Choi v Korowitz
2013 NY Slip Op 33944(U)
August 15, 2013
Supreme Court, Queens County
Docket Number: 700688/11
Judge: Bernice D. Siegal

ORIGINAL

Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

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Jin Young Choi,

Plaintiff,

-against-

Leigh Avery Korowitz and Deborah Korowitz,

Defendants.

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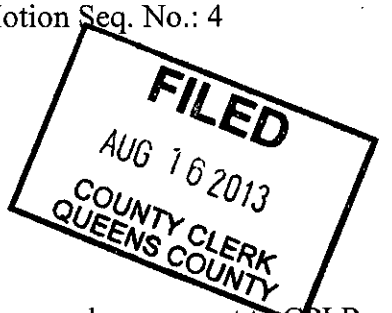
Index No.: 700688/11
Motion Date: 5/21/13
Motion Cal. No.: 26
Motion Seq. No.: 4



The following papers numbered 1 to 9 read on this motion for an order pursuant to CPLR §3212 for summary judgment dismissing this legal action as against defendant Deborah Korowitz, only as a matter of law and cross-motion to amend the complaint.

	PAPERS NUMBERED
Notice of Motion - Affidavits-Exhibits.....	1 - 4
Cross-Motion- Exhibits.....	5 - 9

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Defendant, Deborah Korowitz ("Deborah") moves for an order pursuant to CPLR 3212 for summary judgment dismissing the action as against Deborah Korowitz.

Facts

Plaintiff, Jin Young Choi ("Choi") brought the within action for personal injuries allegedly sustained as a result of a motor vehicle accident that occurred on July 8, 2011 involving Choi and Leigh Avery Korowitz. Deborah was brought into this action under the assumption that she was the

owner of the subject vehicle. However, Deborah states in her affidavit and testified at her deposition that she was not the titled owner nor registered owner of the subject vehicle and that her father, Frank R. Korowitz was the titled owner of the subject vehicle.

Discussion

It is well established that summary judgment should be granted when there is no doubt as to the absence of triable issues. (*See Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 [1978].) As such, the function of the court on the instant motion is issue finding and not issue determination. (*See S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 341 [1974].) The party moving for summary judgment must tender admissible evidentiary proof that eliminates any material issues of fact from the case. (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980].) If the movant succeeds, the burden shifts to the party opposing the motion, who must show issues of material facts sufficient to require a trial. (*Id.*)

Pursuant to Vehicle and Traffic Law 388, "[e]very owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle." Here, Deborah established her entitlement to summary judgment by submitting her deposition testimony and affidavit attesting to the fact that she was not the registered nor titled owner of the subject vehicle.

In opposition, plaintiff fails to submit any proof to refute Deborah's assertions. Instead, plaintiff merely contends that further discovery is necessary to determine who the true owner of the vehicle was at the time of the accident. However, a party may not "rely upon mere hope that evidence sufficient to defeat summary judgment may be uncovered during the discovery process." (*Baron v. Newman*, 300 A.D.2d 267 [2nd Dept 2002]; *see also Neruaev v. Salon*, 6 A.D. 3d 510 [2nd Dept. 2004].) Plaintiff has "failed to offer an evidentiary basis to show that discovery may lead to

relevant evidence and that the facts essential to justify opposition were exclusively within the knowledge and control of the [defendant]," thereby necessitating additional discovery. (*Cavitch v Matea*, 58 AD3d 592, 593 [2nd Dept. 2009].) Accordingly, the plaintiff failed to raise a triable issue of fact in opposition. (see generally *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986].)

Cross-Motion

Plaintiff cross moved for leave to amend the pleadings to add Frank R. Korowitz as a defendant, discontinue without prejudice as to Deborah and amend the caption. Leave to amend a pleading should be freely granted where the proposed amendment is not palpably insufficient or patently devoid of merit and will not prejudice or surprise the opposing party. (See CPLR §3025(b); *Bloom v. Lugli*, 102 A.D.3d 715 [2nd Dept January 16, 2013]; *Greco v. Christoffersen*, 70 A.D.3d 769 [2nd Dept 2010].)

CPLR §1003 provides, in pertinent part, that "[p]arties may be added at any stage of the action by leave of court or by stipulation of all parties who have appeared, or once without leave of court within twenty days after service of the original summons or at anytime before the period for responding to that summons expires or within twenty days after service of a pleading responding to it." Defendants fail to oppose plaintiff's application and the testimony of Deborah supports the amendment. Accordingly, it hereby is

ORDERED, that the caption hereby is amended to read as follows:

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Jin Young Choi, Index No.: 700688/11

Plaintiff,

-against-

Leigh Avery Korowitz and Frank R. Korowitz,

Defendants.

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ORDERED, that plaintiff is to serve the amended Summons and Complaint reflecting the appropriate caption upon ALL defendants within thirty (30) days of the date of service of a copy of this decision and order with Notice of Entry.

Conclusion

For the reasons set forth above, defendant's motion to dismiss the action pursuant to CPLR 3212 solely as to Deborah Korowitz is granted and plaintiff's cross-motion is granted, solely to the extent of amending the caption as indicated above.

Dated: August 15, 2013

Bernice D. Siegal, J. S. C.