

O'Hara v Atlantic Express Transp. Group, Inc.

2010 NY Slip Op 31050(U)

March 31, 2010

Sup Ct, Nassau County

Docket Number: 6512/08

Judge: F. Dana Winslow

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

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

JOHN O'HARA,

**TRIAL/IAS, PART 5
NASSAU COUNTY**

Plaintiff,

-against-

**MOTION SEQ. NO.: 002
MOTION DATE: 1/20/10**

**ATLANTIC EXPRESS TRANSPORTATION
GROUP, INC., d/b/a ATLANTIC EXPRESS
COACHWAYS, INC.,**

ACTION #1

INDEX NO.: 6512/08

Defendants.

The following papers having been read on the motion (numbered 1-3):

- Notice of Motion for Summary Judgment.....1**
- Opposition to Motion for Summary Judgment.....2**
- Reply Affirmation.....3**

Motion by attorneys for the plaintiffs John O'Hara in Action No. 1 and Patrick O'Hara in Action No. 2 for an order pursuant to CPLR § 3212 granting summary judgment in favor of plaintiffs against the defendant on the grounds that defendant negligently and solely caused the accident to the plaintiffs and that there are no triable issues of fact, striking the defendant's First Affirmative Defense that alleges culpable conduct and/or comparative negligence by the plaintiff Patrick O'Hara, and striking the defendant's Ninth Affirmative Defense that defendant's motor vehicle was not operated with the permission and consent of the owner at the time of the accident, is determined as hereinafter provided.

On a motion for summary judgment the movant must establish his or her cause of action or defense sufficient to warrant a court directing judgment in its favor as matter of law. Frank Corp. v. Federal Ins. Co., 70 NY2d 966 (1988); Alvarez v. Prospect Hosp., 68 NY2d 320 (1986). The party opposing the motion,

on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material issues of fact. Frank Corp. v. Federal Ins. Co., supra at 967; GTF Mktg. v. Colonial Aluminum Sales, 66 NY2d 965 (1985).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine issues of credibility, but merely to determine whether such issues exist. Barr v. County of Albany, 50 NY2d 247 (1980). The evidence should be construed in a light most favorable to the party moved against. Weiss v. Garfield, 21 AD2d 156 (3rd Dept. 1964). Summary judgment is rarely granted in negligence cases. Connell v. Buitekant, 17 AD2d 944 (1st Dept. 1962). CPLR § 3212; Siegel, McKinneys Commentaries C3212:8 pp. 15- 16.

Negligence cases by their very nature do not usually lend themselves to summary judgment, since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination. Only if it can be concluded as a matter of law that a defendant is negligent may summary judgment be granted in a negligence action. If the admitted facts are such that no other conclusion other than negligence can be drawn, summary judgment is not precluded in a negligence action. Even in those negligence cases in which the facts are conceded, however, there is often a question as to whether the defendant or the plaintiff acted reasonably under the circumstances. This can rarely be decided as a matter of law. Accordingly, when the suit is founded on a claim of negligence, a plaintiff will generally be entitled to summary judgment only in cases in which there is no conflict at all in the evidence, the defendant's conduct fell far below any permissible standard of due care, and the plaintiff's conduct either was not really involved (such as a passenger) or was clearly of exemplary prudence in the circumstances. Ugarizza

v. Schmieder, 46 NY2d 471 (1979).

Here, by the affidavits of plaintiff John O'Hara sworn to on November 13, 2009, September 4, 2008 and November 13, 2008, the affidavit of plaintiff Patrick O'Hara sworn to on November 13, 2008, and the Police Accident Report plaintiffs have made a prima facie showing that the defendant's driver was negligent as a matter of law by alleging the following:

Plaintiff John O'Hara was a passenger in a motor vehicle operated by his son plaintiff Patrick O'Hara on May 20, 2007 at approximately 11:45pm traveling eastbound in the left lane on the Northern State Parkway. A bus owned by the defendant and operated by one of its drivers was traveling westbound on the Northern State Parkway approximately .5 miles east of its exit with Shelter Rock Road. Plaintiffs observed the bus traveling westbound on the Northern State Parkway fail to reduce its speed and proceeded onto the right shoulder, lose control and veer back across all westbound lanes and strike the center median separating the westbound traffic from the eastbound traffic. Metal and other debris hit the vehicle carrying the plaintiffs and causing them serious personal injury.

Defendant offers no evidentiary proof in admissible form to dispute the facts as alleged by plaintiffs and therefore has failed to demonstrate any material triable issues of fact with respect to the negligence of the defendant's driver.

Here, there is no conflict at all in the evidence offered by the plaintiffs, the conduct of the driver of the bus owned by the defendant fell far below any permissible standard of due care by driving onto the right shoulder in violation of Vehicle and Traffic Law § 1131, veering across all westbound lanes on the Northern State Parkway in violation of Vehicle and Traffic Law § 1128(a), and entering and striking the center median separating the westbound traffic from the eastbound traffic in violation of Vehicle and Traffic Law § 1130(1), and the

plaintiffs conduct was not involved in that they were merely a driver and passenger in a vehicle traveling in the opposite direction on the Northern State Parkway. It is also noted that defendant offers no nonnegligent explanation for the happening of the accident in this case. Accordingly, motion by plaintiffs for an order pursuant to CPLR § 3212 for summary judgment against defendant is **granted** to the extent that the Court finds that defendant is negligent as a matter of law. Ugarizza, supra.

By the affidavits of plaintiff John O'Hara sworn to on November 13, 2009, September 4, 2008 and November 13, 2008, the affidavit of plaintiff Patrick O'Hara sworn to on November 13, 2008, and the Police Accident Report plaintiffs have made a prima facie showing that there was no contributory negligence on the part of plaintiff driver Patrick O'Hara by alleging, including the underlined paragraph above, the following:

Plaintiff John O'Hara states that the act of bus veering off the roadway and crossing over three westbound lanes of traffic at an angle happened very quickly and plaintiff driver Patrick O'Hara took immediate evasive action as the bus was heading toward the median and moved his motor vehicle from the left hand eastbound lane to the middle lane and his motor vehicle was then struck by debris. At the time of the accident plaintiff John O'Hara estimates that driver plaintiff Patrick O'Hara's speed was no more than 50 miles per hour. Another vehicle traveling eastbound on the Northern State Parkway was also involved in the accident and was struck by debris from the defendant's bus.

Plaintiff driver states that about two seconds elapsed from the time when he first saw the defendant's bus in the middle lane until the accident happened. At the time of the accident plaintiff driver was traveling under the speed limit and at no time did he lose control of his motor vehicle.

Defendant offers no evidentiary proof in admissible form to dispute the facts as alleged by plaintiff and therefore has failed to demonstrate any material triable issue of fact with respect to the contributory negligence of the plaintiff driver Patrick O'Hara.

Here, the circumstances that confronted plaintiff driver immediately prior to the accident clearly constituted an emergency situation. In such an emergency, a driver will not be held to the same standard of care that would be applied to a driver in a nonemergency situation. Rivas v. Metropolitan Suburban Bus Auth., 203 AD2d 349 (2nd Dept. 1994); Glick v. City of New York, 191 AD2d 677, 678 (2nd Dept. 1993). If a party, when confronted with an emergency not of his own making, reacts as a reasonable person would when faced with similar circumstances, no negligence will be found. Rivera v. New York City Tr. Auth., 77 NY2d 322, 327 (1991); Ferrer v. Harris, 55 NY2d 285, 292-293 (1982). Here, the Court finds that the plaintiff driver reacted in a reasonable manner when he was faced with an emergency situation not of his own making. No evidence has been offered from the occupant(s) of the third vehicle involved in this accident to dispute the facts alleged by plaintiffs. Furthermore, no evidence has been offered to show that plaintiff driver had any opportunity to avoid the accident. The Court finds that there was no contributory negligence on the part of the plaintiff driver Patrick O'Hara as a matter of law.

