Morrison v Ojeda
2016 NY Slip Op 32535(U)
December 7, 2016
Supreme Court, Suffolk County
Docket Number: 16504/2014
Judge: William G. Ford
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER **INDEX NO.: 16504/2014**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

COPY

PRESENT:
HON. WILLIAM G. FORD
JUSTICE SUPREME COURT

Motion Submit Date: 08/18/16
Motion Seq 001 MG
Motion Seq 002 MG

---x

LINDA MORRISON,

Plaintiff,

-against-

STEPHANIE OJEDA & EMKAY, INC.,

Defendants.

---x

PLAINTIFF'S ATTORNEY:
BERNARD A. NATHAN, ESQ.
P.O. Box 443
West Islip, NY 11795

DEFENDANT'S ATTORNEY:
LAW OFFICE OF KEITH J. CONWAY
By: Daniel P. McCabe, Esq.
58 South Service Rd., Ste. 350
Melville, NY 11747

The Court has considered the following in determining defendant's pending motion to dismiss and plaintiff's motion for leave to amend the pleadings:

1. Notice of Motion and Affirmation of Daniel P. McCabe, Esq. dated March 22, 2016, Exhibits A – E;
2. Notice of Cross-Motion dated June 22, 2016, Affirmation in Support of Bernard A. Nathan, Esq. dated June 27, 2016, Exhibits A – E
3. Reply Affirmation in Further Support & in Opposition to Plaintiff's Cross-Motion of Daniel P. McCabe, Esq. dated August 10, 2016; it is

ORDERED that defendant Emkay, Inc.'s motion pursuant to CPLR 3211(a)(7) to dismiss the complaint for failure to state a claim is **GRANTED** for the reasons stated below. Further, plaintiff Linda Morrison's motion seeking leave of court to amend her complaint to add an additional proposed defendant pursuant to CPLR 3025 and CPLR 203 is granted solely as discussed herein.

This negligence personal injury action comes before the Court on dueling motions filed by the parties. Defendant Emkay has moved to dismiss the complaint pursuant to CPLR 3211(a)(7), or in the alternative seeking summary judgment asserting no triable issue of fact exists precluding judgment as a matter of law for defendant pursuant to CPLR 3212. Emkay premises its motion on arguments that as a matter of federal law, the "Grave Amendment", it cannot be found liable for injuries plaintiff alleges she sustained as a result of a rear-end motor vehicle collision because it is engaged in the regular, routine and ordinary commercial enterprise of offering for lease motor vehicles at the time of the motor vehicle collision in question.

This action arises out of a rear-end motor vehicle collision which occurred on January 23, 2012. Morrison alleges she was struck in the rear by a 2010 Ford Taurus bearing Vehicle Identification Number 1FAHP2EW9AG107912 operated by defendant Stephanie Ojeda. That vehicle apparently was leased by Ojeda's employer, James Hardie Building Products, Inc. from Emkay pursuant to a lease agreement dated March 17, 2009.

The matter commenced in Supreme Court with filing of the summons and complaint on August 21, 2014. Issue was joined with Emkay's interposition of an answer on October 27, 2014.

Standard of Review

In assessing the adequacy of a cause of action under CPLR 3211(a)(7), the court must afford the pleading a liberal construction (*see* CPLR 3026), accept the facts alleged to be true, accord the pleader the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (***JPMorgan Chase Bank, N.A. v. Hunter Grp., Inc.***, 124 AD3d 727, 728, 2 NYS3d 536, 537 [2 Dept 2015]; ***Granada Condominium III Assn. v. Palomino***, 78 AD3d 996, 996, 913 NYS2d 668; *see* ***Leon v. Martinez***, 84 NY2d 83, 87, 614 NYS2d 972).

I. Lessor Liability

On August 10, 2005, President George W. Bush signed into law the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), a comprehensive transportation bill which included the Graves Amendment, now codified at 49 USC § 30106. The section, entitled "Rented or leased motor vehicle safety and responsibility," states, in relevant 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)."

The section applies to all actions commenced on or after August 10, 2005 (*see* 49 USC § 30106[c]), and has been enforced as preempting the vicarious liability imposed on commercial lessors by Vehicle and Traffic Law § 388 (*see* ***Hernandez v. Sanchez***, 40 AD3d 446, 447, 836 NYS2d 577; ***Kuryla v. Halabi***, 39 AD3d 485, 486, 835 NYS.2d 230; ***Jones v. Bill***, 34 AD3d 741, 742, 825 NYS2d 508; ***Murphy v. Pontillo***, 12 Misc3d 1146, 1147, 820 NYS2d 743; ***Graham v. Dunkley***, 50 AD3d 55, 57–58, 852 NYS2d 169, 172–73 [2d Dept 2008]).

