

Zoller v Nagy

2010 NY Slip Op 33296(U)

November 8, 2010

Sup Ct, Nassau County

Docket Number: 8138/09

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 17 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ x

KIRT ZOLLER,

Plaintiff(s),

Index No. 8138/09

-against-

**Motion Submitted: 9/16/10
Motion Sequence: 002, 003**

STANISLAV NAGY AND ELRAC, INC.,

Defendant(s).

_____ x

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....XX
- Answering Papers.....
- Reply.....XX
- Briefs: Plaintiff's/Petitioner's
Defendant's/Respondent's

Plaintiff moves this Court for an Order resolving the issue of liability for the accident in plaintiff's favor, and prohibiting defendants from opposing certain of plaintiff's claims, pursuant to CPLR § 3126. Defendants oppose the requested relief, and they cross-move for an Order dismissing the complaint for failure to state a claim against ELRAC, Inc. ("ELRAC"), and granting summary judgment in ELRAC's favor. Plaintiff opposes the cross-motion, and raises the issue of a potential conflict of interest with respect to defendants' representation.

This action arises from a motor vehicle accident that occurred on December 12, 2007. Defendant Nagy was apparently driving a vehicle, rented from ELRAC by an individual named Cynthia Joyner, when that rental vehicle was involved in a collision with plaintiff's vehicle.

Both defendants are represented by the same attorney, Brian M. Peknic, Esq., of Peknic, Peknic & Schaefer, LLC. Defendants interposed an answer on or about May 21, 2009. Thereafter, the parties entered into a Preliminary Conference Stipulation and Order on November 12, 2009. A final Compliance Conference Order was signed by the Court on April 21, 2010. Plaintiff was deposed on or about March 9, 2010. Defendant Nagy has never been deposed.

As a result of Nagy's failure to appear for deposition on March 9, 2010, April 14, 2010, and May 7, 2010, plaintiff made the instant motion pursuant to CPLR § 3126. In defendants' opposition papers, Nagy's counsel claims that he has "been unable to locate [Nagy]." Although counsel asserts that Nagy was informed of the deposition dates by telephone and by letter, no evidence substantiating those efforts has been supplied. In conclusory fashion, Nagy's counsel states that Nagy's failure to appear has not been established to be willful. Nagy's counsel suggests that, as an alternative to the relief requested by plaintiff, Nagy be ordered to appear for a deposition on the condition that he be precluded from offering testimony at trial on the issue of liability should he again fail to do so.

Nagy's counsel's alternate suggestion that Nagy be ordered to appear for a deposition or be precluded from offering testimony at trial on the issue of liability concerns the Court in view of the fact that counsel claims that Nagy cannot be located. Counsel's suggestion does not appear to be in Nagy's best interest, and it suggests a conflict of interest (*New York Rules of Professional Conduct, Rule 1.7*).

In addressing the potential conflict of interest issue, the Court finds it necessary to first address ELRAC's claim that the complaint should be dismissed for failure to state a cause of action (*CPLR § 3211[a][7]*), and that summary judgment should be granted in ELRAC's favor based on what is commonly known as the Graves Amendment (*49 USC § 30106*). ELRAC asserts that, because it is an improper party to this lawsuit, and that the claims against it cannot lie, there is no conflict of interest.

The Graves Amendment, enacted in 2005, is federal legislation preempting vicarious liability imposed by states on commercial lessors of vehicles (*Vehicle and Traffic Law § 388*). The Graves Amendment has been found to be constitutional, and it acts as a bar to an action against a rental or leasing company for injuries and/or damages based solely on a theory of vicarious liability (*see Graham v. Dunkley*, 50 A.D.3d 55, 852 N.Y.S.2d 169 [2d Dept., 2008]).

The legislation reads, in pertinent part:

(a) In general. An owner of a motor vehicle that rents or leases the vehicle to a person

(or an affiliate of the owner) shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner), for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle *during the period of the rental* or lease, if--

- (1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and
- (2) there is *no negligence* or criminal wrongdoing on the part of the owner (or an affiliate of the owner).

(49 USC § 30106, emphasis added).

Some New York State courts have held that there is an inherent conflict of interest in the representation of both the rental/leasing company and the driver of the vehicle involved in the accident, reasoning that, if the case is dismissed as against one defendant (the company), the other defendant (driver) is left to bear full liability for the claims alleged in the complaint (*see Vinokur v. Radhunandan*, 27 Misc.3d 1239A, 2010 N.Y. Slip Op. 51108U (Sup. Ct. Kings County 2010); *Meigel v. Schulman*, 24 Misc.3d 1242A, 901 N.Y.S.2d 900 (Sup Ct. Kings County 2009); *Graca v. Krasnik*, 20 Misc.3d 1127A, 872 N.Y.S.2d 690 [Sup Ct. Kings County 2008]).

