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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH Justice

PART 22

Index Number : 117541/2009
COOPER, CHERYL A.
VS.
ELIS LEASING
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to 5, were read on this motion to/for SJ

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2

Answering Affidavits — Exhibits none of x-motion | No(s). 3, 4

Replying Affidavits + cross-motion | No(s). 5

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

FILED

DEC 27 2013

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 12/23/13

_____, J.S.C.
HON. ARLENE P. BLUTH

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF NEW YORK
NEW YORK COUNTY: PART 22

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CHERYL A. COOPER,

Plaintiff,

- against -

ELI'S LEASING, INC. and MAMDADOU DIAKITE,

Defendants.

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Decision and Order
Index No.: 117541/09

Arlene P. Bluth, J.:

In this action for personal injuries, plaintiff Cheryl A. Cooper moves, pursuant to CPLR 3212, for summary judgment on the issue of liability against defendants, Eli's Leasing, Inc. (Eli's Leasing) and Mamdadou Diakite (Diakite).

Defendant Eli's Leasing cross-moves, pursuant to CPLR 3212, for an order dismissing the action against it, based on Public Law 109-59 (HR#), the Safe, Accountable, Flexible Transportation Equity Act: A Legacy for Users or "SAFETEALU" and on 49 USC § 30106, known as the "Graves Amendment."

As set forth more fully below, the motion is granted in part, and denied in part, and the cross motion is denied.

Background

On September 17, 2007, plaintiff, then a bus driver for New York City, was driving a 40-foot bus owned by the New York City Transit Authority. She was traveling on Fifth Avenue at the intersection at or about East 55th Street in Manhattan, in the far right bus lane (plaintiff aff, ¶ 1; plaintiff tr at 23). The bus was struck on the middle driver's side by a bread van owned by Eli's Leasing, and operated by Diakite (*id.*). According to the police report taken that day,

Diakite stated that he was attempting to make a right hand turn going east bound across five traffic lanes to turn onto 55th Street when the collision occurred.

Plaintiff testified that when she first saw the bread van, through the rear-view mirror, three panels, or more than half of the bus, had already passed over the intersection at 55th Street (plaintiff tr at 24, 25). The bread truck was at the stop light on 55th Street and 5th Avenue, on the far left (*id.* at 25). Plaintiff claims that: she was operating the bus safely with respect to the existing traffic and roadway conditions; she had the right of way in her lane of travel; her vehicle did not suddenly stop or change lanes; and the bus was fully within the far right bus lane of travel at the time of impact (plaintiff aff, ¶ 3-5). She anticipated that Diakite would obey traffic laws which required him to yield (*id.*, ¶ 6). As a result of the incident plaintiff allegedly sustained serious and permanent injuries.

According to the affidavit of Robert L. Shaloff, he is the comptroller for defendant Eli's Leasing, Inc. and is also comptroller for nonparty Eli's Bread (Eli Zabar), Inc. (Eli's Bread), Diakite's employer (Shaloff aff, ¶ 1). Shaloff further avers that Eli's Leasing was in the business of renting or leasing motor vehicles on September 17, 2007 and has been through the present (*id.*, ¶ 3; Shaloff tr at 21). According to business records that Shaloff apparently reviewed, Eli's Leasing rented the van involved in the accident, which was being driven by Diakite, to Eli's Bread, in return for which Eli's Bread paid a monthly fee to Eli's Leasing (*id.*). No documents were provided to support these statements.

Shaloff testified that he is employed as comptroller by EAT, owned by Eli Zabar, Inc.,

located at 1064 Madison Avenue, New York, New York (Shaloff tr at 7-8).[1] At or about the day in question, Diakite came to Shaloff's office to report the accident (Shaloff tr at 10). As comptroller of EAT, Eli's Bread and Eli's Leasing, Shaloff testified that "[o]ur drivers are told if they have an accident to report it to me and we fill out a . . . MV-104 report" (Shaloff tr at 11). According to that alleged report, which has not been provided to the Court, Diakite "was making a delivery on Fifth Avenue on the left side of the street. He made a right turn. There was a bus with it's [sic] flashers on. He proceeded to turn. The bus went straight . . . . And they hit" (Shaloff tr at 12-13).

Diakite failed to appear for a deposition. By stipulation and order dated April 12, 2013, defendant was "to be produced for an EBT within 30 days or shall be precluded from testifying" (Levine affirmation, exhibit F). Upon information and belief, he no longer resides in the United States.

Plaintiff's motion

In order to grant summary judgment, there must be no material or triable issues of fact presented. It is well established that "'[t]he 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'" (*Wolff v New York City Tr. Auth.*, 21 AD3d 956, 956 [2d Dept 2005], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The party opposing the motion must then come forward with sufficient evidence to

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[1] This is also the address provided to the New York State Department of State, Division of Corporations, Entity Information as the principal executive office for both Eli's Bread and Eli's Leasing. According to Shaloff's deposition, he is also comptroller of Eat Shop Inc., Eli's Manhattan Warehouse Inc., The Vinegar Factory Inc., Eli's Bread - Eli Zabar's Inc. and several real estate companies (Shaloff tr at 21).

create an issue of fact for the consideration of the jury (*Pinto v Pinto*, 308 AD2d 571, 572 [2d Dept 2003], citing *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Recently, the First Department in *Calcano v Rodriguez* (91 AD3d 468 [1st Dept 2012]), held that "a plaintiff moving for summary judgment on the issue of liability in an action for negligence must eliminate any material issue, not only as to the defendant's negligence, but also as to whether the plaintiff's own comparative negligence contributed to the incident" (*Calcano*, 91 AD3d at 469). Based on this holding, a summary judgment motion by a "plaintiff who cannot eliminate an issue as to his or her own comparative fault should simply be denied" (*id.* at 471).

Plaintiff claims that the "fact that a negligent lane change collision occurred raises an inference of the defendant's negligence," citing *Flores v City of New York* (66 AD3d 599 [1st Dept 2009]), and that the police accident report, which reflects that the defendant driver stated he was attempting to make a right hand turn across five traffic lanes when the collision occurred, is sufficient to establish defendants' negligence. Plaintiff asserts that she "had the right-of-way and was entitled to anticipate that [defendant] would obey traffic laws which required [him] to yield," quoting *Jacino v Sugerman* (10 AD3d 593, 595 [2d Dept 2004]). As Diakite has been precluded from testifying at trial due to his repeated failure to appear for court-ordered depositions, plaintiff claims that there are no triable issues of fact as to the issue of liability, and summary judgment, therefore, should be granted in her favor.

Defendants claim that there are issues of fact as to how the accident occurred, the negligence of the parties and the allocation of fault, if any, on the part of each driver, which necessitates a denial of plaintiff's motion for summary judgment. Specifically, defendants claim

that: there is no evidence that Eli's Leasing was negligent; deposition testimony of Shaloff that he was told by Diakite that the bus had its flashers on raises a question of fact as to whether the bus was stopped at the time Diakite attempted to move across the lanes (Shaloff tr at 12); and plaintiff's own testimony raises a question of fact as to whether she could have avoided the accident, i.e., that she saw the bread van a couple of seconds before the impact (plaintiff tr at 23). In addition, defendants claim that plaintiff's testimony that the "other vehicle" was stopped at the light on 55th Street is contrary to the testimony of Eli's Leasing and the police accident report. Defendants claim that a driver with the right of way still has a duty to use reasonable care to avoid a collision (*Wilson v Rosedom*, 82 AD3d 970, 970 [2d Dept 2011] ["a driver who has the right-of-way has a duty to exercise reasonable care to avoid a collision with another vehicle already in the intersection"]; *Cox v Nunez*, 23 AD3d 427 [2d Dept 2005]). Defendants claim that where, as here, "'[t]here can be more than one proximate cause of an accident'[,] the issue of comparative negligence is generally one for the jury to decide" (*Wilson*, 82 AD3d at 970, quoting *Cox*, 23 AD3d at 427).

The Court disagrees with defendants' position. First, Diakite has repeatedly failed to appear for deposition, which could potentially contradict plaintiff's version of the accident; nor has he submitted an affidavit in opposition to this motion. In any event, he has been precluded from testifying. Diakite, a witness to the accident, has not contradicted plaintiff's version of the events. Second, the police accident report upon which defendants rely is "insufficient to raise an issue of fact, since [it was] prepared by an officer who had not observed the accident" (*Singh v Stair*, 106 AD3d 632, 633 [1st Dept 2013]; *see also Brady v Casilio*, 93 AD3d 1190, 1191 [4th Dept 2012] [defendant's use of police accident report found "insufficient to raise a triable issue

of fact"]). Third, any testimony by Shaloff regarding Diakite is hearsay and is likewise insufficient to defeat summary judgment (*see Rugova v Davis*, __ AD3d__, 2013 NY Slip Op 08003 [1st Dept Dec. 3, 2013] ["hearsay may be used to defeat summary judgment as long as it is not the only evidence submitted in opposition"]). Here, defendants "failed to raise a triable issue of fact, since [they] submitted no other admissible evidence as to the happening of the accident in opposition to [plaintiff's] motion for summary judgment" (*id.*).

Moreover, defendants' reliance on plaintiff's testimony concerning seeing the bread van a "couple of seconds" before impact is also misplaced (*see Gramble v Precision Health*, 267 AD2d 66 [1st Dept 1999]). The only sworn facts before this Court are that plaintiff was driving a forty foot bus in the far right bus lane when defendant made a right turn, across five lanes of traffic, into her bus. In light of the foregoing, summary judgment is granted as to liability against Diakite.

Liability against Eli's Leasing and Defendants' cross-motion

The Court next turns to the cross motion by defendant Eli's Leasing asserting a defense pursuant to the Graves Amendment. The Graves Amendment provides that if an owner or its affiliate is in the business of renting or leasing motor vehicles, it cannot be held vicariously liable for the negligent acts of drivers of those rented or leased vehicles based solely on the fact that they hold title to the motor vehicle.

Specifically, 49 USC § 30106 provides:

> "(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 he period of the rental or lease, if - -
> (1) the owner (or 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."

Eli's Leasing claims, based only on the self-serving testimony and affidavit of its comptroller, Shaloff, that: Eli's Leasing rented the bread van to Eli's Bread, Diakite's employer and that there was no negligence or criminal wrongdoing on the part of Eli's Leasing relating to the accident. Therefore, Shaloff claims, it cannot be found liable.

Plaintiff counters that there are questions of fact as to whether Eli's Leasing was a bona fide commercial lessor in the business of leasing motor vehicles, and whether Eli's Leasing was also Diakite's employer. Plaintiff has presented evidence that poses questions of fact as to whether Eli's Leasing and Eli's Bread are so intertwined as to be essentially one, such that Diakite, in working for Eli's Bread, also worked for Eli's Leasing. Based on the information before this Court, and the lack of information, the Court agrees that defendant has not met its burden on the cross-motion.

Specifically, plaintiff argues that Eli's Leasing fails to submit evidence in admissible form that it is in such business, save for Shaloff's self-serving affidavit (*see Cassidy v DCFS Trust*, 89 AD3d 591, 591 [1st Dept 2011] [DCSF "did not offer competent proof that it was engaged in the business or trade of leasing or renting motor vehicles (including the vehicle driven by the individual defendant), as would entitle it to immunity from vicarious liability for injury caused by the individual defendant"). Eli's Leasing has failed to produce a rental or lease agreement, or paid invoices, evidencing their right of the protections afforded under the Graves

Amendment.

This Court agrees and finds that Eli's Leasing fails to offer competent evidence sufficient to establish its initial burden to show prima facie entitlement to summary judgment (*see Davido v Salazar,* 89 AD3d 463 [1st Dept 2011]), and the cross-motion is denied.

With respect to plaintiff's motion against Eli's Leasing, it is denied. Plaintiff submits records from the New York State Department of State, Division of Corporations, Entity Information, which reflects that Eli's Leasing and Eli's Bread maintain the same principal executive office address, chief executive officer, and, as averred by Shaloff, the same comptroller. Shaloff himself testified that all drivers from the various entities within the corporate infrastructure were to come to him if an accident were to occur. All of which could imply a corporate structure that may have been established to shield Eli's Leasing from liability but may or may not have in fact been operated as separate entities.

As there has been a finding of liability against Diakite, his employer would be vicariously negligent. According to Shaloff, that is nonparty Eli's Bread. Remaining, therefore, are questions of fact as to whether such a finding is necessary with respect to Eli's Leasing (*see* 49 USCA § 30106 (d) (1) ["(t)he term 'affiliate' means a person other than the owner that directly or indirectly controls, is controlled by, or is under *common control* with the owner"] [emphasis added]). As such, plaintiff's motion for summary judgment as against Eli's Leasing is denied.

Conclusion

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment on liability is granted in part as

against defendant Mamdadou Diakite, and is denied as against defendant Eli's Leasing, Inc. and it is further

ORDERED that the cross motion by defendant Eli's Leasing, Inc. for summary judgment is denied.

This is the Decision and Order of the Court.

Dated: December 23, 2013
New York, New York

HON. ARLENE P. BLUTH, JSC