Accordingly, motion by plaintiff Patrick O'Hara for an order granting summary judgment against defendant by striking the defendant's First Affirmative defense that alleges culpable conduct and/or comparative negligence of the plaintiff driver Patrick O'Hara is **granted**.

Plaintiff maintains that the determination of the workers compensation status collaterally estoppes the defendant from raising the issue of permissive use of the bus.

The doctrine of collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same. Ryan v. New York Tel. Co., 62 NY2d 494 (1984); Rigopolous v. American Museum of Natural History, 297 AD2d 728, 729 (2nd Dept. 2002); CRK Contr. of Suffolk v. Brown & Assoc., 260 AD2d 530 (2nd Dept. 1999). Thus, the doctrine has been held to be applicable with respect to quasi-judicial determinations of administrative agencies, such as a Workers' Compensation Board. Rigopolous, supra; Lee v. Jones, 230 AD2d 435 (3rd Dept. 1997). Allied Chem. v. Niagra Mohawk Power Corp., 72 NY2d 271, 276 (1988), cert. denied 488 US 1005 (1989). However, while issue preclusion may arise from the determination of administrative agencies, in that context, the doctrine is applied more flexibly. Moreover, an administrative agency's final conclusion, characterized as an ultimate fact or a mixed question of fact and law, is not entitled to preclusive effect. Akgul v. Prime Time Transp., 293 AD2d 631, 633 (2nd Dept. 2002). In order to invoke the doctrine of collateral estoppel, two requirements must be satisfied. First, the party seeking the benefit of collateral estoppel must prove that the identical issue was necessarily decided in the prior action and is decisive in the present action. Second, the party to be precluded from relitigating an issue must have had a full and fair opportunity to litigate the prior determination. Kaufman v. Eli Lilly & Co., 65 NY2d 449 (1985). In determining whether one should be collaterally estopped from litigating an issue decided in an administrative proceeding in a subsequent action, the court should consider the nature of the forum, the importance of the claim in the prior litigation, the incentive to litigate, the extent of the litigation, the ability of counsel, the availability of new or different evidence, differences in the applicable law and the foreseeability of further litigation. Ryan, supra; Gilberg v. Barbieri, 53 NY2d 285

(1981).

Here, the Workers Compensation Board's final conclusion that "the accident occurred due to the decedent being lost and is therefore covered under the Workers' Compensation Law" is characterized as mixed question of fact and law. Furthermore, plaintiff does not state what burden of proof, standards, factors, elements, statutes, and/or caselaw were considered by the Workers' Compensation Board in rendering its decision. As a result, plaintiff has failed to satisfy his burden of proving that the issues of whether the driver drove the bus to Nassau County without the permission of defendant and whether such act was within the scope of employment was necessarily decided in the Workers' Compensation Proceeding and is decisive in this action. Jimenez v. Shippy Realty Corp., 213 AD2d 377 (2nd Dept. 1995). Accordingly, the Court finds that the Workers' Compensation Board's final conclusion is not entitled to preclusive effect with respect to the issue of whether the defendant is vicariously liable for the driver's actions on the night of the accident in this case. Akgul, supra; O'Gorman v. Journal News Westchester, 2 AD3d 815 (2nd Dept. 2003).

An employer is vicariously liable for the torts of an employee, even when the employee's actions are intentional, if the actions were done while the employee was acting within the scope of his or her employment. Riviello v Waldron, 47 NY2d 297, 302 (1979). Pursuant to this doctrine, the employer may be liable when the employee acts negligently or intentionally, so long as the tortious conduct is generally foreseeable and a natural incident of employment. Judith M. v Sisters of Charity Hosp., 93 NY2d 932 (1999); Riviello, supra; Melbourne v New York Life Ins. Co., 271 AD2d 296 (1st Dept. 2000). However, there is no vicarious liability on the part of the employer for torts committed by the employee solely for personal motives unrelated to the furtherance of the employer's business. Riviello, supra; Flowers v New York Tr. Auth. 267 AD2d

