Tacuri v Begley
2014 NY Slip Op 32579(U)
September 29, 2014
Supreme Court, Suffolk County
Docket Number: 10-18828
Judge: Jeffrey Arlen Spinner

[* 1]

SHORT FORM ORDER

INDEX No. 10-18828

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 7-14-13 (004)
MOTION DATE 9-11-13 (005)
ADJ. DATE 7-9-14
Mot. Seq. # 004 - MG
005 - MG; CASEDISP

JORGE LUIS RODAS TACURI a/k/a JORGE RODAS,

Plaintiff,

- against -

TRACI A. BEGLEY and CHRYSLER GROUP LLC,

Defendants.

PETER D. BARON, PLLC
Attorney for Plaintiff
90 Main Street
Cold Spring Harbor, New York 11724

LEWIS JOHS AVALLONE AVILES, LLP
Attorney for Defendant/Third-Party Plaintiff Begley
One CA Plaza, Suite 225
Islandia, New York 11749

TRACI A. BEGLEY,

Third-Party Plaintiff,

- against -

BOHEMIA HAND WASH,

Third-Party Defendant.

HERZFELD & RUBIN, P.C.
Attorney for Defendant Chrysler Group
125 Broad Street
New York, New York 10004

O'CONNOR REDD LLP
Attorney for Third-Party Defendant Bohemia
200 Mamaroneck Avenue
White Plains, New York 10601

CHRYSLER GROUP, LLC,

Second Third-Party Plaintiff,

- against -

CARLOS A. CASTANEDA-VALLE and BOHEMIA HAND WASH,

Second Third-Party Defendant.

Upon the following papers numbered 1 to 76 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (004)1-28; Notice of Cross Motion and supporting papers (005) 29-51; Answering Affidavits and supporting papers 52-53; 54-55; Replying Affidavits and supporting papers 56-67; 68-76; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (004) by third-party defendants, Bohemia Hand Wash, pursuant to CPLR 3212 for summary judgment dismissing plaintiff Jorge Luis Rodas Tacuri's complaint in the main action #1 and the third party complaint on the basis that said actions are barred by Worker's Compensation Law §§ 11 and 29 is granted; and it is further

ORDERED that motion (005) by defendant/third-party plaintiff and defendant in action #2,Traci A. Begley pursuant to CPLR 3212 for summary judgment dismissing plaintiff Jorge Luis Rodas Tacuri's complaint in the main action #1, as barred by Worker's Compensation Law §§ 11 and 29 is granted.

Action #1 arises from an automobile accident which occurred on April 11, 2010 at Bohemia Auto Wash at 4740 Route 27, Bohemia, Suffolk County, New York, when the plaintiff, Jorge Rodas Tacuri, while a pedestrian, was struck by the vehicle owned by Traci A. Begley, and operated by plaintiff's co-worker, Carlos A. C. Castaneda-Valle, during their course of employment with third-party defendant Bohemia Hand Wash. Action #1 was commenced by plaintiff against Traci A. Begley and amended to add Chrysler Group, LLC as a defendant. However, the action was discontinued against Chrysler Group, LLC by stipulation dated September 24, 2012. Traci Begley commenced a third-party action against third-party defendant, Bohemia Hand Wash wherein she asserts she is not liable to the plaintiff; that Bohemia Hand Wash was negligent in the supervision and training of its employees; and negligently failed to properly operate, inspect, and maintain vehicles being washed or dried at its facility; and for contribution/ indemnification. In its answer, Bohemia Hand Wash cross claimed against Begley for indemnification and for breach of an agreement wherein Begley was to maintain insurance providing coverage for Bohemia Hand Wash for all or part of the loss or injury claimed by the plaintiff, and that such agreement was in force and effect on April 11, 2010. As second third-party plaintiff, Chrysler Group, LLC commenced a second third-party action against Carlos A. Castaneda-Valle and Bohemia Hand Wash. These actions were commenced in Suffolk County. Sunrise Highway Commons, LLC commenced action #2 in Nassau County Supreme Court against defendants Traci Begley, C.A. Castaneda-Valle and Bohemia Auto Wash, LLC asserting property damage for which they seek compensation premised upon the alleged negligence of defendants. Pursuant to CPLR 602, by order dated December 11, 2012, (Spinner, J.), action #2 was removed from Nassau County to Suffolk County, and was joined for discovery and trial with action #1.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]; ***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form and must "show facts sufficient to require a trial of any issue of fact" (CPLR3212 [b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595

[1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.***, 79 AD2d 1014, 435 NYS2d 340 [1981]).

