SHORT FORM ORDER

INDEX No. 05-21023
CAL. No. 07-01057-MV

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

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 8-31-07
ADJ. DATE 11-28-07
Mot. Seq. # 002 - MotD
004 - XMD

GEORGE A. CIMINELLO, Plaintiff,	GRUENBERG & KELLY, PC Attorneys for Plaintiff 3275 Veterans Memorial Highway, Suite B-9 Ronkonkoma, New York 11779
	BREEN & CLANCY Attorneys for Defendants Sullivan 1355 Motor Parkway, Suite 2 Hauppauge, New York 11749
- against -	JOHN G. GRIFFIN, ESQ. Attorney for Defendant Robert Hartford 46 Route 25A, Suite 8 East Setauket, New York 11733
BRIAN C. SULLIVAN, GERARD E. SULLIVAN, ROBERT HARTFORD, PATRICIA HARTFORD and DAVID McDOWELL, Defendants.	KUJAWSKI & DELLICARPINI Attorneys for Defendant Patricia Hartford 1637 Deer Park Avenue Deer Park, New York 11793
	SCHONDEBARE & KORCZ Attorneys for Defendant McDowell 355 Veterans Memorial Highway, Suite K Ronkonkoma, New York 11779

Upon the following papers numbered 1 to 68 read on this motion and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 20 ; Notice of Cross Motion and supporting papers 21 - 50 ; Answering Affidavits and supporting papers 51 - 55; 56 - 60 ; Replying Affidavits and supporting papers 61 - 64; 65 - 68; Other plaintiff's memorandum of law; defendant's memorandum of law ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendants Brian Sullivan and Gerrard Sullivan's motion for summary judgment dismissing plaintiff's complaint is decided as follows; and it is further

ORDERED that plaintiff's cross motion for summary judgment against the defendants on the issue of liability is denied.

Plaintiff George Ciminello commenced this action to recover damages for personal injuries allegedly sustained on July 29, 2005 when he was struck in the eye by a cup filled with urine thrown from the window of a moving vehicle. The cup was thrown by defendant Robert Hartford, who was riding as a passenger in a motor vehicle owned by defendant Gerard Sullivan and operated by defendant Brian Sullivan. Defendants Patricia Hartford[1] and David McDowell also allegedly were riding as passengers in the Sullivan vehicle at the time of the incident. Plaintiff alleges that the defendants caused his injuries by their negligent and reckless conduct, and by their use and operation of a motor vehicle in a manner which violated several sections of the New York State Vehicle and Traffic Law ("VTL").

Defendants Brian Sullivan and Gerard Sullivan now move for summary judgment dismissing plaintiff's complaint against them. Specifically, Gerard Sullivan argues that plaintiff's claims against him for vicarious liability as an absentee owner of the motor vehicle should be dismissed because plaintiff may not maintain such an action where the injuries sustained did not arise out of the use or operation of the motor vehicle. Likewise, Brian Sullivan argues that the claims against him should be dismissed, since plaintiff's injuries did not arise from his use or operation of the motor vehicle and there is no proof that he otherwise caused plaintiff's injuries. In support of their motion defendants submit, inter alia, copies of the pleadings and the transcripts of the parties' deposition testimony.

Plaintiff cross moves for summary judgment in his favor on the issue of liability. Plaintiff argues that as owner of the motor vehicle involved in the incident, Gerard Sullivan is vicariously liable for the negligent and reckless conduct of the vehicle's operator and passengers under VTL §388. In addition, plaintiff argues that both Brian Sullivan and Robert Hartford are liable, as they negligently and recklessly caused his injuries. Plaintiff also seeks leave to amend his Verified Bill of Particulars.

Defendant Robert Hartford opposes both motions. Hartford argues that plaintiff's motion should be denied because plaintiff failed to submit sufficient evidence in admissible form to entitle him to summary judgment. In particular, Hartford asserts that plaintiff has submitted portions of the transcripts of defendants Brian Sullivan and Robert Hartford's testimony which were sealed as a part of the defendants' Youthful Offender adjudication. Hartford also argues that plaintiff's request seeking leave to amend his Bill of Particulars should be denied, because it is untimely and prejudicial. Further, in pointing out the possible confusion between the use of the guidelines for New York Insurance Law §1503 (a) and VTL §388, Hartford urges that dismissal of the claims against Brian and Gerard Sullivan on the ground that plaintiff's injuries did not arise from the use or operation of the subject motor vehicle requires a dismissal of the claims against him.

During his deposition testimony, plaintiff testified that the incident took place while he and a companion were walking south bound on Portion Road. He testified that he observed subject motor vehicle on two occasions. He testified that on the first occasion, someone in the vehicle blew a loud

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[1] By stipulation of the parties dated August 14, 2007, defendant Patricia Hartford was dismissed from the action.

whistle at them. He testified that on the second occasion, approximately fifteen minutes later, he saw the same car make a U-turn and head toward them as they were walking on the south side of Portion Road. He testified that he observed an arm protruding from the car with a white object within its finger tips. He testified that less than a second later the arm and the cup made contact with the left side of his face and the bridge of his nose under his right eye. He testified that the blow to his face caused his left eye and nose to bleed.

During her deposition, non-party witness Jessica Gessner testified that she was walking on the sidewalk with the plaintiff on Portion Road when a passing motor vehicle swerved close to the curb and a passenger in the vehicle threw a cup filled with urine into plaintiff's face. She testified that the male who threw the cup had his head and shoulders hanging outside of the car. She testified that she did not see the cup make contact with the plaintiff's face, because she looked away when some of the urine splashed on her shoulder. She testified that she noticed that the plaintiff was hurt when she observed his blood on her left arm as he was looking to the ground and complaining that he could not open his eyes.

During his examination before trial, Brian Sullivan testified that he was listed as an insured driver of the vehicle which he was driving on the night of the incident. He testified that he and Robert Hartford planned to douse someone on the street with urine after they left the diner where they ate dinner. He testified that they purchased a large plastic cup of soda from a nearby 7-11 and subsequently stopped on the side of the street in order to allow Hartford to fill the cup with urine. He testified that they decided to douse the plaintiff when they observed him and his female companion walking on Portion Road. He testified that at the time Hartford threw the cup at plaintiff he was driving his vehicle at a speed of 30 miles per hour, and that he swerved the car close to the curb just before the incident. He testified that he never crossed the white line of the shoulder and that he was approximately 10 feet away when the plaintiff was doused.

During his examination before trial, Gerrard Sullivan testified that his son, defendant, Brian Sullivan, was listed as one of the covered drivers under his insurance policy for the subject motor vehicle. He testified that his son had his permission and consent to use the vehicle on the night of the incident.

At his examination before trial, Robert Hartford testified that he and his friends came up with a plan to urinate in a cup and splash someone on the street with the urine as they were driving by. He testified that he blew a whistle at the plaintiff and his companion when he first observed them on Portion Road. He testified that after driving a block or two, Brian Sullivan made a U-turn and then swerved into the shoulder lane in order to get close enough to plaintiff and his companion. He testified that the cup was ¾ filled and that it was not in his hand when it hit the plaintiff in his face. He testified that it was not his intention to throw the cup, but that it slipped from his hand and hit the plaintiff as he attempted to splash him.

Initially, the Court notes that it did not rely on the privileged information contained within the defendants' criminal plea allocutions in reaching its conclusion. However, a review of the record reveals that the defendants voluntarily disclosed the otherwise-privileged information contained within their allocution by testifying to the facts underlying the incident in which plaintiff sustained his injuries within the transcripts of their deposition testimonies (*see*, ***In the Matter of Barnett v David M. W.***, 22

AD3d 575, 802 NYS2d 711 [2005]). Furthermore, with regard to plaintiff's cross motion, "[a]n untimely cross motion for summary judgment may be considered by the Court where a timely motion for summary judgment was made on nearly identical grounds" (*see*, ***Grande v Peteroy***, 39 AD3d 590, 592, 833 NYS2d 615 [2007]; *see also,* ***Ellman v Village of Rhinebeck***, 41 AD3d 635, 838 NYS2d 641 [2007]; ***Bressingham v Jamaica Hosp. Med. Ctr.***, 17 AD3d 496, 793 NYS2d 176 [2005]). In such circumstances, the issues raised by the untimely cross motion are already properly before the court and, thus, the nearly identical nature of the grounds may provide the requisite good cause under CPLR §3212 (a) (1) (*see*, ***Grande v Peteroy***, *supra*; ***Ellman v Village of Rhinebeck***, *supra*). Here, plaintiff's cross motion for summary judgment was made on nearly identical grounds to those litigated within defendants' timely motion. Although they seek differing interpretations, defendants and plaintiff are seeking summary judgment pursuant to VTL §388 (*see*, ***Grande v Peteroy***, *supra*; ***Ellman v Village of Rhinebeck***, *supra*; ***Bressingham v Jamaica Hosp. Med. Ctr.***, *supra*).

With regard to the portion of plaintiff's motion seeking to amend his bill of particulars, CPLR §3025(b) provides that leave to serve an amended pleading should be freely given as long as the opponent is not surprised or prejudiced and the proposed amendment appears to be meritorious (*see*, ***Holchendler v We Transp.***, 292 AD2d 568, 739 NYS2d 621 [2002]; ***Leszczynski v Kelly & McGlynn,*** 281 AD2d 519, 722 NYS2d 254 [2001]; ***Charleson v City of Long Beach***, 297 AD2d 777, 747 NYS2d 802 [2002]). Although the courts are reluctant to allow amendments to the pleading where there is lengthy delay and the case has already been certified (*see*, ***Clarkin v Staten Is. Univ. Hosp.***, 242 AD2d 552, 662 NYS2d 91 [1997]), courts are unlikely to deny the request to amend if the proposed amendments do not prejudice the adverse party by changing the basic issues of the action or by adding significant factual allegations of which the party was unaware (*see*, ***Symphonic Electronic Corp., v Audio Devices***, 24 AD2d 746, 263 NYS2d 676 [1965]; ***Rogers v South Slope Holding Corp.***, 255 AD2d 898, 680 NYS2d 772 [1998]; *see also*; ***Rodriguez v State***, 153 Misc2d 363, 581 NYS2d 972 [1992]). Although more than 120 days have passed, there is no surprise or prejudice to the defendants since the proposed amendments merely amplifies facts already included within plaintiff's complaint and does not change the basic issues in the case or involve new or additional factual allegations (*see*, ***Symphonic Electronic Corp., v Audio Devices***, *supra*; ***Rogers v South Slope Holding Corp.***, *supra*; *see also,* ***Brewster v Baltimore & Ohio R.R. Co.***, 185 AD2d 653, 585 NYS2d 647 [1992]).

With regard to the Sullivan defendants' motion for summary judgment in their favor, although VTL §388 allows claims against the owner of a motor vehicle if a plaintiff is injured during the "use or operation" of such vehicle, "[n]ot every injury occurring in or near a motor vehicle is covered by the phrase 'use or operation'" (***Olin v Moore***, 178 AD2d 517, 517, 577 NYS2d 446 [1991]; *see*, ***Horney v Tisyl Taxi Corp.***, 93 AD2d 291, 461 NYS2d 799 [1983]). A plaintiff's injuries cannot be said to arise from the use or operation of a motor vehicle where the operation or driving function of the automobile, or the condition of the automobile itself, is not the proximate cause of the injury (*see*, ***United Servs. Auto. Assn. v Aetna Cas. & Sur. Co.***, 75 AD2d 1022, 429 NYS2d 508 [1980]; ***Levitt v Peluso***, 168 Misc 2d 239, 638 NYS2d 878 [1995]). Indeed, VTL §388 requires that negligence in the use of the vehicle must be shown, and that such negligence is a cause of the injury (***Argentina v Emery World Wide Delivery Corp.***, 93 NY2d 554, 693 NYS2d 493 [1999]; ***Bouchard v Canadian Pac***, 267 AD2d 899, 700 NYS2d 940 [1999]; *see also*, ***Gaige v Kepler***, 303 AD2d 626, 756 NYS2d 644 [2003];***Olin v Moore***, *supra*; ***Horney v Tisyl Taxi Corp.***, *supra*).

While the use of the Sullivan vehicle may have contributed to the severity of plaintiff's injuries, the adduced testimony indicates that the injuries did not arise from the use or operation of the subject motor vehicle (*see*, ***Gaige v Kepler***, *supra*; ***Olin v Moore***, *supra*; ***Horney v Tisyl Taxi Corp.***, *supra*; ***Levitt v Peluso***, *supra*). Plaintiff's injuries were neither the result of the operation or driving function of the automobile, or the condition of the automobile itself. Rather, plaintiff's injuries resulted from the intentional acts of Brian Sullivan and Robert Hartford, who allegedly contrived to assault the plaintiff by swerving the motor vehicle closer to the curb and throwing a urine filled cup in his face. Therefore, as plaintiff's injuries are not covered within the ambit of the "use and operation" clause of VTL §388, the claim against defendant Gerrard Sullivan for vicariously liability must be dismissed (*see*, ***Gaige v Kepler***, *supra*; ***Olin v Moore***, *supra*; ***Horney v Tisyl Taxi Corp.***, *supra*; ***Levitt v Peluso***, *supra*). However, the portion of defendants' motion seeking dismissal of plaintiff's claims against defendant Brian Sullivan is denied, as plaintiff has raised an issue of fact as to whether his injuries resulted, in part, from the intentional acts of Brian Sullivan (*see,* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [1987]).

With respect to plaintiff's cross motion for summary judgment against defendants on the issue of liability, inasmuch as Gerrard Sullivan is granted summary judgment dismissing plaintiff's claim for vicarious liability based on VTL §388, the portion of plaintiff's cross motion seeking to establish Gerrard Sullivan's liability for his injuries is denied, as moot. Plaintiff's cross motion for summary judgment on the issue of liability against the remaining defendants based upon their "negligent" or "reckless" conduct is also denied. The adduced evidence indicates that plaintiff's injuries resulted from the intentional conduct of the remaining defendants rather than mere negligent or reckless behavior. To the extent plaintiff failed to assert any cause of action predicated upon the intentional conduct of the remaining defendants, he may not now obtain summary judgment on a cause of action not alleged within his complaint (*see*, ***Left v Canada Life Assur. Co.***, 40 AD2d 641, 336 NYS2d 478 [1972]). Moreover, while the evidence indicates the existence of an arguably meritorious cause of action different from the one pleaded, the Court must consider plaintiff's complaint as drawn, not what the result might be on a differently drawn complaint (*see*, ***Bennardi & Assocs., Inc. v Ramsons One, Inc.***, 8AD3d 948, 779 NYS2d 630 [2004]; ***Meadow Brook National Bank v Feraca***, 33 Misc2d 616, 224 NYS2d 846 [1962]). Therefore, plaintiff's cross motion for summary judgment against the remaining co-defendants on the issue of liability is denied. Nevertheless, under these circumstances, plaintiff is granted leave to apply to the Court for leave to serve and file an amended complaint within 30 days after the entry of this order (*see*, ***Bennardi & Assocs., Inc. v Ramsons One, Inc.***, *supra*; ***Left v Canada Life Assur. Co.***, *supra*; ***Meadow Brook National Bank v Feraca***, *supra*).

Dated: MAR 17 2008

J.S.C

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**