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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

TERESA WROBLEWSKI,

Plaintiff,

- against -

ABRAHAM L. SCHRAETER, TROOP 41 PRODUCTIONS, LLC and HERTZ EQUIPMENT RENTAL CORPORATION,

Defendants.

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Index No.: 24433/2011

Motion Date: 01/07/13

Motion No.: 159

Motion Seq.: 2

The following papers numbered 1 to 16 were read on this motion by plaintiff, TERESA WROBLEWSKI, for an order pursuant to CPLR 3212(a) granting plaintiff partial summary judgment on the issue of liability against defendants ABRAHAM L. SCHRAETER and TROOP 41 PRODUCTIONS, LLC and setting this matter down for a trial on damages; and the cross-motion of defendant HERTZ EQUIPMENT RENTAL CORPORATION for an order dismissing the plaintiff's complaint against it pursuant to the Graves Amendment:

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Notice of Motion-Affidavits-Exhibits	1 - 6
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In this negligence action, the plaintiff, Teresa Wroblewski, seeks to recover damages for personal injuries she sustained as a result of a motor vehicle accident that occurred on September 9, 2011, between the plaintiff's vehicle and the vehicle owned by defendant Hertz Equipment Rental Corporation and operated by defendant Abraham L. Schraeter. At the time of the accident, Schraeter was employed by defendant Troop 41

Productions as a production assistant and was driving the vehicle in the scope of his employment. The accident took place on the northbound lanes of the Major Deegan Expressway in Bronx County, New York. At the time of the accident, plaintiff's vehicle was hit in the rear by the vehicle operated by defendant Schraeter.

The plaintiff commenced this action by filing a summons and complaint on October 26, 2011 and a supplemental summons and complaint on January 3, 2012. Schraeter and Troop 41 served a verified answer to the amended complaint dated March 29, 2012. Defendant Hertz served a verified answer to the amended complaint with cross-claim dated March 22, 2012. Plaintiff filed a note of issue on August 1, 2012.

Plaintiff now moves for an order pursuant to CPLR 3212(a), granting partial summary judgment on the issue of liability against Schraeter and Troop 41 Productions and setting the matter down for a trial on damages. Defendant Hertz cross-moves for an order dismissing the plaintiff's complaint against it pursuant to 49 USC § 30106(a) commonly known as the Graves Amendment which provides that motor vehicle rental corporations may not be held vicariously liable for the acts of the operator. Hertz also moves for an order directing co-defendants to indemnify Hertz for damages and attorney's fees pursuant to an indemnification clause contained in the rental agreement.

Plaintiff's motion for Partial Summary Judgment

In support of the motion, plaintiff submits an affirmation from counsel, Frederick C. Aranki, Esq., a copy of the pleadings, copies of the transcripts of the examinations before trial of plaintiff, Teresa Wroblewski, and defendant, Abraham Schraeter; a copy of the police accident report and color photographs depicting damage to the vehicles.

The police accident report states in pertinent part as follows:

"Driver Veh # 2 (defendant Schraeter) states he was 'fatigued and dehydrated and passed out behind the wheel' causing him to strike the rear of vehicle #1(plaintiff). Driver of Vehicle #1 (plaintiff) states travelling approximately 15 miles per hour when struck by Veh #2 (defendant)."

In her examination before trial taken on May 10, 2012, Ms. Wroblewski, age 54, testified that on the date of the accident, September 9, 2011, she was driving from her house in Howard Beach, Queens County to her summer house in Sullivan County, New

York. Her husband Walter was seated in the front passenger seat. She stated that she was driving 10 - 15 miles per hour in the middle lane of the Major Deegan when her vehicle was struck in the rear several times by a white box truck. When the police arrived at the scene she overheard the defendant driver, Mr. Schraeter, tell the Officer that he was dehydrated and fell asleep. She identified a photograph of her vehicle taken after the accident which depicts the damage to the rear of her vehicle.

The defendant, Abraham Schraeter, age 26, testified at an examination before trial on July 9, 2012 that on the date of the accident he was employed as a production assistant/driver by Troop 41 Productions, a film production company. He was driving a box truck, rented from Hertz, picking up equipment in New Jersey and then returning to the Company location in Manhattan. He states that the accident occurred when he finished picking up all of his equipment and was going back to the company in the Bronx. He stated that while driving on the Major Deegan Expressway he fell asleep and does not remember hitting the plaintiff's vehicle in the rear. He woke up when he felt the impact to the rear of plaintiff's vehicle. He states that he lost consciousness due to dehydration. He remembers that his foot was on the gas pedal when he fell asleep. When he regained consciousness his foot was still on the gas pedal and his vehicle was still moving. He does not know how long he was asleep before he struck the plaintiff's vehicle. He testified that as soon as he realized that he was involved in an accident he hit the brakes. After the accident he observed the trunk of the plaintiff's Mercedes was damaged and pushed in. He then called his supervisor at Troop 41 and also called 911 to report the accident to the police. He testified that when the police came to the scene, "I told the police that I was dehydrated and exhausted and that it was my fault that the accident had occurred." He told the police he had passed out behind the wheel.

Plaintiff's counsel contends that the accident was caused solely by the negligence of defendant Abraham Schraeter who admitted that he fell asleep with his foot on the gas pedal while operating his vehicle on the Major Deegan Expressway and then failed to safely stop his vehicle prior to rear-ending the plaintiff's vehicle. Counsel contends, therefore, that the plaintiff is entitled to partial summary judgment on the issue of liability because the defendant driver, who testified that he briefly lost consciousness due to dehydration, was solely responsible for causing the accident while the plaintiff driver was free from culpable conduct. Counsel argues that plaintiff's deposition stating that her vehicle was struck in the rear by defendants' vehicle while moving on the Major Deegan Expressway

is sufficient to demonstrate, prima facie, that defendant Schraeter was negligent as a matter of law (see Young v City of New York, 113 AD2d 833 [2d Dept. 1985]["when a driver approaches another vehicle from the rear, he is bound to maintain a reasonably safe rate to speed and to maintain control of his vehicle and use reasonable care to avoid colliding with the other vehicle]). Counsel also asserts that as the defendant did not offer a non-negligent explanation for the accident and did not attempt to place any fault for the accident on the plaintiff, that the defendant failed to raise a question of fact on the issue of liability.

In opposition to the motion, defendants' counsel, Joseph Varvaro, Esq. submits an affirmation in which he does not contest the plaintiff's motion for summary judgment on the issue of liability but requests that the matter be set down for a jury trial on the issue of threshold and damages.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion to show the existence of material issues of fact by providing evidentiary proof in admissible form in support of his position (see Zuckerman v. City of New York, 49 NY2d 557[1980]).

"When the driver of an automobile approaches another automobile from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle" (Macauley v ELRAC, Inc., 6 AD3d 584 [2d Dept. 2003]). It is well established law that a rear-end collision creates a prima facie case of negligence on the part of the driver of the rearmost vehicle, requiring the operator of that vehicle to proffer an adequate, non-negligent explanation for the accident (see Zweeres v Materi, 94 AD3d 1111 [2d Dept. 2012]; Nsiah-Ababio v Hunter, 78 AD3d 672 [2d Dept. 2010]; Klopchin v Masri, 45 AD3d 737 [2d Dept. 2007]; Hakakian v McCabe, 38 AD3d 493 [2d Dept. 2007]; Velazquez v Denton Limo, Inc., 7 AD3d 787 [2d Dept. 2004]).

Here, the plaintiff testified that her vehicle was suddenly struck from the rear by the vehicle operated by defendant Abraham Schraeter while she was lawfully operating her vehicle on the Major Deegan Expressway. Thus, the plaintiff satisfied her prima facie burden of establishing entitlement to judgment as a matter of law on the issue of liability (see Volpe v Limoncelli,74 AD3d 795 [2d Dept. 2010]; Smith v Seskin, 49 AD3d 628 [2d Dept. 2008]; Vavoulis v Adler, 43 AD3d 1154 [2d Dept. 2007]; Levine v Taylor, 268 AD2d 566 [2000]).

Having made the requisite prima facie showing of entitlement to summary judgment, the burden then shifted to defendants to raise a triable issue of fact as to whether plaintiff was also negligent, and if so, whether that negligence contributed to the happening of the accident (see Goemans v County of Suffolk,57 AD3d 478 [2d Dept. 2007]; Jumandeo v Franks, 56 AD3d 614 [2d Dept. 2008]; Arias v Rosario 52 AD3d 551 [2d Dept. 2008]).

This Court finds that the defendant, Abraham Schraeter, who admitted to the police officer at the scene and also conceded in his examination before trial that he fell asleep with his foot on the gas immediately prior to the accident and struck the rear of the plaintiffs' vehicle, and who did not submit an affidavit in opposition to the motion, failed to provide any admissible evidence as to a non-negligent explanation for the accident sufficient to raise a question of fact(see Lampkin v Chan, 68 AD3d 727 [2d Dept. 2009]; Cavitch v Mateo, 58 AD3d 592 [2d Dept. 2009]; Garner v Chevalier Transp. Corp, 58 AD3d 802 [2d Dept. 2009]; Kimyagarov v Nixon Taxi Corp., 45 AD3d 736 [2d Dept. 2007]; Gomez v Sammy's Transp., Inc., 19 AD3d 544 [2d Dept. 2005][the defendants failed to raise a triable issue of fact by only interposing an affirmation of their attorney who lacked knowledge of the facts]).

Cross-Motion by Hertz Equipment Rental Corporation

Defendant Hertz, by counsel, Peter T. Connor, Esq., cross-moves for an order dismissing the complaint against it, pursuant to CPLR 3212, alleging that under the Federal Transportation Equity Act of 2005, 49 U.S.C. § 30106, commonly known as the "Graves Amendment, a leasing/rental company vehicle owner cannot be held to be vicariously liable for the alleged negligent acts of the renter, its employees or agents. Hertz asserts that the Graves Amendment preempts New York Vehicle and Traffic Law § 388. Counsel also contends that pursuant to paragraph 7 of the rental agreement defendants agreed to defend and indemnify Hertz for liability and expenses sustained from the operation of the vehicle. Accordingly Hertz requests a Judgment declaring that Troop 41 Productions as the leasee is obligated to defend Hertz in this matter.

In support of its motion, Hertz submits an affidavit from Dennis McGinley an Assistant General Counsel employed by Hertz dated November 5, 2012. Mr. McGinley states that the rental agreement indicates that on September 9, 2011 a motor vehicle registered to Hertz Equipment Rental Corporation was rented to Troop 41 Productions, LLC. He states that pursuant to the Graves Amendment, as Hertz was a rental company, it is not vicariously liable under VTL § 388 and therefore, the complaint fails to

state a cause of action. McGinley also asserts that pursuant to the rental agreement Troop 41 agreed to indemnify and hold harmless the Hertz Corporation.

In opposition counsel for Troop 41 does not oppose that branch of the motion seeking summary judgment dismissing the action against Hertz on the grounds of the Graves amendment. However, counsel opposes that branch seeking indemnity against Troop 41. Counsel claims that thee motion for indemnity must be denied as Hertz never tendered a demand for indemnity as required by paragraph 17 of the agreement.

The Transportation Equity Act of 2005 (49 USC § 30106) provides in pertinent part:

Section 30106 Rented or leased motor vehicle safety and responsibility.

"(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)"

It has now been determined that the Graves Amendment preempts all state statutes to the extent they hold those owners in the business of renting or leasing motor vehicles vicariously liable for the negligence of drivers, except when there is negligence or criminal wrongdoing on the part of the owner.

There is no dispute that Hertz is a leasing company and therefore cannot be held liable for leasing the vehicle in question. The Court finds that Hertz has provided sufficient evidence to demonstrate that the Graves Amendment is applicable to the rental of the vehicle under the Rental Agreement in that Hertz is an owner engaged in the trade or business of renting or leasing motor vehicles.

Therefore, the motion by Hertz to dismiss the plaintiff's claims and all cross-claims and counter claims if any, based solely on vicarious liability against said defendant, is granted pursuant to CPLR 3212 and 3211(a)(7) as that claim fails to state

a cause of action (see Pedroli v. Mercedes-Benz USA, LLC, 94 AD3d 842 [2d Dept. 2012]; Burrell v Barreiro, 83 AD3d 984 [2d Dept. 2011]; Byrne v Collins, 77 AD3d 782 [2d Dept. 2010]; Gluck v Nebgen, 72 AD3d 1023 {2d Dept. 2010]).

As the plaintiff's complaint is dismissed as to Hertz that branch of the cross-motion seeking indemnification is denied as academic.

Accordingly, as the evidence in the record demonstrates that the defendants ABRAHAM L. SCHRAETER and TROOP 41 PRODUCTIONS, LLC failed to provide a non-negligent explanation for the collision, and as no triable issues of fact have been put forth as to whether plaintiff may have borne comparative fault for the causation of the accident, and based on the foregoing, it is hereby,

ORDERED, that the plaintiff's motion is granted, and the plaintiff, Theresa Wroblewski, shall have partial summary judgment on the issue of liability against the defendants ABRAHAM L. SCHRAETER and TROOP 41 PRODUCTIONS, LLC, and the Clerk of Court is authorized to enter judgment accordingly; and it is further,

ORDERED, that upon completion of discovery on the issue of damages, filing a note of issue, and compliance with all the rules of the Court, this action shall be placed on the trial calendar of the Court for a trial on damages, and it is further,

ORDERED that the Clerk of Court is directed to enter judgment in favor of defendant Hertz dismissing the complaint as to defendant Hertz Equipment Rental Corporation.

Dated: January 15, 2013
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.