132 (1st Dept 1999); Vega v Northland Mktg. Corp., 289 AD2d 565 (2nd Dept. 2001). While questions of whether an employee's actions fall within the scope of his or her employment are ordinarily questions of fact for a jury, where there are no disputed facts and there is no question that the employee's acts fall outside the scope of employment, the determination becomes one of law for the court and not one of fact for the jury. Horowitz v Sears, Roebuck & Co., 137 Ad2d 492 (2nd Dept. 1988) lv denied 72 NY2d 803. In Riviello, supra, the Court of Appeals listed what it described as "useful guidelines" in determining whether the conduct of a particular employee, overall, falls within the permissible ambit of the employment. Among the factors to be weighed are: the connection between the time, place and occasion of the act; the history of the relationship between employer and employee as spelled out in actual practice; whether the act is one commonly done by such employee; the extent of departure from normal methods of practice; and whether the specific act was one that the employer could reasonably have anticipated. See Prosser, Torts [4th ed], § 70 p. 461; Restatement, Agency 2d, § 229.

Vehicle and Traffic Law § 388(1) imputes to the owner of a motor vehicle the negligence of one who operates it with the owner's permission. That section gives rise to rebuttable presumption that the vehicle is being operated with the owner's consent. Leotta v. Plessinger, 8 NY2d 449, 461 (1960); Wynn v. Middleton, 184 AD2d 1019 (4th Dept. 1992); Schrader v. Carney, 180 AD2d 200 (4th Dept. 1992); Aetna v. Cas. & Sur. Co. v. Santos, 175 AD2d 91 (2nd Dept. 1991). The presumption of consent has been characterized as "very strong" and continues until there is "substantial evidence to the contrary." Bruno v. Privilegi, 148 AD2d 652 92nd Dept. 1989), quoting Albouyeh v. County of Suffolk, 96 AD2d 543, 544 (2nd Dept. 1983), aff'd 62 NY2d 681.

The Court finds that an issue of fact exists as to whether the driver drove the

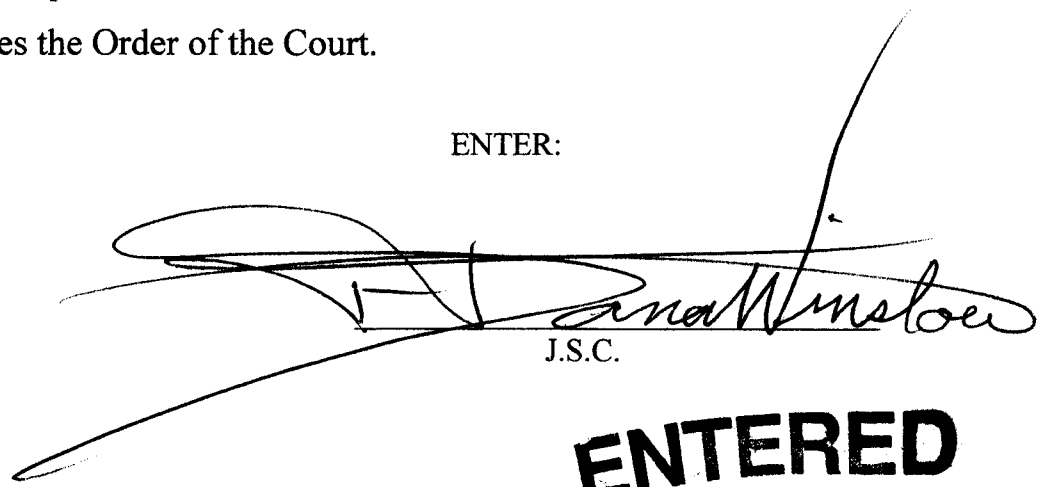
bus to Nassau County without the permission of the defendant and whether said act was within the scope of the driver's employment.

Accordingly, motion by plaintiff for summary judgment striking the defendant's Ninth Affirmative Defense that alleges the defendant's bus was not being operated with the permission and consent of the defendant is **denied**.

This Constitutes the Order of the Court.

Dated: March 31, 2010

ENTER:

A large, stylized handwritten signature in black ink, appearing to read 'J.S.C.', is written over the 'ENTER:' text and extends across the page.

J.S.C.

ENTERED

APR 21 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**