

**Ballatore v Hub Truck Rental Corp.**

2010 NY Slip Op 30059(U)

January 4, 2010

Supreme Court, Suffolk County

Docket Number: 05-27023

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 24 - SUFFOLK COUNTY

COPY

**PRESENT:**

Hon. PETER FOX COHALAN  
Justice of the Supreme Court

MOTION DATE 10-17-08 (# 003)  
12-3-08 (# 004)  
1-28-09 (# 004)

CAL DATE March 25, 2009  
MNEMONIC: # 003 - MotD  
# 004 - MD  
# 005 - XMD

-----X  
FRANCESCO BALLATORE and VITA :  
BALLATORE, :  
 :  
 :  
 Plaintiffs, :  
 :  
 - against - :  
 :  
 HUB TRUCK RENTAL CORP., DAVID C. :  
 BUTLER and NUZZOLESE BROS. ICE :  
 CORPORATION, :  
 :  
 Defendants. :  
-----X

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Upon the following papers numbered 1 to 50 read on these motions and cross motion to compel disclosure and for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17; 18 - 27; Notice of Cross-Motion and supporting papers 28 - 35; Answering Affidavits and supporting papers 36 - 44; Replying Affidavits and supporting papers 45 - 50; Other \_\_\_\_\_; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that for the purposes of this determination the motion (# 003) by the defendant Hub Truck Rental Corp. for an order precluding the plaintiffs and the defendants David C. Butler and Nuzzolese Bros. Ice Corporation from offering any evidence at the trial of this action and the motion (# 004) by the defendant Hub Truck Rental Corp. for summary judgment are consolidated and decided together with the cross-motion (# 005) by the plaintiffs for summary judgment; and it is further

**ORDERED** that the motion (# 003) by the defendant Hub Truck Rental Corp. for an order precluding the plaintiffs and the defendants David C. Butler and Nuzzolese Bros. Ice Corporation from offering any evidence at the trial of this action or, in the alternative, compelling the aforementioned parties to respond to the moving defendant's discovery demands and compelling the plaintiff Franscesco Ballatore to appear for a further deposition is decided as follows; and it is further

**ORDERED** that the motion (# 004) by the defendant Hub Truck Rental Corp. for summary judgment dismissing the complaint against it is denied; and it is further

**ORDERED** that the cross-motion (# 005) by the plaintiffs for an order pursuant to CPLR §3212 granting them summary judgment on the issue of liability is denied.

This is an action to recover damages for personal injuries allegedly sustained by Franscesco Ballatore (hereinafter plaintiff) when his vehicle was struck in its rear while it was stopped for a traffic light by a rented truck owned by Hub Truck Rental Corp. (hereinafter Hub) and operated by David C. Butler (hereinafter Butler) on Route 25A at its intersection with Warner Road in the Town of Huntington, Long Island, New York, at approximately 10:00 a.m. on August 6, 2005. At the time of the accident, Butler was employed by Nuzzolese Bros. Ice Corporation (hereinafter Nuzzolese) which rented the subject truck from Hub.

Hub's request (# 003) for an order, pursuant to CPLR §3042 (c), precluding the plaintiffs and Butler and Nuzzolese from offering any evidence at the trial of this action is denied as moot as the bill of particulars was served before filing the instant motion (see, **Bard-Rock Corp. v Corutky**, 110 AD2d 611, 487 NYS2d 366 [1985]). If a party neglects or refuses to respond to a demand for a bill of particulars, the Court may enter a preclusion order (see, CPLR §3042 [c]; **Northway Eng'g v Felix Indus.**, 77 NY2d 332, 567 NYS2d 634 [1991]). Commentary C3042:1 (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR) states, in relevant part, that "CPLR 3042 contains the procedure for the seeking and serving of a bill of particulars and the sanctions for failure to comply."

Hub's alternate request (# 003) for an order compelling Butler and Nuzzolese to respond to its demand for discovery and inspection, dated July 2, 2008, is denied as moot as Butler and Nuzzolese's response was served during the pendency of the motion.