Pursuant to the Graves Amendment (*see* 49 USC § 30106), generally, the owner of a leased or rented motor vehicle cannot be held liable for personal injuries resulting from the use of such vehicle if: (1) 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 (*see* 49 USC § 30106[a](***Ballatore v. Hub Truck Rental Corp.***, 83 AD3d 978, 979–80, 922 NYS2d 180, 182 [2d Dept 2011]).

In view of this, the Appellate Division has since determined that a lessor carries its burden of production pursuant to the Grave Amendment when it can show by competent and admissible proof, or documentary evidence, that it was the owner and lessor of the subject vehicle, and that it "is engaged in the trade or business of renting or leasing motor vehicles". On this basis then, courts have held that complaints such as Morrison's seeking to hold a commercial vehicle lessor such as Emkay vicariously liable for alleged negligent operation of the leased vehicle based solely on its ownership of the vehicle, are claims barred under the Graves Amendment, 49 USC § 30106(a) (*see* 49 USC § 30106[a][1]; ***Pedroli v. Mercedes-Benz USA, LLC***, 94 AD3d 842, 843–44, 944 NYS2d 150, 151–52 [2d Dept 2012]; *see also* ***Burrell v. Barreiro***, 83 AD3d 984, 985, 922 NYS2d 465, 466 [2d Dept 2011][defendant lessor established entitlement to protection of the Graves Amendment with submission of affidavit of an employee of its servicing agent evidencing sufficient personal knowledge to authenticate the lease for the subject vehicle, which was annexed to his affidavit thus demonstrating that lessor was an "owner (or affiliate of the owner) ... engaged in the trade or business of renting or leasing motor vehicles"]; *accord* ***A Dan Jiang v. Jin-Liang Liu***, 97 AD3d 707, 708, 948 NYS2d 675, 676 [2d Dept 2012]).

In support of its assertion that it falls under the Grave Amendment exception to VTL § 308, Emkay offers the affidavit of Gregory DePace, senior vice president of finance, legal and corporate administration for defendant. DePace testifies that Emkay is involved in the business of providing financing for long-term commercial motor vehicle leases as well as commercial fleet vehicle programs. Defendant further asserts that Ojeda's employer is a signatory, party and lessee to one of its commercial vehicle lease programs, the vehicle being the same 2010 Ford Taurus involved in plaintiff's collision.

Additionally, Emkay offers annexed to DePace's affidavit as exhibits are copies of the March 2009 lease agreement between Emkay and Ojeda's employer and a vehicle repair and maintenance service history for the 2010 Ford Taurus in question for January 22, 2010, February 12, 2010, July 26, 2010, January 10, 2011, May 28, 2011, September 28, 2011, December 21, 2011, and January 13, 2010, all of which indicate that no complaints were made or received concerning the vehicle's condition. Emkay also proffers a New York State Certificate of Motor Vehicle title indicating it as the owner/lessor of the 2010 Ford Taurus. Thus via submission of putative business records, Emkay argues that the Court should not entertain any claim by Morrison on a negligent maintenance theory, and thus Emkay must be dismissed as a party from this action.

Plaintiff offers no substantive arguments in opposition to Emkay's motion.

Based upon the Court's review of the record submissions, this Court is satisfied that Emkay has carried its burden of production and persuasion entitling it to dismissal for failure to state a cause of action. Since the record evidence shows that Emkay was involved in the

commercial enterprise of motor vehicle leasing at the time of Morrison's collision, and indeed, leased the subject vehicle to Ojeda's employer (evidenced by ownership records and the lease agreement), Emkay is not a proper party to this action by operation of federal, to wit, the Grave Amendment. Thus as a matter of law plaintiff's causes of action as against Emkay for negligence are dismissed with prejudice.

II. Leave to Amend the Pleadings

Rather than oppose Emkay's motion for dismissal, instead Morrison has moved seeking leave to amend her complaint to add as an additional defendant operator Ojeda's employer, James Hardie Building Products, Inc. Plaintiff implicitly concedes that pursuant to the 3 year negligence statute of limitations, its request is untimely. To circumvent this, Morrison argues that the Court should invoke the relation-back doctrine to save any and all anticipated negligence claims against Ojeda's employer.

The decision to allow or disallow an amendment is committed to the court's sound discretion, the exercise of which should not be lightly disturbed (*see* ***Edenwald Contr. Co. v City of New York,*** 60 NY2d 957, 959, 471 NYS2d 55; ***Castagne v Barouh***, 249 AD2d 257, 671 NYS2d 283). Leave to amend a pleading should be freely granted, provided that the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit (*see* ***Aurora Loan Services v Dimura***, 104 AD3d 796 [2d Dept. 2013]; ***Gitlin v Chirinkin***, 60 AD3d 901 [2d Dept. 2009]; ***Sheila Props. Inc. v A Real Good Plumbers Inc.,*** 59 AD3d 424 [2d Dept. 2009]); ***U.S. Fidelity and Guaranty Company v. Delmar Development Partners, LLC***., 22 AD3d 1017, 803 NYS2d 254 [3d Dept. 2005]).

