Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:
WILLIAM B. REBOLINI
Justice

Alcides Hernandez,

Plaintiff,

-against-

Osiris Lamar, Unique Auto Sound, Security & Performance, Inc., Jennifer A. Renick and Kickin' Grass Inc.,

Defendants.

Index No.: 16533/2011

Motion Sequence No.: 004; MOT.D
Motion Date: 2/14/14
Submitted: 3/19/14

Motion Sequence No.: 005; XMOT.D
Motion Date: 3/19/14
Submitted: 3/19/14

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Clerk of the Court

Upon the following papers numbered 1 to 35 read upon this motion and cross motion for summary judgment: Notice of Motion and supporting papers, 1 - 22; Notice of Cross Motion and supporting papers, 28 - 32; Answering Affidavits and supporting papers, 23 - 27; 33 - 35; it is

ORDERED that the motion by the plaintiff for an order pursuant to CPLR 3212 granting summary judgment in his favor on the issue of liability against defendants Osiris Lamar, Unique Auto Sound, Security & Performance, Inc., and Jennifer Renick, for an immediate trial on the issue of damages, and to preclude the defendants from calling Dr. Scott Press as a witness at trial is granted to the extent of granting summary judgment in favor of the plaintiff on the issue of liability

against defendants Osiris Lamar, Unique Auto Sound, Security & Performance, Inc., and Jennifer Renick, and is otherwise denied; and it is further

ORDERED that the cross-motion by defendants Jennifer Renick and Kickin Grass, Inc. for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross-claims asserted against them and for summary judgment in their favor and against defendants Osiris Lamar and Unique Auto Sound, Security & Performance, Inc. on their cross-claim for common-law indemnification is granted to the extent of granting summary judgment dismissing the complaint and all cross-claims asserted against Kickin Grass, Inc. and granting summary judgment in favor of Jennifer Renick and against Unique and Lamar on her cross-claim for common-law indemnification, and is otherwise denied.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff as a result of a bicycle accident which occurred on May 4, 2011 at the intersection of Sunrise Highway and 42nd Street in Lindenhurst, New York. According to the plaintiff, he was riding his bicycle westbound along the south sidewalk of Sunrise Highway and was in the process of crossing its intersection with 42nd Street, when he was struck by a vehicle owned by defendant Jennifer Renick and operated by Osiris Lamar, an employee of Unique Auto Sound, Security & Performance, Inc. ("Unique"), the company that was installing chrome rims on the front wheels of Mrs. Renick's vehicle that day. In the complaint, the plaintiffs allege that defendant Lamar was negligent, *inter alia*, in his operation of the motor vehicle owned by Mrs. Renick while he was acting in the scope of his employment for Unique. In their answer, Lamar and Unique assert cross-claims against Mrs. Renick for common-law indemnification. In her answer, Renick asserts a cross-claim against Lamar and Unique for common-law and contractual indemnification. Thereafter, the plaintiff commenced a second action against defendant Kickin Grass, Inc. ("Kickin"), a landscaping company owned by Jennifer Renick. In that complaint, the plaintiff alleged that Kickin was the owner of the vehicle which struck the plaintiff. In its answer, Kickin did not assert any cross-claims. Pursuant to a so-ordered stipulation dated August 23, 2012, both actions were consolidated for all purposes under index number 11-16533.

The plaintiff now moves for summary judgment in his favor on the issue of liability against defendants Lamar, Unique, and Jennifer Renick, for an immediate trial on the issue of damages, and for an order precluding the defendants from calling Dr. Scott Press as a witness at trial. Defendants Jennifer Renick and Kickin cross-move for summary judgment dismissing the complaint and all cross-claims asserted against them, and for summary judgment in their favor and against Lamar and Unique on their cross-claim for common-law indemnification.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see* ***Rotuba Extruders, Inc. v Ceppos***, 46 NY2d 223, 413 NYS2d 141 [1978]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such

a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797, 799 [2d Dept 1988]). Once a *prima facie* showing has been made, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*).

Vehicle and Traffic Law § 1172 (a) provides that "every driver of a vehicle approaching a stop sign shall stop at a clearly marked stop line, but if none, then shall stop before entering the crosswalk on the near side of the intersection, or in the event there is no crosswalk, at the point nearest the intersecting roadway where the driver has a view of the approaching traffic on the intersecting roadway before entering the intersection and the right to proceed shall be subject to the provisions of section eleven hundred forty-two." Vehicle and Traffic Law § 1142 (a) provides that "every driver of a vehicle approaching a stop sign shall stop as required by section eleven hundred seventy-two and after having stopped shall yield the right of way to any vehicle which has entered the intersection from another highway or which is approaching so closely on said highway as to constitute an immediate hazard during the time when such driver is moving across or within the intersection." It is well-settled that "a driver who has the right-of-way is entitled to anticipate that the other motorist will obey the traffic law requiring him or her to yield" (***Vainer v DiSalvo***, 79 AD3d 1023, 1024, 914 NYS2d 236, 237 [2d Dept 2010]; *see also* ***Platt v Wolman***, 29 AD3d 663, 816 NYS2d 121 [2d Dept 2006]; ***Dileo v Barreca***, 16 AD3d 366, 793 NYS2d 53 [2d Dept 2005]).

Furthermore, "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" (***Panteleon v Amaya***, 85 AD3d 993, 994, 927 NYS2d 85, 86 [2d Dept 2011]; *accord* ***Country–Wide Ins. Co. v National R.R. Passenger Corp.***, 6 NY3d 172, 811 NYS2d 302 [2006]).

In addition, the doctrine of respondeat superior renders an employer vicariously liable for a tort committed by his employee within the scope of employment (*see* ***Rivera v Fenix Car Serv. Corp.***, 81 AD3d 622, 916 NYS2sd 169 [2d Dept 2011]). "An act is considered to be within the scope of employment if it is performed while the employee is engaged generally in the business of his employer, or if his act may be reasonably said to be necessary or incidental to such employment" (***Fenster v Ellis***, 71 AD3d 1079, 1080, 898 NYS2d 582, 584 [2d Dept 2010] [internal quotation marks omitted]).

Here, the plaintiff established his *prima facie* entitlement to summary judgment as a matter of law. The plaintiff demonstrated through his own affidavit and deposition testimony that at the time of the accident Osiris Lamar, who was operating a vehicle owned by Jennifer Renick and acting within the scope of his employment for Unique, either failed to stop at the stop sign or, upon stopping, failed to yield the right of way to the plaintiff, and that Lamar's failure to stop or failure

to yield was the sole proximate cause of the accident (*see* Vehicle and Traffic Law § 1142 [a]; § 1172 [a]; ***Ballatore v HUB Truck Rental Corp.***, 83 AD3d 978, 922 NYS2d 180 [2d Dept 2011]; ***Vainer v DiSalvo***, *supra*). In addition, plaintiff, who had the right of way, was entitled to assume that Lamar would obey the traffic laws requiring him to yield (*see* ***Platt v Wolman***, *supra*). Specifically, plaintiff states in his affidavit that he was traveling westbound on his bicycle on Sunrise Highway through its intersection with 42nd Street, with no traffic control devices. However, even though there were no traffic control devices and there was a stop sign controlling vehicles traveling northbound on 42nd Street at its intersection with Sunrise Highway, he stopped for approximately one to two seconds at the southeast corner of 42nd Street at its intersection with Sunrise Highway to make sure it was safe to cross. He then continued westbound on Sunrise Highway through the intersection. When he was approximately halfway across the intersection, he saw Lamar approach the intersection and fail to stop or yield before entering the intersection, striking him with the front of his vehicle.

In opposition, Lamar, Unique, and Jennifer Renick failed to raise a triable issue of fact (*see* ***Williams v Hayes***, 103 AD3d 713, 959 NYS2d 713 [2d Dept 2013]; ***Alvarez v Prospect Hosp.***, *supra*). While Lamar testified at his deposition that he fully stopped at the stop sign before proceeding into the intersection, the question of whether he stopped at the stop sign is not dispositive since the evidence establishes that he failed to yield even if he did stop (*see* ***Williams v Hayes***, *supra*; ***Czarnecki v Corso***, 81 AD3d 774, 916 NYS2d 828 [2d Dept 2011]). Although Lamar also testified that he looked both ways before proceeding into the intersection, it is well settled that "[a] driver is negligent where an accident occurs because he or she fails to see that which through proper use of [his or her] senses [he or she] should have seen" (***Amalfitano v Rocco***, 100 AD3d 939, 940, 954 NYS2d 644, 646 [2d Dept 2012]).

With respect to the branch of the plaintiff's motion which seeks to preclude the defendants from calling Dr. Scott Press as a witness at trial, the plaintiff asserts that he was examined by Dr. Press at the defendants' request approximately three months ago and that he has made numerous requests to the defendants for a copy of the narrative report of Dr. Press to no avail. In response, Jennifer Renick and Kickin's attorney stated that the independent medical exam performed by Dr. Press was coordinated by the attorney for Lamar and Unique, and after speaking with counsel for Lamar and Unique, he learned that the report completed by Dr. Press was originally received by them at the end of 2013. However, after receiving the report and noticing a typographical error, they requested that Dr. Press correct the report. Jennifer Renick and Kickin's attorney also stated that he learned that the report has since been exchanged with all of the parties. In his reply papers, the plaintiff does not dispute that he has received the report prepared by Dr. Press. Thus, the branch of the motion seeking to preclude the defendants from calling Dr. Press as a witness at trial is denied.

