Short Form Order

SUPREME COURT - STATE OF NEW YORK
CALENDAR CONTROL PART - SUFFOLK COUNTY

P R E S E N T:
HON. PAUL J. BAISLEY, JR., J.S.C.

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THOMAS D. WOISIN, as Administrator of the Estate of PATRICE K. MASSARO-WOISIN, and as Representative of the Distributees of PATRICE K. MASSARO-WOISIN,

Plaintiff,

-against-

JOHN T. BLACK, VAUL TRUST, GENERAL MOTORS ACCEPTANCE CORP., DIVERSIFIED ACQUIRING SOLUTIONS, INC., 17 W. MAIN ST. ENTERPRISES, INC., TOM MARZANO and CLAUDIA HARDING, collectively doing business as FARADAY'S RESTUARANT and THOMAS MULZOFF and MULAND CONCEPTS, LLC collectively doing business as THE LAZY CLAM,

Defendants.

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INDEX NO.:18854/2006
CALENDAR NO.: 200900340MV
MOTION DATE: 11/5/2009
MOTION SEQ. NO.: 007 MOT D,
008 MD, 009 MD

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Upon the following papers numbered 1 to read on this motion ; Notice of Motion/ Order to Show Cause and supporting papers 1- ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion by defendant/third-party plaintiff Diversified Acquiring Solutions, Inc. is granted in part and denied in part; and it is further

ORDERED that the cross motion for leave to intervene by Valley Forge Insurance Company is denied as moot; and it is further

ORDERED that the cross motion by plaintiff Thomas D. Woisin, as administrator of the Estate of Patrice K. Massaro-Woisin, and as representative of the distributees of Patrice K. Massaro-Woisin is denied.

Defendant/third-party plaintiff Diversified Acquiring Solutions, Inc. ("Diversified"), moves (#007) for an order pursuant to CPLR 321 (b)(2) discharging the law firm of Ahmuty, Demers & McManus ("Ahmuty") as counsel for Diversified and substituting the firm of Christopher P. Di Giulio, PC ("Di Giulio") and staying all proceedings in the matter pending such substitution and, upon the grant of the order directing substitution, a further order granting Diversified summary judgment severing and dismissing all claims against it. Diversified provides, in support, various correspondence, copies of the pleadings, various witnesses' pretrial deposition transcripts, and police reports. Counsel for defendant John Black ("Black") opposes and provides a copy of an affirmation by Robert Hindman of Ahmuty, a copy of a notice of motion by Brad Kauffman ("Kauffman"), dated June 22, 2009, various correspondence, and a copy of a resolution by the board of directors of Diversified. Diversified has replied. Valley Forge Insurance Company ("VFIC") cross-moves (#008) to intervene pursuant to CPLR 1012 and, in the alternative, CPLR 1013, and for an order declaring Di Giulio counsel for Diversified and provides documents titled "CNA Quality Assurance Form" and a "renewed business account package policy" and various correspondence. An "affirmation in opposition to Valley Forge (CNA); affirmation in opposition to attorney Di Giulio['s] cross-motion; affirmation in support of plaintiff's cross-motion for summary judgment; affirmation in further support of Kauffman['s] motion on behalf of [Diversified] as private counsel" has been submitted in response but, inasmuch as it is presented by an attorney who does not appear to be of record and because court records reveal that the motion which it seeks to further support has not been filed, it has not been considered. VFIC has submitted a reply. Thomas D. Woisin, as administrator of the Estate of Patrice K. Massaro-Woisin (respectively "plaintiff" and "decedent") cross-moves (#009) for summary judgment on the issue of Diversified's vicarious liability and an order denying the motion by Diversified. Di Giulio opposes and plaintiff has replied.

By the underlying complaint it is alleged that, on December 22, 2005, decedent was involved in a motor vehicle accident which occurred when Black's car collided with hers while both were traveling on Landing Avenue in Smithtown, New York at approximately 8:42 p.m. Prior to the accident, according to the complaint, Black attended a lengthy business luncheon at a restaurant known as Faraday's, arriving at 1:00 p.m. and leaving at about 6:15 p.m. After departing, Black, accompanied by others in his party, allegedly drove to his office a short distance away and then to another establishment known as The Lucky Clam, which he left at about 8:15 p.m. Decedent died of her injuries approximately one hour after the accident. Ultimately, Black was arrested and pled guilty to Manslaughter Second Degree.

The motion for summary judgment by Diversified which seeks the discharge of current counsel, a stay of all proceedings upon the order of substitution, and severance and dismissal of the claims against it is opposed by Black. Counsel, on behalf of "John and Michele Black" contends that the summary judgment motion is "in direct contravention to the requests of Diversified" and its representatives. Plaintiff, by his cross motion, opposes the motion for summary judgment by Diversified and seeks an order granting a summary determination as to Diversified's vicarious liability for the conduct of Black. Black, too, opposes the motion by Diversified and "adopt[s] the motion papers of [plaintiff]." VFIC, by its motion for leave to intervene, asks that Di Giulio be "declared" defense counsel for Diversified.

Di Giulio notes, as a threshold matter, that his law firm has been retained by CNA Insurance Company ("CNA"), the insurer defending Diversified. Submissions to the court reveal that Diversified was initially represented by Tromello, McDonnell & Kehoe, and then by Ahmuty.

Apparently Kauffman was retained as "private counsel" for Diversified. By his affirmation, Di Giulio contends that Diversified has refused to consent to the substitution although Ahmuty has consented. It is contended that CNA, as insurer for Diversified, has the authority to retain Di Giulio to defend the action absent a conflict of interest. It is further contended that no conflict of interest exists which would defeat CNA's right to control the defense of its insured. During the last conference held in this matter before the court on September 20, 2010, all parties agreed to the substitution of the law office of Christopher P. Di Giulio, PC as counsel for Diversified in place of Ahmuty. Therefore, upon consent of all parties, the motion to substitute Di Giulio is granted. Further, inasmuch as there is no objection and because the matter is fully submitted, the court will also entertain the motion by Diversified and the cross motion by plaintiff for summary judgment. It is noted that by this determination the motion by VFIC for leave to intervene is moot and, therefore, denied.

Essentially, Diversified contends that it cannot be held liable for Black's alleged negligence under the doctrine of respondeat superior because he was not acting in the scope of his employment at the time of the accident and, in fact, it occurred while he was en route home. It is further contended that Diversified cannot be held liable under the so-called Dram Shop statute codified by General Obligations Law 11-101 nor can it be held liable under a theory of common law negligence for damages attributable to Black's intoxication, because it had no duty to supervise or control his actions. It is contended that Diversified did not own the vehicle driven by Black at the time of the accident. Diversified also argues that it cannot be held liable under the Dram Shop act, because the statute applies only to sellers of alcoholic beverages and it is "undisputed" that Diversified did not sell alcoholic beverages to Black. It is also contended that Diversified cannot be held liable for failing to prevent Black from becoming intoxicated or for any failure to supervise his actions, because Diversified had no common law duty to supervise or control Black by either preventing him from becoming intoxicated or controlling his behavior once he became intoxicated.

Although by his opposition Black opposed the substitution of DiGiulio, such opposition has been withdrawn as noted above. Black also joins in the cross motion by plaintiff opposing a grant of summary judgment to Diversified and seeking a grant of summary judgment finding Diversified liable for his actions.

By his cross motion, plaintiff contends that Black was acting within the scope of his employment at the time of the accident and, therefore, Diversified is vicariously liable for his actions. Plaintiff also objected, initially, to the substitution of Di Giulio which, as noted, is no longer a disputed issue.

With respect to the substantive claim of liability, plaintiff argues that the testimony of the various witnesses, including Black, belies the assertion that he was not acting within the scope of his employment at the time of the accident. It is noted that Black is presently incarcerated as a result of having pled guilty to Manslaughter Second Degree and Operating a Motor Vehicle While Under the Influence of Alcohol. Plaintiff points to Black's pretrial deposition testimony in support of the contention that Black was actively engaged in marketing efforts on behalf of Diversified, including taking clients out for meals and drinks on the evening of the accident and that a company credit card was used for those expenses. It is contended that Black, during his testimony, indicated that there were no specific credit limits with respect to such activities nor was there a requirement that employees use either public transportation or a designated driver. It is also contended that the car

used by Black on the night of the accident was leased and that payments were made by "a related company, First Look Leasing Corp., which was 96% owned by Mr. Black." Plaintiff also relies upon Black's testimony to chronicle the events of the night of the accident. Black testified that he began entertaining representatives of MasterCard with whom he sought to conduct business during the luncheon meeting, and that after lunch, the group continued to drink at The Lucky Clam until the evening. He also testified that inasmuch as Diversified is a small business, he was actively engaged in "sales, marketing, finances, [and] generating new business" which required him to entertain clients. Black testified that he was engaged in entertaining clients on behalf of Diversified "after normal business hours on occasion," including on the night of the accident. Black testified that, after leaving the restaurant, he and members of his party returned to his place of business so that the others could retrieve their cars and so that he could lock up his office. The business engagement continued at The Lucky Clam and "Black was the last of the group to leave" at about 8:15 p.m.

Plaintiff contends that Diversified is vicariously liable for Black's actions under the doctrine of respondeat superior, because he was acting within the scope of his employment at the time of the accident. Although plaintiff concedes that "it is generally true that an employee driving to and from a fixed place of employment is not within the scope of employment," he argues that "this general rule is not applicable where, as here, an employee regularly uses his car in furtherance of his employment." It is noted that Black testified that the focus of the business meeting on the day of the accident was to maintain an ongoing relationship with an existing client.

With respect to the allegation that Diversified was actively negligent, it is contended that Diversified had a common-law duty to regulate Black's activities as its employee and that it breached its duty in that regard. It is further contended that Diversified breached its statutory duty by, through its employees, unlawfully selling, furnishing and assisting in the procurement of the alcoholic beverages consumed by Black while he was in a visibly intoxicated condition and, finally, it is contended that Diversified, through its employees, voluntarily assumed the duty to monitor Black and failed to do so.

