[* 1]

S

Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 11 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

---x

LUCILLE J. JACOBS, individually and AIMEE SCHWARTZ, as the Executrix of the Estate of MYRON J. JACOBS, Deceased,

Plaintiff(s),

-against-

EVERARDO B. NIETO, J. TREZZA ASSOCIATES, INC., INNOVATIVE DESIGNS AND MAINTENANCE, LLC. and JOHN DOE, as unknown driver,

Defendant(s).

---x

Index No. 2681/11

Motion Submitted: 11/22/11
Motion Sequence: 001

The following papers read on this motion:

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

The plaintiffs, Lucille J. Jacobs, Individually, and Aimee Schwartz, as the Executrix of the Estate of Myron Jacobs, move pursuant to CPLR §3212, for a an order granting summary judgment as to the issue of the defendants' liability.

The underlying action results from an automobile accident, which occurred on November 28, 2010 on Jericho Turnpike in Syosset, New York. On said date, the automobile operated by the plaintiff, Lucille J. Jacobs, and owned by plaintiff, Myron Jacobs, was struck head on when a 2000 Ford truck, "crossed the double yellow [line] which divides eastbound

and westbound traffic, [and] entered Plaintiffs" westbound lane of travel (*see* Block Affirmation in Support at ¶3). The subject truck was allegedly owned by defendant, J. Trezza Associates, Inc. [hereinafter Trezza], as well as defendant, Innovative Designs and Maintenance, LLC [hereinafter Innovative], and was operated by defendant, Everardo B. Nieto, an employee of Innovative (*see* Demers' Affirmation in Opposition at Exh. B at pp. 14, 19). As a result of this accident, Mrs. Jacobs suffered physical injuries and Mr. Jacobs was unfortunately killed (*see* Block Affirmation in Support at ¶3).

On or about February 16th, 2011, the plaintiffs commenced the underlying action and now move for summary judgment as to the issue of the defendants' liability for the happening of the subject accident.

In support of the instant application, counsel for the plaintiffs' contends the evidence as adduced herein establishes that defendant Nieto was negligent as a matter of law when the truck he was operating crossed over the double yellow line and proceeded into oncoming traffic. Counsel additionally posits that as Mrs. Jacobs was properly proceeding in her lane of traffic she was under no duty to anticipate the truck operated by defendant Nieto would cross-over into opposing traffic. As evidentiary support for said contentions, counsel for the plaintiffs relies principally, although not exclusively, upon the sworn deposition of non-party witness, Allen Hudson, who testified he was a passenger in a Mercedes SUV traveling westbound on Jericho Turnpike immediately behind the vehicle operated by Mrs. Jacobs (*see* Block Affirmation in Support at Exh. 3 at pp. 10, 13, 16, 17, 18, 22). Mr. Hudson stated that he "saw a landscaping truck heading eastbound" which crossed over the double yellow line entering the westbound lane of travel and hitting the plaintiffs' vehicle (***id.*** at pp. 18, 24, 25). Plaintiffs' counsel argues that the defendants can not offer any non-negligent explanation for the happening of the subject accident thus warranting the relief herein requested (***id.*** at ¶26).

In opposing the plaintiffs' instant application, the central contention posited by defendants' counsel is that inasmuch as the offending truck was not owned by either Trezza or Innovative, the instant motion must be denied (*see* Demers' Affirmation in Support at ¶¶4,5). More specifically and with particular respect to Trezza, counsel asserts that said defendant "never acquired legal title to the vehicle which is believed to have originally been leased" and consequently is not the owner of the subject truck (***id.*** at ¶4). As to defendant Innovative, counsel contends that "although the truck involved in the accident was intended to have been transferred by Trezza to Innovative as part of a bulk transfer", no such transfer occurred and accordingly Innovative is not the legal owner thereof (***id.***).[1]

---

[1] By written agreement executed on September 1, 2010, Trezza, which is in the landscaping business, agreed to sell to Innovative, which is also in the landscaping business, various accounts and equipment (*see* Demers' Affirmation in Opposition at Exh. B at p. 25).

In the instant matter, the Court has carefully reviewed the submissions of the parties and upon said review finds that the Plaintiffs have demonstrated their entitlement to judgment as a matter of law with respect to defendant, Everardo Nieto (***Scott v. Kass***, 48 A.D.3d 785, 851 N.Y.S.2d 649 (2d Dept., 2008); ***Snemyr v. Morales-Aparicio***, 47 A.D.3d 702, 850 N.Y.S.2d 489 [2d Dept., 2008]). It is well settled that "[c]rossing a double yellow line into the opposing lane of traffic, in violation of Vehicle and Traffic Law §1126(a), constitutes negligence as a matter of law, unless justified by an emergency situation not of the driver's own making" (***id; Foster v. Sanchez***, 17 A.D.3d 312, 792 N.Y.S.2d 579 (2d Dept., 2005); ***Barbaruolo v. DiFede***, 73 A.D.3d 957, 900 N.Y.S.2d 671 (2d Dept., 2010); ***Sullivan v. Mandato***, 58 A.D.3d 714, 873 N.Y.S.2d 96 [2d Dept., 2009]). Moreover, a "driver is not required to anticipate that an automobile going in the opposite direction will cross over into oncoming traffic" (***Eichenwald v. Chaudhry***, 17 A.D.3d 403, 794 N.Y.S.2d 391 [2d Dept., 2005]; ***Snemyr v. Morales-Aparicio***, ***supra***). Here, the aforementioned deposition testimony of Mr. Hudson demonstrates that defendant Nieto violated Vehicle and Traffic Law §1126 by crossing over the double yellow line separating the east and westbound lanes on Jericho Turnpike and entering an opposing lane of traffic (***Barbaruolo v. DiFede***, ***supra***). In opposing the application, the defendants did not in any respect address the issue of Mr. Nieto's negligence but rather confined the opposing arguments to the ownership of the offending truck. Accordingly, the defendants have failed to raise a triable issue of fact (***Zuckerman v. City of New York***, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]).

As to Defendants Trezza and Innovative, the Court finds that the plaintiffs have demonstrated their entitlement to summary judgment by establishing that Trezza and Innovative were indeed the owners of the subject truck and that the use thereof by defendant Nieto was permissive (***Vehicle and Traffic §388; Tsadok v. Veneziano***, 65 A.D.3d 1130, 885 N.Y.S.2d 336 (2d Dept., 2009); ***Panteleon v. Amaya***, 85 A.D.3d 993, 927 N.Y.S.2d 85 [2d Dept., 2011]).

"Vehicle and Traffic Law §388 (1) provides that the owner of a motor vehicle is liable for the negligence of anyone who operates the vehicle with the owner's express or implied consent" (***id.***). The statute affords a "strong presumption of permissive use . . . , [which] can only be rebutted by substantial evidence sufficient to show that the driver of the vehicle was not operating the vehicle with the owner's consent" (***Matter of State Farm Mut. Auto. Ins. Co. v. Ellington***, 27 A.D.3d 567, 810 N.Y.S.2d 356 [2d Dept., 2006]; ***Tsadok v. Veneziano***, ***supra***). Of particular relevance herein is the term owner, which is defined in VTL §128 as follows: ". . . a person entitled to the use and possession of a vehicle or vessel subject to a security interest in another person and also 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."

Applying the foregoing statutory provisions to the matter *sub judice*, this Courts finds that Trezza, as the admitted lessee of the 2000 Ford truck, clearly falls within the purview of the statute's definition of an owner (***VTL §128***). As to Innovative, the record establishes that said defendant was a bailee, which had exclusive use of the vehicle for more than the 30 day statutory time frame, and accordingly also falls within the ambit of VTL §128. A bailee is defined as an individual " who receives personal property from another, and has possession of but not title to the property" (Black's Law Dictionary [9th ed. 2009], bailee). Here, included in the defendants' opposition papers is the deposition of David Parsons, the sole owner of Innovative, who testified, *inter alia*, that from the "first week in of September" Trezza "agree[d] for [Innovative] to use the truck . . . ." Mr. Parsons further testified that Innovative did in fact take possession of the truck at that time and intended to ultimately purchase same from Trezza. Thus, contrary to defense counsel's opposing arguments, the record evidence adduced herein establishes that Trezza, by virtue of its status as a lessee, and Innovative, as a bailee having had exclusive use of the truck for a period greater than thirty days, are both owners as contemplated by VTL §128.

In addition to the foregoing, this Court finds that said defendants have failed to rebut the presumption that Nieto's operation of the 2000 Ford truck was permissive (***Matter of State Farm Mut. Auto. Ins. Co. v. Ellington, supra***). In the instant matter, the record is devoid of any evidence that Trezza, as bailor, placed any conditions *vis a vis* Innovative's use of the truck and consequently Innovative was able to permit a third person, in the form of defendant Nieto, to operate the vehicle (***Fili v. Matson Motors, Inc.***, 183 A.D.2d 324, 590 N.Y.S.2d 961 [4th Dept., 1992]). Morever, Mr. Parsons clearly testified that on the date of the plaintiffs' accident, defendant Nieto was operating the vehicle within the course of his employment as a landscaper with Innovative and as such was clearly operating the truck with Innovative's express consent (***Tsadok v. Veneziano, supra***).

Based upon the foregoing, the application interposed by the plaintiffs, which seeks an order granting summary judgment as to the issue of the defendants' liability, is hereby Granted.

The foregoing constitutes the Order of this Court.

Dated: January 24, 2012
Mineola, N.Y.

Karen V. Murphy
J. S. C.