Turning to the branch of the cross-motion by Jennifer Renick and Kickin for summary judgment dismissing the complaint, both Jennifer Renick and her husband, Mr. Renick, testified at their depositions that the vehicle driven by Lamar at the time of the accident was owned by Jennifer Renick, and that while the vehicle had an advertisement on it for Kickin, Jennifer Renick's landscaping business, it was not used in the course of the business but was used solely by Mr. Renick for personal use. In addition, a copy of the certificate of title, annexed as an exhibit to the cross-

motion, indicates that Jennifer Renick was the owner of the vehicle. In opposition, the plaintiff does not dispute this nor does he raise an issue of fact as to whether Kickin was the owner of the vehicle (*see* ***Alvarez v Prospect Hosp.***, *supra*). Therefore, since Kickin is not the owner of the vehicle, it cannot be held liable for the accident (*see* Vehicle and Traffic Law § 388). The Court notes that while Kickin also seeks summary judgment on its cross-claim for common-law indemnification, Kickin has not asserted any cross-claims in its answer and, in any event, would not be entitled to common-law indemnification as the complaint is dismissed as against Kickin.

As for Jennifer Renick, she asserts in her cross-motion that she cannot be held liable for the accident pursuant to Vehicle and Traffic Law § 388 since Lamar did not have permission to move her vehicle from the back parking lot to the front parking lot of Unique after the work had been completed on the vehicle. In her affidavit in support of the cross-motion, Jennifer Renick states that Unique's permission to operate her vehicle was limited to the extent of doing the work necessary on the vehicle. Specifically, Unique was permitted to bring the vehicle into the service bay to complete the work on the vehicle and to remove the vehicle from the service bay. However, Mr. Renick testified at his deposition that when he dropped off the vehicle to be worked on at Unique, he left the keys at the shop and did not state that they could not move the vehicle from the back parking lot to the front parking lot when the work was completed. Lamar testified at his deposition that every time a vehicle is worked on at Unique, it has to be moved from the back lot into the shop. After the work is complete, the vehicles are either moved to the back lot or to the front for the customer to pick up. On the day of the accident, after he finished working on Jennifer Renick's vehicle, it needed to be moved to the front parking lot so that Mr. Renick could pick it up. In order to move the vehicle into the front lot, he had to drive the vehicle out of the rear parking area and eastbound on Sunrise Highway. Shahram Kafaierad, the owner of Unique, testified that the front parking lot of his shop is located on the south side of Sunrise Highway in front of the lanes heading eastbound. The back parking lot faces 42nd Street. All customers leave their keys so that their vehicles can be moved into the shop to be worked on. The customers all understand that either he or one of his employees will have to move the vehicle in order to work on it. Neither Mr. Renick nor Jennifer Renick told him that his employees were not permitted to move the vehicle. In light of the foregoing, the Court finds that Jennifer Renick's assertion that she cannot be held liable pursuant to Vehicle and Traffic Law § 388 because Unique did not have permission to move her vehicle from the back parking lot to the front parking lot after they finished working on the vehicle to be without merit.

To the extent that the cross motion by Jennifer Renick and Kickin sought summary judgment in favor of Jennifer Renick and against Unique and Lamar on their cross-claim for common-law indemnification, it is well settled that "[s]ummary judgment on a claim for common-law indemnity . . . is appropriate . . . where there are no issues of material fact concerning the precise degree of fault attributable to each party involved" (***La Lima v Epstein***, 143 AD2d 886, 888, 533 NYS2d 399, 401 [2d Dept 1988]). To be entitled to summary judgment, a party is required to establish "that no negligent act or omission on its part contributed to the plaintiff's injuries, and that its liability is therefore purely vicarious" (***Coque v Wildflower Estates Dev.***, 31 AD3d 484, 489, 818 NYS2d 546, 551 [2d Dept 2006]). Here, it is implicit in this Court's decision, which finds that the plaintiff is entitled to summary judgment against Unique and Lamar on the issue of liability, that Unique and

Lamar were negligent in operating Jennifer Renick's motor vehicle by striking the plaintiff. Therefore, since Jennifer Renick established that she can only be held statutorily liable for the negligence of Unique and Lamar pursuant to Vehicle and Traffic Law § 388, she is entitled to common-law indemnification against Unique and Lamar.

Dated: 6/24/2014

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**