

Marshall v Barraza

2023 NY Slip Op 34117(U)

October 2, 2023

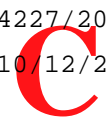
Supreme Court, Bronx County

Docket Number: Index No. 34227/2018E

Judge: Bianka Perez

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 14**

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GINA MARSHALL,

Index No. 34227/2018E

Plaintiff,

-against-

Hon. BIANKA PEREZ

Justice Supreme Court

JORGE R. BARRAZA, HUB TRUCK RENTAL
CORP., and SARABETH’S KITCHEN, LLC,
Defendants.

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The following papers were read on these motions (Seq No. 2 & 3) for SUMMARY JUDGMENT submitted on April 19, 2023.

Notice of Motion #2 – Affirmation and Exhibits	NYSCEF Doc. 47-61
Answering Affidavits and Exhibits	NYSCEF No(s). 96-108
Replying Affidavit and Exhibits	NYSCEF No(s). 109-110
Notice of Motion #3 – Affirmation and Exhibits	NYSCEF No(s). 62-86
Answering Affidavits and Exhibits	NYSCEF No(s). #88-89, 96-108
Replying Affidavit and Exhibits	NYSCEF No(s). #112

Upon the foregoing papers defendant Jorge R. Barraza (hereinafter “Barraza”), on motion sequence #2, and defendants Hub Truck Rental Corp. (hereinafter “Rental Corp.”) and Sarabeth’s Kitchen, LLC (hereinafter “Kitchen”), on motion sequence #3, move for summary judgment to dismiss the complaint in that plaintiff failed to establish a “serious injury” threshold as defined by New York Insurance Law §5104(a) and 5102(d). Defendants Rental Corp. and Kitchen also move to dismiss all claims and cross-claims asserted against Defendant Rental Corp. pursuant to the Graves Amendment (49 USC §30106) and that Kitchen bears no responsibility for Defendant driver Barraza’s actions. Plaintiff opposes.

Plaintiff Gina Marshall seeks damages for alleged personal injuries arising out of a motor vehicle accident. Plaintiff alleges a vehicle, owned by Defendant Rental Corp., was being operated by Defendant Barraza, while in the course of his employment with Defendant Kitchen, when the Defendant vehicle struck the left side of Plaintiff’s vehicle. The accident is alleged to have occurred on July 28, 2018, at the intersection of Westchester Avenue and Brook Avenue, Bronx County, New York.

SERIOUS INJURY THRESHOLD (Sequence #2 & 3)

When a defendant seeks summary judgment alleging that plaintiff does not meet the “serious injury” threshold required to maintain a lawsuit, the burden is on the defendant to establish through competent evidence that the plaintiff has no cause of action (*Franchini v. Palmeri*, 1 N.Y.3d 536 [2003]). “Such evidence includes ‘affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff’s claim’” (*Spencer v. Golden Eagle, Inc.*, 82 A.D.3d 589, 590 [1st Dept. 2011][internal quotations omitted]). A defendant may also meet his or her summary judgment burden with sufficient medical evidence demonstrating that the plaintiff’s injuries are not causally related to the accident (see *Farrington v. Go On Time Car Service*, 76 A.D.3d 818 [1st Dept. 2010], citing *Pommels v. Perez*, 4 N.Y.3d 566, 572 [2005]). Once this initial threshold is met, the burden shifts to the plaintiff to raise a material issue of fact using objective, admissible medical proof (see *Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345, 350 [2002]). The defendants failed to meet their prima facie burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see *Toure*, 98 NY2d at 345; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]).

Defendant Barraza failed to submit competent medical evidence establishing, prima facie, that the plaintiff did not sustain a serious injury under either the permanent consequential limitation of use or significant limitation of use categories of Insurance Law § 5102(d), as his expert, Dr. Rene Elkin, found significant limitations in the range of motion of Plaintiff’s left shoulder, cervical and lumbar spine (see *Singleton v F & R Royal, Inc.*, 166 A.D.3d 837, 838 [2d Dept 2018]; *Nunez v Teel*, 162 A.D.3d 1058, 1059 [2d Dept 2018]; *Mercado v Mendoza*, 133 A.D.3d 833, 834 [2d Dept 2015]; *Miller v Bratsilova*, 118 A.D.3d 761 [2d Dept 2013]). Moreover, Defendant’s expert failed to address Plaintiff’s alleged tooth fracture.

Defendants Rental Corp. and Kitchen also failed to submit competent medical evidence establishing, prima facie, that the plaintiff did not sustain a serious injury under either the permanent consequential limitation of use or significant limitation of use categories of Insurance Law § 5102(d), as they rely on Defendant Barraza’s expert., and their own expert, Dr. Dana Mannor. Both experts failed to address the right and left shoulder and tooth fracture injuries alleged by Plaintiff, listed in Plaintiff’s annexed first and second supplemental bill of particulars (see NYSCEF Docs 69-71; see *Singleton v F & R Royal, Inc.*, 166 A.D.3d 837, 838 [2d Dept 2018]; *Nunez v Teel*, 162 A.D.3d 1058, 1059 [2d Dept 2018]; *Mercado v Mendoza*, 133 A.D.3d 833, 834 [2d Dept 2015]; *Miller v Bratsilova*, 118 A.D.3d 761 [2d Dept 2013]).

The Court accordingly finds that Defendants failed to meet their burden of showing that the plaintiff did not sustain a serious injury under either the permanent consequential limitation of use or significant limitation of use categories of the Insurance Law § 5102(d).

I. 90/180 Claim

As to Defendants' branches of their respective motions, which argue that the proof rules out a serious injury based on the 90/180-day claim:

Defendant Barraza attaches Plaintiff's deposition transcript where Plaintiff stated that she was out of work for 92 days after the accident (Exhibit D pg. 97).

Defendant Rental Corp and Kitchen relies on defendant's medical expert Dr. Dana Mannor, who examined plaintiff approximately two months after the accident and addressed plaintiff's condition or limitations within the first 180 days following the accident which is necessary to foreclose the 90/180 day category, (see *Harris v. Vogler*, 187 AD3d 1392 [3rd Dept 2020]; see also *Kaakyire v. Soto*, 151 NYS 3d 891 [1st Dept 2021]; *Lazzari v. Qualcon Constr., LLC*, 162 AD3d 440, 441-442 [1st Dept 2018]; *Martinez v Goldmag Hacking Corp.*, 95 AD3d 682, 683 [1st Dept 2012]).

In opposition, Plaintiff submits treatment records indicating that she was not working ongoing assessment for at least 3 months following the accident (see *Kaakyire v. Soto*, 151 NYS 3d 891 [1st Dept 2021]; *Lazzari v. Qualcon Constr., LLC*, 162 AD3d 440, 441-442 [1st Dept 2018]; *Martinez v Goldmag Hacking Corp.*, 95 AD3d 682, 683 [1st Dept 2012]).

As there exists question of fact as to the 90/180-day claim, the branches of Defendants' motions seeking dismissal of the 90/180 claim are denied.

Finally, there is no evidence on this record that plaintiff sustained a "permanent loss of use" of any body part - which requires a "total" loss of use (*Swift v. New York City Transit Authority*, 115 A.D.3d 507, 509 [1st Dept. 2014]).

MOTION TO DISMISS, Seq. # 3: Defendant Rental Corp. USC § 30106 Graves Amendment

Vehicle and Traffic Law § 388(1) states "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." The statute altered the common-law rule that a vehicle owner could only be held liable for the negligence of a permissive driver under agency or respondeat superior theories" (*Morris v. Snappy Car Rental, Inc.*, 84 N.Y.2d 21, 27 [1994])

However, "on August 10, 2005, Congress amended the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users to preempt the New York Vehicle and Traffic Law (the Graves

Amendment [49 USC § 30106(c)]) to the extent that the federal legislation prohibits imposition of vicarious liability on vehicle lessors for injuries resulting from the negligent use or operation of the leased vehicle (the Graves Amendment [49 USC § 30106(c)])” (*Jones v. Bill*, 10 N.Y.3d 550, 553 [2008]). The statute provides, in relevant part, that:

“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 an 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 an affiliate of the owner).”

The “Graves Amendment,” bars State law vicarious liability actions commenced on or after August 10, 2005, against owners of motor vehicles “engaged in the trade or business of renting or leasing motor vehicles (see *Hernandez v. Sanchez*, 40 A.D.3d 446, 447 [1st Dept. 2007]; *Williams v. White*, 40 A.D.3d 110 [4th Dept. 2007]). However, a claim based upon negligent maintenance is not barred by the Graves Amendment since the statute does not absolve leasing companies of their own negligence (see *Collazo v MTA-New York City Tr.*, 74 A.D.3d 642 [1st Dept. 2010]). In the Appellate Division, First Department matter *Hall v. Elrac, Inc.* the Court found the Graves Amendment barred the plaintiff’s vicarious liability claims, rejecting plaintiff’s argument that the Graves Amendment violates the Commerce Clause of the U.S. Constitution (52 A.D.3d 262 [1st Dept 2008]).

In support of the present motion, Defendants Rental Corp. annexes the deposition transcript of Defendant Rental’s Director of Maintenance Paul Lirosi, a copy of the Vehicle Lease Agreement (NYSCEF Doc #75), and affidavit of Defendant Rental’s insurance manager Jennifer Gelber. Defendant Rental Corp. alleges that it is in the business of leasing and/or renting motor vehicles and that therefore, the loaner vehicle it provided to Defendant Kitchen falls under the protection of the Graves Amendment.

The proponent of a summary judgment motion has the initial burden of establishing entitlement to judgment as a matter of law, submitting evidence in admissible form demonstrating the absence of any triable issues of fact (see *Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]). Only when the movant satisfies its prima facie burden will the burden shift to the opponent “to lay bare his or her proof and demonstrate the existence of triable issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Summary judgment is inappropriate

where there are material issues of fact in dispute or where more than one conclusion may be drawn from the facts (see *Friends of Thayer Lake LLC v Brown*, 27 NY3d 1039 [2016]).

Defendant Rental Corp. has established *prima facie* entitlement to summary judgment dismissing Plaintiff's Complaint, by demonstrating that it is a motor vehicle leasing company, there were no issues regarding the maintenance of the loaner vehicle, and that therefore, it cannot be held liable for the negligence of Defendant driver Barraza (*Hernandez*, 40 A.D.3d 446). Defendant Rental Corp.'s Director of Maintenance Paul Lirosi testified that Defendant Rental Corp. primarily leases trucks and that the loaner vehicle involved in the subject accident was subject to the terms and conditions of the original vehicle lease agreement (NYSCEF Doc# 75).

In opposition, Plaintiff argues that a loaner vehicle is an exception to the Graves Amendment. Here, Plaintiff's allegations against Defendant Rental Corp. are predicated solely on the alleged ownership, operation, maintenance, and control of the loaner vehicle provided to Defendant Kitchen.

The Court finds that the legislative intent of the Graves Amendment was to protect businesses in the trade of renting or leasing motor vehicles from vicarious liability when there has been no action of culpability on behalf of the leasing/renting business (see generally *Moreau v. Josaphat*, 42 Misc.3d 345 [Kings Supreme 2013] quoting *Minto v. Zipcar New York, Inc.*, [Sup. Ct. Queens County March 17, 2010, Rosengarten, J., Index 15401/09] although not binding, both courts found that implicating vicarious liability to loaner vehicles from companies that would ordinarily fall under the protection of the Graves Amendment would thus affect interstate commerce and fall within Congress' Constitutional authority to regulate).

Therefore, the branch of Defendant Rental Corp.'s motion seeking dismissal of the complaint against them based on the Graves Amendment is granted.

MOTION TO DISMISS, Seq #3: Defendant Kitchen's Vicarious Liability

Defendant Kitchen also moves for summary judgment on the basis that it should not be held vicariously liable for the actions of Defendant driver Barraza.

