Calhoun v County of Suffolk
2008 NY Slip Op 33702(U)
July 17, 2008
Supreme Court, Nassau County
Docket Number: 21672/07
Judge: Michele M. Woodard
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SUPREME COURT STATE OF NEW YORK
COUNTY OF NASSAU

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BRIAN CALHOUN as administrator of the Estate of WILLIAM S. CALHOUN, deceased,
Plaintiff,

-against-

COUNTY OF SUFFOLK, COUNTY OF NASSAU, RICHARD MAIR, ELRAC INC. and CAROLYN JIMENEZ,
Defendants.

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MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 16
Index No.: 21672/07
Motion Seq. No: 03

Papers Read on This Motion:

1. Defendant, Jimenez's, Notice of Motion.....02
2. Plaintiff's Affirmation in Opposition.....xx
3. Defendant, Jimenez's, Reply Affirmation.....xx

The Defendant, Carolyn Jimenez (hereinafter "Jimenez"), moves for an Order pursuant to CPLR §3211 dismissing the Plaintiff's Complaint for failure to state a cause of action where relief can be provided and dismissing the gross negligence causes of action which also seek punitive damages against her, and for such other and further relief as this Court deems just and equitable.

According to the Defendant, Jimenez's, motion papers, this action arose out of an automobile accident which occurred on December 28, 2006. The Plaintiff alleges in its first Cause of Action that the Defendant, Jimenez, rented a 2006 Pontiac from the Defendant, Elrac Inc., and that the Defendant, Richard Mair (hereinafter "Mair") was operating the vehicle with the consent of Jimenez. According to the Plaintiff's opposition papers, the police were chasing Mair as a result of a police officer's witnessing a drug transaction by an individual who was with Mair at the time. The Plaintiff alleges that as a result of Mair's losing control of the vehicle, he drove through the home of the Plaintiff's decedent, William Calhoun, striking Mr. Calhoun, causing him pain and suffering which ultimately led to his death. Following the accident, Mair had blood drawn from his body which revealed the presence of drugs at a level of impairment. As a result of this tragic accident, Mr. Calhoun's next of kin commenced this wrongful death action

against the above-named Defendants.

The Defendant, Jimenez, alleges that pursuant to New York Vehicle and Traffic Law §388 and §128, she cannot be held liable because she was not the owner nor operator of the vehicle involved in the accident, she was the renter of the vehicle from the Defendant, Elrac Inc. Jimenez argues that because New York Vehicle and Traffic Law §128 includes in its definition of an "owner," a person entitled to use and possess a vehicle as a result of a lease of a motor vehicle for a period greater than thirty days, and because her rental agreement with Elrac Inc., was for a period of one week according to Jimenez's Affidavit found in the motion papers, she cannot be held liable as she is not an "owner" within the meaning of New York Vehicle and Traffic Law §128. In support of this argument, Jimenez relies on *La Plant v Cutlip,* 258 AD2d 769 (3d. Dept., 1999) where a lessee of a tractor-trailor was held to be the owner of the tractor-trailer, and thus was not vicariously liable for the negligence of a driver in connection with the accident, where the lessee did not have exclusive control of the tractor-trailer for over 30 days prior to the accident. As for the punitive damages, Jimenez contends that punitive damages are available in tort cases when the conduct of the Defendant has a high degree of moral culpability *(Home Ins. Co. v American Home Prods. Corp.*, 75 NY2d 196 (1990)). However, Jimenez argues that the because the Plaintiff has not alleged any wanton, willful or egregious conduct on her part, the punitive damage allegation against her should be dismissed.

The Plaintiff concedes that Jimenez is not vicariously liable as an "owner;" however, contends that what is not clear at this stage of the litigation is whether Jimenez negligently entrusted the vehicle to the Defendant, Mair. The Plaintiff argues that according to the Restatement (Second) of Torts §308,

> "[I]t is negligent to permit a third person to use a thing or engage in an activity which is under the control of the actor, if the actor knows or should know that such a person intends or is likely to use the thing or conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others."

The Plaintiff argues that because there is no evidence presented in Jimenez's moving papers that shows that she did not give Mair permission to use the motor vehicle, there exists a question of fact as to whether Jimenez gave Mair permission to use the vehicle knowing he had a propensity to use drugs and whether he was in fact under the influence of drugs when she allowed him to use the vehicle. The Plaintiff argues that these unanswered questions alone preclude the granting

of the within motion. The Plaintiff further argues that according to *Bennett v Geblein,* 71 AD2d 96 (4d., Dept., 1979), if in fact Jimenez knew that Mair was under the influence of drugs, this fact would establish her liability. The Plaintiff also argues that at this stage in the litigation it is impossible to establish that Jimenez was aware that Mair had his license revoked in 2005 or was on lifetime parole; therefore, the within Motion should be denied in order to determine these facts.

In reply, Jimenez argues that at the very least because the Plaintiff has not opposed that part of the movant's application to dismiss the causes of action seeking punitive damages, this portion of the application must be granted. Moreover, according to Jimenez's Affidavit attached to the Reply Affirmation, she did not give permission or consent for Mair to use the vehicle, and she had no knowledge of any of Mair's past drug use. Therefore, counsel for Jimenez argues that the Plaintiff must come forth with some evidence to oppose the instant motion and raise a question of fact, and because of its failure to do so, the within motion must be granted. Jimenez also argues that according to caselaw, in order to impose liability under a negligent entrustment theory, the Plaintiff must demonstrate: 1) that the Defendant had control over a thing of activity, 2) that the Defendant permitted or enabled another person to use the thing or engage in the activity, 3) that the Defendant had special knowledge concerning a characteristic or condition peculiar to said other person, which characteristic rendered said person's use of the thing, or conduct in the activity, likely to create unreasonable risk of harm to others, and 4) that the harm sustained by the Plaintiff was a result of the risk thus created. *Weeks v City of New York*, 181 Misc.2d 39 (1999). Jimenez argues that because she did not permit or enable Mair to use the vehicle, and did not know that Mair was a drug user or under the influence of drugs on the date of the occurrence, that his driver's license was revoked, or that he was on lifetime parole, the within Motion should be granted.

> **New York State Vehicle and Traffic Law §388 (2005)** states in relevant part: "Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to persons or property resulting from negligence in the use or operation of such vehicle...by any person using or operating the same with the permission, express or implied, of such owner."
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> **New York State Vehicle and Traffic Law §128 (2005)** states in relevant part: "[A]n owner of a motor vehicle is defined as] [a] person...having...title to a

vehicle. The term includes a person entitled to the use and possession of a vehicle...subject to a security interest in another person and also includes any lessee...of a motor vehicle...having the exclusive use thereof, under a lease or otherwise for a period greater than thirty days."

CPLR §3211 states in relevant part:
"A party may move for judgment dismissing one or more causes of action asserted against him on the ground that...the pleading fails to state a cause of action."

The Court finds that Jimenez cannot be held vicariously liable as an "owner" within the meaning of New York State Vehicle and Traffic Law §§388 and 128. The Plaintiffs did not allege in the Complaint that the conduct of Jimenez had a high degree of moral culpability (*Home Ins. Co. v American Home Prods. Corp.*, 75 NY2d 196 (1990)), or was activated by an evil or reprehensive motive (*Walker v Sheldon*, 10 NY2d 401 (1961), but only alleged that Mair operated the vehicle with the permission and the consent of Jimenez. As such, the Court finds the Complaint does not allege a Causes of Action for punitive damages against the Defendant, Jimenez. Thus, the Plaintiff has not stated any Cause of Action for which relief can be granted against Jimenez. Although the Plaintiff does mention Jimenez's "moral culpability" as a result of "her actions" in its Affirmation in Opposition to this Motion, the Plaintiff cannot cure such a failure by this Affirmation. Thus, the Court finds that the Defendant's Motion is **GRANTED**.

As such it is hereby

ORDERED, that the Complaint as to the Defendant, Carolyn Jimenez **DISMISSED**. It is also

ORDERED, that the remaining parties are to attend a Compliance Conference on December 11, 2008 at the Nassau County Supreme Court, Part 16.

Any relief not granted herein is **DENIED**.

This constitutes the **DECISION** and **ORDER** of the Court.

DATE: July 17, 2008
Mineola, N.Y.

ENTER: _____
HON. MICHELE M. WOODARD
J.S.C.

ENTERED
JUL 21 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE