



Leon v. Budget Rent-A-Car

2005 | Cited 0 times | California Court of Appeal | March 2, 2005

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

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Plaintiff and appellant Gloria Leon (plaintiff) appeals the trial court's entry of summary judgment in favor of defendant and respondent Budget Rent-A-Car (defendant) in plaintiff's action for injuries sustained in an automobile accident caused by the driver of a vehicle owned by defendant and rented to the driver. She claims that a conflict of interest existed between defendant and the driver of the rented vehicle; that because of that conflict, there was a "substantial likelihood that facts were suppressed in discovery that tended to prove [the existence of] a triable issue of material fact"; and that summary judgment should not have been granted for these reasons. Plaintiff has asserted no legal basis for reversing the summary judgment, nor has she raised any triable issue of material fact. We therefore affirm the judgment.

BACKGROUND

Plaintiff was a passenger in an automobile struck by a rental car driven by Joanna Williams (Williams). Williams had rented the car from defendant. Plaintiff sued Williams and defendant for injuries sustained in the accident, and eventually settled the action against Williams. Pursuant to a stipulation with defendant, plaintiff limited her causes of action against defendant to vicarious liability under Vehicle Code section 17150, negligent entrustment, and negligent failure to provide insurance.

Defendant moved for summary judgment on the following grounds: any liability it owed to plaintiff under Vehicle Code section 17150 was discharged by tendering payment of \$15,000, the extent of its liability as a vehicle owner under Vehicle Code section 17151 for personal injuries caused by a permissive user of the vehicle; there was no negligent entrustment because at the time of the rental Williams was not under the influence of any drugs, alcohol or prescription medication and provided defendant with a valid driver's license; and there was no negligent failure to provide Williams with insurance because Williams had declined to purchase the supplemental liability insurance coverage offered by defendant. Defendant's motion was supported by the declaration of its attorney; copies of the rental agreement signed by Williams and showing that she had declined supplemental liability insurance coverage; and portions of Williams' deposition testimony in which she acknowledged her



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signature and initials on the rental agreement and stated that she had not used any alcohol, drugs or prescription medication at the time of the rental. At the hearing on the motion, defendant tendered to plaintiff \$15,000.

In opposition to the motion, plaintiff submitted the declaration of her attorney; a letter from her attorney to Williams asserting that Williams had requested supplemental liability coverage from defendant and asking Williams to reply in writing within seven days if this assertion was incorrect; and plaintiff's own deposition testimony in which she said that Williams had admitted to being under the influence of alcohol and drugs at the time of the rental¹. Defendant objected to the attorney letter and to plaintiff's testimony concerning Williams' alleged admissions as hearsay. The trial court sustained the evidentiary objections and granted summary judgment in defendant's favor. Appellant does not challenge the trial court's evidentiary rulings, but appeals the summary judgment.

DISCUSSION

Summary judgment is granted when a moving party establishes the right to the entry of judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826, 843.)

A defendant moving for summary judgment meets its burden of showing there is no merit to a cause of action if that party has shown that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subd. (p)(2).) Once the defendant has made such a showing, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or as to a defense to the cause of action. (Aguilar v. Atlantic Richfield Co., supra, 25 Cal.4th at p. 849.) If the plaintiff does not make such a showing, summary judgment in favor of the defendant is appropriate. In order to obtain a summary judgment, "all that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action [T]he defendant need not himself conclusively negate any such element" (Id. at p. 853.)

On appeal from a summary judgment, an appellate court makes "an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law." (Iverson v. Muroc Unified School Dist. (1995) 32 Cal.App.4th 218, 222.)

Plaintiff argues for the first time on appeal that a conflict of interest existed between defendant and Williams, entitling Williams to representation by independent counsel²; that because of that conflict there was a "substantial likelihood" that facts "tend[ing] to prove a triable issue of material fact" were



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suppressed during discovery; and that the trial court erred by granting summary judgment in light of that conflict. Plaintiff failed to make this argument before the trial court, and therefore forfeited the right to do so for the first time on appeal. (Sommer v. Gabor (1995) 40 Cal.App.4th 1455, 1468.) An appellate court will consider only those facts presented to the trial court and will disregard any new factual allegations on appeal. Facts not presented below cannot create a triable issue on appeal. (Havstad v. Fidelity National Title Ins. Co. (1997) 58 Cal.App.4th 654, 661.) Even assuming such a conflict of interest existed³, plaintiff has no standing to raise the issue of independent counsel. (McGee v. Superior Court (1985) 176 Cal.App.3d 221, 228 [right to independent counsel belongs to the insured, not the insured's adversary].)

Plaintiff does not dispute the absence of any triable issue of material fact that would preclude summary judgment in this case. She has also failed to provide an adequate appellate record demonstrating any error on the part of the trial court. Failure to provide an adequate record on an issue requires that the issue be resolved against the appellant. (Maria P. v. Riles (1987) 43 Cal.3d 1281, 1295-1296.) Plaintiff improperly seeks to introduce, as exhibits to her appellate brief, new evidence concerning her claims against defendant. We grant defendant's motion to strike those portions of plaintiff's brief referring to matters outside the record. (Cal. Rules of Court, rule 14(e)(2).)

Plaintiff's sole argument on appeal is that an alleged conflict of interest between defendant and Williams presented a "substantial likelihood" that evidence was suppressed during discovery. Even if plaintiff had standing to assert the alleged conflict between defendant and Williams, she failed to present any evidence of such a conflict or that any relevant information was withheld from her as a result. Because plaintiff failed to sustain her burden of showing a triable issue of material fact, summary judgment was properly granted. (Aguilar v. Atlantic Richfield Co., supra, 25 Cal.4th at p. 849.)

DISPOSITION

The judgment is affirmed. The parties to bear their own costs on appeal.

We concur.

TURNER, P.J.

ARMSTRONG, J.

1. The declaration of plaintiff's attorney, and some of the exhibits to his declaration, are the only documents in opposition to defendant's motion for summary judgment that were included in the record on appeal. We grant defendant's motion to augment the record to include defendant's evidentiary objections to plaintiff's opposition to the summary judgment motion, defendant's reply to plaintiff's opposition, and the minute order sustaining defendant's evidentiary objections and granting summary judgment.



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2. Plaintiff cites *San Diego Federal Credit Union v. Cumis Ins. Society, Inc.* (1984) 162 Cal.App.3d 358 as authority for this argument. In that case, which involved an insurance coverage dispute, the court held that when an insurer undertakes to defend its insured subject to a reservation of the right to deny coverage, and there are divergent interests between the insured and the insurer as a result of such reservation, the insured has the right to representation by independent counsel at the insurer's expense. (Id. at p. 375.)

3. There is no evidence that any insurer was representing Williams subject to a reservation of rights that would give rise to a right to independent counsel under *San Diego Federal Credit Union v. Cumis Ins. Society, Inc.*, supra, 162 Cal.App.3d 358.

