To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY
PRESENT: HON. SAM D. WALKER , J.S.C.

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SAVERIO ORLANDO, as Administrator of the Estate of MICHAEL ORLANDO, Deceased
Plaintiff,

-against-

Index No. 55672/11
DECISION & ORDER

SEQ. 1

EVELYN E. BARTMANN, SIEGMUND BARTMANN, EE'S GOLDEN HARVEST, CLOVE BRANCH MUFFLER & BRAKE, INC,
Defendants.

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The following papers were read on the defendant Clove Branch Muffler & Brake, Inc., motion seeking summary judgment of dismissal of the complaint and all cross claims asserted against the defendant.

PAPERS	**NUMBERED**
Notice of Motion/Affirmation/Exhibits A-L/ Memorandum of Law	1-15
Affirmation in Opposition/Exhibits A-E	16-21
Reply Affirmation	22

Based on the foregoing submissions, defendant's motion for summary judgment of dismissal is DENIED .

The action is for wrongful death stemming from an accident that occurred on October 23, 2010 when a vehicle operated by the defendant Evelyn Bartmann struck

Michael Orlando, a pedestrian at the intersection of Union Valley Road and Old Union Valley Road in Mahopac, New York. Plaintiff maintains that, defendant Evelyn Bartmann, was unable to stop her 1989 Dodge pickup truck before striking and killing Mr. Orlando because the brakes and steering systems were defective. Defendant Clove Branch Muffler & Brake, Inc. (hereinafter, "Clove Branch"), had performed the annual NYS safety inspection of Ms. Bartmann's vehicle three weeks prior to the accident, passing the vehicle and issuing a New York State inspection certificate. Subsequent investigation revealed five separate defects in the vehicle:

1. Broken let front caliper bleeder screw;
2. Insufficient brake pedal reserve and excessive brake pedal fade;
3. Excessive steering wheel free play;
4. Inoperative parking brake, and;
5. Loose front wheel bearing.

Two of those defects, the broken bleeder screw and the inoperative parking brake, were known by Ms. Bartmann to exist prior to the time of the inspection. The other three defects were determined by inspection experts with the Town of Carmel Police Department, the New York State Department of Motor Vehicles (DMV) and an independent expert, to have existed for a period of time well in excess of the three weeks that elapsed between the inspection and the accident.

The defendant's 1989 Ram pick up truck was purchased in August of 2009 and had 75,000.00 miles on it at the time of its purchase. Defendant Bartmann stated at her deposition that she and her husband are very knowledgeable in automotive maintenance and do everything to their vehicles on their own. Her husband has done extensive work to the vehicle including putting in shock absorbers and brakes and various other components

between the date of purchase and the date of the accident.

The complaint alleges that the defendant, Clove Branch was negligent in the performance of their inspection of the defendant's vehicle and that the defendant's vehicle should not have passed inspection because of various deficiencies claimed with the vehicle. Defendant Clove Branch argues that as a matter of law, this court must grant summary judgment to defendant, as Clove Branch owed no duty of care to the plaintiffs.

Discussion

A party seeking summary judgment bears the initial burden of affirmatively demonstrating its entitlement to summary judgment as a matter of law. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986). Because a finding of negligence must be based on the breach of a duty, a threshold question in this matter is whether the alleged tortfeasor owed a duty of care to the injured party" (*Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136, 138(2002). "[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Stiver v. Good & Fair Carting & Moving, Inc.*, 9 N.Y.3d 253, 257(2007), quoting *Espinal* supra, at 138; see *Church v. Callanan Indus.*, 99 N.Y.2d 104, 111 (2002). The Court of Appeals has held, as a matter of public policy, that the operator of a New York State motor vehicle inspection station does not owe a duty of care to a third party outside the inspection contract who was injured as a result of an allegedly negligent inspection (See *Stiver , supra).*

Exceptions to this general rule are: "(1) where the contracting party, in failing to exercise reasonable care in the performance of [its] duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the

contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*Stiver* at 257 [internal quotation marks and citations omitted]).

In this case plaintiff offers evidence that the inspection performed by defendant may well have been egregiously negligent and, that Clove Branch failed to discover, or ignored, five separate defects each of which, individually, should have result in the vehicle being rejected. While this Court does not determine that the failed inspection constitutes evidence of negligence in this case, this issue presents a disputed question of fact that if proved, could fall within the first *Espinal* exception. In addition, the case presents facts that were not present in *Stiver*, where there is no indication that the defects which allegedly caused the vehicular crash, existed at the time of the inspection.

Police officer Thomas Johanson, who investigated the accident and tested the truck braking system at the accident scene, observed a significant brake pedal fade. Officer Johanson also determined that the mileage recorded by Clove Branch as part of the October 2010 inspection was inaccurate, further raising the question as to whether the inspection of the vehicle was actually performed. Based upon his investigation, Johanson filed a complaint with the Department of Motor Vehicles which prompted DMV inspectors Mark Smith and John Nahlik to conduct independent inspections of the vehicle and the circumstances of the accident. The report of Mr. Nahlik revealed that the vehicle improperly passed the October 1, 2010 annual NYS inspection and that the issuance of the inspection certificate permitted an unsafe vehicle to be driven on the public highways.

In light of the above findings, plaintiff has proffered sufficient facts and admissible evidence to establish that there are material issues of fact present as to whether Clove

Branch's negligence falls within the first exception set forth in *Espinal* and whether defendant "launched an instrument of harm". The facts presented suggest that Clove Branch may have fraudulently issued an improper inspection certificate for an inspection that they did not perform, or that they were so grossly negligent in their performance of that inspection that they failed to perform a duty imposed upon them by the applicable regulation. These are questions for a jury to determine and sufficient to defeat the motion for summary judgment.

In light of the defendant's failure to establish their prima facie entitlement to judgment as a matter of law, the motion is DENIED.

The parties are directed to appear before the settlement conference part at 9:30 am on March 13th, 2014. The foregoing shall constitute the decision and order of the Court.

Dated: White Plains , New York
January 6, 2014

Sam D. Walker
HON. SAM D. WALKER, J.S.C.