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

PRESENT: LOUIS B. YORK J.S.C. Justice

PART 2

Index Number : 115466/2005

WILLIAMS, LAMAR

VS.

ONE CALL MOTOR FREIGHT

SEQUENCE NUMBER : 005

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

Dated: 8/23/10

LOUIS B. YORK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

FOR THE FOLLOWING

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

----------x

LAMAR WILLIAMS,

Index No.: 115466/2005

Plaintiff,

-against-

ONE CALL MOTOR FREIGHT INC., RUTH SULLIVAN as Administratrix of the Estate of William Sullivan, DAVID VELA and DAVID'S TRUCKING,

Defendants.

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LOUIS B. YORK, J.S.C.:

In this personal injury action, defendants One Call Motor Freight ("One Call") and Ruth Sullivan, acting as Administratrix of the Estate of William Sullivan ("Sullivan"), move for summary judgment pursuant to CPLR 3212 on all claims and cross-claims asserted against them. For the reasons stated below, the Court grants the motion with respect to defendant Sullivan, but denies the motion with respect to defendant One Call.

BACKGROUND

The incident that precipitated the present action occurred on either December 20 or 22, 2004, while plaintiff Lamar Williams ("Williams") and defendant David Vela ("Vela") were unloading a heavy piece of kitchen equipment from Vela's truck. At the time, Williams was an employee of Empire Restaurant Supply ("Empire"), which provides restaurants and hotels with kitchen equipment and appliances. Vela, the owner and sole employee of David's Trucking, was making a delivery to Empire on behalf of One Call, variously described as a "trucking company," a "motor carrier engaged in the transportation of property for hire," and "a storage facility" for materials in transit. According to Williams, as he and Vela were dragging heavy cargo out of the trailer and onto the truck's liftgate, Vela

disregarded Williams's call to "halt" and negligently caused Williams to fall off the truck. Williams landed on his back, suffering serious injury.

On October 5, 2005, Williams commenced the present action, incorrectly naming William Sullivan, One Call's president and shareholder, as the driver of the truck. After discovering that Vela was the driver involved in the incident, Williams filed an amended complaint on March 5, 2007, adding Vela and David's Trucking as defendants alongside Sullivan and One Call. Sullivan passed away in April 2008, and proceedings were stayed while Williams entered a request to substitute Mr. Sullivan with the Administratrix of his Estate, his wife Ruth Sullivan. When proceedings resumed, the defendants filed cross-claims against each other for, *inter alia*, contribution and indemnification.

One Call and Ruth Sullivan now make a three-pronged motion for summary judgment. They argue first that the amended complaint and the cross-claims fail to state a cause of action, and second that Vela was an independent contractor who cannot create vicarious liability in One Call for his allegedly negligent acts. The third prong, which applies to Sullivan alone, presents the argument that the amended complaint offers no permissible ground for piercing the corporate veil. Williams and Vela contest the first two prongs of the motion, but neither opposes Sullivan's third argument to dismiss the claims against her.

DISCUSSION

Perhaps the most appropriate place to begin the analysis is with the unusual first prong of One Call's and Sullivan's motion. There, One Call and Sullivan ask this Court for what, on its face, appears to be a hybrid form of relief, namely, summary judgment pursuant to CPLR 3212 for failure to state a cause of action. In general, "[t]he appropriate manner in which to determine whether or not a duly filed claim states a cause of action is by a *motion to dismiss*[,]" not by a motion for summary judgment. 97 NY Jur Summary Judgment and Pretrial Motions to Dismiss § 138 (emphasis added). This is because failure to state a cause of action, like other motions to dismiss, directly attacks the sufficiency of the *pleadings*,

while summary judgment attacks the sufficiency of the *evidence* underlying the pleadings. *See Friedman v. Connecticut General Life Ins. Co.*, 30 A.D.3d 349, 349-50, 818 N.Y.S.2d 201, 202 (1st Dep't 2006).

