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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. ADAM SILVERA
J.S.C.

22

PRESENT: _____
Justice

PART _____

Index Number : 402454/2013
BAAKA, NOUREDDINE
vs
TORAL, LUIS M.
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

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

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

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

RECEIVED
AUG 01 2018
HON. JUDICIAL CLERK - CIVIL
GENERAL CLERK'S OFFICE

FILED
AUG 01 2018
NEW YORK COUNTY
COUNTY CLERK

Dated: JUL 31 2018

Adam Silvera
_____, J.S.C.

- 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 THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ADAM SILVERA PART IAS MOTION 22

Justice

-----X

BAAKA, NOUREDDINE

Plaintiff

- v -

TORAL, LUIS M.

Defendant

FILED
AUG 01 2018
NEW YORK COUNTY
COUNTY CLERK

INDEX NO. 402454/2013

MOTION DATE _____

MOTION SEQ. NO. 001

DECISION AND ORDER

The following papers, numbered 6, were read on this application to/for summary judgment

Notice of Motion/ Petition/ OSC - Affidavits - Exhibits	No(s)	<u>1, 2, 3</u>
Answering Affidavits - Exhibits	No(s)	<u>4, 5</u>
Replying	No(s)	<u>6</u>

Upon the foregoing documents, it is ordered that defendant MTLR Corp.'s (hereinafter referred to as "defendant MTLR") motion for summary judgment is granted. In this personal injury action arising out of a motor vehicle accident, defendant MTLR moves for summary judgment dismissing the complaint against it, arguing that it is a vehicle rental company such that it is not vicariously liable for the instant motor vehicle accident pursuant to the Graves Amendment (49 USC §30106). It is well settled that the Graves Amendment bars state statutory and common law vicarious liability actions against owners of motor vehicles who are in the business of renting or leasing motor vehicles for the negligence of the drivers.

To grant summary judgment, it must be clear that no material or triable issues of fact are presented. See *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). "The 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 from the case". *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985).

Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to “demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure...to do [so]”.

Zuckerman v City of New York, 49 NY2d 557, 560 (1980). However, the Court of Appeals has made clear that bare allegations or conclusory assertions are insufficient to create genuine, bona fide issues of fact necessary to defeat such a motion. *See Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Here, defendant MTLR has established that it leased the subject vehicle to non-party Prestige First Ave Cleaning Corp. and that non-party Alberto Torres was driving such vehicle at the time of the accident. Defendant MTLR further established that, at the time of the accident, non-party Torres was acting within the scope of his employment with non-party Prestige. It is undisputed that defendant MTLR is in the business of leasing motor vehicles. Thus, defendant MTLR has established entitlement to summary judgment, and the burden shifts to plaintiff to raise an issue of fact.

While plaintiff concedes that the Graves Amendment would generally bar this action against defendant MTLR as a motor vehicle leasing company, plaintiff argues that an exception to the Graves Amendment applies herein. Specifically, plaintiff contends that an action is permitted against the owners of the motor vehicles, even where the owners are in the business of renting or leasing motor vehicles, where there is negligence on the part of the owner. Here, plaintiff alleges that defendant MTLR was negligent in the maintenance and repair of the motor vehicle at issue herein. In support of such argument, plaintiff relies primarily on, and proffers, the affidavit of Mr. Jeffrey Ketchman, a professional engineer, who reviewed documents and photographs including an email from Mr. J. Pender. Based upon his review of such documents

and photographs, Mr. Ketchman avers that the brakes on the motor vehicle driven by non-party Torres and owned by defendant MTLR were not functioning properly. Mr. Ketchman further contends that based upon his review, the police post-accident inspection of the subject truck's braking system was inadequate. According to Mr. Ketchman, had the truck's brakes been functioning, non-party Torres would have been able to stop the truck before impacting the other motor vehicle when such vehicle began to turn left across the truck's path.

The Court notes that based upon the deposition transcripts of the police officers, such officers inspected the subject truck on the same day as the accident and the brakes were functioning properly. Moreover, certified police records reveal that non-party Torres stated that the brakes were functioning at the time of the accident. Here, plaintiff attempts to raise an issue of fact by submitting an inadmissible hearsay statement made by Mr. J. Pender in an email. Moreover, such hearsay statement was provided to Mr. Ketchman who states that he relied on it in forming his opinion. Specifically, Mr. Ketchman states that "considering Mr. Torres's (belated) admission that the brakes were not functioning properly, ..., I am of the opinion... that the truck's brakes were not properly maintained and malfunctioned". Aff. In Opp., Exh. M, Ketchman Affidavit, ¶10. Thus, it is clear that, in forming his opinion, which plaintiff is now presenting to the Court as evidence to raise an issue of fact, Mr. Ketchman considered the hearsay statement made by Mr. J. Pender, and took such statement as proof of the matter asserted, namely that the driver, Mr. Torres, made a statement that the truck's brakes were not functioning. Although hearsay evidence may be considered in opposition to a summary judgment motion where other evidence in admissible form is submitted...contrary to plaintiff's repeated reference to the hearsay statement[] as 'first-hand' admissions, they are in fact without any probative value and do not support...[plaintiff's] conclusory assertions". *Schwaller v Squire*

Sanders & Dempsey, 249 AD2d 195, 197 (1st Dep't 1998) (internal citations omitted). Moreover, hearsay statements relied upon by the party opposing summary judgment are conclusory and fail to raise a genuine issue of fact, particularly where the documentary evidence, submitted in admissible form, is to the contrary. See *Andron v Libby*, 120 AD3d 1056, 1058 (1st Dep't 2014). Thus, plaintiff has failed to raise any genuine issues of triable fact or establish an exception to the Graves Amendment. As such, defendant MTLR's motion for summary judgment is granted.

Accordingly, it is

ORDERED that defendant MTLR Corp.'s motion for summary judgment to dismiss this action as against it is granted and this action is dismissed as to defendant MTLR Corp. only; and it is further

ORDERED that any cross-claims against said defendant are dismissed; and it is further

ORDERED that the said claims against defendants Luis M. Toral and Carlos X. Toral are severed and the balance of the action shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendant MTLR Corp. dismissing the claims and cross-claims made against it, together with costs and disbursements taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that within 30 days of entry, defendant MTLR Corp. shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court.

7/31/18

DATE

FILED
AUG 01 2018
NEW YORK COUNTY
COUNTY CLERK

ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE