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| Cuellar v Gelco Corp. |
| 2009 NY Slip Op 31414(U) |
| June 26, 2009 |
| Supreme Court, Queens County |
| Docket Number: 4009/2007 |
| Judge: Bernice Daun Siegal |
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE BERNICE D. SIEGAL IA Part 5
Justice

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| JACKELINE CUELLAR, etc., et al. | x | | Number | <u>4009</u> | 2007 |
| - against - | | | Motion | | |
| | | | Date | <u>March 31,</u> | 2009 |
| GELCO CORP., et al. | | | Motion | | |
| | x | | Cal. Numbers | <u>7, 8, 9</u> | |
| | | | Motion Seq. Nos. | <u>2, 3, 4</u> | |

The following papers numbered 1 to 32 read on this motion (motion sequence number 2, calendar number 9) by defendant One Beacon Insurance Group, Ltd. (One Beacon) for an order granting summary judgment dismissing the complaint and all cross claims. Defendant John Savini separately moves (motion sequence number 3, calendar number 7) for an order granting summary judgment dismissing the complaint and all claims against him. Plaintiff separately moves (motion sequence number 4, calendar number 8) for an order granting partial summary judgment on the issue of liability against defendant Christopher Savini.

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Upon the foregoing papers these motions are consolidated solely for the purpose of a single decision and order and are determined as follows:

The court in the order of June 26, 2008, granted that branch of defendant Gelco Corp.'s motion for summary judgment dismissing the complaint and denied that branch of One Beacon's motion for summary judgment dismissing the complaint "with leave to renew after completion of all discovery and depositions but no later than 45 days after service and filing of the Note of Issue and Statement of Readiness" and "ORDERED that the Note of Issue and Statement of Readiness shall be served on or before October 10, 2008."

The Note of Issue and Statement of Readiness, dated October 2, 2008 was served by plaintiffs' counsel on October 2, 2008, and was filed with the court on October 10, 2008.

As regards One Beacon, the 45-day time period in which to renew its motion for summary judgment expired on November 24, 2008. One Beacon service of its motion for summary judgment on February 6, 2009 therefore is untimely, as it failed to comply with the time restraints set forth in the order of June 26, 2008, and failed to seek any extension of said time restraint. One Beacon's motion therefore is denied as untimely (CPLR 3212[a]).

As regards plaintiffs and defendant John Savini, the 120-day period in which to move for summary judgment expired on February 7, 2009 (CPLR 3212[a]).

Plaintiff's motion for partial summary judgment on the issue of liability as to defendant Christopher Savini was served on March 16, 2009, and therefore is untimely. In view of the fact that plaintiff offers no excuse whatsoever for her lateness, thus untimely, is denied (*Brill v City of New York*, 2 NY3d 648, 652 [2004]).

Defendant John Savini's motion for summary judgment was served on February 6, 2009 and therefore is timely.

This action arises out of a motor vehicle accident which occurred on February 7, 2007. Plaintiff Andrea Machiqua was a passenger in a vehicle owned by Victor Peralta and operated by Christian Melendez which came into a contact with a guardrail on the Grand Central Parkway. Ms. Machiqua exited the Peralta vehicle, and sustained serious physical injuries when a 2006 Chevrolet Impala operated by Christopher Savini came into contact with the Peralta vehicle "compelling it into plaintiff Andrea Machiqua." Ms. Machiqua sustained a traumatic amputation of a leg and other serious injuries.

The Chevrolet was owned by Gelco Corp., who had leased it to One Beacon. One Beacon assigned said vehicle to defendant John Savini, an employee of One Beacon's subsidiary One Auto Insurance Company. Defendant Christopher Savini is the adult son of John Savini, and was residing in his father's home at the time of the accident.

John Savini now seeks an order dismissing the complaint and all claims against him on the grounds that as he was not the owner of the Chevrolet Impala, and as Christopher Savini was driving the Chevrolet Impala without his permission, he cannot be held liable under the theory of permissive use or the doctrine of negligent entrustment.

Vehicle & Traffic Law § 388 provides: "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 any person using or operating the same with the permission, express or implied, of such owner." Under Vehicle & Traffic Law § 128, the applicable definition of "owner" includes "any lessee or bailee of a motor vehicle or vessel having the exclusive use thereof, under a lease or otherwise, for a period greater than thirty days."

Vehicle & Traffic Law § 388 was enacted to "ensure access by injured persons to 'a financially responsible [party] against whom to recover for injuries'" and "to change the common-law rule and to impose liability upon the owner of a vehicle 'for the negligence of a person legally operating the car with the permission, express or implied, of the owner'..." (*Morris v Snappy Car Rental*, 84 NY2d 21, 27, [1994]).