Diversified, by its reply, notes that it did not provide the "company car"which was leased by a different corporation and claims that any assertion that the companies are "one and the same" is not supported by the record. It is further argued that, assuming Black was driving his own vehicle, the doctrine of respondeat superior is inapplicable under the facts here. It is noted that Black was en route to his home at the time of the accident and that there is no evidence to suggest that he was engaged in any activity which might be considered related to his business at that time. It is also contended that Black's activities were not akin to those of a traveling salesperson or repairperson who performs work at various locations without having a fixed place of business. It is acknowledged that, under those circumstances, an employer may be found liable under the doctrine of respondeat superior because the travel undertaken by the employee serves a "dual purpose," in other words he continues to act within the course of his employment while, at the same time, serves some purpose of his own. Diversified argues, however, under the factual scenario presented here, plaintiff has failed to raise a triable issue of fact as to its applicability. Diversified also notes that General Obligations Law 11-101 applies only in those instances in which an entity is engaged in the sale of alcohol. It is claimed that under no view of the evidence can it be found that Diversified sold alcohol to Black and that any assertion to the contrary is "absurd." It is similarly argued that Diversified did not "procure" alcohol for Black. Finally, Diversified contends that it did not, by the actions of its employees, assume a duty to exercise control over Black. It is noted, tangentially, that Diversified employees

followed Black to the last establishment and, later, inquired as to whether he needed a ride home. Diversified contends, however, those actions do not rise to the level of assuming a duty to control Black's actions for the benefit of a third party because detrimental reliance cannot be established. Decedent was a stranger to Black and, therefore, according to Diversified, she could not have relied in any fashion on Diversified's employees to control his actions. It is also contended that, even assuming a duty on the part of Diversified, through its employees, to prevent Black from becoming voluntarily intoxicated or from driving while intoxicated, the evidence is to the contrary. The record, according to Diversified, shows nothing to support the contention that anyone suggested Black stop drinking and that simply inquiring as to whether he needed a ride home, is insufficient to create such duty.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material question of fact from the case. The grant of summary judgment is appropriate only when it is clear that no material and triable issues of fact have been presented (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). The movant bears the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposition (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Once such proof has been proffered, the burden shifts to the opposing party who, to defeat the motion, must offer evidence, in admissible form, and must set forth facts sufficient to require a trial of any issue of fact (CPLR 3212[b]; (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]).

Plaintiff's assertion that General Obligations Law 11-101 applies to entities other than establishments engaged in the sale of alcohol is misplaced. The statute instructs that any person injured by an intoxicated person "shall have right of action against any person who shall, by unlawful selling to or unlawfully procuring liquor for such intoxicated person, have caused or contributed to such intoxication; and in any such action, such person shall have a right to recover actual and exemplary damages" (General Obligations Law 11-101 [1]). There has been no showing by plaintiff which warrant an expansion of the liability articulated by the foregoing (*see D'Amico v Christie*, 71 NY2d 76 [1987]). Diversified's application to dismiss that cause of action is granted, as is the application to dismiss plaintiff's cause of action which would impose a common law duty on the part of Diversified to control Black's actions through its employees. There is no showing that any of its employees assumed a duty to prevent Black from becoming intoxicated or from driving while intoxicated.

"The doctrine of respondeat superior renders a master vicariously liable for a tort committed by a servant while acting within the scope of his employment" (*Quadrozzi v Norrem,* Inc., 125 AD2d 559 [1986]). An act is considered to be within the scope of employment if it is performed while the employee is engaged generally in the business of his employer or if his act may be reasonably said to be necessary or incidental to such employment (*see Markohol v Genl. Elec., Co.*, 13 NY2d 163 [1963]). Here plaintiff asserts that the vehicle driven by Black at the time of the accident was a "company car" because it was leased by a "related company" largely owned by Black. However, Black, by his testimony, was somewhat equivocal in describing the relationship between Diversified and First Leasing Corporation as "separate, but they have mutual clients." Black also indicated that,

at the time of the accident, "[he] was headed right home." Apparently he made no telephone calls before leaving the Lazy Clam and was the last in his party to leave the bar. The testimony by Black, however, also underscored that it was his function to "entertain clients" and that to do so required him to meet them at different locations during and after regular business hours. It has also not been established, as a matter of law, that the car driven by Black was not a company vehicle. The evidence suggests that it was necessary for Black to use the vehicle to conduct business on behalf of Diversified. Diversified has not established, therefore, that this case falls within the exception to the general rule that an employer is not liable, under the doctrine of respondeat superior, for the actions of an employee while en route to or from work (*Lundberg v State of New York*, 25 NY2d 467 [1969]). Under the scenario presented here, such determination is more properly within the province of the trier of fact. The motion for summary dismissal by Diversified is denied with respect to plaintiff's cause of action as to the issue of respondeat superior, therefore, is denied.

Dated: October 19, 2010

PAUL J. BAISLEY JR.

J.S.C.