SHORT FORM ORDER

INDEX No. 05-29471
CAL. No. 07-01147-MV

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 7-31-07
ADJ. DATE 8-15-07
Mot. Seq. # 001 - MG; CASEDISP

DAVID TORRES and MELISSA TORRES, Plaintiffs, - against - STEPHEN CHAPIN and BURNER KING INC., Defendants.	ROBERT M. CIPRIANO, ESQ. Attorney for Plaintiffs 136 East Main Street East Islip, New York 11730 ESCHEN, FRENKEL & WEISMAN, LLP Attorneys for Deft/3rd Pty Pltf Chapin 20 West Main Street Bay Shore, New York 11706
STEPHEN CHAPIN and BURNER KING INC., Third-Party Plaintiffs, - against - RAMP CHEVROLET, Third-Party Defendant.	AHMUTY, DEMERS & McMANUS Attorneys for Deft/3rd Pty Pltf Burner King 200 I.U. Willets Road Albertson, New York 11507 TROMELLO, McDONNELL & KEHOE Attorneys for 3rd Pty Deft Ramp Chevrolet P.O. Box 9038 Melville, New York 11747-9038

Upon the following papers numbered 1 to 53 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 41 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 42-45; 46-47; 48-49 ; Replying Affidavits and supporting papers 50 - 53 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by third-party defendant, Ramp Chevrolet ("Ramp"), for an order pursuant to CPLR 3212, granting it summary judgment dismissing the complaint and the third-party complaint against it is granted.

Plaintiffs, David Torres and Melissa Torres, commenced the instant action against defendants, Stephen Chapin and Burner King Inc ("Burner King") for personal injuries sustained by the plaintiffs as a

result of a motor vehicle accident. Defendants Chapin and Burner King thereafter interposed a third-party complaint against the third-party defendant, Ramp. Following third-party defendant Ramp's interposition into the action, plaintiffs served an amended summons and complaint on third-party defendant Ramp, naming it as a direct defendant in the action.

Mr. Torres was injured as a result of a motor vehicle accident, on Sunday, June 12, 2005, at approximate y 4:30 pm, at the intersection of North Ocean Avenue also known as County Road 83 and Mooney Pond Road, County of Suffolk, New York. Mr. Torres was a passenger in the vehicle operated by his wife, Mrs. Torres. The Torres' vehicle was struck in the right front passenger side while it was stopped at a red light when the vehicle operated by Mr. Chapin and owned by defendant Burner King failed to stop, allegedly due to brake failure, as it was traveling downhill on North Ocean Avenue. The brakes of the Burner King box truck were serviced approximately two months prior to the subject accident on April 14, 2005, by third-party defendant Ramp. At the time of the subject accident, Mr. Chapin was on his way to deliver the vehicle to the Ramp Chevrolet service department, to finish the repairs from April's scheduled maintenance. Mr. Torres seeks to recover damages for injures he allegedly sustained while a passenger in the motor vehicle accident. Mrs. Torres seeks damages for the loss of services, consortium and society of her husband, David Torres.

Third-party defendant Ramp now moves for summary judgment on the basis that a repair shop has no liability for an accident that occurs because of a vehicle's brakes' malfunctioning. Third-party defendant Ramp also asserts that the plaintiffs' use of res ipsa loquitur is inapplicable because Ramp did not have exclusive control over the vehicle. Third-party defendant Ramp further contends that it did not owe a duty of care to the plaintiffs since there was no exclusive contract in existence between the plaintiffs and Ramp. Third-party defendants Ramp submits, the pleadings, copies of the deposition transcripts of plaintiffs, third-party defendant Ramp, defendant Burner King, defendant Chapin and copies of third-party defendant Ramp's repair orders and invoices for the subject Burner King vehicle.

Defendant Burner King opposes third-party defendant Ramp's motion on the grounds that third-party defendant Ramp failed to properly warn and advise defendant Burner King about any problems with the braking system on the subject box truck. Defendant Burner King submits, a copy of the amended answer and a copy of the deposition transcript of defendant Burner King.

Defendant Chapin and plaintiffs, in opposition, to third-party defendant Ramp's motion adopt and incorporate the grounds stated in defendant Burner King's opposition to defendant Ramp's motion.