Although leave to amend should be freely given in the absence of prejudice or surprise to the opposing party (see CPLR 3025[b]), the motion should be denied where the proposed amendment is palpably insufficient or patently devoid of merit (***Ferrandino & Son, Inc. v Wheaton Bldrs., Inc., LLC,*** 82 AD3d 1035, 920 NYS2d 123 [2d Dept. 2011], citing ***Scofield v DeGroodt,*** 54 AD3d 1017, 1018, 864 NYS2d 174; ***Lucido v Mancuso,*** 49 AD3d 220, 227, 851 NYS2d 238).

The three conditions a plaintiff must satisfy before claims against one defendant may relate back to claims asserted against another are that:

> "(1) both claims arose out of same conduct, transaction or occurrence, (2) the new party is united in interest with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining its defense on the merits, and (3) the new party knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against that party as well"
>
> (***Xavier v. RY Mgmt. Co.***, 45 AD3d 677, 678, 846 NYS2d 227, 229 [2d Dept 2007]).

Courts have previously opined that linchpin of the relation-back doctrine is whether the new defendant had notice within the applicable limitations period" (***Lopez v. Wyckoff Heights Med. Ctr.***, 78 AD3d 664, 665, 913 NYS2d 230, 232 [2d Dept 2010]).

Moreover, parties are united in interest if their interest " 'in the subject-matter is such that they stand or fall together and that judgment against one will similarly affect the other' " "Defendants are not united in interest if there is a possibility that the new party could have a different defense than the original party." "In a negligence action, 'the defenses available to two defendants will be identical, and thus their interests will be united, only where one is vicariously liable for the acts of the other' " (***Mileski v. MSC Indus. Direct Co.***, 138 AD3d 797, 800, 30 NYS3d 159, 162 [2d Dept 2016]).

More importantly, it is settled law that defendants are united in interest only when their interest "in the subject-matter [of the action] is such that [the defendants] stand or *680 fall together and that judgment against one will similarly affect the other," and are not united in interest if there is a possibility that the new party could have a different defense than the original party (***Montalvo v. Madjek, Inc.***, 131 AD3d 678, 679–80, 15 NYS3d 471, 472–73 [2d Dept 2015]).

In support of her motion, Morrison argues that Ojeda and her employer are obviously united in interest insofar as one rises and falls with the other. In other words, to the extent that Ojeda, the employee is liable for negligence arising from the rear-end collision with Morrison, the employer must also too be negligent. Additionally, Morrison argues that but for its mistake – not ascertaining or recognizing that the vehicle operated by Ojeda was a leased vehicle in time within the statute of limitations- Ojeda's employer knew or reasonably should have known or expected to be named as a necessary or indispensable party to the resulting personal injury suit resulting from its employee's collision. Lastly, plaintiff argues any vicarious liability attributed to Ojeda's employer naturally flows form the same common core of operative facts and circumstances from its employee, Ojeda's, alleged negligence.

Morrison's motion to amend is opposed by Emkay. Emkay argues that plaintiff offers insufficient substantive proof that Ojeda and James Hardie Building Products, Inc., her employer, are necessarily united in interest. To support its position, Emkay notes that should it happen that the employer's anticipated defense to Morrison's negligence claims differs in any way from Ojeda's, any perceived unity is destroyed, removing any support for plaintiff's proposed amendment.

While the Court agrees that plaintiff has somewhat stated conclusorily its case for unity of interest between Ojeda and her employer, the specific factual nature of whether Ojeda was "on the clock" at the time of the collision, whether she was operating the vehicle within the scope of her employment or engaged in a dalliance, are the very sort of questions that pretrial discovery is intended to probe and lay bare. Thus, the Court finds that sufficient and adequate grounds exist to grant plaintiff's motion and thus this Court accordingly grants plaintiff leave to amend its complaint to implead as a defendant in this action Ojeda's employer, James Hardie Building Products, Inc.

Thus it is

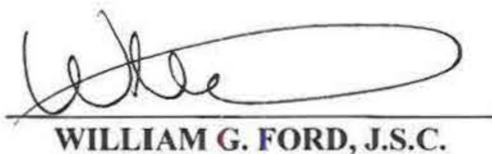
ORDERED that plaintiff shall serve a copy of this decision with notice of entry on defendant and shall cause a copy of the proposed amended pleadings to be served by personal service on additional defendant James Hardie Building Products, Inc. on or before January 9, 2017.

[* 6]

The parties are directed to appear before the undersigned for a discovery status conference to be held at **10:00 a.m. on February 7, 2017.**

The foregoing constitutes the decision and order of this Court.

Dated: December 7, 2016
Riverhead, New York



WILLIAM G. FORD, J.S.C.

____ FINAL DISPOSITION __X__ **NON-FINAL DISPOSITION**