Kwamya v Malik
2020 NY Slip Op 33286(U)
September 23, 2020
Supreme Court, Kings County
Docket Number: 520159/2019
Judge: Lillian Wan

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17

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JULIA KWAMYA,

Plaintiff,

- against -

ABDUL WAHEED MALIK, CHEIKH LEYE, and
ALL TAXI MANAGEMENT, INC.,

Defendants.

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Index No.: 520159/2019
Motion Date: 9/23/20
Motion Seq.: 01

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 01) 13-20, 23-25, 27, 28 were read on this motion for dismissal of the complaint.

In this action to recover for personal injuries, the defendant, All Taxi Management, Inc. (hereinafter All Taxi), moves for dismissal for failure to state a cause of action, pursuant to CPLR § 3211(a)(7). For the reasons set forth below, the defendant's motion is denied.

This action arises from a motor vehicle accident that occurred on January 13, 2019. The plaintiff was a passenger in a vehicle driven by defendant Cheikh Leye bearing taxi medallion 9E18. According to the complaint, the driver put the vehicle in motion before the plaintiff had safely entered/exited the vehicle. As a result, the plaintiff fell out of the vehicle and was dragged along the roadway sustaining serious injuries.

All Taxi alleges the complaint fails to state a cause of action as it is not a proper party. Specifically, the defendant alleges that: 1) All Taxi is not the vehicle owner; 2) All Taxi's Medallion Management Agreement (hereinafter Agreement) with defendant, Abdul Waheed Malik (hereinafter Malik) expressly holds All Taxi harmless from liability; and 3) the affidavit of All Taxi's manager, Alpha Ba, is evidence that other than the lease agreement, there is no connection between All Taxi and the vehicle. The defendant relies on Vehicle and Traffic Law (hereinafter VTL) § 388 as a basis for dismissal, arguing that All Taxi is not the registered owner of the vehicle, and is therefore free from liability for the accident. Plaintiff also refers to the Graves Amendment, and concedes it is not applicable, but asks the Court to take note of the statute because under the statute All Taxi would not be liable for the accident.

In support of the motion, the defendant submits the Agreement of May 30, 2018 which refers to All Taxi as "Manager" and Malik as "Owner." It further states that "Owner [Malik] desires Manager [All Taxi] to act as the Agent for Owner in the operation of Owner's Medallion No. 9E18." Pursuant to paragraph 6 of the Agreement, the Manager has the obligation to "enter

into contracts and/or leases with TLC licensed Taxicab drivers for the operation, maintenance and service of the Taxicab…" Paragraph 12 of the Agreement provides that upon execution of the Agreement the title to the taxi shall be transferred to the owner, defendant Malik, during the term of the lease.

According to paragraph 2 of the Agreement, "[f]or so long as Manager operates the Medallion as a Taxicab, Manager shall pay Owner Lease Payments, which shall become due and payable on the last day of the month for which the Medallion was operated by Manager." The term of the Agreement is four years. In support of the motion, the defendant also submits the affidavit of Alpha Ba, a manager at All Taxi, which simply states that All Taxi has no connection to the vehicle other than the lease.

The plaintiff opposes the motion, arguing that discovery is needed, which is exclusively within the possession of the defendants at this time. The plaintiff contends that documents and depositions are necessary to oppose the instant motion to ascertain, *inter alia*, the degree of management that All Taxi exercised as to the subject vehicle, including maintenance, repair, inspection and the degree of control, supervision, hiring and training of the vehicle drivers. The plaintiff argues that Mr. Ba's affidavit cannot be considered on a motion to dismiss based on CPLR § 3211(a)(7), and that a liberal construction of the factual allegations in the complaint, accepted as true and given the benefit of every possible inference, manifest a cause of action cognizable at law.

The plaintiff also argues that the issue of whether the defendant is vicariously liable as an owner of the vehicle is determined by VTL § 128, and not, as the defendant contends, whether it is the registered owner of the vehicle. VTL §128 defines an owner as "a person entitled to the use and possession of a vehicle…and also includes any lessee or bailee of a motor vehicle…having the exclusive use thereof, under a lease or otherwise, for a period greater than thirty days." According to the plaintiff, under VTL § 128, All Taxi may be considered a lessee under the Agreement because it references lease payments to be made by All Taxi to defendant Malik as long as All Taxi operates the Medallion as a taxicab. The plaintiff contends that under the terms of the Agreement All Taxi may also be considered a bailee because the Agreement references the delivery of the vehicle to All Taxi's premises for the four year period that the Agreement is in force. Finally, the plaintiff argues that the Graves Amendment is not applicable here because All Taxi fails to address its own independent negligence.

In considering a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), a court "must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Lubonty v U.S. Bank N.A.*, 159 AD3d 962, 963 (2d Dept 2018) (internal quotation marks omitted); *Nonnon v City of New York*, 9 NY3d 825, 827 (2007) (internal quotation marks omitted). When a party moves to

dismiss a complaint pursuant to CPLR § 3211(a)(7), the standard is "whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action." *Bokhour v GTI Retail Holdings, Inc.*, 94 AD3d 682, 682 (2d Dept 2012). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus." *Id.* (internal quotation marks omitted). The motion must be denied "unless it has been shown that a material fact as claimed by the [plaintiff] to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it." *Id* at 683; *see also Sokol v Leader*, 74 AD3d 1180 (2d Dept 2010); *Clarke v Laidlaw Transit, Inc.*, 125 AD3d 920 (2d Dept 2015).

Further, "affidavits submitted by a defendant will almost never warrant dismissal under CPLR § 3211 unless they establish conclusively that [the plaintiff has] no cause of action." *Phillips v Taco Bell Corp.*,152 AD3d 806, 808 (2d Dept 2017) (internal quotation marks omitted). Affidavits received on a motion to dismiss for failure to state a cause of action are not to be examined for the purpose of determining whether there is evidentiary support of the pleading. *Anglero v Hanif*, 140 AD3d 905 (2d Dept 2016); *see also Hinrichs v Youssef*, 214 AD2d 604 (2d Dept 1995). As such, the affidavit of Alpha Ba cannot be considered by the Court in determining whether the complaint should be dismissed based on CPLR § 3211(a)(7). *See Phillips* at 808.

In the instant case, All Taxi has failed to demonstrate that the complaint should be dismissed because it is not a proper party. The express language of the Agreement makes clear that All Taxi was the manager and the agent of the owner Malik, and that its obligations under the Agreement included entering into contracts and/or leases with TLC licensed taxicab drivers for the operation, maintenance, service and repair of the vehicle. Therefore, the complaint states a cause of action based on All Taxi's responsibility for the management, operation, control, maintenance and repair of the vehicle.

The defendant's argument that it is not the registered owner of the vehicle, and therefore cannot be held vicariously liable for the accident is also unavailing. Contrary to the defendant's assertion, VTL § 128 contains a much broader definition of an owner than the defendant suggests. As the plaintiff correctly points out, VTL § 128 broadly defines the term owner to include a person "entitled to the use and possession of the vehicle," and includes "any lessee or bailee of a motor vehicle." The Agreement provides for "lease payments" by All Taxi to defendant Malik as long as it operates the Medallion as a taxicab, and therefore All Taxi may be considered a lessee. Further, All Taxi may be considered a bailee under the Agreement because it provides for delivery of the vehicle to All Taxi for the four-year period of the Agreement. Thus, the complaint properly states a cause of action against All Taxi based on vicarious liability.

Likewise, the defendant's claim that defendant Malik must hold All Taxi harmless from liability under the Agreement is without merit. The Agreement required defendant All Taxi to procure liability insurance for the taxicab for the minimum coverage amount required by New York State. It further required defendant Malik to pay for premiums exceeding that amount of coverage. "It is well established that the agreement to purchase insurance coverage is clearly distinct from and treated differently from the agreement to indemnify." *McGill v Polytechnic University*, 235 AD2d 400, 401-402 (2d Dept 1997). Here, All Taxi has failed to submit evidence in admissible form that it obtained a liability insurance policy as mandated by the Agreement. In any event, the defendant's claim for indemnification based on the Agreement is premature, as All Taxi must first prove that it is free from negligence "because to the extent its negligence contributed to the accident, it cannot be indemnified therefor." *Bellefleur v Beth Israel Medical Center*, 66 AD3d 807, 808 (2d Dept 2009) (internal quotation marks omitted) .

Lastly, the defendant's reference to 49 U.S.C. § 30106, the Graves Amendment, for consideration by the Court in dismissing the action is misplaced. As the defendant concedes, the statute is inapplicable to the facts presented here, and in any event, the defendant has not shown that it was not independently negligent, as required by the Graves Amendment.

Therefore, construing the plaintiff's pleadings liberally, affording the plaintiff the benefit of every possible favorable inference, and accepting all facts as alleged in the complaint to be true, the defendant's motion must be denied, as it has failed to meet its *prima facie* burden demonstrating its entitlement to dismissal of the complaint pursuant to CPLR § 3211(a)(7).

Accordingly, it is hereby

ORDERED, that defendant's motion to dismiss is denied in its entirety.

This constitutes the decision and order of the Court.

Dated: October 2, 2020

Lillian Wan

Hon. Lillian Wan, J.S.C.
Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated 4/20/20.