Hub's request (# 003) for an order compelling the plaintiffs to respond to its discovery demands, dated October 15, 2007, August 19, 2008 and September 10, 2008, and compelling the plaintiff to appear for a further deposition (hereinafter EBT) with regard to his previous accidents and injuries is granted.

Under CPLR §3101(a), a party is entitled to evidence that is "material and necessary," and these words are to be liberally construed to require disclosure of any facts bearing on the controversy that will assist trial preparation and reduce delay (see, **Graves v Merco Properties**, 198 AD2d 476, 604 NYS2d 210 [1993]; **Bumbulsky v McCarthy**, 151 AD2d 857, 542 NYS2d 832 [1989]). Further, a court is vested with broad discretion to supervise disclosure to prevent unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice (see, **Daniels v City of New York**, 291 AD2d 260, 737 NYS2d 598 [2002]; **Eber Bros. Wine & Liquor Corp. v Ribowsky**, 266 AD2d 499, 698 NYS2d 725 [1999]). The evidentiary scope of an EBT is broader than what may be admissible on trial (see, **Orner v**

**Mount Sinai Hosp.**, 305 AD2d 307, 761 NYS2d 603 [2003]; **White v Martins**, 100 AD2d 805, 474 NYS2d 733 [1984]). Unless a question is clearly violative of the constitutional rights of a witness, or of some privilege recognized in law, or is palpably irrelevant, questions at a deposition should be freely permitted and answered, since all objections other than those as to form are preserved for the trial and may be raised at that time (see, **Roggow v Walker**, 303 AD2d 1003, 757 NYS2d 410 [2003]; **Dibble v Consolidated Rail Corp.**, 181 AD2d 1040, 582 NYS2d 582 [1992]).

At his EBT, dated April 3, 2007, the plaintiff testified that he was involved in several accidents prior to the subject accident and, since a 1992 auto accident, he had never been "treated for any back [or neck] symptoms." In a bill of particulars submitted in an action involving a June 1995 accident, the plaintiff contended that he suffered, *inter alia*, herniated discs at C5-C6, L5-S1 and T9-T10 as a result of that accident. Hub's notices for discovery and inspection, dated October 15, 2007, August 19, 2008 and September 10, 2008, seeking authorizations to obtain certain records relating to the injuries the plaintiff allegedly sustained in the previous accidents, were properly served on the plaintiffs, but the plaintiffs have failed to produce information or documents responding to the request. Thus, Hub's request to compel the plaintiffs to respond to its notice for discovery and inspection, dated October 15, 2007, August 19, 2008 and September 10, 2008, is granted (see, **Perla v Wilson**, 287 AD2d 606, 732 NYS2d 35 [2001]). Accordingly, the plaintiffs shall furnish a response to these notices within 20 days of service of a copy of this order with notice of entry. Moreover, the Court orders that the plaintiff appear for an examination before trial to be conducted at the office of Hub's counsel at 10 a.m. on February 15, 2010 or at such time and place prior thereto as the parties may agree. At such EBT, the plaintiff shall be directed to answer questions concerning his previous accidents and injuries.

Hub moves (# 004) for summary judgment dismissing the complaint and all cross-claims against it because, according to the Federal law known as the Graves Amendment, it was not liable for the accident. Hub contends that there is no evidence that the plaintiff's injuries were caused by any negligence of Hub.

The Graves Amendment provides that the owner of a vehicle that is engaged in the trade or business of renting or leasing motor vehicles shall not be liable under any State law for damages sustained in a motor vehicle accident provided there is no negligence or criminal wrongdoing on the part of the owner (see, 49 USC § 30106 [a]). Thus, the statute preempts the vicarious liability imposed pursuant to Vehicle and Traffic Law §388 with respect to actions commenced after the Graves Amendment date. (see, **Graham v Dunkley**, 50 AD3d 55, 852 NYS2d 169 [2006], *lv dismissed* 10 NY3d 835, 852 NYS2d 169 [2008]; **Hall v Elrac Inc.**, 52 AD3d 262, 859 NYS2d 641 [2008]; **Leuchner v Cavanaugh**, 42 AD3d 893, 837 NYS2d 887 [2007]; **Hernandez v Sanchez**, 40 AD3d 446, 836 NYS2d 577 [2007]). Enacted on August 10, 2005, the Graves Amendment states in pertinent part:

**§30106. Rented or leased motor vehicle safety and responsibility**

(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 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 affiliate of the owner).

Vicarious liability is not abrogated where the injury or damages results from the negligence of the owner's employee in the operation or maintenance of the vehicle, nor where it seems the owner was negligent in entrusting the vehicle to the operator (see, *Byrne v Collins*, 25 Misc 3d 1232 [A]; 2009 NY Slip Op 52395U [2009]; *Luma v ELRAC, Inc.*, 19 Misc 3d 1138 [A], 862 NYS2d 815 [2008]).

Here, Hub has failed to establish its entitlement to judgment as a matter of law. In his October 26, 2007 EBT testimony, Hayes Conn, III., Hub's vice president of maintenance, stated that, prior to renting the subject truck to Nuzzolese on August 3, 2005, a pre-trip inspection including brakes was conducted on the truck and that one of Hub's employees would check "air pressure leaks" in the brake system and would walk around the truck to make sure that all requirements of the inspection were properly performed. In his May 7, 2008 EBT Butler testified that, prior to the impact with the plaintiffs' vehicle, he "put [his] foot onto the brake" and knew that he "wasn't going to stop" because the truck he was operating had "no brakes." There are triable issues of fact as to whether the accident was caused by the alleged brake failure and thus as to Hub's possible contribution to the accident (see, *Suitor v Boivin*, 219 AD2d 799, 631 NYS2d 960 [1995]). Hub has failed to sustain its initial burden of establishing a prima facie entitlement to judgment as a matter of law.

The plaintiffs cross-move for summary judgment in their favor on the issue of liability against the defendants because the defendants' vehicle struck the plaintiffs' vehicle in its rear when it was stopped.

A prima facie case of liability is created when the operator of the moving vehicle strikes the rear of a stopped or stopping vehicle and that a duty of explanation is imposed on the operator of the moving vehicle to excuse the collision by providing a non-negligent explanation such as a mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on a wet pavement or some other reasonable cause (see, *Rainford v Han*, 18 AD3d 638, 795 NYS2d

645 [2005]; **Thoman v Rivera**, 16 AD3d 667, 792 NYS2d 558 [2005]; **Power v Hupart**, 260 AD2d 458, 688 NYS2d 194 [1999]). Moreover, where the driver of the offending vehicle lays the blame for the accident on brake failure, it is incumbent upon that party to show that the brake problem was unanticipated and that reasonable care was exercised to keep the brakes in good working order (see, **Hubert v Tripaldi**, 307 AD2d 692, 763 NYS2d 165 [2003]; **Vidal v Tsitsiashvili**, 297 AD2d 638, 747 NYS2d 524 [2002]).

The plaintiffs have established their prima facie entitlement to summary judgment by presenting evidence indicating that, while the plaintiffs' vehicle was completely stopped for a traffic light, it was struck from the rear by the defendants' vehicle. However, in opposition, the defendants have submitted sufficient evidence to raise a triable issue of fact as to whether the alleged brake failure was unanticipated and whether Hub had exercised reasonable care to maintain the brakes in good working order, as discussed above. (see, **Schuster v Amboy Bus Co.**, 267 AD2d 448, 700 NYS2d 484 [1999]).

Accordingly, the branch of the motion (# 003) by Hub for an order compelling the plaintiffs to respond to its previous discovery demands and compelling the plaintiff to appear for a further EBT with regard to his previous accidents and injuries is granted and all other branches of the motion (# 003) are denied. The motion (# 004) by Hub for summary judgment and the cross-motion (# 005) by the plaintiffs for summary judgment on the issue of liability are denied.

Dated: January 4, 2010



\_\_\_\_\_  
J.S.C.

\_\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION