

Hutton v City of New York
2012 NY Slip Op 31075(U)
April 16, 2012
Supreme Court, New York County
Docket Number: 109105/2009
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JAFFE BARBARA JAFFE
J.S.C.
Justice

PART 5

Index Number : 109105/2009
HUTTON, ROBIN
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____

No(s). 1

Answering Affidavits — Exhibits _____

No(s). 2, 3, 4, 5, 6, 7

Replying Affidavits _____

No(s). _____

Upon the foregoing papers, It is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

APR 23 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4-16-12

APR 16 2012

_____, J.S.C.
BARBARA JAFFE

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☒ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----X
ROBIN HUTTON,

Index No. 109105/09

Plaintiff,

Motion Date: 1/10/12

Motion Seq. No.: 003

-against-

DECISION AND ORDER

THE CITY OF NEW YORK, DEPARTMENT OF
TRANSPORTATION, NEW YORK CITY POLICE
DEPARTMENT and DOUGLAS C. KAY and
SPINE WAVE, INC.,

FILED

APR 23 2012

Defendants.

-----X
BARBARA JAFFE, JSC:

NEW YORK
COUNTY CLERK'S OFFICE

For plaintiff:

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Proner & Proner
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For City defendants:

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New York City Law Department
Manhattan Trial Unit, Tort Division
100 Church St., 4th Fl.
New York, NY 10007-2601
212-442-0398

For defendant Spine Wave, Inc.:

Louis C. Annunziata, Esq.
Law Office of James Toomey
485 Lexington Ave., 7th Fl.
New York, NY 10017
917-778-6600

For defendant Kay:

Lynn Golder, Esq.
Kay & Gray
875 Merrick Ave.
Westbury, NY 11590
516-229-4425

By notice of motion dated September 21, 2011, defendant Spine Wave, Inc. (Spine Wave) moves pursuant to CPLR 3212 for an order dismissing the complaint and all cross claims against it. Defendant Kay and defendants City of New York, Department of Transportation, and New York City Police Department (collectively, City) oppose.

By notice of motion dated October 20, 2011, plaintiff moves pursuant to CPLR 3212(g) for an order finding that Kay was in furtherance of Spine Wave's business and acting within the scope of his authority as an employee of Spine Wave at the time of the accident. Spine Wave

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APR 18 2012

NEW YORK COUNTY CLERK'S OFFICE
100 CHURCH STREET, 4TH FLOOR
NEW YORK, NY 10007-2601

opposes.

By undated notice of motion, City moves pursuant to CPLR 3211(a)(7) for an order dismissing the complaint against it for failure to state a cause of action. Only Spine Wave opposes.

I. BACKGROUND

On February 6, 2009, as plaintiff crossed the intersection at East 72nd Street and Second Avenue in Manhattan, she was struck by a motor vehicle owned and operated by Kay, and incurred physical injuries. (Affirmation of Louis C. Annunziata, Esq., dated Sept. 21, 2011 [Annunziata Aff.], Exh. A). The roadway at the intersection was under construction, and a traffic agent employed by City allegedly directed Kay to turn left onto Second Avenue, who thereupon struck plaintiff with his vehicle. (*Id.*).

On or about June 26, 2009, plaintiff served her summons and complaint. (*Id.*). On or about April 16, 2010, plaintiff served a supplemental summons and amended complaint adding Spine Wave as an additional defendant (*id.*, Exh. B), and on or about July 27, 2010, Spine Wave served its answer with cross claims against City and Kay (*id.*, Exh. C).

On February 4, 2011, plaintiff testified at an examination before trial (EBT) that she noticed cones and barriers and other construction-related material on the opposite corner of Second Avenue toward which she was walking, including a drum that blocked a part of the crosswalk, impeding her ability to walk in the crosswalk. There was a traffic agent in the intersection directing cars to turn onto Second Avenue. She began to walk in the crosswalk with the green light in her favor, and had crossed four lanes of traffic in the crosswalk when Kay's vehicle hit her. Kay told her after the accident that he had not seen her before his vehicle collided with her. (*Id.*, Exh. F).

At an EBT held on February 7, 2011, Kay testified that he was employed by Spine Wave as a senior Product manager since July 2008, that he receives W-2 forms from Spine Wave, that he does not work specific hours but was paid a fixed salary regardless of the number of hours he worked each week, and that he is reimbursed for business expenses. He receives a salary and a bonus from Spine Wave but no commissions. Kay uses his personal vehicle for travel related to his work, sometimes works from home, and has a supervisor to whom he reports and with whom he coordinates his schedule and work.

On the day of the accident, Kay had gone to Cornell Hospital as part of his job duties, after which he stopped to get something to eat, and he got back into his vehicle with the intention of driving back to Spine Wave's office where he would do some paperwork and work on various projects. While waiting to turn left onto Second Avenue from 71st Street, Kay observed a traffic agent directing traffic at the intersection. The traffic agent eventually directed him to turn left, and he did so, but his vision was obstructed by construction cones and a concrete barrier and a fence and poles at the corner. Kay did not see plaintiff until right before his vehicle came into contact with her, and he believed that she stepped into the side of his car as he was going through the crosswalk. When he returned to his office after the accident that day, he performed his work there. (*Id.*, Exh. G).

At an EBT held on April 26, 2011, Sharon Garber, Spine Wave's Controller, testified that in 2009 Spine Wave had a written policy of reimbursing its salespersons for expenses incurred during their employment, that part of its salespersons' functions included traveling to medical offices and hospitals, and that Kay was a salaried employee of Spine Wave who received sick and vacation time. Spine Wave also hired independent contractors to sell its products, but only

Spine Wave employees received a W-2 form at the end of the year. Neither the salespeople nor the independent contractors hired by Spine Wave had regular work hours or work schedule. She identified Kay as a senior product manager in the marketing department, rather than a salesperson, with more duties than a salesperson. Kay was hired by Spine Wave pursuant to a written contract that included a non-compete clause and set forth his employment duties and expectations. He also received employee benefits including health insurance and participation in a pension plan. (*Id.*, Exh. H).

II. SPINE WAVE'S AND PLAINTIFF'S MOTIONS

A. Contentions

Spine Wave argues that Kay was not acting within the scope of his employment at the time of the accident as he had finished his morning appointment, had stopped to get food, and had no specific time to return to work that day; as he did not fill out an accident report for Spine Wave nor did he believe he had to; and as he worked at his own convenience and not on a fixed schedule. (*Annunziata Aff.*).

Kay contends that he was acting within the scope of his employment at the time of the accident as he was on his way back to Spine Wave's office to conduct work and in fact went to the office after the accident to do so. (*Lynn Golder, Esq.*, dated Oct. 21, 2011).

City asserts that as Kay was a salaried manager for Spine Wave, who had traveled to Manhattan that day for work and who intended to return to Spine Wave's office after his appointment, he was acting within the scope of his employment, and it is irrelevant that he failed to inform Spine Wave that day about the accident. (*Affirmation of Suzanne K. Colt, Esq.*, dated Oct. 18, 2010).

Plaintiff maintains that as Kay was in Manhattan on the day of the accident in furtherance of Spine Wave's business and was on his way to Spine Wave's office at the time of the accident, there is no triable issue as to whether he was acting within the scope of Spine Wave's employment. (Affirmation of Tobi R. Salottolo, Esq., dated Oct. 20, 2011).

In reply, Spine Wave argues that Kay acted as an independent contractor as it did not dictate his time, route, or means of travel that day. (Affirmation of Louis C. Annunziata, Esq., dated Nov. 14, 2011).

B. Analysis

An employer may be held liable for tortious acts committed by its employee when the employee was "acting in furtherance of duties owed to the employer and where the employer is or could be exercising some degree of control, directly or indirectly, over the employee's activities," (8B NY Jur 2d, Automobiles § 1163 [2012]). An employee's act is considered to be within the scope of his or her employment "when it can fairly and reasonably be deemed to be an ordinary and natural incident or attribute of the service to be rendered, or a natural, direct, or logical result of it," or, stated differently, when it is necessary to accomplish the purpose of the employment or it was done while the employee was doing the employer's work. (53 NY Jur 2d, Employment Relations § 417 [2012]). When the act is done while it involves travel by the employee, the test is whether the employment necessitated the travel. (*Id.*). In determining whether an employee is under an employer's control, the factors to be considered include whether the employee: (1) worked at his or her 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 NY3d 193 [2003]).

Here, Kay had driven into Manhattan in order to observe a surgery pursuant to his job duties, had left the surgery and was driving to Spine Wave's office to perform other work, and after the accident, he went to the office and finished his work for the day. Thus, that he had stopped to get something to eat while on his way to his office does not prove that he was not acting within the scope of Spine Wave's employment at the time of the accident as his employment duties that day required that he drive his vehicle to and from Manhattan. (*See Dimitrakakis v Bridgecom Intl., Inc.*, 70 AD3d 885 [2d Dept 2010] [as employee was required to drive vehicle to and from employer's office, employer failed to establish that employee was not acting within scope of employment when he got into accident after traveling from office to home]; *Davis v Larhette*, 39 AD3d 693 [2d Dept 2007] [as defendant's employment with employer required regular and frequent travel, his activities of stopping for dinner while on business trip and driving back to motel were incidental to employment, and thus within scope of employment]; *see also Margolis v Volkswagen of Am., Inc.*, 77 AD3d 1317 [4th Dept 2010] [employee was acting within scope of employment as he was driving van for employer's business, had finished work at one location, and decided to stop for medication on way back to employer's garage]).

Nor is it accurate to say that Spine Wave had no control over his employment. Rather, while Kay had certain autonomy related to his job duties for Spine Wave, he was expected to complete those duties within specific timeframes set by his immediate supervisor and to work a minimum number of hours per week in order to satisfy his duties, he was on Spine Wave's payroll and received various employee benefits, including paid sick and vacation time and health insurance, and he was hired pursuant to a contract containing a non-compete clause. (*See Fenster*

v Ellis, 71 AD3d 1079 [2d Dept 2010] [employee worked for employer pursuant to contract with non-compete clause, had no flexibility to refuse assignments, and was given rental vehicle to commute to work]; *compare Armacida v D.G. Neary Realty Ltd.*, 65 AD3d 984 [1st Dept 2009] [employee worked whatever hours he chose, did not report to or receive directions from anyone at brokerage, received no health insurance benefits, and was compensated only by commissions]).

III. CITY'S MOTION

A. Contentions

City contends that it is entitled to dismissal as it may not be held liable for the actions of the traffic agent. (Affirmation of Suzanne K. Colt, ACC, dated Oct. 21, 2010). Spine Wave argues that there are triable issues as to whether the traffic agent acted negligently in directing Kay to turn at the intersection. (Affirmation of Louis C. Annunziata, Esq., dated Nov. 14, 2011).

B. Analysis

Although I denied City's prior motion for summary judgment on the ground, *inter alia*, that the construction at the intersection may have caused or contributed to plaintiff's accident, no evidence is offered to prove that the construction was related to City's work or was owned or controlled by City. I also observe that while plaintiff opposed City's first motion, she does not oppose the instant motion.

Moreover, a municipality may not be held liable for the allegedly negligent acts committed by its employee during the course of managing or directing pedestrian or vehicular traffic. (See *Lewis v City of New York*, 82 AD3d 410 [1st Dept 2011], *lv denied* 16 NY3d 713 [City immune from liability for allegedly negligent conduct of traffic agent in directing traffic];

Santos v County of Westchester, 81 AD3d 710 [2d Dept 2011], *lv denied* 17 NY3d 705 [same]; *Devivo v Adeyemo*, 70 AD3d 587 [1st Dept 2010] [City not liable for police officers' alleged negligence in configuring barricade at public event which allegedly caused vehicle to hit plaintiff as "as it involved discretionary acts in managing pedestrian and vehicular traffic undertaken in furtherance of public safety"]; *Shands v Escalona*, 44 AD3d 524 [1st Dept 2007], *lv denied* 10 NY3d 705 [2008] [police officer guided plaintiff's vehicle onto highway]). City has thus established entitlement to dismissal of plaintiff's claim that the traffic agent's negligence caused her accident

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Spine Wave, Inc.'s motion for summary judgment is denied; it is further

ORDERED, that plaintiff's motion for summary judgment on liability is granted to the extent of determining that defendant Kay was acting within the scope of his employment with Spine Wave, Inc. at the time of his accident with plaintiff; it is further

ORDERED, that the summary judgment motion of defendants The City of New York, The New York City Department of Transportation, and The New York City Police Department is granted, and the complaint and any cross claims are dismissed against said defendants with costs and disbursements to defendants as taxed by the clerk of the court upon the submission of an appropriate bill of costs, and the clerk of the court is directed to enter judgment accordingly; it is further

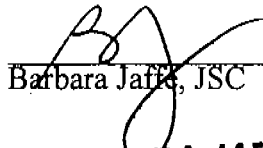
ORDERED, that the remainder of the action shall continue; and it is further

ORDERED, that the Trial Support Office is directed to reassign this case to a non-City part and remove it from the Part 5 inventory. Plaintiff is directed to serve a copy of this order on all other parties and the Trial Support Office, 60 Centre Street, Room 158.

ENTER:

FILED

APR 23 2012


Barbara Jaffe, JSC

DATED: April 16, 2011
New York, New York

APR 16 2012

BARBARA JAFFE
J.S.C.

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