

<b>Rodriguez v New York City Dept. of Probation</b>
2009 NY Slip Op 30594(U)
March 17, 2009
Supreme Court, New York County
Docket Number: 112776/06
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: RAKOWER  
Justice

PART 5

Index Number : 112776/2006  
RODRIGUEZ, ANGEL  
vs  
DEPARTMENT OF PROBATION  
Sequence Number : 002  
SUMMARY JUDGMENT

INDEX NO. 112776/06  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 002  
MOTION CAL. NO. \_\_\_\_\_

the following papers \_\_\_\_\_ this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits X MOT  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER

**FILED**  
MAR 20 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 3/17/09

EILEEN A. RAKOWER J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5

-----X  
ANGEL RODRIGUEZ and JOAN RODRIGUEZ,  
Plaintiffs,

Index No.  
112776/06  
**ORDER AND  
DECISION**  
Mot. Seq.: 002

- against -

NEW YORK CITY DEPARTMENT OF PROBATION,  
THE CITY OF NEW YORK and NATHANIEL W.  
BROWN,

Defendants

-----X  
EILEEN A. RAKOWER, J.S.C.

**FILED**  
MAR 20 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Plaintiffs brings this action for personal injuries allegedly sustained when plaintiff Angel Rodriguez was involved in a motor vehicle accident with a New York City Probation officer, defendant Nathaniel W. Brown ("Brown"), while driving on Route 22 in Springfield, New Jersey on June 25, 2005. Plaintiff Joan Rodriguez brings a derivative action. Plaintiffs now move for summary judgment pursuant to CPLR 3212. The owners of the van driven by Brown, the New York City Department of Probation and the City of New York ("City") oppose and cross-move for summary judgment dismissing claims against them. Plaintiffs previously moved to declare Brown in default after he failed to answer, and a default judgment was granted without the opposition of Brown and without the opposition of City by this courts' order dated August 14, 2007. Thus, Brown's liability has been established.

Plaintiffs, in support of their motion, submit: the pleadings; a copy of an order of this court dated August 14, 2007; a copy of the Notice to Admit, dated September 11, 2008; an Affidavit in Support by Mr. Rodriguez, dated August 9, 2008; and the deposition transcript of both plaintiffs. Plaintiffs append a copy of the police report to their reply papers. Plaintiffs argue that both the police report and Mr. Rodriguez' affidavit establish that Brown changed lanes into the path of Mr. Rodriguez' truck, which was the cause of the collision. Thus, Brown was negligent as he failed to follow his statutory duty.

City submits the following exhibits, not duplicative of plaintiffs' submissions: the deposition transcript of Kenneth Groves, Probation Officer; a copy of the City of New York Department of Probation Vehicular Incident Evaluation Report ("Incident Report"); and a copy of City's "Response to Notice to Admit," dated October 8, 2008.

City, in support of its cross-motion, first argues that it is not liable under a respondeat superior theory because Brown was acting outside the scope of his employment when the accident occurred. Specifically, City points to the fact that the accident occurred on a weekend and Brown works Monday through Friday. City also points to the Incident Report where Brown states: "I wasn't doing anything job related." City next argues that it is not liable as an owner under Vehicle and Traffic Law §388 because Brown was using the vehicle without the express or implied permission of the City. In support of its argument, City points to the deposition testimony of Mr. Groves, Brown's supervisor, who states that Brown only had permission to drive the vehicle Monday thru Friday and was allowed to "maintain" the car at his house on the weekends.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

Vehicle and Traffic Law §1128(a) states:

Driving on roadways laned for traffic. Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply:

- (a) A vehicle shall be driven as nearly as practicable entirely within a single lane and *shall not be moved from such lane until the driver has first ascertained that such movement can be made*

*with safety.*

In *Zummo v. Holmes*, 57 Ad3d 366[1st Dept. 2008], the court found that plaintiff had established her entitlement to partial summary judgment when defendants failed to raise a triable issue of fact as to comparative negligence after plaintiff offered evidence that “she was driving in the right lane when driver of tractor trailer in lane to her left attempted to merge into her lane when his lane ended, in violation of the statute pertaining to driving on roadways laned for traffic, at which point tractor trailer struck her vehicle . . . §1128(a).” (*Id.* at 366).

Here, Mr. Rodriguez testifies that Route 22 is a one way, three lane road. Mr. Rodriguez claims that he was traveling in the far right lane on the day of the accident and testifies as to the circumstances surrounding the accident:

Q: Did that van come in contact with your truck?

A: Yes, it did, sir.

...

Q: Where was the van when you saw it out of the corner of your eye?

A: It just came right across me, sir.

Q: From what direction?

A: From the left.

Q: How far was the van from your truck when you first saw it?

A: Seconds away. I couldn't - -

...

Q: What direction was the van traveling when you first saw it?

A: It just came right across. It wasn't in any direction but horizontal.

...

Q: What, if anything, did you do with respect to the operation of your truck when you first saw the van?

A: I tried to avoid him.

Q: What did you do?

A: I turned right.

Q: Did the truck move right?

A: Yes, it did.

...

Q: Where was your truck at the time of the accident?

...

A: The actual contact - - um - - I would have to say yes, yes, it was on

the grassy area, I tried to move over and we collided. Yes that's how it happened . . .

. . .

Q: Did your truck strike anything other than the van?

A: No sir.

Plaintiffs have submitted testimony evidencing that Brown violated his statutory duty, and thus, are entitled to judgment as a matter of law. The police accident report corroborates Mr. Rodriguez' version of the collision. Additionally, Brown's failure to appear in the action precludes a contrary position by Brown. In opposition, City attempts to rebut Mr. Rodriguez' testimony by pointing to hearsay evidence consisting of Mr. Grove's statement that Brown told him that the accident was not his fault. It is well settled that, "although hearsay may be used to oppose a summary judgment motion, such evidence is insufficient to warrant denial of summary judgment where it is the only evidence submitted in opposition." (*Candela v. City of New York*, 8 AD3d 45, 47 [1<sup>st</sup> Dept. 2004]). Thus, City has failed to raise an issue of comparative negligence.

Vehicle and Traffic Law §388(1) 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 person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by an person using or operating the same with the permission, express or implied, of such owner . . .

VTL §388(1) "creates a rebuttable presumption that the driver was using the vehicle with the owner's permission, express or implied . . . and . . .this presumption continues until there is substantial evidence to the contrary." (*Chappelear v. Dollar Rent-A-Car Systems, Inc.*, 5 AD3d 187[1st Dept. 2004]).

City claims that it has presented undisputed evidence that Brown was not permitted to use the van on weekends. City points to the deposition testimony of Mr. Groves. Mr. Groves testifies:

Q: Were the community associates permitted to operate this van on a weekend?

A: No.

...

Q: Did you give Mr. Brown permission to use this vehicle on the day of the accident, 6/25/05?

A: No, I did not.

Plaintiffs do not submit testimony which contradicts Mr. Groves' statement that Brown did not have permission to use the van on weekends. However, the presumption of permissive use is a strong one and the "uncontradicted testimony of a vehicle owner that the vehicle was operated without his or her permission, does not, by itself, overcome the presumption of permissive use." (*Talat v. Thompson* 47 A.D.3d 705[2nd Dept. 2008]). Indeed, in *Country-Wide Ins. Co. V. National R.R. Passenger Corp.*, 6 NY3d 172(2006), the court stated that even where both the owner and the driver offer uncontradicted testimony that the driver was operating a vehicle without permission, summary judgment is not necessarily warranted. (*Id.* at 177). Further, that court found that "where the disavowals are arguably suspect, as where there is evidence suggesting implausibility, collusion, or implied permission, the issue of consent should go to the jury." (*Id.* At 178). The court, in *Piwowarsky v. Cornwell*, 273 NY 226[1937], states "no court has power to determine the truth or falsity of the evidence of these interested witnesses. Their credibility, even though their testimony be uncontradicted, when . . . its truthfulness or accuracy is open to a reasonable doubt, was exclusively for the jury. (*Id.* at 229) (where vehicle owner claimed that driver did not have permission to drive to a ball game in Buffalo where he ultimately became involved in a collision).

Here, although Mr. Groves states that Brown was not permitted to use the van on weekends without permission from him or another supervisor, there are questions of fact concerning whether Brown had implied permission to use the van. Brown had possession of the keys to the van<sup>1</sup> and he was allowed to drive it home and "maintain" it at his house on weekends. The court in *Travelers Property Casualty Corp. v. Maxwell-Singleton*, 300 A.D.2d 225[1st Dept. 2002], affirmed the special referee's finding that the owner's testimony that he never gave permission to operate his vehicle, failed to rebut the strong presumption of permissive use. (where owner left the vehicle parked behind his shop and left his car keys with the assistant manager of

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<sup>1</sup>According to Mr. Groves' testimony, Brown shared the van with another officer who would take possession of the keys, according to a schedule that the two of them worked out together.

his business). Further, although Mr. Groves states that Brown was not permitted to drive the van on weekends, he also testifies that there are no written Department of Probation rules or regulations to that effect. Mr. Groves further testifies that use of the vehicle on the weekends is permitted if a supervisor orally authorizes it. Lastly, there is no evidence that Brown was ever reprimanded; and indeed, Groves states that Brown continues to work for the Department of Probation. Thus, City has failed to rebut the presumption that Brown was operating the vehicle with the implied permission of the Department of Probation. The question of whether Brown operated the vehicle without the knowledge and permission of its owner is a fact to be determined by the trier of fact at trial.

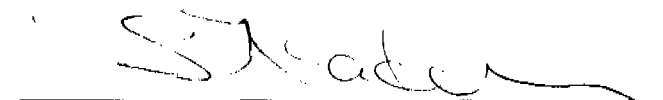
Wherefore it is hereby

ORDERED that plaintiffs' motion for partial summary judgment on the issue of liability only is denied as against defendants the New York City Department of Probation and the City of New York; and it is further

ORDERED that the cross-motion to dismiss is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: March 17, 2009



EILEEN A. RAKOWER, J.S.C.

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