In support of motion (004), Bohemia Hand Wash submitted, inter alia, an attorney's affirmation; copy of the MV 104 Police Accident Report; copies of pleadings, answers, and plaintiff's verified bill of particulars; notice of discontinuance dated September 24, 2013; order dated December 11, 2012; unsigned but certified transcript of the examination before trial of plaintiff; notice to admit dated March 4, 2013 and response dated April 22, 2013; letter dated April 26, 2013; unsigned and undated incident report; statement by Castaneda-Valle; unsigned employer's report of work-related injury/illness; blank exhibit; copy of New York State Worker's Compensation Claim dated August 9, 2010; a copy of a notice of cancellation of insurance, stating that the policy was not renewed effective December 31, 2010; affidavit of Edward Fitzpatrick dated April 3, 2013; and decision of Workers' Compensation Board after a hearing held on July 27, 2010; and proposed order.

In support of motion (005), Begley submitted, inter alia, an attorney's affirmation; copies of pleadings and answers, and plaintiff's verified bill of particulars; stipulation of discontinuance dated September 24, 2012; order dated December 11, 2012 (Spinner, J.) joining actions #1 and #2 for discovery and trial; notice to admit dated March 4, 2013; response to notice to admit dated April 22, 2013; letter dated April 26, 2013; unsigned but certified transcript of the examination before trial of plaintiff; uncertified copy of MV 104 Police Accident Report; unsigned and undated incident report; statement by Castaneda-Valle; unsigned employer's report of work-related injury/illness; blank exhibit; copy of New York State Worker's Compensation Claim dated August 9, 2010; a copy of a notice of cancellation of insurance stating that the policy was not renewed effective December 31, 2010; affidavit of Edward Fitzpatrick dated April 3, 2013; and decision of Workers' Compensation Board pursuant to hearing held on July 27, 2010.

It is determined that the "incident report" submitted by the moving parties is hearsay and is not in admissible form; is undated and unsigned; and is not accompanied by an affidavit or other statement attesting to its authenticity and veracity (CPLR 3212, ***Friends of Animals v Associated Fur Mfrs.***, supra). The unsworn MV 104 Police Accident Report constitutes hearsay and is inadmissible (*see*, ***Lacagnino v Gonzalez***, 306 AD2d 250, 760 NYS2d 533 [2d Dept 2003]; ***Hegy v Coller***, 262 AD2d 606, 692 NYS2d 463 [2d Dept 1999]).

A notice to admit dated March 4, 2013, with its attendant exhibits, was served by third-party defendant Bohemia Auto Wash, LLC upon plaintiff Jorge Luis Rodas Tacuri, who admitted that the automobile accident of April 11, 2010 is the subject of the lawsuit; that Tacuri submitted a claim with the Worker's Compensation Board for his injuries under claim number GO196656 and that his Worker's Compensation insurance carrier number for the claim is 709-844323. However, said response to the notice was not signed by plaintiff, was rejected by third-party Bohemia Car Wash, and the entire notice was deemed admitted by Bohemia. However, notices to admit may not go to those material elements in an action.

In motion (004), third-party defendant Bohemia Hand Wash seeks summary dismissal of the plaintiff Jorge Rodas Tacuri's complaint, as well as the third party complaint asserted by third-party plaintiff Traci Begley. The plaintiff seeks damages for personal injury against Begley based upon her

alleged negligence in the ownership, operation, maintenance, and control of the subject vehicle involved in the accident, a 2010 Jeep. In her third-party complaint, Begley alleges in her first cause of action that should the evidence show that plaintiff sustained a "grave injury" within the meaning of Workers' Compensation Law, then Bohemia Hand Wash is liable to Begley for contribution or indemnification; that Bohemia Hand Wash was negligent in training and supervising its employees, failed to properly and adequately inspect, test, maintain, and repair vehicles being washed or dried; failed to properly and adequately use the vehicle; and for common law indemnification/contribution.

