Galo v Fast Operating Corp.
2015 NY Slip Op 32535(U)
February 22, 2015
Supreme Court, New York County
Docket Number: 157844/2013
Judge: Arlene P. Bluth

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 22

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FELIX GALO and EDNA GALO, as CO-EXECUTORS OF THE ESTATE OF GALOUST GALO DECEASED and ADELINA GALO,

Plaintiffs,

- against-

FAST OPERATING CORP. d/b/a CARMEL CAR AND LIMOUSINE SERVICE, BAICHANS, INC., MEDHAT H. REZEK, and ANSHELA AMINOVA,

Defendants.

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Index No. 157844/2013
Mot. Seq. 001 and 002

DECISION/ORDER

ARLENE P. BLUTH, JSC

Motion sequence numbers 001 and 002 are consolidated for disposition.

Plaintiffs Felix Galo and Edna Galo, co-executors of the Estate of Galoust Galo, and Adelina Galo's (collectively plaintiffs) motion for partial summary judgment on the issue of liability is granted to the extent that Galoust Galo, an innocent passenger, had no liability for the happening of the accident. Defendant Fast Operating Corp. d/b/a Carmel Car and Limousine Service's (Carmel) cross-motion for summary judgment on the issue of liability is granted (seq 001).

Plaintiffs' motion for leave to amend their complaint is denied. Defendant Carmel's cross-motion for sanctions is denied; the branches of Carmel's motion for sanctions requiring Galoust Galo to be deposed again under supervision, requiring Galoust Galo or his counsel to bear all costs associated with the further deposition, ordering Galoust Galo and his counsel at the further deposition to observe the Uniform Rules for the Conduct of Depositions and awarding

Carmel its costs and expenses, including attorneys' fees, associated with making this cross-motion and with the further deposition are denied as impossible; no further deposition of Galoust Galo is possible because he is deceased (seq 002).

In this action, plaintiff Galoust Galo seeks to recover damages for personal injuries allegedly suffered during a motor vehicle accident and for loss of services by his spouse, Adelina Galo. Galoust Galo was a rear-seat passenger in a for-hire Carmel branded limousine car driven by defendant Rezek and owned by defendant Baichans. The second vehicle involved in the intersection collision was owned and operated by defendant Aminova.

Plaintiffs' Summary Judgment Motion

In order to prevail on its motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact *(Alvarez v Prospect Hospital,* 68 NY2d 320, 508 NYS2d 923 [1986]). Once the movant demonstrates entitlement to judgment, the burden shifts to the opponent to rebut that prima facie showing (*Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872, 433 NYS2d 1015 [1980]). In opposing such a motion, a party must lay bare its evidentiary proof. Conclusory allegations are insufficient to defeat the motion; the opponent must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact (*Zuckerman v City of New York,* 49 NY2d 557, 562, 427 NYS2d 595 [1980]).

In deciding the motion, the court must draw all reasonable inferences in favor of the non-moving party and must not decide credibility issues (*Dauman Displays, Inc. v Masturzo,* 168 AD2d 204, 205, 562 NYS2d 89 [1st Dept 1990], *lv. denied* 77 NY2d 939, 569 NYS2d 612 [1991]). As summary judgment is a drastic remedy which deprives a party of being heard, it

should not be granted where there is any doubt as to the existence of a triable issue of fact (*Chemical Bank v West 95th Street Development Corp.*, 161 AD2d 218, 219, 554 NYS2d 604 [1st Dept 1990]), or where the issue is even arguable or debatable (*Stone v Goodson,* 8 NY2d 8, 12, 200 NYS2d 627 [1960]).

In support of their motion for partial summary judgment on liability, plaintiffs argue that an innocent rear seat passenger is entitled to partial summary judgment on liability."'It is well settled that the right of an innocent passenger to summary judgment is not in any way restricted by potential issues of comparative negligence as between the drivers of the two vehicles'" (*Delgado v Martinez Family Auto*, 113 AD3d 426, 428, 979 NYS2d 277 [1st Dept 2014] quoting *Garcia v Tri-County Ambulette Serv.*, 282 AD2d 206, 207, 723 NYS2d 163 [1st Dept 2001]). Therefore, plaintiffs are entitled to summary judgment to the extent that Galo, an innocent passenger, is not liable for the happening of the accident.

Carmel's Cross-Motion for Summary Judgment

Turning to Carmel's cross-motion for summary judgment, Carmel alleges that Rezek was an independent contractor, that it did not own the limousine, and that there is no legal basis for holding it responsible for the collision.

The doctrine of respondeat superior renders an employer vicariously liable for torts committed by an employee acting within the scope of the employment (*Judith M. v Sisters of Charity Hosp.*, 93 NY2d 932, 933, 693 NYS2d 67 [1999]). However, "'a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor's negligent acts'" (*Brothers v New York State Elec. and Gas Corp.*, 11 NY3d 251, 257, 869 NYS2d 356 [2008] quoting (*Kleeman v Rheingold*, 81 NY2d 270, 273, 598

NYS2d 149 [1993]). The most crucial factor for determining whether an employment or independent contractor relationship exists is the control over the methods or the means by which the work was to be performed (*Chaouni v Ali*, 105 AD3d 424, 425, 963 NYS2d 27 [1st Dept 2013]). "Factors relevant to assessing control include whether the worker (1) worked at his 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, 198, 770 NYS2d 692 [2003]).

In support of its cross-motion, Carmel submits the affidavit of John Roberts, Carmel's General Manager. This evidence shows that Rezek was free to set his own schedule and take vacations when he wished. Rezek was responsible for finding a vehicle and for the cost of the vehicle's maintenance. Rezek was not on Carmel's payroll, did not need authorization to take a break or go home, and could engage in other employment.