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 demonstrate the absence of any material issues of fact (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing party's moving papers (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). Once the showing has been made the burden will then shift to the opposing party to raise an issue of fact by producing evidentiary proof in admissible form sufficient enough to require a trial on the merits (***Zuckerman v City of New York***, *supra*). A party will not sustain its burden by simply pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merits of its claim or defense (***Mennerich v Esposito***, 4 AD3d 399,

772 NYS2d 91 [2004]; ***George Larking Trucking Co. v Lisbon Tire Mart, Inc.***, 185 AD2d 614, 585 NYS2d 894 [1992]). In addition, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2004]).

Mr. Daniel Waldeck, a nine year service advisor in Ramp's commercial department, testified to the effect that, defendant Burner King was a customer of Ramp's and that Ramp had performed a total of six repairs on the subject truck between December 11, 2002 and April 14, 2005. Mr. Waldeck testified that Burner King used Ramp's early bird envelope method, which consisted of the customer filling out a note explaining the repairs to be made then placing the note and keys to the vehicle in an early bird envelope and dropping it through the mail slot in the service department's door whenever repairs were needed. Mr. Waldeck testified that the first time the subject vehicle was brought into Ramp for repairs to its brakes was December11, 2002 and that the rear brakes were adjusted. Mr. Waldeck then testified that between February 6, 2003 and July 30, 2003, the vehicle's front and rear brakes were replaced and adjusted each time the vehicle was brought in for servicing. He stated that the truck's brakes were changed at a relatively quick frequency, but also explained that the frequency for changing a vehicle's brakes depends upon the driving habits of the driver, the weight of the vehicle and the vehicle's usage on a daily basis. Mr. Waldeck then testified that after January 29, 2004, the subject vehicle did not return to Ramp for repairs until April 15, 2005. Mr. Waldeck testified that upon inspection it was found that rear brakes were severely worn, the front brakes only had approximately 2,000 miles left on them, the New York State Inspection was overdue, the windshield was cracked, there was a transmission fluid leak, and the exhaust manifolds needed to be replaced. Mr. Waldeck stated that the customer declined the repairs and Ramp does not have the authority to take a vehicle out of service. Mr. Waldeck further testified that it is his general practice that whenever something is indicated on the bottom of the repair order to either inform the owner of Burner King or one of the Burner King secretaries about it, although he could not specifically recall if he spoke to someone at the Burner King office on this occasion. Mr. Waldeck then testified that on June 2, 2005 a repair order was written for the subject vehicle to repair the exhaust manifolds but the vehicle was never brought in and on June 29, 2005, the repair order was closed because all repair orders remain open until the end of the month.

Mr. Brian Link, the president of Burner King, testified, in pertinent part, that Mr. Chapin was employed as an installer for Burner King and was operating one of its vehicles on the day of the subject accident. Mr. Link testified that Mr. Chapin informed him that the accident occurred while Mr. Chapin was on his way to deliver the truck to Ramp for scheduled repairs. Mr. Link explained that whenever a vehicle needed to be serviced he was the one to schedule it and on the appointed service date he would have one of his available installers deliver the vehicle to Ramp for servicing. Mr. Link testified that after a vehicle was dropped off he would phone Ramp to speak with Mr. Waldeck to discuss the required repairs. Mr. Link stated that the subject truck's last scheduled repairs were performed on April 14, 2005 and the truck was placed back into service after being picked up on April 15th. Mr. Link testified that after the April 14th repairs, he was never informed by Ramp to not use the truck in its current state or that the brakes were severely worn brakes and the front brakes were only usable for another 2,000 miles. He stated that a repair order was not placed in the truck after the repairs, only an invoice was left. Mr. Link said that he scheduled a service date for the subject truck on June 13, 2005, after receiving complaints from the operators that the truck's exhaust was too loud. Mr. Link stated that Mr. Chapin explained to him that the accident when Mr. Chapin "lost the brakes" on the truck as he was going down a hill. Mr.

Link testified that after the accident the truck was towed to his shop and that he did not see any fluids leaking from the truck. Mr. Link further testified that the braking system was never inspected after the accident and that he did not have a procedure in place for taking a vehicle out of service. He also stated that Ramp never advised him of an inherent problem with the braking system, even though he believed the problems with the braking system were unusual and believed the truck was a "lemon". Mr. Link further testified that he never complained to Ramp about the braking system nor did he inform Ramp about the subject accident.

