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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

HUA CHEN and HONG LIU

- v -

VICTOR M. TAVAREZ et al.

INDEX NO. 121086/03

MOTION DATE 2-28-07

MOTION SEQ. NO. 006

MOTION CAL. NO. 26

The following papers, numbered 1 to 4 were read on this motion by the defendants, Hector Tavarez i/s/h/a Victor M. Tavarez and A. L. Eastmond & Sons, Inc. for summary judgment on the issue of liability.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1
Answering Affidavits — Exhibits (Memo)	2
Answering Affidavits — Exhibits (Memo)	3
Replying Affidavits (Reply Memo)	4

Cross-Motion: ☐ Yes ■ No

While riding in a taxi cab in the vicinity of East 83rd Street and First Avenue in Manhattan on October 6, 2003, the plaintiffs were struck by a truck owned by defendant A. L. Eastmond & Sons, Inc. (Eastmond) and operated by defendant Rafael Santos (Santos). Plaintiffs commenced the instant action seeking damages for personal injuries they allegedly sustained in the accident. The defendants, Hector Tavarez i/s/h/a Victor M. Tavarez (Tavarez) and Eastmond now move, pursuant to CPLR 3211(a)(7) and 3212, for summary judgment on the issue of liability. The motion is denied.

It is well settled that 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. See Alvaraz v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). In support of their motion, the defendants proffer the accident report, Eastmond's Auto Safety Policy and the deposition testimony of Tavarez, Santos, Luis Lora, a field supervisor for Eastmond and Lennix Andersen (Andersen), a safety manager for Eastmond. Andersen testified that Santos was not authorized to operate Eastmond's truck which was involved in the accident. In addition, the Auto Safety Policy and Andersen's testimony establishes that only licensed drivers are allowed to operate Eastmond's vehicles. Santos testified that at the time of the accident he was aware that he was not allowed to drive the truck.

Once the defendants have met their burden, it is incumbent upon the plaintiff to come forward with proof in admissible form to raise a triable issue of fact. See Alvaraz v Prospect Hospital, Supra; Zuckerman v City of New York, Supra. In opposition to the motion, the plaintiff cites to deposition testimony which establishes that Tavarez was employed by Eastmond to drive the work crew from one job site to another. Tavarez testified that he left the keys to the ignition of the unlocked truck in the vehicle's ashtray while he attended to a personal errand. Santos testified that Tavarez failed to return in time to drive the work crew to the next Eastmond job. Accordingly, Santos as the work crew supervisor drove the Eastmond truck to the next job. This action by Santos resulted in the accident. Santos testified that he was motivated to drive the truck so he would not miss Eastmond's next appointment. Tavarez also testified that he had witnessed Santos drive Eastmond vehicles in the past. Santos also testified that after the accident Eastmond did not take any disciplinary action against him.

Since it is established that driving the truck was done in furtherance of Eastmond's interests, the keys were left in the unlocked truck's ashtray and Santos had driven Eastmond vehicles in the past, there is an issue of whether it was foreseeable that Santos would drive the vehicle under the circumstances presented here. Additionally, although Eastmond claims they had a strict driver policy. Santos had driven Eastmond vehicles in the past, with no resulting disciplinary action.

In deciding a motion for summary judgment, the court must bear in mind that issue finding rather than issue determination is the key to summary judgment. See Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395 (1957). Furthermore, since summary judgment is a drastic remedy which deprives a litigant of his or her day in court, the evidence adduced on the motion must be liberally construed in the light most favorable to the opposing party. See Kesselman v. Lever House Restaurant, 29 AD3d 302 (1st Dept. 2006); Goldman v. Metropolitan Life Ins. Co., 12 AD3d 289 (1st Dept. 2004). These same rules apply for a motion for summary judgment on liability.

The Court of Appeals has held "no longer is an employer necessarily excused merely because his employees, acting in furtherance of his interests, exhibit human failings and perform negligently or otherwise than in an authorized manner. Instead, the test has come to be 'whether the act was done while the servant was doing his master's work, no matter how irregularly, or with what disregard of instructions.'" Riviello v Waldron, 47 NY2d 297, 302 (1979); quoting Jones v Weigand, 134 App Div 644, 645, (2nd Dept. 1909). Furthermore, "'for an employee to be regarded as acting within the scope of his employment, the employer need not have foreseen the precise act or the exact manner of the injury as long as the general type of conduct may have been reasonably expected (2 Mechem, Agency (2d ed), s 1884).'" See Riviello v Waldron Supra at 304.

Section 388 of the Vehicle and Traffic Law (VTL § 388) provides that "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." Where it is foreseeable that

a non-permissive driver would use the vehicle, an owner can be charged with constructive consent, which satisfies the requirements of VTL § 388. MVAIC v. Continental National American Group Co., 35 N.Y.2d 260 (1974).

Furthermore, the determination of whether specific acts are within the scope of an employee's position or whether the employee acted with permission of the employer is so heavily based on specific facts, as such, the question should be determined by a jury. See Riviello v Waldron Supra; Rounds v Delaware Lackawanna & Western R. R. Co., 64 NY 129 (1876); McLoughlin v New York Edison Co., 252 NY 202, (1929). The Court of Appeals has held "uncontradicted statements of both the owner and the driver that the driver was operating the vehicle without the owner's permission will not *necessarily* warrant a court in awarding summary judgment for the owner." Country Wide Ins. Co. v. National R.R. Passenger Corp., 6 N.Y.3d 172, 177 (2006). Additionally, "where the disavowals are arguably suspect, as where there is evidence suggesting implausibility, collusion or implied permission, the issue of consent should go to a jury." See Country Wide Ins. Co. v. National R.R. Passenger Corp., Supra at 178.

For these reasons and upon the foregoing papers, it is

ORDERED that the defendants' motion for summary judgment on the issue of liability is denied; and it is further,

ORDERED that the defendants shall serve a copy of this order with notice of entry upon all parties, the County Clerk, and the Clerk of the Trial Support Office within 45 days of entry.

This constitutes the Decision and Order of the Court.

Dated: April 15, 2007

Deborah K

DEBORAH A. KAPLAN
Deborah A. Kaplan J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**
Check if appropriate: ☐ **DO NOT POST**