. STEWART, et al

INDEX NO. 114878/2006
MOTION DATE _____
MOTION SEQ. NO. 006
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED
PAPERS NUMBERED
JUL 23 2009
COUNTY CLERK'S OFFICE
NEW YORK


Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

is granted as per annexed decision.

and it is hereby ordered that parties appear for a status conference on August 13, 2009 @ 2:30 PM, at 71 Thomas St Room 304.

Dated: 7/17/09


HAROLD BEELER J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

-----X
CUMAN CROPPER,

Plaintiff,

-against-

M.D. STEWART, NEW YORK CITY TRANSIT
AUTHORITY, MANHATTAN AND BRONX
SURFACE TRANSIT OPERATING AUTHORITY,
METROPOLITAN TRANSIT AUTHORITY,
PETER CAB CORPORATION, and SAID N. FAOUI
Defendants

PETER CAB CORPORATION, and SAID NFAOUI,
Third-Party Plaintiffs

-against-

KEVIN ESTRADA,

Third-Party Defendant

-----X

**Index No. 114878/2006
SEQUENCE MS006
DECISION & ORDER**

FILED
JUL 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

HAROLD B. BEELER, J.S.C.:

Third party defendant Kevin Estrada ("Estrada") moves for summary judgment dismissing third-party claims by Peter Cab Corporation and Said Nfaoui¹ (collectively, "third-party plaintiffs"). Third-party plaintiffs oppose the motion; plaintiff does not submit opposition.

Plaintiff Cuman Cropper ("Cropper") alleges that on June 19, 2006, he was riding on his bicycle when he collided with a taxicab owned by Peter Cab Corp. and driven by Nfaoui, and a bus owned by defendant New York City Transit Authority ("Transit Authority") and driven by M.D. Stewart ("Stewart"). According to plaintiff, Nfaoui opened the taxi's door, causing plaintiff to run into it. After plaintiff collided with the taxicab, he was hit by the bus.

A police accident report was prepared on the day of the accident. The officer wrote that

¹ The original complaint names "Said N. Faoui" but the motion papers and other documents in the record indicate that his name is "Said Nfaoui."

Nfaoui said he "was parked and opened his door to exit veh and did not see - bicyclist tried closing door but bicyclists rear tire struck taxi door then bicyclist fell to ground and bus ran over him. At the time of report bicyclist could not give story was not likely." The officer wrote that Stewart "states, he saw two bicyclists traveling one behind the other when bicyclist #2 bumped bicyclist #1 causing him to fall to the ground and under the bus."² The officer noted that he or she did not witness the event.

The report did not indicate the name of the second bicyclist. Three other witnesses, and not Estrada, are listed.

Stewart signed an Accident report on the day of the accident wherein the description of the accident reads:

At 7:05 pm while I was traveling North on the 10th Ave. I noticed two bikes on my right side at the rear of the bus. I noticed that the second bicyclist tried to take the first bicyclist and hit his back tire. The first bicyclist lost control of his bike and fell up under the right tire of the bus.

In Stewart's report with the New York State Department of Motor Vehicles, the following is written:

I beep [sic] my horn. Two bicyclist [sic] riding up 10th Ave first bicyclist lost control of his bicycle when second bicyclist hit his rear tire. First bicyclist falls under rear tire.

Finally, MTA/New York City Transit prepared two reports, by persons who interviewed Stewart. The first states:

Interviewed B/O Marvin Stewart in ambulance #1901. B/O stated while going north on 10th Ave at @ 44th St he noticed through the right side mirror two bicyclist riding right side of bus. B/O states the bikes where [sic] riding one in front of the other, he states the bike in back hit the back tire of the bike in the front causing the cyclist to wobble. At this time the b/o applied the brakes, as he watched the cyclist to [sic] fall of the bike under the rear right tire.

² The handwritten notes attribute this statement to Veh#3, even though Stewart's name and information is written in the filed "VEHICLE 1." As a whole, the Report indicates that the officer meant to attribute statements by "Veh # 3" to Stewart.

And the second:

Operator stated at the hospital that while driving his bus on 10th Ave. he noticed two bicyclists on right rear side of bus. According to operator bicyclist trailing first bicyclist struck rear tire of lead bicyclist causing first bicyclist to wobble. At that time operator stated he applied brakes and noticed injured bicyclist (lead bicyclist) falling to pavement by right side rear tire of bus. When asked if he noticed any cars on right side of bus, operator said he did not notice [sic] any cars on right side of bus. Operator also stated he was paying attention to his left side of bus trying to create more space between bus and bicyclists.

None of the abovementioned reports, nor any other documents in evidence, identify the second bicyclist or name Estrada.

On October 11, 2006, plaintiff sued Transit Authority, Stewart, Peter Cab Corp., Nfaoui, and other parties not subject to the instant motion. Mr. Estrada is not named in Cropper's complaint. According to the complaint, Cropper testified at the mandatory 50-h hearing on September 12, 2006. His testimony is not annexed to either party's moving papers. Plaintiff's verified bill of particulars dated January 19th, 2007, alleges that Nfaoui's taxicab was parked when Nfaoui opened the driver's side front door of his taxicab without looking out for traffic or bicyclists, blocking plaintiff's path of movement, causing plaintiff to collide into the door.

On July 10, 2008, Patrick J. Sullivan, Transit Authority's general manager of road operations, testified at an examination before trial. At the time of the accident, Sullivan was the chief officer of safety and training. He did not know or speak to Stewart personally. However, he reviewed Transit Authority's evaluation of the accident based, in part, with interviews with Stewart. The evaluation noted that Stewart "gave conflicting statements to both the safety and training division investigator and the Manhattan Road Operations Supervisor." It concluded that Stewart should be "held accountable" for the accident. Specifically:

The bus operator failed to maintain a safety zone between the bus and the bicyclist. The bus operator failed to maintain control of his

bus. The bus operator failed to operate the bus using defensive driving techniques. The bus operator failed to anticipate the hazards that bicyclists pose. The motorist of the taxi failed to observe the bicyclist before he opened the door into the moving traffic. The bicyclist failed to observe the taxi door opening.

Nfaoui was deposed for an examination before trial on August 19, 2008. He stated that while he was parked, he looked in the left side mirror before he opened the door. He opened the door just enough to get out, approximately two feet. He then saw a bicycle, apparently from his peripheral vision, so he immediately closed the door and went back to sitting in his car. The bicycle was then hit by the bus, which took the bicycle under the bus's tire. Contrary to Cropper's allegations, Nfaoui stated that the bicyclist never hit the cab. He specifically stated that he saw only one bicycle, and when asked if he saw another bicyclist, he answered no.

Estrada has not yet been deposed. He submits an affidavit accompanying this motion, averring that "[a]t no time whatsoever, did the bicycle I was riding come into contact with the bicycle being operated by Cuman Cropper." Aside from that averment, he offers no explanation of the events, except for his general denials of the allegations against him.

On July 1, 2008, Justice Mills granted plaintiff's motion to strike Stewart's answer, on the grounds that he failed to appear for several scheduled depositions and thereafter defaulted on plaintiff's motion. Subsequently, this court granted summary judgment against Stewart on default, but denied summary judgment against Transit Authority. *Cropper v. Stewart*, Index No. 114878/2006 (Sup. Ct. N.Y. Co. Mar. 17, 2009).

Based on the aforementioned facts and allegations, there at least two inconsistent theories of the events on June 19, 2006. In plaintiff's version, his bicycle collided with Peter Cab. Corp.'s taxi door after Nfaoui negligently opened it, and plaintiff thereafter was hit by the Transit Authority bus. In Peter Cab Corp. and Nfaoui's version, an alleged second bicyclist collided with plaintiff, Nfaoui closed the taxi door in order to avoid a collision, and plaintiff was struck

by the bus.

Nfaoui closed his door in time, so that plaintiff did not hit the door and Estrada,

Discussion

Estrada argues that summary judgment must be granted because he has stated that he did not cause the accident, and third-party plaintiffs' own testimony that he did not see a second bicyclist contradicts any allegation of Estrada's negligence.

In opposition, third-party plaintiffs argue that the motion should be denied as premature, because Estrada has not yet been deposed. Furthermore, Stewart's statements in the accident reports regarding the actions of a second bicyclist present a triable issue of fact as to Estrada's liability, and Stewart may still be presented as a witness at trial. Defendant replies that Estrada's deposition will not provide any material facts because he has denied the allegations, that the statements in the reports are all inadmissible hearsay with no applicable hearsay exceptions, and that there is no chance that the defaulting bus driver will be available for trial.

The court agrees with Estrada that the alleged comments in the accident reports are all inadmissible. A hearsay statement is one that is "made out of court...offered for the truth of the fact asserted in the statement." *People v. Romero*, 78 N.Y.2d 355, 361, 575 N.Y.S.2d 802 (1991) (internal citations omitted). The statements attributed to Stewart, although there are several, are introduced only for their truth, i.e. that there was a second bicyclist who crashed into Cropper and caused the accident. Even if any of these reports are admissible under the business records exception pursuant to NY CPLR § 4518, the underlying statements attributed to Stewart require their own hearsay exception in order to be admissible. In the Matter of Leon RR, 48 N.Y.2d 117, 122, 397 N.E.2d 374, 377, 421 N.Y.S.2d 863, 866-67 (1979). None of these underlying statements are subject to a hearsay exception. On the contrary, as they purportedly derive from a witness and party who has failed to abide by the orders of this court, they exemplify the lack of

trustworthiness upon which the hearsay rule is based. Moreover, none of these statements establish Estrada as the second bicyclist, and third-party plaintiffs have not even indicated how Estrada was so identified.

Although the court may consider inadmissible hearsay in an opposition to a motion for summary judgment, it may not do so where it is the sole basis for the court's decision.

DiGiantomasso v. City of New York, 55 A.D.3d 502, 503, 866 N.Y.S.2d 184 (1st Dept 2008).

Third-party plaintiffs present no additional evidence to support a material issue of fact. Stewart, who defaulted under numerous orders by this court and has already had judgment against him, has given no indication that he will appear. That leaves only the third-party defendant himself, who has denied that he made contact with Cropper. Summary judgment cannot be avoided merely by seeking discovery from the movant, unless the responding party can demonstrate that there is relevant information solely in possession of the movant. *Cf. Baldasano v. Bank of N.Y.*, 199 A.D.2d 184, 185, 605 N.Y.S.2d 293, 293-94 (1st Dept 1993). Here, where the third-party plaintiff himself witnessed the event and cannot recall the second bicyclist, and the first bicyclist has already testified, it cannot be said that Estrada withholds relevant information solely in his possession.

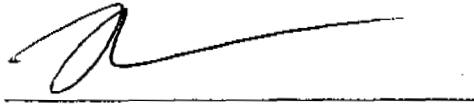
Because third-party plaintiffs cannot present a material issue of fact, it is hereby ORDERED that third-party defendant's motion for summary judgment is granted, and Peter Cab Corporation and Said Nfaoui's complaint is dismissed.

This constitutes the decision and order of the court.

Dated: New York, New York

July 17, 2009

ENTER:



Harold B. Beeler, JSC

HAROLD BEELER
J.S.C.

FILED
JUL 23 2009
COUNTY CLERK'S OFFICE
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