However, to avoid uncertainty, and in the interest of judicial economy, the Court treats One Call's and Sullivan's motion in its entirety as one for summary judgment, applying all the relevant standards and burdens. Vela is plainly mistaken in asserting that "[n]owhere in C.P.L.R. Rule 3212 is a party entitled to move for summary relief for failure to state a cause of action." (Vela Affirmation in Opposition, ¶ 46). *See* CPLR § 3212(c); *Lautner v. Catarelli*, 112 Misc. 2d 157, 158, 446 N.Y.S.2d 166, 167 (Sup. Ct., Nassau County 1982). However, Vela correctly points out that One Call's and Sullivan's motion papers fail to articulate a basis for this relief. Indeed, the motion papers never discuss the sufficiency of the pleadings. Instead, with one exception, One Call and Sullivan consistently ask the Court for what can be termed a conventional, evidence-based summary judgment pursuant to CPLR 3212. The exception—which appears in the last sentence of One Call's and Sullivan's Affirmation in Support and asks the Court to dismiss the amended complaint and all cross-claims pursuant to CPLR 3211(a)(7)—may well be a typographical error. Hence, the Court addresses One Call's and Sullivan's motion in accordance with its clear intent—summary judgment. *See Bd. of Mgrs. of Woodpoint Plaza Condominium v. Woodpoint Plaza LLC*, 24 Misc. 3d 1233A, 901 N.Y.S.2d 897 (Sup. Ct., Kings County 2009).

A court will grant a motion for summary judgment when the moving party tenders "sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 317-18 (1985). The party moving for summary judgment bears the burden of persuasion as well as the initial burden of production. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). However, if the moving party makes a prima facie showing of entitlement to judgment as a matter of law, the burden of production "shifts to the party opposing the motion . . . to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Id.* at 324, 508 N.Y.S.2d at 925-26. The burden of persuasion, on

the other hand, rests with the moving party throughout. *Carty v. Port Auth.*, 6 Misc. 3d 1017A, 800 N.Y.S.2d 343 (Sup. Ct., Bronx County 2004), *affd*, 32 A.D.3d 732, 821 N.Y.S.2d (1st Dep't 2006). Thus, ultimately, if the evidence on a motion for summary judgment is evenly balanced, the party that bears the burden of persuasion must lose. *See Director, Off. of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 274-76, 114 S. Ct. 2251, 2256-57 (1994); *300 East 34th St. Co. v. Habeeb*, 248 A.D.2d 50, 55-56, 683 N.Y.S.2d 175, 178 (1st Dep't 1997).

The third prong of the instant motion, asserted by Ruth Sullivan alone, can be resolved at the outset. Williams expressly notes that he does not oppose dismissal of the case against Sullivan, and neither he nor Vela respond to Sullivan's argument that One Call abided by all proper corporate formalities, thus precluding any possibility of piercing the corporate veil. *See Intl. Credit Brokerage Co., Inc. v. Agapov*, 249 A.D.2d 77, 78, 671 N.Y.S.2d 64, 65 (1st Dep't 1998); *Forum Ins. Co. v. Texarkoma Transp. Co.*, 229 A.D.2d 341, 342, 645 N.Y.S.2d 786, 787-88 (1st Dep't 1996). "[I]t is perfectly legal to incorporate for the express purpose of limiting the liability of the corporate owners." *Morris v. New York State Dept. of Taxation & Fin.*, 82 N.Y.2d 135, 140, 603 N.Y.S.2d 807, 810 (1993). Furthermore, courts will only disregard "the corporate form . . . [when] necessary to prevent fraud or to achieve equity." *Id.* (citation and internal quotation marks omitted). Thus, as no issues of fact exist with regard to One Call's faithful keeping of corporate formalities, and as no questions of fraud or equity have been raised, the Court grants the third prong of the motion, and the analysis proceeds as if One Call were the sole movant.

In support of the second prong of the motion, One Call concentrates the bulk of its argument on the question of Vela's employment status at the time of the incident. It argues that, in December 2004, Vela was an independent contractor, not a One Call employee, and as such, his negligent actions cannot give rise to vicarious liability in One Call. In response, Vela asserts that, when the incident took place, his

status with relation to One Call was that of common-law employee, not independent contractor, thus creating vicarious liability in One Call under the doctrine of *respondeat superior*.

"The doctrine of *respondeat superior* renders a master vicariously liable for a tort committed by his servant while acting within the scope of his employment." *Fenster v. Ellis*, 71 A.D.3d 1079, 1080, 898 N.Y.S.2d 582, 583 (2nd Dep't 2010) (citing *Riviello v. Waldron*, 47 N.Y.2d 297, 418 N.Y.S.2d 300 (1979)). However, as a general rule, an employer "who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor's negligent acts." *Kleeman v. Rheingold*, 81 N.Y.2d 270, 273-74, 598 N.Y.S.2d 149, 152 (1993). This is the case because, "unlike the master-servant relationship, [the employer] cannot control the manner in which independent contractors perform their work." *Melbourne v. New York Life Ins. Co.*, 271 A.D.2d 296, 297, 707 N.Y.S.2d 64, 66 (1st Dep't 2000). Thus,

> [c]ontrol of the method and means by which work is to be performed . . . is a critical factor in determining whether one is an independent contractor or an employee for the purposes of tort liability (citation omitted), and such a determination typically involves a question of fact (citation omitted). However, where the evidence on the issue of control presents no conflict, the matter may properly be determined by the court as a matter of law (citation omitted). Moreover, the mere retention of general supervisory powers over independent contractors cannot form a basis for the imposition of liability against the [employer] (citation omitted).

Id. Some additional factors to consider when assessing a worker's relationship to an employer are "whether the worker (1) worked at his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll and (5) was on a fixed schedule." *Bynog v. Cipriani Group, Inc.*, 1 N.Y.3d 193, 198, 770 N.Y.S.2d 692, 695 (2003). However, after all is said and done, there is no set formula that reveals whether a worker is an employee or an independent contractor, and courts are left to make their assessments on an "ad hoc basis." *Stevens v. Spec, Inc.*, 224 A.D.2d 811, 811, 637 N.Y.S.2d 979, 980 (3rd Dep't 1996). As such, the cases cited to in the parties' papers—*Anikushina v. Moodle*, 58 A.D.3d 501, 870 N.Y.S.2d 356 (1st Dep't 2009); *Abouzeid v. Grgas*, 295 A.D.2d

376, 743 N.Y.S.2d 165 (2nd Dep't 2002); and *Reyes v. Chee Trucking, Inc.*, 20 Misc. 3d 1109A, 867 N.Y.S.2d 378 (Sup. Ct., Bronx County 2008)—are helpful from an analytical standpoint but not ultimately determinative of the issue facing the Court.

Here, One Call makes a compelling argument that Vela was, in fact, an independent contractor and not its employee in December 2004. As William Sullivan attests, One Call had more than twenty employees on its official payroll, but none of those employees were "drivers" responsible for making deliveries. One Call itself did not own any trucks or tractors, and the task of delivering materials was regularly contracted to outside workers. Vela, on the other hand, did own his own truck, which was emblazoned with the logo of Vela's own trucking company, David's Trucking. Vela paid all the costs associated with this truck, including its insurance premiums. He also paid for and used his own equipment and cellular phone. According to William Sullivan, Vela made his own hours with One Call, and could select or reject jobs as he wished. Allegedly, Vela was also free to work for others, and was not exclusively employed by One Call. In addition, Vela did not fill out a Form W-2, and apparently, no taxes or Social Security were withheld from his paycheck. Finally, Vela received no fringe benefits from One Call.

However, despite this evidence, Vela argues persuasively that One Call may have exerted sufficient control over him as to render him its common-law employee. Therefore, a triable issue of fact exists, and the Court reserves the question of Vela's employment status for the trier of fact. As discussed in more detail below, the record testimony suggests that One Call had leased Vela's truck in December 2004, a claim that is further borne out by the fact that Vela's truck exhibited One Call's name, address, and United States Department of Transportation (USDOT) number on its trailer. This lease must receive special weight in the present context given that Vela owned only one truck, which he used in his capacity as the owner and sole employee of David's Trucking. In addition, though Vela paid for both his vehicle insurance and for the cost of his cellular phone, he only obtained these products in order to

fulfill One Call's hiring requirements. Vela avers that he reported to One Call's facility five days a week, arriving every morning at six-thirty. He also claims that One Call's dispatchers would contact him throughout the day to monitor the progress of his deliveries. At the end of the workday, Vela would check in with a One Call employee and leave his truck—again, the only one he owned—overnight at One Call's facility, where it would be loaded by One Call employees in preparation for the following day's deliveries. Finally, Vela was required to report any "incidents" that occurred in the course of his deliveries back to One Call. Thus, after all the evidence is considered, the Court is unable to decide as a matter of law that Vela was merely One Call's independent contractor, and the motion for summary judgment must therefore be denied.

Indeed, even if Vela's employment status were not in dispute, Williams offers a strong alternative basis for denying One Call's motion. In fact, Williams argues that the question of Vela's employment status is of only secondary importance—key here is One Call's alleged lease of Vela's truck in December 2004, which creates vicarious liability in One Call under New York's Vehicle and Traffic Law (VTL). Specifically, Williams's argument springs from VTL section 388, which reads 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 any person using or operating the same with the permission, *express or implied, of such owner.*

Vehicle and Traffic Law § 388(1). Section 128 of the VTL clarifies that, under the statute, an "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." (Emphasis added). Thus, section 388 of the VTL allows for a person or an entity that leases a vehicle under a lease greater than thirty days to be held liable for injuries that arise during the use or operation of that vehicle. *See Hassan v. Montuori*, 99 N.Y.2d 348, 353, 756 N.Y.S.2d 126, 128 (2003); *GE Capital Auto Lease, Inc. v. Allstate Ins. Co.*, 281 A.D.2d 456, 457, 722 N.Y.S.2d 549, 550 (2nd Dep't 2001). Furthermore, for the purposes of VTL section 388, the

terms "use" and "operation" have been interpreted to encompass the loading and unloading of a vehicle. *Paul M. Maintenance, Inc., v. Transcont. Ins. Co.*, 300 A.D.2d 209, 211, 755 N.Y.S.2d 3, 5 (1st Dep't 2002) (citing *Argentina v. Emery World Wide Delivery Corp.*, 93 N.Y.2d 554, 693 N.Y.S.2d 493 (1999)).

Here, the record clearly favors Williams's allegation that One Call leased Vela's truck in December 2004, thus giving rise to a triable issue of fact with regard to One Call's liability under VTL section 388. In his deposition, William Sullivan appears to admit outright that One Call had leased Vela's truck during the relevant period:

> Q. So it is a yes or no question. If you know, was [Vela's] truck leased to One Call Motor Freight in December of 2004?
> A. Yes.

(Sullivan deposition, 24:12-15). In his own deposition, Vela recalls signing a lease with One Call as well:

> Q. How did it become determined how much you would be paid on a daily or weekly basis?
> A. The day we signed the lease we sit down at the table and we talk about the how much [sic], what is going to be the pay every day, pretty much how it is going to work, and the responsibilities of each other.
> Q. Did you sign that lease?
> A. Yes, sir.
> Q. Did William Sullivan sign that lease?
> A. Yes, sir.

(Vela deposition, 11:20-25—12:1-8). Other parts of the record offer further evidence that the parties entered into a lease in December 2004. First, the deposition of Vela reveals that, in addition to displaying the logo of David's Trucking on its cab doors, Vela's truck also exhibited One Call's name, address, and USDOT number on the side of its trailer. William Sullivan acknowledged that the practice of listing One Call's information on the side of a vehicle "[g]enerally" indicates that "the vehicle was leased to One Call." (Sullivan deposition, 22:14-17). Second, Vela claims that he gave One Call a copy of his truck's registration, a claim that William Sullivan does not expressly deny. According to Vela, handing

over a copy of the registration was mandatory under USDOT regulations before a company could lease a vehicle.

Counselor for One Call offers a brief but vigorous defense against Williams's argument, stating with no lack of confidence that "One Call . . . did not own any trucks and did not ***lease*** any trucks." (One Call and Sullivan Reply, ¶ 8) (emphasis in original). In support of this proposition, counselor cites the following lines of testimony from William Sullivan's deposition, given below in full:

> Q. Sir, by whom are you presently employed?
> A. One Call Motor Freight.
> Q. What is your position with One Call Motor Freight?
> A. President.
> Q. By whom were you employed on December 22, 2004?
> A. One Call Motor Freight.
> Q. On that date, what was your position with One Call Motor Freight?
> A. President.
>
> ***
>
> Q. As of December of 2004, did One Call Motor Freight own any trucks?
> A. No.
> Q. Did they own any so-called tractors for semi situations?
> A. No.

(Sullivan deposition, 6:10-21; 9:4-9). Even after a handful of read-through's, the Court remains mystified by counselor's ability to wring these lines of testimony for the proposition that One Call did not *lease* any trucks. Contrary to One Call's argument, these lines of testimony do not support this proposition. Moreover, as mentioned above, Sullivan appears to admit just a few pages later in the very same deposition that One Call *did* lease Vela's truck. Such slapdash use of the record testimony does nothing to promote the credibility of counselor's other arguments.

CONCLUSION

Based on the above, therefore, it is

ORDERED that the motion of defendants One Call and Ruth Sullivan, Administratrix of the Estate of William Sullivan, for summary judgment is granted with respect to defendant Ruth Sullivan; and it is further

ORDERED that the motion is denied with respect to defendant One Call.

ENTER:

Dated: 8/23/10

LOUIS B. YORK, J.S.C.

LOUIS B. YORK J.S.C.

FILED
AUG 25 2010
NEW YORK
COUNTY CLERK'S OFFICE