Based upon the foregoing, third-party defendant Ramp has met its prima facie burden of establishing its entitlement to judgment as a matter of law (***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Zuckerman v City of New York***, *supra*). Third-party defendant Ramp has demonstrated that the brakes were functioning adequately for approximately two months prior to the collision and immediately before the accident occurred. Notwithstanding the fact that Mr. Chapin stated that he "lost the brakes" and tried to pump the brakes as well as pulled the emergency brakes' switch, all to no avail, he also testified that the brakes were operating properly on Friday, June 10, 2005, and that he had applied the brakes at least three times on the day of the accident without incident. Therefore, since third-party defendant Ramp has shown that the brakes were fully operational prior to the collision and that it had not performed any work on the subject vehicle since April 14, 2005, it has satisfied its burden (***Tufano v Nor-Hgts. Serv. Ctr.***, 15 AD3d 470, 790 NYS2d 486 [2005]; ***Breslin v Rij***, 259 AD2d 458, 686 NYS2d 91 [1999]; ***Williams v Healy Intl. Corp.***, 240 AD2d 403, 658 NYS2d 117 [1997]). Thus, the burden has shifted to defendants Burner King and Chapin to prove that there are triable issues of fact thereby precluding summary judgment in favor third-party defendant Ramp.

In response, defendants Burner King and Chapin have failed to raise a triable issue of fact, demonstrating that Ramp failed to adequately repair or warn defendants Burner King and Chapin that the brakes were defective (*see*, ***Breslin v Rij***; *supra*; ***Boyd v Seventh Ave. Serv. Sta.***, 235 NYLJ, Mar. 10, 2006, at 47 [Sup Ct, Bronx County, Guzman, J.]). Mr. Link in his deposition testimony testified that he did not receive any complaints from any of his installers or service mechanics regarding the subject vehicles' brakes prior to the accident nor did he ever complain to Ramp about the vehicles' braking system and following the accident, the braking system was never inspected. Mr. Link also testified that during his inspection of the subject vehicle after the accident he did not see any fluids leaking from the truck. Defendants have also failed to refute third-party defendant Ramp's contention that it was informed of the necessary repairs that were required on the subject vehicle. Thus, defendants Burner King and Chapin have not come forward with sufficient evidence to establish that any purported defect in the braking system was the cause of the subject accident or that third-party defendant Ramp failed to warn defendant Burner King that there was a problem with the braking system on the subject vehicle prior to the accident's occurrence (***Tufano v Nor-Hgts. Serv. Ctr.***, *supra*; ***Boyd v Seventh Ave. Serv. Sta.***, *supra*).

Furthermore, third-party defendant Ramp has also established its entitlement to judgement as a matter of law against the plaintiffs. Plaintiffs seek to rely upon the doctrine of res ipsa loquitur, which allows for an inference of negligence to be drawn regarding a defendant's actions based upon the happening of an event where the plaintiff can establish that the event is of a type which would not ordinarily happen in the absence of someone's negligence; was caused by an agent or instrumentality exclusively within the defendant's control; and was not due to any voluntary action or contribution on the plaintiff's behalf (***Kambat v St. Francis Hosp.***, 89 NY2d 489, 655 NYS2d 844 [1997]; ***Dermatossian v***

New York City Transportation Authority, 67 NY2d 219, 501 NYS2d 784 [1986]; ***Prosser and Keeton, Torts*** § 39 at 248-251). Plaintiffs may not rely upon the doctrine of res ipsa loquitur as they have failed to establish that third-party defendant Ramp had exclusive control over the subject vehicle and its braking system at the time of the accident (*see,* ***Dermatossian v New York City Transportation Authority***, *supra;* ***Breslin v Rij***, *supra*; ***Caffiero v Shore***, 216 AD2d 265, 627 NYS2d 770 [1995]). Nor did third-party defendant Ramp owe plaintiffs a duty of care by virtue of its limited service contract with defendant Burner King (*see,* ***Palka v Servicemaster Mgt Serv.***, 83 NY2d 579, 611 NYS2d 817 [1994]; ***Walker v First Tr., Inc.***, 35 AD3d 452, 825 NYS2d 526 [2007]; ***Espinal v Melville Snow Contr.***, 283 AD2d 546, 724 NYS2d 893 [2001]). Additionally, plaintiffs have failed to demonstrate that third-party defendant Ramp performed any of the aforementioned repairs on the subject vehicle in a negligent manner, resulting in the plaintiffs' injuries (***Vergara v Tides Constr. Corp.***280 AD2d 665, 721 NYS2d 103 [2001]; ***Giustino v Hollymatic Corp.***, 202 AD2d 161, 608 NYS2d 179 [1994]).

Accordingly, third-party defendant Ramp's motion for summary judgment is granted. The action is severed and shall continue against the remaining defendants.

Dated: DEC 10 2007

J.S.C.

__ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION