

**Calhoun v County of Suffolk**

2009 NY Slip Op 30254(U)

January 26, 2009

Supreme Court, Nassau County

Docket Number: 021672/07

Judge: Michele M. Woodard

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SCAN

SUPREME COURT OF THE STATE OF NEW YORK  
Present: **HON. MICHELE M. WOODARD**  
**JUSTICE**

\_\_\_\_\_  
**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**  
**JIMINEZ**

Defendants

\_\_\_\_\_  
X

TRIAL/IAS PART 14

Index No. 021672/07  
Motion Seqs. #4,5,6,7  
Submit Date: 1/21/09

**DECISION AND ORDER**

The following papers were read on this motion:

1. Notice of Motion dated September 3, 2008
2. Affirmation in Support dated September 3, 2008
3. Notice of Cross-motion dated September 10, 2008
4. Affirmation in Support dated September 10, 2008
5. Notice of Motion dated October 16, 2008
6. Affirmation in Support dated October 16, 2008
7. Affirmation in Partial Opposition and in Reply dated October 28, 2008
8. Notice of Cross-Motion and Affirmation in Opposition dated December 30, 2008
9. Affirmation in Support and in Opposition dated December 30, 2008
10. Affirmation in Opposition dated January 5, 2009
11. Reply Affirmation and Affirmation in Opposition dated January 16, 2009

*Relief Requested:*

The defendant Carolyn Jiminez, moves for an order granting leave to renew or reargue the previously interposed application which sought dismissal of the plaintiff's complaint as asserted against her and upon such renewal and reargument, requests an order dismissing any and all

cross-claims asserted against her. (Sequence #004).

The defendant, County of Nassau, cross-moves for an order dismissing the complaint together with any and all cross-claims asserted against it. (Sequence #005).

The defendant, Elrac Inc. d/b/a Enterprise Rent a Car [hereinafter ELRAC], moves pursuant to CPLR §§3211, 3212 for an order dismissing the plaintiff's complaint together with any and all cross-claims asserted against it or in the alternative an order pursuant to CPLR §3025 granting leave to amend it's answer to include a cross-claim as against co-defendant Carolyn Jiminez, for contractual indemnification. (Sequence #006).

The defendant, County of Suffolk, moves pursuant to CPLR §3025(b) for an order seeking leave to serve an Amended Answer to include a cross-claim against co-defendant ELRAC for common law contribution and indemnification. (Sequence #007).

*Procedural and Factual History:*

On December 28, 2006, the plaintiff/decendent, William Calhoun, died in his living room when a 2006 Pontiac automobile, bearing license plate number CWJ197, and driven by defendant Richard Mair crashed into the home of the plaintiff after being pursued by members of the Suffolk County Police Department. This vehicle was owned by defendant ELRAC d/b/a Enterprise Rent A Car, which rented the car to defendant Carolyn Jiminez. Ms. Jiminez alleges that defendant Mair took possession of the subject vehicle without her knowledge or consent.

As a result of the foregoing, the underlying action was commenced by the decendent's estate in December of 2007. The complaint alleges causes of action sounding in negligence, wrongful death, deceit and fraud. By Order dated June 10, 2008, this Court dismissed the plaintiff's third cause of action sounding in fraud against both Suffolk County and Nassau

County. Additionally, by separate order dated July 17, 2008, this Court dismissed the plaintiff's complaint as asserted against Carolyn Jiminez. No other relief was granted to Ms. Jiminez by said order.

Defendants County of Suffolk, County of Nassau, ELRAC, and Carolyn Jiminez, have interposed separate applications seeking various forms of relief, each of which is determined as set forth hereinafter.

*Motion by Defendant Jiminez for leave to Renew/Reargue:*

Initially, the Court turns to the application interposed by defendant Jiminez, and which seeks an order granting renewal/reargument of this Court's July 17, 2008 Decision and Order. In support of the application, counsel for the defendant states that in the original application which sought dismissal of the plaintiff's complaint, the movant inadvertently neglected to request that all cross claims be dismissed along with the complaint. Counsel contends that inasmuch as the complaint was in fact dismissed against defendant Jiminez, the cross-claims should now, as well, be dismissed.

It is well settled that "[m]otions for reargument are addressed to the sound discretion of the trial court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or mistakenly arrived at its earlier decision." (*Viola v City of New York*, 13 AD3d 439; *Carrillo v PM Realty Group*, 16 AD3d 611; *McNeil v Dixon*, 9 AD3d 481). A motion to reargue is not to afford an unsuccessful party with additional opportunities to reargue issues previously decided, or to set forth arguments which differ in substance from those originally articulated ( *McGill v Goldman*, 261 AD2d 593; *Woody's Lumber Co., Inc. v Jayram Realty Corp.*, 30 AD3d 590; *Gellert & Rodner v Gem*

*Community Mgt.*, 20 AD3d 388).

Alternatively, a motion for leave to renew “shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination(CPLR §2221[e][2]). The purpose of a motion to renew is “to draw the court’s attention to new or additional facts, which, although in existence at the time of the original motion, were unknown to the party seeking leave to renew and therefore not brought to the court’s attention (*Gomez, v Needham Capital Group, Inc.*, 7 AD3d 568 quoting *Natale v Samel & Assocs.*, 264 AD2d 384). An application for renewal may also be based upon law which was not previously considered by the court (*Caryl S v Child & Adolescent Treatment Services, Inc.*, 238 AD2d 953).

The rules governing renewal applications are, however, “flexible” and in its discretion, the court can grant renewal, in the interests of justice, based upon facts which were previously known to the movant. (*Gomez, v Needham Capital Group, Inc.*, 7 AD3d 568, *supra*; *Garner v Latimer*, 306 AD2d 209).

Applying the foregoing to the facts and circumstances extant, the motion by defendant Jiminez for leave to reargue the decision of this Court dated July 17, 2008 is hereby DENIED. Upon review of the arguments originally posited within the context of the defendant’s earlier application, and is conceded by counsel, nowhere therein contained are any arguments in support of dismissing those cross-claims as are asserted against Ms. Jiminez. Accordingly, this Court did not and could not have overlooked or misinterpreted any law or facts in rendering it’s prior determination. Further, there are no new facts which were unknown to the movant at the time of the original application and thus the application seeking leave to renew is similarly DENIED.

(Sequence #004).

Motion by the County of Nassau :

The County of Nassau cross-moves for an order formally dismissing the complaint in it's entirety, as well as any and all cross-claims asserted against it. In support of the within application, counsel for the County of Nassau contends that the only cause of action contained in the plaintiff's complaint which alleges wrongdoing on the part of the County is the third cause of action. Counsel argues that inasmuch as this cause of action has been previously dismissed by this Court that an order should thus be granted dismissing the complaint in it's entirety together with any cross-claims asserted.

A careful review of the complaint indeed reveals that the only allegations directly put forth against Nassau County are those which are alleged in the third cause of action which was dismissed against the County by Order of this Court dated June 10, 2008. Moreover, said review reveals that there is no factual basis linking the County of Nassau to the accident which forms the basis on the underlying action. Therefore, the application is GRANTED and the plaintiff's complaint is hereby dismissed in it's entirety against the County of Nassau, together with any and all cross-claims asserted it. (Sequence #005).

Motion by ELRAC

In support of that branch of the application seeking dismissal of the plaintiff's complaint, counsel posits that ELRAC is the owner of the subject vehicle, as well as a company in the business of renting automobiles and is therefore insulated from liability by operation of the "Graves Amendment" as codified at 42 USCA §30106 and which is a part of the Federal Transportation Equity Act. Counsel argues that as a result all claims asserted against ELRAC

must be dismissed as a matter of law.

ELRAC annexes various documents in support of its application including the relevant rental agreement, an affidavit of Jason Jones, an employee of ELRAC, and two affidavits of Carolyn Jiminez, which were previously submitted by Ms. Jiminez in connection to her motion to dismiss. Mr. Jones, who is employed by ELRAC in the capacity as Senior Loss Control Administrator, states that ELRAC is a corporation in the business of renting motor vehicles to the general public doing business as Enterprise Rent A Car. Mr. Jones conducted a review of the loss claims file relevant to the subject automobile and based upon said review, as well as his personal knowledge, avers that in December of 2006 ELRAC was the owner of the 2006 Pontiac automobile bearing the license plate CWJ197. He further states that on December 20, 2006, said vehicle was rented to Carolyn Jiminez. Mr Jones additionally states that his review of the records relating to this vehicle revealed that there were an absence of any pre-accident complaints relating to the performance thereof.

A review of the two affidavits authored by Ms. Jiminez and the averments contained therein reveals that she was not the owner of the 2006 Pontiac automobile but rather rented same on December 20, 2006 from ELRAC. Ms. Jiminez further states that defendant Richard Mair operated the subject automobile without her knowledge, permission or consent.

Counsel for the County of Suffolk, as well as the plaintiff set forth several arguments in opposition to the application interposed by ELRAC. Initially, counsel for each of the opposing parties contend that there are questions of fact as to whether the rental agreement executed by and between ELRAC and Ms. Jiminez was a true rental agreement as opposed to a loaner agreement, the latter of which would allegedly bring ELRAC beyond the protections afforded by

the Graves Amendment. Additionally, the plaintiff and the County of Suffolk each contend that the rental agreement is not admissible as the print size thereon is not that which is required by CPLR §4544.

It is well settled that a motion for summary judgment is a drastic remedy that should not be granted where there is any doubt as the existence of a triable issue of fact (*Sillman v Twentieth Century Fox*, 3 NY2d [1957]; *Bhatti v Roche*, 140 AD2d 660 [2d Dept 1998]). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof in admissible form sufficient to warrant the Court, as a matter of law, to direct judgment in the movant's favor. Such evidence may include deposition transcripts as well as other proof annexed to an attorney's affirmation (CPLR §3212 [b]; *Olan v Farrell Lines*, 64 NY2d 1092 [1985]).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. It is incumbent upon the non-moving party to lay bare all of the facts which bear on the issues raised in the motion (*Mgrditchian v Donato*, 141 AD2d 513 [2d Dept 1998]). Conclusory allegations are insufficient to defeat the application and the opposing party must provide more than a mere reiteration of those facts contained in the pleadings (*Toth v Carver Street Associates*, 191 AD2d 631 [2d Dept 1993]).

In the instant matter, the Court finds that ELRAC has demonstrated its *prima facie* showing entitling it to judgment as a matter of law (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; *Alvarez v Prospect Hospital*, 68 NY2d 320[1986]). In opposition

neither the plaintiff nor the County of Suffolk has raised a material issue of fact (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

The Federal Transportation Equity Act of 2005 and particularly that section referred to as the Graves Amendment as embodied in 49 USCA §30106 provides the following, in relevant

part: (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).

Having been determined to be a constitutional exercise in congressional power, the Graves Amendment is applicable to all actions commenced on or after August 10, 2005 and has been held to preempt vicarious liability from being imposed upon commercial renters and lessors of automobiles (*Graham v Dunkley*, 50 AD3d 55 [2d Dept 2008]; *see also Vedder v Cox*, 18 Misc3d 1142 [2008]).

In the instant matter, having review the record the Court finds that ELRAC is entitled to the protections afforded by the statute. Even assuming that the rental agreement is in contravention of CPLR §4544 and therefore unavailable for use by ELRAC as competent evidence of ownership of the vehicle, ELRAC has notwithstanding demonstrated the applicability of the Graves Amendment to the extant circumstances.

Via the production of the affidavit of Mr. Jones, ELRAC has demonstrated both that it

was the owner of the vehicle in issue and that it was in fact an entity in the business of renting and or leasing motor vehicles (42 USCA §30106). Moreover, there is no evidence that ELRAC was negligent with respect to their maintenance of the subject vehicle or that it rented the automobile to defendant Mair, the unauthorized operator of the vehicle on the day of the accident. In her affidavit, Ms. Jiminez clearly and unequivocally states that she was the individual who rented the car from ELRAC.

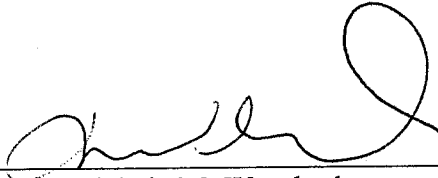
Based upon the foregoing, the motion by ELRAC made pursuant to CPLR §3212 seeking an order granting summary judgment dismissing the plaintiff's complaint together with any and all cross-claims asserted against it is hereby GRANTED. (Sequence #006).

In consideration of the foregoing, the second branch of the motion by ELRAC made pursuant to CPLR §3025 and which sought leave to amend it's answer to include a cross-claim as against co-defendant Carolyn Jiminez, for contractual indemnification is DENIED as moot and that motion interposed by the County of Suffolk made pursuant to CPLR §3025 for an order seeking leave to serve an Amended Answer to include a cross-claim against co-defendant ELRAC for common law and contribution and indemnification is similarly DENIED as moot. (Sequence #007).

This constitutes the Decision and Order of the Court.

Any applications not specifically addressed herein are deemed DENIED.

DATED: Mineola, New York  
January 26, 2009



Michele M. Woodard  
J.S.C.

**ENTERED**  
JAN 29 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE