Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

DAWN DIGIROLOMO,

Plaintiff,

-against-

JUNE GOLDSTEIN, as Executor of the Estate of IRVING BROWN, deceased,

Defendant.

Index No. 13791/09

Motion Date September 20, 2011

Motion Cal. No. 10

Motion Sequence No. 3

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Defendant's motion for summary judgment pursuant to the fifth affirmative defense in the amended answer of the exclusivity of Section 29 of the Workers' Compensation Law which defense bars plaintiff's recovery, and that branch of plaintiff's cross motion which seeks to strike defendant's workers' compensation section 29 defense (which, in essence, is a request for summary judgment on this issue) are hereby decided as follows:

In this action, plaintiff, Dawn Girolomo sues for personal injuries she allegedly sustained in a motor vehicle accident occurring on February 5, 2009 in Queens, New York, when she was a passenger in a vehicle owned and operated by defendant's decedent, Irving Brown. Plaintiff alleges in her Verified Complaint that defendant's decedent, Irving Brown negligently came into contact with another vehicle, causing her to sustain serious injuries. Defendant submits an Amended Answer wherein defendant alleges as a fifth affirmative defense that the plaintiff's instant action is barred by the provisions of section 29(6) of the Workers' Compensation Law.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (*see, Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4th Dept 2000]).

The Appellate Division, Second Department has held that:

> When an employee elects to receive Workers' Compensation benefits from his general employer, a special employer is shielded from any action at law commenced by the employee (*see*, Workers' Compensation Law § 29 [6]; *Thompson v. Grumman Aerospace Corp.*, 78 NY2d 553; *Abuso v. Mack Trucks*, 174 AD2d 590; *Richiusa v. Kahn Lbr. & Millwork Co.*, 148 AD2d 690). A special employee is defined as "one who is transferred for a limited time of whatever duration to the service of another" (*Thompson v. Grumman Aerospace Corp., supra*, at 557). Principal factors in determining whether a special relationship exists include the right to control, the method of payment, the furnishing of equipment, the right to discharge, and the relative nature of the work (*see, Matter of Shoemaker v. Manpower,*

> *Inc.*, 223 AD2d 787). Within this context, however, it has been said that the key to the determination is who controls and directs the manner, details, and ultimate result of the employee's work (*see, Thompson v. Grumman Aerospace Corp., supra*). Generally, whether a person can be categorized as a special employee is a question of fact (*see, e.g., Kramer v. NAB Constr. Corp.*, 250 AD2d 818; *Singh v. Metropolitan Constr. Corp.*, 244 AD2d 328; *Fitzgerald v. New York City Tr. Auth.*, 243 AD2d 606).

(*Martin v. Baldwin Union Free School District*, 271 AD2d 579 [2d Dept 2000]).

Defendant failed to present a prima facie case that the action is barred pursuant to 29 of the Workers' Compensation Law. In support of the motion, defendant presented, the examination before trial transcript testimony of plaintiff herself, wherein she testified that: she was employed as a home health aide on the date of the accident and her employer was "Bets Home," she was assigned to one patient, Irving Brown, and she would take care of him at his home, she had been assigned to work exclusively for the decedent for between a month and a half to two months prior to the accident, she attended to Mr. Brown's care and comfort, she, inter alia, cooked, cleaned, did his laundry, shopped for him and made sure that he took his medication and she took him to his doctors, she bathed him if needed, and the accident occurred as she was going home with the decedent after he visited one of his doctors. Defendant failed to establish that there was any special employee relationship between plaintiff and decedent. The facts presented fail to establish a prima facie case for decedent's control and direction of "the manner, details and ultimate result of [plaintiff's] work" (*Thompson v. Grumman Aerospace Corp., supra*).

Plaintiff presented a prima facie case that the action is not barred pursuant to section 29 of the Workers' Compensation Law. Plaintiff submits, inter alia, an affidavit of plaintiff herself, wherein she states that: Better Home Health Care, Inc. ("Better Home") was her sole employer on the date of the accident, pursuant to the direction of Better Home, she would assist Irving Brown in his activities of daily living including cleaning, cooking, shopping, making sure he took his medication and going to his doctors appointments, she never took any instruction or direction from decedent, decedent never supervised

anything she did in his home, she was paid solely by Better Home, at no time did decedent pay her for her work, she set her work schedule in conjunction with Better Home, she had no authority to deviate from the care plan set forth by Better Home unless she was instructed to do so by Better Home, and every morning before work, she would call Better Home to check in and discover if there were any changes to her schedule or patients. Such facts establish a prima facie case that there was no special employee relationship between plaintiff and decedent.

As there are no triable issues of fact regarding Section 29 of the Workers' Compensation Law, summary judgment is granted to plaintiff on this issue and the fifth affirmative defense is dismissed.

That branch of plaintiff's cross motion seeking summary judgment on liability is granted. Plaintiff established a prima facie case that there are no triable issues of fact regarding liability. In support of the motion, plaintiff presents, inter alia, the examination before trial transcript testimony of plaintiff, herself, wherein she testified that: at the time of the accident, she was a seat-belt restrained, front seat passenger, in the vehicle owned by Mr. Brown, that Mr. Brown crossed into oncoming traffic and collided with another vehicle traveling in the opposite direction when attempting a left turn, he tried to beat the oncoming car and ran into it, prior to the accident, plaintiff did not see Mr. Brown apply his brakes and she did not hear any screeching tires or the sounding of a horn from either of the vehicles involved in the collision, Mr. Brown was traveling 35-40 mph at the time of impact, she overheard Mr. Brown telling the other driver involved that he was at fault, at the time of the accident, plaintiff was not doing anything besides for sitting in the passenger seat. Plaintiff established a prima facie case that defendant's decedent, Irving Brown violated New York Vehicle and Traffic Law §§ 1120, 1141, and 1180.

In opposition, defendant failed to raise triable issues of fact on liability. In opposition, defendant merely submits, an attorney's affirmation which presents no facts whatsoever on the issue of liability.

As there are no triable issues of fact, a trial on the issue of liability is unnecessary and summary judgment is granted to plaintiff on the issue of liability.

The remaining branch of plaintiff's cross motion is rendered moot.

This constitutes the decision and order of the Court.

Dated: November 14, 2011

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Howard G. Lane, J.S.C.

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