A federal court has held that no conflict of interest exists where a plaintiff alleges only vicarious liability against the rental/leasing company, but does not allege any claim of independent negligence against the company (*see Drake v. Karahuta*, 2010 U.S. Dist. LEXIS 5703 [W.D.N.Y. 2010]). In that case, discovery had been completed and plaintiff did not seek to prove any theory other than vicarious liability of the leasing company.

Where there is a claim of independent negligence asserted against the rental/leasing company, the Graves Amendment is inapplicable, and cannot be asserted as a defense to the action (*see generally Park v. Edge Auto Inc.*, 2009 N.Y. Misc. LEXIS 2427 (Sup Ct. Nassau County 2009); *Sigaran v. ELRAC*, 22 Misc.3d 1101A, 875 N.Y.S.2d 824 (Sup Ct. Bronx County 2008); *Murphy v. Pontillo*, 12 Misc.3d 1146, 820 N.Y.S.2d 743 [Sup Ct. Nassau County 2006]).

Once the Graves Amendment is determined to be inapplicable to a matter, or that a particular action falls outside the ambit of Graves, it is reasonable to conclude that the potential for a conflict of interest exists between the interests of the rental/leasing company and the driver of the vehicle, both of whom are defendants in the same negligence action, with foreseeable cross-claims against one another (*see Drake, supra; New York Rules of Professional Conduct, Rule 1.7*).

In this case, there are several factors that appear to make the Graves Amendment inapplicable. In the first instance, discovery is not complete. Only plaintiff has thus far been deposed; yet, plaintiff alleges in the complaint that ELRAC and Nagy were, *inter alia*, negligent in the ownership, operation, maintenance, management and control of the vehicle. In plaintiff's bill of particulars, plaintiff further alleges, *inter alia*, a failure to properly maintain and equip the motor vehicle.

Construing the pleadings liberally, presuming the facts alleged therein to be true, and according every favorable inference as the Court is required to do (*Fleming v. Allstate Insurance Co.*, 106 A.D.2d 426, 482 N.Y.S.2d 519 (2d Dept., 1984); *Foley v. D'Agostino*, 21 A.D.2d 60, 248 N.Y.S.2d 121 [1st Dept., 1964]; *Murphy, supra*), this Court finds that the pleadings are sufficient to state a cause of action sounding in independent negligence against defendant ELRAC.

Furthermore, the Court has reviewed the police accident report and the rental agreement supplied by ELRAC in its opposition and cross-motion papers. It appears from the rental agreement that the rental period commenced on November 26, 2007, and that the car was to be returned on November 30, 2007. The police accident report indicates that the accident between plaintiff and defendant Nagy occurred on December 12, 2007.

The Graves Amendment protects rental/leasing companies "during the period of the rental." It appears that the accident in this case occurred outside the parameters of the rental period. The affidavit of Daniel Madden, ELRAC's Risk Management Supervisor, utterly fails to address this apparent violation of the rental agreement. The fact that the car was being operated after the scheduled return date also raises questions about what efforts, if any, ELRAC made to retrieve its property in order to prevent it from being operated in violation of the rental agreement. The answers to these questions may also sound in independent negligence committed by ELRAC.

Likewise, the rental agreement lists Cynthia Joyner as the "renter." The agreement further specifies, "no other driver permitted." Mr. Madden's affidavit fails to address this apparent violation of the agreement, while acknowledging that defendant Nagy was the operator of the vehicle on December 12, 2007. Again, there are many questions raised by these discrepancies that may sound in independent negligence committed by ELRAC.

At this juncture, however, it does not appear that these issues can be fully explored, or discovery completed, in light of the existence of a potential conflict of interest in this case.

A party is entitled to be represented by counsel of his or her own choosing. This is a valued right which should not be abridged without a clear showing that disqualification is

warranted. (See, *Eisenstadt v. Eisenstadt*, 282 A.D.2d 570, 723 N.Y.S.2d 395 [2d Dept., 2001]).

Accordingly, all parties, including Stanislav Nagy, are directed to appear before this Court on December 15, 2010 at 9:30 a.m. for a conference, and, if necessary, a hearing with respect to the possible existence of an irreparable conflict of interest in the representation of both defendants by one attorney.

The motion and cross-motion are stayed pending a review of the conflict of interest issue, and they are adjourned to December 15, 2010.

The foregoing constitutes the Order of this Court.

Dated: November 8, 2010
Mineola, N.Y.


J. S. C.

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