In motion (005), defendant/third-party plaintiff Traci Begley, seeks summary dismissal of the complaint asserted against her by plaintiff Jorge Luis Rodas Tacuri.

Defendant/third-party plaintiff Traci Begley was the owner of the vehicle involved in the accident, a 2010 Jeep, which she brought to Bohemia Hand Wash to have washed. The plaintiff, Jorge Luis Rodas Tacuri, a pedestrian and employee of Bohemia Hand Wash, was injured when his coworker, Carlos Castaneda-Valle, while operating the Jeep, struck the plaintiff. Begley, is being sued pursuant to VTL § 388 which ensures access by an injured person to a financially responsible party against whom to recover for injuries, and which changes the common-law rule, and imposes liability upon an owner of a vehicle for the negligence of a person legally operating the car with the permission, express or implied, of the owner (***Hassan v Montuori***, 99 NY2d 348, 756 NYS2d 126 [2003]).

In the instant action, it is asserted that the accelerator on Begley's vehicle became stuck while being driven out of the car wash tunnel by Castaneda-Valle, causing the Jeep to strike the plaintiff, another vehicle, and a building. Because it is asserted that the accelerator became stuck, plaintiff seeks damages from the owner of the Jeep on the basis she was negligent in the ownership, operation, maintenance, and control of the subject vehicle. Begley denies the same.

Counsel for the moving parties set forth in his supporting affirmation that Chrysler was released from the action given that there were no defects found in the vehicle after an inspection of the vehicle by the experts and counsel of all parties. This is not been disputed by any party.

The plaintiff applied for and has received benefits to under Workers' Compensation Law §11 and §29(6) under policy number WC-009-87-2513. The affidavit of Edward Fitzpatrick, dated April 3, 2013, a Workers' Compensation claims adjuster with AIG/Chartis Insurance Company, provides that under claim number 709-844323, Chartis honored the claim of Jorge Rodas for the accident that occurred on April 11, 2010 during the course of his employment with Bohemia Auto Wash.

The fact that an injured employee's right to compensation or benefits shall be exclusively those provided for in the Workers' Compensation Law where such employee is injured by the negligence or wrong of another in the same employ, under Workers' Compensation Law §29(6), not only prevents suit against the employer, pursuant to Workers' Compensation Law §11, but against a coemployee who, while acting within the scope of his employment, causes the injury (***Heritage et al v Van Patten,*** 90 AD2d 936, 457 NYS2d 912 [3d Dept 1982]). It is undisputed that Castaneda-Valle, as second third-party defendant, was plaintiff's coworker and was operating the Begley vehicle during the course of his employment at Bohemia Handwash at the time the incident occurred.

"Workers' Compensation Law §§ 11, 29 (6) render workers' compensation benefits the exclusive remedy of an injured employee, thereby barring the employee from recovering against a negligent coemployee or employer (***Isabella v Hallock***, 22 NY3d 788, 987 NYS2d 293 [2014]). In ***Naso v Lafata***, 4 NY2d 585, 176 NYS2d 622 [1958], the court stated that to bring into operation Workers' Compensation Law § 29 (6), two elements must emerge. The first is that an employee be injured in the course of his employment, and second, that his injury is the result of the negligence or wrong of a fellow employee. When these elements are present, Workers' Compensation Law § 29 (6) becomes the only remedy available to the injured employee. Workers' Compensation Law §§ 11, 29 (6) further precludes third-parties from seeking contribution or indemnification from coemployee or employer unless the employee sustained a qualifying grave injury as defined by Workers' Compensation Law §§ 11 (***Isabella v Hallock***, surpa). In the instant action, it has not been argued or demonstrated that the plaintiff sustained a grave injury.

Isabella v Hallock, supra, also provided that a defendant was not permitted to pursue a third-party contribution claim under VTL § 388 against a vehicle owner where the driver's negligence was a cause of plaintiff's injuries, because the driver was plaintiff's coworker and insulated from a lawsuit under Workers' Compensation Law § 29 (6). It additionally provided that Workers' Compensation Law § 29 (6) prevents an injured passenger from suing the vehicle owner under VTL § 388 where, at the time of the accident, the automobile was operated by a coemployee of the passenger during the course of their employment. In the instant action, the plaintiff was a pedestrian struck by his coworker during their course of employment.

In ***Rose v Gelco Corporation***, 261 AD2d 381, 688 NYS2d 259, the plaintiff employee sustained physical injury during the course of his employment when he tripped and fell over a fire extinguisher installed in a van by defendant company. The van had been leased by plaintiff's employer from defendant van owner. The complaint was dismissed against defendant van owner in part, because the plaintiff failed to allege any independent negligence on the part of defendant van owner; evidence in support of causes of action for strict products liability or breach of implied warranty were devoid of a factual basis and were vague and conclusory; and the allegations contained in the complaint were insufficient to support the claim that the van was defectively designed or manufactured. In the instant action, the plaintiff has asserted an independent act of negligence against Begley in the ownership, maintenance, operation and control of her vehicle although such claim is conclusory and unsupported by the record and moving papers. Plaintiff does not dispute defendants' counsels assertions that the vehicle, upon inspection by the experts for all parties, revealed no defects.

In ***Jaglall v Supreme Petroleum Co of New Jersey, Inc.***, 185 AD2d 971, 587 NYS2d 413 [2d Dept 1992], it was held that the rental company, as the owner of the vehicle, was not vicariously liable for the driver's negligence because the driver was statutorily immune. The driver and passenger were coworkers, the vehicle was leased by the employer, the employer was responsible for the maintenance and repair of the vehicle, and thus, the rental company was not vicariously liable as the owner of the vehicle. In the instant action, plaintiff's employer, Bohemia Hand Wash, was not responsible for maintenance and repair of the vehicle.

In ***Donahue v DeLea & Sons, Inc.***, 56 AD3d 602, 871 NYS2d 155 [2d Dept 2008]), the plaintiff was injured while operating a truck in the course of her employment. The truck was leased to her employer by defendant owner DeLea Leasing Corp. The complaint, which asserted that the owner

negligently failed to inspect, maintain, and repair the truck, was dismissed because the owner demonstrated, inter alia, that it was not responsible for the maintenance and repair of the truck, and the plaintiff failed to raise a triable issue of fact in opposition.

In the instant action, it asserted that Begley was responsible for the maintenance and repair of the vehicle. An owner of a vehicle may be held liable for its own independent negligence (***Rodriguez v Lodato Rental, Inc.***, 267 AD2d 293, 701 NYS2d 33 [2d Dept 1999]; see also ***Delio v Percom Equip. Rental Corp***, 249 NYS2d 354; ***Houston v Avis Rent A Car Sys.***, 209 AD2d 583; ***Jaglall v Supreme Rental Corp***., supra). However, in the instant action, it is undisputed that there were no defects found in the 2010 Jeep vehicle after the inspections by the experts and counsel for all parties. Thus, the claim that Begley failed to properly inspect, maintain, and control her vehicle has been rendered academic as no evidence has been submitted, and no factual issue raised, to support any liability against Begley premised upon her failure to maintain, operate, and control her vehicle.

In ***Rauch v Jones***, 4 NY2d 592, 176 NYS2d 628 [1958] it was held that because Workers' Compensation Law § 29 (6) is the exclusive remedy afforded to plaintiff because plaintiff was injured by a coworker, that the plaintiff is deprived of the right to maintain an action against the coworker or a derivative claim that depends upon the same claim of negligence. ***Rauch v Jones***, involved VTL § 59 which provides that the owner of a motor vehicle shall be liable for the negligence of any person operating the vehicle upon a public highway with the express or implied permission of the owner. VTL § 59-a provides a similar liability (not, however, restricted to operation upon a public highway) imposed jointly upon separate owner of an auto truck or auto trailer and of an attached trailer or semi-trailer. It was determined that VTL § 59 does not extend the liability of the master for the acts of his servant, and places the borrower of the car in the same position toward the lender as that of master and servant, principal and agent, but does not increase the liability of the lender beyond that of the master for those acts of his servant coming within the scope of his employment. The court stated that it was clear that the plaintiff seeks to recover for injury caused by the negligence or wrong of another in the same employ, and as such, he is excluded from any remedy, save that afforded him by the Workmen' Compensation Law.

In the instant action, it is determined that plaintiff's claim asserted against Begley is dependent upon the same claim of negligence which is the basis for the Workers' Compensation claim. It is clear that Begley was not operating and controlling her vehicle at the time plaintiff sustained injury, as it was being operated by plaintiff's co-worker, Castaneda-Valle. While a statement was provided from Castaneda-Valle, although dated, it is not notarized, is not in affidavit form, and is inadmissible. Castaneda-Valle stated to the effect that the car took off when he took it out of neutral and he was unable to stop it. It is undisputed by plaintiff that, upon inspection of the vehicle by counsel and experts for all the parties, no defects were found in the Jeep. No factual issue has been raised with regard to any negligence by Begley in operating, maintaining, or controlling the subject vehicle.

The plaintiff opposes these motions based upon the holding in ***Tikhonova v Ford Motor Company***, 4 NY3d 621, 797 NYS2d 799 [2005], wherein it addressed whether or not a vehicle owner could be vicariously liable under Vehicle & Traffic Law § 388 for the negligence of the driver, who was a diplomat and thus immune from suit pursuant to 28 USCS § 254d. The court acknowledged that the diplomatic mission was required to secure liability insurance for the driver pursuant to 28 USCS § 1364, but declined to hold that §1364 was an exclusive remedy that precluded the injured passenger from pursuing recovery from the vehicle owner under Vehicle & Traffic Law § 388. The court continued that Vehicle & Traffic

Law § 388 was not written to absolve the owner of liability simply because the driver was immune from liability by statute. The court continued that Vehicle & Traffic Law §388 hinged on the owner's liability because of the driver's negligence, and that there was nothing in the relevant sections of the Diplomatic Relations Act, 22, USCS § 254e and 28 USCS §1364 that barred the passenger from suing the car owner in state court.

The court continued that in 1924, the Legislature enacted Highway Law § 282-3, the predecessor to section 388, and despite 14 amendments or consolidations over eighty years, the Legislature has not retreated from its intention to assure injured plaintiffs that there will be a financially responsible party to provide compensation for negligent driving. The court continued that in ***Naso v Lafata***, supra, it explained that a worker injured in a car driven negligently by a coemployee, and in the course of their employment, may not resort to the Vehicle & Traffic Law § 388 for a cause of action against the car's owner as Workers' Compensation Law offers the only remedy for injuries caused by the coemployee's negligence. The conclusion, the court stated, flowed directly from the statutory language in what was then Workers' Compensation Law §29 (6). Similarly, it stated, in the companion case, ***Rauch v Jones***, *supra*, "we confirmed that the statute prohibits any remedy but that provided by Workers' Compensation Law. It distinguished its ruling in ***Tikhonova v Ford Motor Company*** on the basis that the federal statute providing diplomats' tort victims with a direct action against the diplomats' insurance carrier contains nothing like the "exclusive remedy" clause specified in Workers' Compensation Law.

Based upon the foregoing, it is determined as a matter of law that there can be no vicarious liability imposed by plaintiff against defendant Begley pursuant to Vehicle & Traffic Law § 388. Plaintiff does not dispute that the inspections by all counsel and their experts did not demonstrate any defects in the plaintiff's Jeep or that it was not maintained. Plaintiff's cause of action asserted against Begley is that she was negligent in her ownership, operation, control, and maintenance of the vehicle. While Begley owned the vehicle, she was not operating or controlling the vehicle at the time of the accident. Plaintiff's counsel's aspiration for additional discovery to establish liability against Begley is unsupported by any basis, in light of the failure to raise a factual issue with regard to the vehicle being improperly maintained.

Accordingly, motions (004) and (005) are granted and the complaint as asserted against Traci Begley in action #1, and the third-party complaint asserted by Begley against Bohemia Hard Ware are dismissed with prejudice.

Dated: SEP 29 2014

J.S.C.
HON. JEFFREY ARLEN SPINNER

__X__ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**