This statute also creates a presumption that the vehicle is being operated with the owner's consent, but the presumption may be rebutted by substantial evidence showing that the operation was without permission (see *Murdza v Zimmerman*, 99 NY2d 375, 380 [2003]; *Leotta v Plessinger*, 8 NY2d 449 [1960]; *Bernard v Mumuni*, 22 AD3d 186, 187 [2005], *affd* 6 NY3d 881 [2006]; *Cherry v Tucker*, 5 AD3d 422, 424 [2004]; *Naidu v Harwin*, 281 AD2d 525 [2001]; *Leonard v Karlewicz*, 215 AD2d 973, 974 [1995]; *Guerra v Kings Plaza Leasing Corp.*, 172 AD2d 583 [1991]; *Bruno v Privilegi*, 148 AD2d 652 [1989]; *Albouyeh v County of Suffolk*, 96 AD2d 543 [1983], *affd* 62 NY2d 681 [1984]).

Assuming *arguendo* that John Savini is a statutory owner of the 2006 Chevrolet Impala (see *Hassan v Montouri*, 99 NY2d 348 [2003]), uncontradicted statements by both the owner and its driver that the driver was operating the vehicle without his owner's permission

constitutes substantial evidence that rebuts the presumption and, in most circumstances, entitles the owner to summary judgment (see *Country-Wide Ins. Co. v National R.R. Passenger Corp.*, 6 NY3d 172, 177 [2006]; *Padilla v Felson*, 28 AD3d 530, 531 [2006]). However, even if the presumption is rebutted, the issue of consent should go to a jury "where there is evidence suggesting implausibility, collusion or implied permission" (*Country-Wide Ins. Co. v National R.R. Passenger Corp.*, supra at 178).

Here, John Savini testified at his examination before trial that at the time of the accident he was employed by Auto One Insurance as a property damage appraiser and that the 2006 Chevrolet Impala was assigned to him by his employer. Mr. Savini stated that in February 2007 he lived with his wife in Roslyn Heights, New York, and that their adult son Christopher resided with them. He stated that his wife and Christopher each owned a motor vehicle, but that his son's vehicle had been disabled since December 2006. He stated that his wife drove her car to her place of employment, that Christopher also operated his mother's vehicle, and that to his knowledge Christopher did not use the Chevrolet Impala at any time prior to February 7, 2007.

John Savini stated that he was first assigned a vehicle by his employer in September 2002, and that within a week of said assignment he received a booklet from his employer which indicated the responsibility and use of the vehicle. He stated that he was furnished with such a booklet in 2002 and again about two years later. He identified the booklet entitled One Beacon Insurance Corporate Fleet Program Guide, and stated that a copy of said document, or a similar one was provided to him prior to February 7, 2007. He stated that he had read the booklet each time it was given to him and that he understood that only he and his wife were authorized to use the subject vehicle, which could be used for vacations, within a thousand miles. Mr. Savini stated that he had at least one conversation with his son in which he told him that only he (John) and his wife could use the company car, and that his son could not operate the vehicle. He also stated that he never requested that his son be authorized to use the vehicle.

Mr. Savini stated that both he and his wife parked their cars in their driveway, or on the street in front of their house. He stated that on February 6, 2007 he went to sleep around 9:00 P.M. in an upstairs bedroom, that his wife was downstairs in the den, and that he was unaware that his son had taken the keys for the Chevrolet which had been hanging on a hook in the kitchen. He stated that Christopher telephoned the house around midnight and reported that he had been in an accident with the Impala. Mr. Savini stated that he and his wife went to pick up Christopher at a location in Brooklyn, where he observed the badly damaged

Impala. He drove Christopher back to the scene of the accident, where he observed Christopher placed under arrest. Later that morning (February 7, 2007) at approximately 7:00 A.M. or 7:30 A.M., he telephoned his manager and reported the accident, and immediately thereafter called Michael Zambelli, the person who had assigned him the subject vehicle. He also went to see Mr. Zambelli that morning, and told him that his son had taken the company car without authorization and had been in an accident, and filled out an incident report.

Christopher Savini testified at an examination before trial that he was a patient at Nassau County Medical Center from December 26, 2006 to January 1, 2007 for "detox" arising out his use of prescription drugs and opiates, and is a resident of Samaritan Village, a residential drug treatment center in the Bronx since some time after the accident. He stated that at the time of the accident he had not taken any drugs and that he did not consume any alcohol. Christopher stated that on February 7, 2007 he had a valid driver's license; that he had never operated the 2006 Chevrolet Impala prior to February 7, 2007; that his father told him that the company car was "off limits"; that at approximately 11:30 P.M. on February 6 he asked his mother for permission to use her car in order to purchase some Tylenol; that his mother said "no" as his father's car was in the driveway behind her car and his father was sleeping; that his mother told him to walk to an all night convenience store; that he took his father's car keys from the kitchen and drove the car to the convenience store, then to a drug store that was closed, and that he got onto the Northern State/Grand Central Parkway where the accident occurred near Utopia Parkway in Queens. He stated that prior to that night he had never moved or drove his father's car.

Michael Zambelli testified that he is a claims director for Auto One Insurance Company, a subsidiary of One Beacon. He stated that One Beacon leased 15 vehicles from Gelco Corp., for use by each of Auto One's 15 appraisers in his department, and that other departments had employees eligible for the assignment of leased vehicles. He stated that John Savini was an employee of Auto One from 2002 until September 2007 when he was laid off; that John Savini was provided with a leased vehicle in September 2002, September 2004, September 2006 and with a fourth vehicle after the February 7, 2007 accident. Mr. Zambelli stated that John Savini received a manual called the One Beacon Insurance Corporate Fleet Guide Program; that the company required its employees to receive and read this manual in order to operate one of the leased vehicles; that he provided John Savini with a copy of said manual in September 2002 when he was assigned the first vehicle; that he did not ascertain whether Savini had in fact read the manual; that Savini was provided with a copy of the replacement manual which was

smaller in size but had the same content; that the employee was permitted to use the vehicle for business and for personal use; that said personal use was restricted to vacations within a thousand miles; and that only the employee, and the employee's spouse or domestic partner were eligible to use the vehicle, within the guidelines of not traveling more than a thousand miles for vacation; that employees who drove 1500 business miles annually were eligible for a company fleet vehicle; and that he had a conversation with John Savini in which he told him that use of the vehicle was limited to himself and his spouse.

Mr. Zambelli stated that on February 7, 2007, he spoke with John Savini on the telephone, and then met with him at Auto One's offices and discussed some details of the accident and an incident report was made by Mr. Savini. Mr. Zambelli stated that on February 7, 2007 he attempted to report the unauthorized use of the vehicle by Christopher Savini to the police in Nassau County, but was told to obtain a power of attorney as One Auto was not the registered owner of the vehicle. Mr. Zambelli stated he obtained a power of attorney from Gelco, and returned on February 13, 2007 to the police station with John Savini to report the unauthorized use of the vehicle.

Defendant John Savini, thus, has established his entitlement to judgment as a matter of law by submitting substantial evidence that Christopher Savini, the offending driver, did not have express permission to operate the motor vehicle involved in the accident (see *Barrett v McNulty*, 27 NY2d 928, 929 [1970]; *Nelson v Ford Motor Credit Co.*, 41 AD3d 444 [2007]).

Therefore it is incumbent upon the plaintiffs, and co-defendant Christopher Savini, as the parties' opposing the motion, to come forward with evidence, in admissible form, to demonstrate the existence of a question of fact (see *Zuckerman v City of New York*, 49 NY2d 557 [1980]). A review of this evidence, however, reveals nothing more than speculation as to implausibility, collusion or implied permission. Plaintiffs and defendant Christopher Savini have failed to submit competent evidence suggesting implausibility, collusion, or implied permission so as to require the issue of consent to be submitted to a jury (see *St. Andrassy v Mooney*, 262 NY 368, 372-373, 186 NE 867 [1933]; *Britt v Pharmacologic Pet Servs., Inc.*, 36 AD3d 1039 [2007]).

The court notes that as there is no evidence that drugs or alcohol played any role in the events leading up to the accident, John Savini's testimony regarding the extent of his knowledge of his son's substance abuse is irrelevant. The court further finds that as Savini testified that he received the employer's manual

regarding the use of the company vehicles on two occasions, and was aware at all times of the limitations on the use of the company vehicles, whether he received a manual in 2006 is irrelevant, as regards the issue of implied or permissive use. John Savini testified that he did not permit his son to use the 2006 Impala, and Christopher Savini testified that he was not permitted to use any vehicle that his father had received from his employer. Therefore, the number of times they had such a conversation is equally irrelevant.

As regards the police report, the evidence presented establishes that the lack of permissive use was reported to the police, as soon as a power of attorney was obtained from the registered owner, Gelco. Furthermore, as the vehicle had not been stolen and in fact had been impounded by the police following the accident, John Savini had no duty to report the vehicle as stolen.

Finally the fact that John Savini parked the Impala in the driveway behind his wife's vehicle and kept the keys in the kitchen does not raise an issue of fact as regards implied permissive use of the subject vehicle. John Savini had no duty to park the vehicle in such a manner as to prevent it from being moved or used by his wife, a permissive user, and his son Christopher, then a 34-year-old adult, had full knowledge that he did not have permission, actual or implied, to move or use said vehicle.

Therefore as the presumption of consent has been rebutted as a matter of law, defendant John Savini's motion to dismiss the complaint and all claims against him, is granted (see *Country Wide Ins. Co. v Nat'l R. R. Passenger Corp.*, supra; *Barrett v McNulty*, supra; *Nelson v Ford Motor Credit Co.*, supra; *Allstate Indem. Co. v Nelson*, 285 AD2d 545 [2001]; *Guerra v Kings Plaza Leasing Corp.*, 172 AD2d 583 [1991]; *Albouyeh v County of Suffolk*, supra).

In view of the foregoing, defendant One Beacon's motion for summary judgment is denied as untimely. Plaintiffs' motion for partial summary judgment against defendant Christopher Savini on the issue of liability is denied as untimely. Defendant John Savini's motion for summary judgment dismissing the complaint and all other claims against him is granted.

Dated: June 26, 2009

Bernice D. Siegal, J.S.C.