In response, plaintiffs argue that the ruling in *Devlin v City of New York* (254 AD2d 16, 678 NYS2d 102 [1st Dept 1998]) compels this Court to deny Carmel's motion. *Devlin* is inapposite. In *Devlin*, the car dispatch company maintained a dress code and required that vehicles carry certain insurance policy limits set by the car dispatch company (*Devlin*, 254 AD2d at 16, 678 NYS2d at 103). There is no evidence that Carmel has such requirements.

Plaintiffs also argue that Carmel's website creates a triable issue of fact because Carmel holds itself out to the public as the drivers' employer (*see Devlin*, 254 AD2d at 17, 678 NYS2d at 104). Contrary to plaintiffs' assertions, Carmel's website does not suggest that it employs any drivers. Even if that was a reasonable interpretation, it is only one factor in determining whether an employment relationship exists. Taken together, the factors establish as a matter of law that

Rezek is an independent contractor. Plaintiffs have not raised a triable issue of fact sufficient to defeat the motion. Accordingly, Carmel's motion for summary judgment dismissing the complaint and all claims against it is granted.

Plaintiffs' Motion for Leave to Amend the Complaint

Although leave to amend a pleading is freely granted, "'it is equally true that the court should examine the sufficiency of the merits of the proposed amendment'" (*Boaz Bag Bag v Alcobi*, 129 AD3d 649, 649, 13 NYS3d 37 [1st Dept 2015] quoting *Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 22, 756 NYS2d 26 [1st Dept 2003]). Plaintiffs must allege facts that are legally sufficient to support its fraud and negligent misrepresentation claims (*see Non-Linear Trading Co., Inc. v Braddi Associates, Inc.*, 243 AD2d 107, 117, 675 NYS2d 5 [1st Dept 1998]).

"The elements of a cause of action for fraud [are] a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559, 883 NYS2d 147 [2009]). In addition, pursuant to CPLR 3016 (b), "the circumstances constituting the wrong shall be stated in detail." (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491, 860 NYS2d 422 [2008]). "A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148, 831 NYS2d 364 [2007]).

In support of its motion to amend its complaint to assert claims for fraud and negligent misrepresentation, plaintiffs allege that when Galoust Galo made a telephone reservation with

Carmel to transport him, it was his understanding that Carmel owned their own vehicles, and employed its own drivers. Plaintiffs also allege that Galoust Galo was defrauded into selecting Carmel because Carmel's website made it appear that Carmel employed drivers and was adequately insured.

Contrary to plaintiffs' assertions, Carmel's website addresses neither whether the drivers are Carmel's employees nor whether Carmel has adequate insurance. Plaintiffs' subjective interpretations do not evidence a material misrepresentation of fact. Therefore, plaintiffs' motion for leave to amend its complaint to assert a fraud claim must be denied for failure to specifically allege a material misrepresentation of a fact.

Furthermore, the proposed amended complaint fails to allege the existence of any relationship between Carmel and Galoust Galo that would support a negligent misrepresentation claim *(see Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 173-74, 919 NYS2d 465 [2011]). "[L]iability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified" (*Kimmell v Schaefer*, 89 NY2d 257, 263, 652 NYS2d 715 [1996]). The absence of allegations showing such a relationship between Galo and Carmel mandates denial of the motion to amend. The proposed negligent misrepresentation claim does not allege privity or the details of Galoust Galo's alleged contact with Carmel. Plaintiffs fail to allege facts that establish a special relationship of confidence and trust between Galoust Galo and Carmel or that Carmel possessed unique or specialized expertise. Therefore, plaintiffs' motion to amend the complaint to assert a claim for negligent misrepresentation must be denied.

Carmel's Cross-Motion for Sanctions

In support of its cross-motion for sanctions, Carmel argues that Galoust Galo's deposition testimony contradicted his affidavit because Galoust Galo testified that his son selected Carmel. Carmel further alleges that plaintiffs' counsel interrupted the deposition to communicate with Galoust Galo about a prior affidavit in which Galoust Galo alleged that he selected Carmel. It is also alleged that plaintiffs' counsel directed Galoust Galo not to answer and made speaking objections that suggested answers to the questions.

22 NYCRR 130-1.1 (a) provides that:

> "The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part."

22 NYCRR 130-1.1 [c]) provides that:

> "conduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false."

In the instant case, counsel's behavior was clearly inappropriate. However, counsel's actions did not constitute a "continuous pattern of conduct" that would merit the awarding of sanctions *(cf. Grayson v New York City Dept. of Parks & Recreation*, 99 AD3d 418, 419, 952 NYS2d 8 [1st Dept 2012]). While defense counsel may report plaintiffs' counsel's behavior to the Disciplinary Committee, the Court declines to award sanctions. Carmel's motion for sanctions is denied.

Accordingly, it is

ORDERED that plaintiffs' motion for partial summary judgment on the issue of liability is granted to the extent that Galoust Galo, an innocent passenger, is not liable for the happening of the accident, and it is further

ORDERED that the cross-motion by Fast Operating Corp. d/b/a Carmel Car and Limousine Service for an order granting summary judgment on the issue of liability is granted and the complaint and all claims against Fast Operating Corp. d/b/a Carmel Car and Limousine Service are dismissed, and it is further

ORDERED that plaintiffs' motion for leave to serve an amended complaint is denied, and it is further

ORDERED that the cross-motion by Fast Operating Corp. d/b/a Carmel Car and Limousine Service for sanctions is denied.

This is the Decision and Order of the Court.

Next Appearance Date: March 28, 2016 in Part 22 (DCM).

Dated: February 22, 2015
New York, New York

HON. ARLENE P. BLUTH, JSC