In this case, the record before the court indicates there are questions of fact remaining. Viewing the record in the light most favorable to the non-moving parties, there remain questions of fact as to key elements of the accident, which remain the sole province of a jury, (*Communications & Entertainment Corp. v. Hibbard Brown & Co., Inc.*, 202 A.D.2d 191 [1st Dept 1994]; *Glick & Dolleck, Inc. v. Tri-Pac Export Corp.*, 22 NY2d 439 [1968]). The presumption of consent to use a motor vehicle is rebuttable and the question of consent and authority ordinarily presents an issue of fact (*Connors v Paris*, 199 A.D.2d 4 [1st Dept. 1993]). Pursuant to Vehicle and Traffic Law §388, states, in pertinent part, that [e]very 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. Thus, without exception, pursuant to the above-mentioned statute, an owner of a motor vehicle is vicariously liable for a motor vehicle accident, caused by the use of his vehicle, when said vehicle is being operated with the owner's consent. Liability under the statute is purely vicarious and as such, does not turn on any fault of the owner. *Naso v. Lafata*, 4 N.Y.2d 585 (1958). Once ownership of a vehicle is established permission or consent to use the vehicle, either express or implied, is rebuttably presumed. *Murdza v. Zimmerman*, 99 N.Y.2d 375 (2003); *Leotta v. Plessinger*, 8 N.Y.2d 449 (1960); *St. Andrassy v. Mooney*, 262 N.Y. 368 (1933). The presumption of consent and permission continues until substantial evidence negating consent is proffered. *Id.*; *New York Central Mutual Fire Insurance Company v. Dukes*, 14 AD3d 704 (2nd Dept.2005). Whether the issue of consent can be decided as a matter of law or requires submission to a jury depends on the nature of the evidence rebutting the consent. *Country-Wide Insurance Company v. National Railroad Passenger Corporation*, 6 NY3d 172 (2006).

Here, given the undisputed ownership of the vehicle, Defendant Kitchen is required to come forward with substantial evidence to rebut the strong presumption of consent (see *Murdza v. Zimmerman*, 99 N.Y.2d 375, 380, 756 N.Y.S.2d 505, 786 N.E.2d 440 [2003]; see also, *Bernard v. Mumuni*, 22 Ad3d 186 [1st Dept 2005]). There are questions of fact here as to the implied consent to use the subject vehicle by Defendant Barraza who indicated that he occasionally would move Defendant Kitchen's vehicles to avoid the truck being towed.

The Court finds that Defendant Kitchen has failed to rebut the strong presumption of consent. Thus, the defendant has failed to establish prima facie entitlement to summary judgment as a matter of law as the movant's papers raise an issue of fact as to the issue of consent that should be decided by a jury.

For the foregoing reasons, the branch of Defendants' motion is denied.

Accordingly, it is hereby

ORDERED that Defendant Barraza's motion (Mot. Seq. 2) and the branch of Defendants Rental Corp. and Kitchen's motion (Mot. Seq. 3) for summary judgment under Insurance Law 5102(d) are granted ONLY to extent dismissing plaintiff's "permanent loss of use" claim, and it is further,

ORDERED that the branch of Defendants Rental Corp. and Kitchen's motion seeking dismissal of all claims and crossclaims is granted ONLY to the extent of dismissing the causes of action in the Complaint as against Rental Corp., it is further

ORDERED, that the Clerk of the Court is directed to enter judgment as against plaintiff and in favor of Defendant Rental Corp. dismissing the causes of action in the Complaint and all cross-claims as against Defendant Rental Corp., it is further

ORDERED that the Defendant Rental Corp. and Kitchen’s motion is otherwise denied.

This constitutes the Decision and Order of this Court.

Dated: October 2, 2023

Hon. 

BIANKA PEREZ, J.S.C.

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- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
 - 2. MOTION..... GRANTED DENIED GRANTED IN PART OTHER
 - 3. CHECK IF APPROPRIATE.....
 - SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
 - FIDUCIARY APPOINTMENT REFEREE APPOINTMENT