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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN PART 22
Justice

INDEX NO. 107298/06

STEVEN DUNMORE,

Plaintiff,

- v -

MOTION DATE

MOTION SEQ. NO. 004

WILLIAM M. FOX, TOTAL REPAIR EXPRESS, LLC., and PRECISION ENDOSCOPY OF AMERICA, INC.,

Defendant.

MOTION CAL. NO. 22

The following papers, numbered 1 to 3 were read on the motion by defendants Total Repair Express, LLC, for summary judgment on the issue of liability.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Memo)	2
Replying Affidavits (Reply Memo)	

Cross-Motion: ☐ Yes ■ No

On April 21, 2005, plaintiff was involved in a collision, with a vehicle owned and operated by defendant William M. Fox. The accident occurred on West 59th Street, at or about 1:30 p.m., in New York County. At the time of the subject accident defendant William M. Fox was employed by defendant Total Repair Express Inc.

Plaintiff commenced this action to recover damages for alleged personal injuries suffered as a result of the subject accident. Plaintiff discontinued this action as against defendants William M. Fox ("defendant Fox") and Precision Endoscopy of America, Inc. The remaining defendant, Total Repair Express Inc.("Total Repair"), now moves for an order pursuant to CPLR § 3212, granting summary judgment on the issue of liability.

SUMMARY JUDGMENT STANDARD

The proponent of a motion for summary judgment is required to make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient

"evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*JMD Holding Corp. v Congress Fin. Corp.*, 795 NY2d 502 [2005]; Alvarez v Prospect Hospital, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Thomas v Holzberg*, 751 NYS2d 433, 434 [1 Dept 2002]). The motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof . . ." (CPLR § 3212 [b]). A party may also demonstrate a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman v City of New York*, *supra*; *Prudential Securities Inc. v Rovello*, 692 NYS2d 67 [1 Dept 1999]).

Where the movant has established a *prima facie* case of negligence, the respondant is required to submit evidentiary proof in admissible form raising triable issues of material fact in order to defeat the motion for summary judgment (*Perez v Brux Cab Corp.*, 674 NY2d 343 [1 Dept 1998]; *Zuckerman v City of New York*, *supra*;).

It is well settled that the standard of conduct for the driver of a motor vehicle, is that of reasonable care. A *prima facie* case of negligence is established when the driver of a car loses control through no fault of another, which results in an injury to a passenger (*Felberbaum v Weinberger*, 837 NYS2d 664 [2 Dept 2007]; *Dudley v Ford Credit Titling Trust*, 762 NYS2d 905 [2 Dept 2003]).

DISCUSSION

In support of their motion defendant Total Repair Express has submitted, *inter alia*, a copy of the pleadings, the deposition testimonies of Anthony Segalia, an

employee of Total Repair and defendant Fox, and the printouts from the Medtrack system.

Defendant Fox testified that on the date of the subject accident, he was employed as a mobile technician by defendant Total Repair and that his duties were to repair surgical instruments for hospitals. Defendant Fox also testified that he was required to use his own personal vehicle in order to travel to and from the hospital sites. Defendant Total Repair maintains a service truck, containing tools, used defendant Fox to repair surgical instruments. The truck is parked on 115th Street, near St. Luke's Hospital.

Defendant Fox was not required to adhere a work schedule. Defendant Total Repair would issue a monthly schedule which would identify the hospitals that defendant Fox was to service, for the entire month. The hours of his service were left to the discretion of defendant Fox and the hospital. Defendant Total Repair, utilized a system called Medtrack, in order to track the defendant Fox's work. Medtrack would track the location of the hospitals and the times that defendant Fox serviced these hospitals.

Defendant Fox testified that on the date of the subject accident, he arrived at Roosevelt Hospital before 9:00a.m.,to retrieve the surgical instruments that needed repair. Defendant Fox also testified that, after retrieving the surgical instruments from Roosevelt Hospital, he drove to St. Luke's Hospital. After retrieving the surgical instruments that needed repair from St. Lukes Hospital, defendant Fox walked, from St. Luke's Hospital, to the service truck, made the needed repairs to the instruments from both hospitals and signed off on the work that he had done on the Medtrack system .

After he signed off, defendant Fox walked back to St. Luke's hospital and returned St. Luke's repaired instruments and went back to the service truck to turn off the truck's generator and clean up the truck. Afterward, defendant Fox drove his vehicle back to Roosevelt Hospital and returned the Roosevelt's repaired surgical instruments.

Defendant Fox testified that, after he returned Roosevelt's surgical instruments, his duties for defendant Total Repair were finished for the day and he went to lunch. Defendant Fox did not service any other hospitals on that day. After lunch, defendant Fox returned to Roosevelt Hospital, on a "social" visit, to talk to his friends that worked there and that he did not discuss work related issues (defendant Fox's deposition testimony, page 54 and 55). Defendant Fox testified, that after leaving Roosevelt, he drove a friend to the train station on 8th Avenue and on his way home from the train station, the subject accident occurred.

On the date of the subject accident, Anthony Segalia, was employed as a mobile repair specialist, by Total Repair Express. Mr. Segalia's duties were to service Total Repair's accounts. Mr. Segalia was not defendant Fox's supervisor, however, he testified that he was aware of the accounts defendant Fox serviced at Roosevelt Hospital and St. Luke's Hospital. Mr. Segalia also testified that the documents from the Medtrack system on the date of the subject accident, indicated that defendant Fox finished his repairs for Roosevelt Hospital and St. Luke's Hospital at 11:33 a.m. and 11:41a.m., two hours before the subject accident.

Defendants Total Repair conclude that they cannot be held liable for the subject accident because when the accident occurred, defendant Fox was operating his own personal vehicle and he was en route home, thus he was not operating his vehicle in

the scope of his employment.

In opposition plaintiff submits, *inter alia*, his deposition testimony and a copy of defendant Fox's business card. Plaintiff claims that when defendant Fox exited his vehicle after the collision, he was wearing his Total Repair t-shirt and he presented him with his Total Repair business card . Plaintiff also testified that he "believed" that defendant Fox stated that he was "working", and in between sites, at the time of the accident (plaintiff's deposition testimony page 31 and 32).

To bring the doctrine of *respondeat superior* into play "the employee must be performing some act in furtherance of a duty he owes the employer and where the employer is, or could be, exercising some control, directly or indirectly, over his activity (*Johnson v Daily News, Inc.*, 34 NY2d 33, 36 [1974]).

Defendant Total Repair's evidence establishes that at the time of the subject accident, defendant Fox was on his own time, as he was on his way home and was not driving his vehicle "in any project for or in any manner to satisfy any obligation due his employer"(*Johnson v Daily News*, Inc., 34 NY2d 33, 36 [1974]). The only direct proof, adduced by plaintiff, that defendant Fox was acting within the scope of his employment was an extrajudicial statement, purportedly made by defendant Fox to plaintiff, while exchanging information at the scene of the accident, that defendant Fox was in between work sites. "This extrajudicial statement is not admissible against [defendant Total Repair], under the admission exception to the hearsay rule, for the purpose of establishing that [defendant Fox] was performing a duty owed to his employer at the time of the accident" (*Vangersky v Moogan*, 128 AD2d 699, 700 [2nd Dept1987] see,

Loschiavo v Port Auth., 58 NY2d 1040 [1983]; Richardson, Evidence § 253 [Prince 10th ed]). The plaintiff has not "demonstrated the admissibility of this statement under any other exception to the hearsay rule"(*Vangersky v Moogan*, supra).

To hold defendant Total Repair to liability at a time when their employee, defendant Fox, "was engaged in his own affairs . . . would be patently beyond the scope of the doctrine of *respondeat superior*" (*Johnson v Daily News, Inc.*, supra; see Restatement, 2d, Agency, § 239; 52 ALR 2d 290, 295).

For these reasons and upon the foregoing papers, it is,

ORDERED that the defendant Total Repair Express' motion for summary judgment on the issue of liability is granted, and is dismissed in its entirety.

This constitutes the Decision and Order of the Court.

Dated: 9-22-09

SEP 22 2009

Paul Wooten J.S.C.

Paul Wooten
J.S.C.

Check one: ☑ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**