Cadet v Chambers
2007 NY Slip Op 32369(U)
July 26, 2007
Supreme Court, Queens County
Docket Number: 0007793/2005
Judge: Patricia P. Satterfield
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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

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RICHARD CADET and GLENDA CADET, Index No: 7793/05
Motion Date: 5/30/07

Plaintiffs, Motion Cal. No: 6

-against-

SONJI G. CHAMBERS,

Defendants.

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The following papers numbered 1 to 14 read on this motion for an order granting summary judgment and dismissal to defendant; and upon this cross-motion to amend the complaint.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 5
Notice of Cross-Motion-Affidavits-Exhibits.....	6 - 10
Reply.....	11 - 14

Upon the foregoing papers, it is ordered that the motion and cross-motion are disposed of as follows:

This is an action for personal injury allegedly sustained by plaintiff Richard Cadet ("plaintiff"), a mechanic, when the vehicle owned by defendant Sonji G. Chambers ("defendant") rolled over his foot while he was attempting to push the vehicle out of a garage bay with the assistance of defendant's father and friend. At the time of the accident, plaintiff was standing on the outside of the vehicle, which was stationary and in neutral, with his right hand on the steering wheel and left hand on the roof; defendant's father and friend, who were not physically touching the car as they awaited traffic on Elmont Road to pass, were standing on the passenger side of the vehicle; and defendant was standing off to the side observing the entire time the vehicle was being pushed out of the garage. It is upon the foregoing that defendant moves for summary judgment and plaintiff cross-moves to amend.

With respect to the cross-motion for leave to amend the complaint, from the outset, defendant contends, inter alia, that plaintiff's delay in seeking to amend precludes the instant application. "The mere delay in seeking to amend to simply add a new legal theory of recovery is not sufficient to warrant denial of the motion since the original complaint[] gave notice of the occurrence giving rise to the proposed new cause[s] of action (citations omitted)." Goldstein v. Brogan Cadillac Oldsmobile

Corp., 90 A.D.2d 512, 513 (2nd Dept.1982); see, Beverage Marketing USA, Inc. v. South Beach Beverage Co., Inc., 20 A.D.3d 439 (2nd Dept.2005); Sample v. Levada, 8 A.D.3d 465 (2nd Dept. 2004). This Court thus will consider the cross- motion seeking leave to amend the complaint.

It is well settled that leave to amend or supplement pleadings "shall be freely given," unless the amendment sought is palpably improper or insufficient as a matter of law, or unless prejudice and surprise directly result from the delay in seeking the amendment. See, Melendez v. Bernstein, 29 A.D.3d 872, 872 (2nd Dept. 2006); Adams v. Jamaica Hosp., 258 A.D.2d 604 (2nd Dept.1999); East Patchogue Contr. Co. v. Magesty Sec. Corp., 181 A.D.2d 714 (2nd Dept. 1992); Nissenbaum v. Ferazzoli, 171 A.D.2d 654 (2nd Dept. 1991); see, also, McCaskey, Davies & Assocs. v. New York City Health & Hosps.Corp., 59 N.Y.2d 755 (1983); CPLR 3025(b). Moreover, "[w]hile [] leave to amend a pleading shall be freely granted, leave to amend should not be granted 'upon the mere request of a party without a proper basis' [Morgan v. Prospect Park Assocs. Holdings, 251 A.D.2d 306, 674 N.Y.S.2d 62 (2nd Dept.1998); Citarelli v. American Ins. Co., 282 A.D.2d 494, 722 N.Y.S.2d 895 (2nd Dept.2001); see, also, Nissenbaum v. Ferazzoli, 171 A.D.2d 654, 567 N.Y.S.2d 135(2nd Dept.1991)]. Rather, it is incumbent upon the movant to make 'some evidentiary showing that the claim can be supported' (citations omitted)." Joyce v. McKenna Associates, Inc., 2 A.D.3d 592, 594 (2nd Dept. 2003). "A court hearing a motion for leave to amend will not examine the merits of the proposed amendment 'unless the insufficiency or lack of merit is clear and free from doubt. In cases where the proposed amendment is palpably insufficient as a matter of law or is totally devoid of merit, leave should be denied' (citations omitted)." Ricca v. Valenti, 24 A.D.3d 647, 648 (2nd Dept. 2005).

Here, plaintiff seeks leave to amend to add "specific references to Vehicle and Traffic Law § 388, which forms the basis of defendant's liability." The relevant provision, entitled "Negligence in use or operation of vehicle attributable to owner," states in pertinent part the following:

> 1. Every 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, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner. Whenever any vehicles as hereinafter defined shall be used in combination with one another, by attachment or tow, the person using or operating any one vehicle shall, for the purposes of this section, be deemed to be using or operating each vehicle in the combination, and the owners thereof shall be jointly and severally liable hereunder.

Plaintiff contends that defendant is vicariously liable to him, as the owner of the vehicle which allegedly caused injury during his "use and operation" of the vehicle with the permission and consent of defendant. Plaintiff further contends that "liability is not dependent on defendant personally pushing her vehicle at the time of the accident. Likewise, liability is not dependent on defendant's control or direction over the manner in which the incident occurred. Instead, Vehicle and Traffic Law § 388 establishes vicarious liability on the owner of the motor vehicle in such instance where the 'use and operation' of the owner's vehicle causes personal injuries while such use and operation occurs with the owner's permission."

In opposition, defendant contends, inter alia, that plaintiff is essentially seeking to impute his alleged negligence in the use and operation of the vehicle to defendant for the injuries that he purportedly sustained. Defendant states that "the statute was never intended to allow a negligent driver to impute his own negligence to the owner of the vehicle and thereafter recover from him." Consequently, defendant contends that the motion should be denied. This Court agrees. Notwithstanding plaintiff's contention that defendant is liable for his injuries under the aforementioned statute, such interpretation would give plaintiff free reign to act in any manner he sees fit and be completely absolved of the repercussions and ensuing injuries that he may sustain as a result of his negligent conduct, by passing that liability onto defendant. Moreover, plaintiff, a trained mechanic in the process of repairing defendant's car, choose the methodology in which he decided to attempt to move the car, after he misplaced defendant's keys. At no time did defendant participate in the activity that brought about the injury. Indeed, the record reveals through plaintiff's testimony that at the time of the accident, he was the only person in contact with the vehicle. Based upon this set of facts, plaintiff's proposed new theory of liability is flawed, and it is therefore determined that the facts asserted herein make the amendment insufficient as a matter of law. Accordingly, the cross-motion for leave to amend to add specific references to Vehicle and Traffic Law § 388 is denied.

With respect to the defendant's motion for summary judgment, it is beyond cavil that summary judgment should be granted only 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); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2nd Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

In the instant matter, defendant contends that she is entitled to summary judgment based upon application of the assumption of the risk doctrine, which, as acknowledged by defendant, is a theory generally involving recreational activities. In opposition, plaintiff contends that the doctrine does not apply in this situation and cannot be a basis for summary judgment. It is well-settled that "[v]oluntary participants in sporting or recreational events are presumed 'to have consented, by their participation, to those injury-causing events which are known, apparent or reasonably foreseeable consequences of the participation'[(Turcotte v. Fell, 68 N.Y.2d 432, 439, 510 N.Y.S.2d 49, 502 N.E.2d 964 (1986); Perretti v. City of New York, 132 A.D.2d 537, 517 N.Y.S.2d 272 (2nd Dept. 1987); Pascucci v. Town of Oyster Bay, 186 A.D.2d 725, 588 N.Y.S.2d 663(2nd Dept. 1992)." Calise v. City of New York, 239 A.D.2d 378 (2nd Dept. 1997); see, Sedita v. City of New York, 8 A.D.3d 256 (2nd Dept. 2004). "[]It is not necessary to the application of assumption of risk that the injured plaintiff have foreseen the exact manner in which his or her injury occurred, so long as he or she is aware of the potential for injury (citations omitted)." Schiavone v. Brinewood Rod & Gun Club, Inc., 283 A.D.2d 234, 236 (2nd Dept. 2001). "Additionally, while participants in such an activity are not deemed to have assumed the risks of reckless or intentional conduct or concealed or unreasonably increased risk (citations omitted), '[i]f the risks of the activity are fully comprehended

or perfectly obvious, [the] plaintiff has consented to them and [the] defendant has performed its duty' by making the conditions as safe as they appear to be (citations omitted). Joseph v. New York Racing Ass'n, Inc., 28 A.D.3d 105, 108 (2nd Dept. 2006).

Here, although neither defendant nor plaintiff has propounded caselaw in support of their respective positions regarding whether the assumption of the risk doctrine applies in the case at bar, this Court need not resolve that issue, as there are no issues of fact to be determined which preclude a grant of summary judgment in favor of defendant, who owed no duty to plaintiff. "To establish a prima facie case of negligence, a plaintiff must establish the existence of a duty owed by a defendant to the plaintiff, a breach of that duty, and that such breach was a proximate cause of injury to the plaintiff' (citations omitted). [] A duty of care is said to exist where 'the plaintiff's interests are entitled to legal protection against the defendant's conduct' (citations omitted)." Vetrone v. Ha Di Corp., 22 A.D.3d 835, 837 (2nd Dept. 2005); see, Kipybida v. Good Samaritan Hosp., 35 A.D.3d 544 (2nd Dept. 2006); Sanchez v. State of New York, 99 N.Y.2d 247 (2002). "A finding of negligence may be based only upon the breach of a duty. If, in connection with the acts complained of, the defendant owes no duty to the plaintiff, the action must fail. Although juries determine whether and to what extent a particular duty was breached, it is for the courts first to determine whether any duty exists (citations omitted). In so doing, courts identify what people may reasonably expect of one another. In assessing the scope and consequences of civil responsibility, they define the boundaries of 'duty' to comport with what is socially, culturally and economically acceptable (citations omitted)." Darby v. Compagnie National Air France, 96 N.Y.2d 343, 347 (2001); see also, Fitzpatrick v. Fitzpatrick, 26 A.D.3d 302 (1st Dept. 2006); Espinal v. Melville Snow Contractors, Inc., 98 N.Y.2d 136 (2002). "Thus, where it is reasonably foreseeable that a defendant's failure to use ordinary care in his or her own conduct will create a risk of harm to a plaintiff with whom he or she has a cognizable legal relationship, the defendant has a duty to use such ordinary care to avoid the risk (citations omitted). Moreover, insofar as relevant here, the determination of the existence and scope of a duty may involve, not only considerations of the wrongfulness of a defendant's conduct, but also an examination of a plaintiff's own informed estimate of the possible risks, viewed in light of what people may reasonably expect of one another (citations omitted)." Vetrone v. Ha Di Corp., 22 A.D.3d 835, 837-838 (2nd Dept.2005).

Here, not only did defendant neither owe nor breach any duty owed to plaintiff, but a review of the evidence presented by defendant, and the contentions raised in opposition to the motion, establish that there are no other issues of fact to be determined which preclude summary judgment. Accordingly, the motion by defendant for summary judgment is granted and the complaint hereby is dismissed. The cross-motion is denied as insufficient as a matter of law.

Dated: July 26, 2007

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J.S.C.