Katikireddy v Espinal
2015 NY Slip Op 32666(U)
June 10, 2015
Supreme Court, Suffolk County
Docket Number: 20542/2011
Judge: Joseph Farneti
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1]

ORIGINAL

SHORT FORM ORDER **INDEX NO. 20542/2011**

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

CHANDRA K. KATIKIREDDY and DEEPA KUMMATI,

Plaintiffs,

-against-

JOSE A. ESPINAL, YRC WORLDWIDE, INC., d/b/a NEW PENN MOTOR EXPRESS, SEAN M. GIBBONS and WILLIAM VILLAGE INC., d/b/a VILLAGE TAXI,

Defendants.

JOSE A. ESPINAL, NEW PENN MOTOR EXPRESS, INC. i/s/h/a YRC WORLDWIDE, INC., d/b/a NEW PENN MOTOR EXPRESS,

Third-Party Plaintiffs,

-against-

LINDY'S TRANSPORTATION INC.,

Third-Party Defendant.

JOSE A. ESPINAL, NEW PENN MOTOR EXPRESS, INC. i/s/h/a YRC WORLDWIDE, INC., d/b/a NEW PENN MOTOR EXPRESS,

Second Third-Party Plaintiffs,

-against-

JOHN TOMITZ, CALL A CAB TRANSPORT, INC., DEPO TRANSPORT, INC., STEAMY, INC., LINDY'S FLEET SERVICE INC., ALL CORPORATE TRANSPORT, INC., FARMINGVILLE TAXI, INC., RED TOP MANAGEMENT INC., LINDY'S LIMO, INC., JTE FLEET INC., ISLANDIA FLEET SERVICE, INC., J.T.E. ENTERPRISES INC., VILLAGE TAXI OF SUFFOLK, INC., FLUSHING MANAGEMENT INC., LINDY'S AMBULETTE, INC., SOUTH OCEAN TRANSPORT INC., J.J.J. ENTERPRISES, LLC, ALL HAMPTON'S LIMOUSINE, INC., ST. JAMES TAXI SERVICE, INC., and J.T.E. ENTITIES, INC.,

Second Third-Party Defendants.

ORIG. RETURN DATE: MARCH 27, 2014
FINAL SUBMISSION DATE: JULY 17, 2014
MTN. SEQ. #: 007
MOTION: MG

ORIG. RETURN DATE: APRIL 17, 2014
FINAL SUBMISSION DATE: JULY 17, 2014
MTN. SEQ. #: 008
CROSS-MOTION: XMOT D

ORIG. RETURN DATE: JULY 17, 2014
FINAL SUBMISSION DATE: JULY 17, 2014
MTN. SEQ. #: 009
CROSS-MOTION: XMOT D

Third-Party
Index No. 310221/2011

Second Third-Party
Index No. 770051/2014

ATTORNEY FOR PLAINTIFFS
CHANDRA KATIKIREDDY AND DEEPA KUMMATI:
DAVID J. RAIMONDO & ASSOCIATES
2780 MIDDLE COUNTRY ROAD - SUITE 312
LAKE GROVE, NEW YORK 11755
631-471-1222

ATTORNEY FOR DEFENDANTS/THIRD-PARTY PLAINTIFFS/SECOND THIRD-PARTY PLAINTIFFS JOSE A. ESPINAL AND NEW PENN MOTOR EXPRESS, INC. i/s/h/a YRC WORLDWIDE, INC., d/b/a NEW PENN MOTOR EXPRESS:
DeSENA & SWEENEY, LLP
1500 LAKELAND AVENUE
BOHEMIA, NEW YORK 11716
631-360-7333

ATTORNEY FOR DEFENDANTS SEAN M. GIBBONS AND WILLIAMS VILLAGE, INC. d/b/a VILLAGE TAXI:
BAKER, McEVOY, MORRISSEY & MOSKOVITS, P.C.
ONE METROTECH CENTER - 8TH FLOOR
BROOKLYN, NEW YORK 11201
212-857-8230

ATTORNEY FOR SECOND THIRD-PARTY DEFENDANTS:
LONG TUMINELLO, LLP
120 FOURTH AVENUE
P.O. BOX 5591
BAY SHORE, NEW YORK 11706
631-666-2500

Upon the following papers numbered 1 to 14 read on these motions TO SEVER ACTION AND TO DISMISS. Notice of Motion and supporting papers 1-3; Affirmation in Opposition 4; Notice of Cross-motion and supporting papers 5-7; Affirmation in Opposition and supporting papers 8, 9; Notice of Cross-motion and supporting papers 10-12; Affirmation in Opposition and supporting papers 13, 14; it is,

ORDERED that this motion (seq. #007) by plaintiffs CHANDRA K. KATIKIREDDY and DEEPA KUMMATI (collectively "plaintiffs") for an Order, pursuant to CPLR 603, severing the first third-party action under Index No. 310221/2011 and the second-third party action under Index No. 770051/2014, is hereby **GRANTED** for the reasons set forth hereinafter. The Court has received opposition to this motion from defendants/third-party plaintiffs/second third-party plaintiffs JOSE A. ESPINAL and NEW PENN MOTOR EXPRESS, INC. i/s/h/a YRC WORLDWIDE, INC., d/b/a NEW PENN MOTOR EXPRESS (collectively "third-party plaintiffs"), as well as from the second third-party defendants; and it is further

ORDERED that this cross-motion (seq. #008) by the second third-party defendants for an Order, pursuant to CPLR 3211 (a) (7), dismissing the second third-party complaint against the second third-party defendants herein under Index No. 770051/2014, is hereby **GRANTED** solely to the extent provided hereinafter. The Court has received an affirmation in opposition to this cross-motion from the third-party plaintiffs; and it is further

ORDERED that this duplicative cross-motion (seq. #009) by the second third-party defendants for an Order, pursuant to CPLR 3211 (a) (7), dismissing the second third-party complaint against the second third-party defendants herein under Index No. 770051/2014, is hereby similarly **GRANTED** solely to the extent provided hereinafter. The Court has received an affirmation in opposition to this cross-motion from the third-party plaintiffs.

Plaintiffs commenced this action seeking to recover damages for personal injuries sustained by CHANDRA K. KATIKIREDDY in a motor vehicle accident on September 16, 2010, at the intersection of Veterans Memorial Highway and Lincoln Avenue in the Town of Islip. Mr. Katikireddy was a passenger in the back seat of a taxi operated by defendant SEAN GIBBONS and owned by defendant WILLIAM'S VILLAGE, INC. d/b/a VILLAGE TAXI when a collision occurred with the tractor portion of an 18-wheel tractor trailer truck operated by defendant JOSE A. ESPINAL and owned by defendant NEW PENN MOTOR EXPRESS, INC. i/s/h/a YRC WORLDWIDE, INC., d/b/a NEW PENN MOTOR EXPRESS. The tractor trailer truck approached the intersection from the eastbound lane and attempted to execute a left turn across oncoming traffic. According to deposition testimony, the taxi was traveling westbound on Veterans Memorial Highway at about 45 miles per hour and had a green light, and the truck was in the eastbound lane attempting to make a left turn from Veterans Memorial Highway onto Lincoln Avenue in front of the taxi.

This action was commenced on or about February 4, 2011 by the filing of a summons and verified complaint. Issue was joined by the third-party plaintiffs on or about February 28, 2011. Thereafter, the first third-party action was commenced by third-party summons and complaint dated August 12, 2011. The second third-party action was commenced by second third-party summons and complaint on or about March 3, 2014.

By Order of this Court dated April 11, 2013, a default judgment was granted against third-party defendant LINDY'S TRANSPORTATION, INC. in the first third-party action. The Court held that the assessment of damages against LINDY'S TRANSPORTATION INC. shall be conducted at the time of or following the trial or other disposition of the action against the non-defaulting defendants pursuant to CPLR 3215 (d).

Subsequent thereto, by Order dated March 12, 2014, this Court granted a motion by plaintiffs for partial summary judgment on the issue of liability against the third-party plaintiffs only. The Court held that Mr. Espinal violated Vehicle and Traffic Law § 1141 when he made a left turn directly into the path of

the taxi driven by Mr. Gibbons. Vehicle and Traffic Law § 1141 requires the driver of a vehicle intending to turn left to "yield the right of way to any vehicle approaching from the opposite direction which is . . . so close as to constitute an immediate hazard" (Vehicle and Traffic Law § 1141; *see Reyes v Marchese*, 96 AD3d 926 [2d Dept 2012]). As Mr. Gibbons had the right of way, he was entitled to anticipate that Mr. Espinal would obey the traffic laws requiring him to yield. However, the Court found that an issue of fact was raised as to whether Mr. Gibbons may have been comparatively negligent for the happening of the accident. The Court noted that there can be more than one proximate cause of an accident, and a driver who lawfully enters an intersection could still be found partially at fault for failing to use reasonable care to avoid a collision with another vehicle in the intersection.

With respect to plaintiffs' instant motion to sever the first third-party action and the second-third party action, CPLR 603 provides in pertinent part, "[i]n furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue" (CPLR 603). The determination to grant or deny a request for a severance pursuant to CPLR 603 is a matter of judicial discretion which should not be disturbed absent a showing of abuse of discretion or prejudice to a substantial right of the party seeking the severance (*see e.g. Naylor v Knoll Farms of Suffolk County, Inc.*, 31 AD3d 726 [2006]; *Mothersil v Town Sports Intl.*, 24 AD3d 424 [2005]; *McCrimmon v County of Nassau*, 302 AD2d 372 [2003]).

Plaintiffs allege that the main action for negligence is ready to be certified for trial and should not be delayed by the first and second third-party actions for indemnity and contribution. Plaintiffs contend that all discovery is complete in the main action, while discovery proceedings in the third-party actions are in the early stages. Further, plaintiff contends that the third-party actions are "fishing expeditions" for potential subrogation and/or indemnification.

In opposition, the third-party plaintiffs claim that they have "proceeded expeditiously" in bringing the two third-party actions, and that second third-party defendant JOHN TOMITZ owns and operates a series of interrelated entities that share common ownership and control, and often share the same corporate, trade or assumed names in order to protect the overall taxi business from exposure to creditors and judgments.

The Court finds that severance of the third-party actions is appropriate in this matter. As noted *supra*, the main action sounds in negligence, while the third-party actions sound in contribution and indemnification. Further,

the subject motor vehicle accident occurred on September 16, 2010, almost five years ago, the main action was commenced on February 4, 2011, over four years ago, and the second third-party action was commenced on or about March 3, 2014, approximately three years after commencement of the main action. Moreover, plaintiffs indicate that discovery has been complete in the main action and it has been ready to be certified for trial since August 8, 2013.

A court may properly sever cross claims and third-party actions from the main action in negligence cases, particularly when pre-trial discovery in the two actions are at vastly different stages (*see Santos v Sure Iron Works*, 166 AD2d 571 [1990]; *Henderson v Wein Hardware Co.*, 51 AD2d 696 [1976]), and in the absence of prejudice to a substantial right of any other party (*see Vigliarolo v Sea Crest Constr. Corp.*, 16 AD3d 409 [2005]; *Singh v City of New York*, 294 AD2d 422 [2002]). Although the main and third-party actions share some common questions of fact and law, in view of the potential prejudice to plaintiffs if a trial of the main action is further delayed, the Court finds that a severance of the third-party actions is warranted (*see Zuckerman v La Guardia Hospital*, 125 AD2d 304 [1986]).

Accordingly, plaintiffs' motion to sever the first third-party action under Index No. 310221/2011 and the second-third party action under Index No. 770051/2014 from the main action herein, is **GRANTED**.

Regarding the second third-party defendants' motions to dismiss the complaint against them for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the complaint must be construed in the light most favorable to the third-party plaintiffs and all factual allegations must be accepted as true (*see Grand Realty Co. v City of White Plains*, 125 AD2d 639 [1986]; *Barrows v Rozansky*, 111 AD2d 105 [1985]; *Holly v Pennysaver Corp.*, 98 AD2d 570 [1984]). The criterion is whether the third-party plaintiffs have a cause of action and not whether they may ultimately be successful on the merits (*see Stukuls v State of New York*, 42 NY2d 272 [1977]; *One Acre, Inc. v Town of Hempstead*, 215 AD2d 359 [1995]; *Detmer v Acampora*, 207 AD2d 477 [1994]). In assessing a motion under CPLR 3211 (a) (7), a court may freely consider affidavits submitted by a plaintiff to remedy any defects in the complaint (*Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]). However, in opposition to the instant application, the Court notes that the third-party plaintiffs have merely submitted an attorney's affirmation.

The verified second third-party complaint seeks to pierce the corporate veil of WILLIAM VILLAGE INC. for damages, contribution and counsel

fees. The Court notes that although the third-party plaintiffs have already been found liable for this accident, no liability has been attributed to co-defendants SEAN M. GIBBONS and WILLIAM VILLAGE INC., d/b/a VILLAGE TAXI, nor has any apportionment of fault taken place between the third-party plaintiffs and these co-defendants. No liability may ultimately be found against the co-defendants. The third-party plaintiffs also assert two causes of action for *respondent superior*, alleging that any negligence by Sean Gibbons or Village Taxi is imputed to the second third-party defendants. Finally, the third-party plaintiffs have asserted a cause of action for indemnity and contribution against the second third-party defendants, alleging that if the third-party plaintiffs are liable to plaintiffs, then the third-party plaintiffs are entitled to contribution from the second third-party defendants as the negligence of Sean Gibbons, Village Taxi and/or the second third-party defendants was the proximate cause of plaintiff's injuries. Specifically, third-party plaintiffs allege:

> 98. The misrepresentations of Second Third Party Defendants caused Chandra Katikreddy to enter a vehicle that was unsafe, operated by an incompetent driver and owned by an undercapitalized and underinsured sham corporation.
>
> 99. As a result of these misrepresentations, NEW PENN has suffered property and other damages in the amount of $20,000 and loss of use of $15,000 plus interest from September 16, 2010, together with costs and disbursements, and attorneys' fees

(Verified Second Third-Party Complaint, ¶¶ 98, 99).

With respect to piercing the corporate veil, the general rule, of course, is that a corporation exists independently of its owners, who are not personally liable for its obligations, and that individuals may incorporate for the express purpose of limiting their liability (*see Bartle v Home Owners Coop.*, 309 NY 103 [1955]; *Seuter v Lieberman*, 229 AD2d 386 [1996]). The concept of piercing the corporate veil is an exception to this general rule, permitting, in certain circumstances, the imposition of personal liability on owners for the obligations of their corporation (*see East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122 [2009]). Piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in

[* 7]

plaintiff's injury (*see Morris v State Dep't of Taxation & Fin.*, 82 NY2d 135 [1993]; *Gateway I Group v Park Ave. Physicians, P.C.*, 62 AD3d 141 [2009]). While complete domination of the corporation is the key to piercing the corporate veil, especially when the owners use the corporation as a mere device to further their personal rather than the corporate business, such domination, standing alone, is not enough; some showing of a wrongful or unjust act toward plaintiff is required. The party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene (*see Morris*, 82 NY2d 135; *Shisgal v Brown*, 21 AD3d 845 [2005]).

A plaintiff's attempt to pierce the corporate veil does not constitute a cause of action independent of that against the corporation; it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners. Accordingly, New York does not recognize a separate cause of action to pierce the corporate veil. An action to pierce the corporate veil merely requires that the controlled corporation be named as a defendant in the action (*Hart v Jassem*, 43 AD3d 997 [2007]; *Old Republic Nalt. Title Ins. Co. v. Moskowitz*, 297 AD2d 724 [2002]).

In this matter, third-party plaintiffs have pleaded the elements to pierce the corporate veil in its complaint, and the complaint sets forth allegations which, if true, would justify piercing the corporate veil and holding the individual second third-party defendant JOHN TOMITZ liable in his individual capacity (*see Morris*, 82 NY2d 135; *Millennium Constr., LLC v Loupolover*, 44 AD3d 1016 [2007]; *Matter of Goldman v Chapman*, 44 AD3d 938 [2007]; *Levin v Isayeu*, 27 AD3d 425 [2006]; *Goldberg v Lee Express Cab Corp.*, 227 AD2d 241 [1996]; *cf. Pellarin v Moon Bay Dev. Corp.*, 29 AD3d 553 [2006]). However, since the First and Second causes of action only sought to pierce the corporate veil of the corporate second third-party defendants in order to make second third-party defendant JOHN TOMITZ personally liable, and since New York "does not recognize a separate cause of action to pierce the corporate veil" (*Fiber Consultants, Inc. v Fiber Optek Interconnect Corp.*, 15 AD3d 528, 529 [2005]), these two causes of action cannot withstand the instant motion to dismiss. However, as the allegations in support of the purported First and Second causes of action are factual assertions, third-party plaintiffs are granted leave to replead such allegations in an amended complaint, if the third-party plaintiffs be so advised (*see Hart*, 43 AD3d 997; *Fiber Consultants, Inc.*, 15 AD3d 528).

With respect to the Third and Fourth causes of action sounding in *respondeat superior*, an employer is vicariously liable for its employees' torts under the theory of respondeat superior if the acts were committed while the employee was acting within the scope of his or her employment (*see Xin Tang Wu v Ng*, 70 AD3d 818 [2d Dept 2010]). 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 or her act may be reasonably said to be necessary or incidental to such employment (*see Davis v Larhette*, 39 AD3d 693 [2d Dept 2007]). In the instant matter, the third-party plaintiffs have pleaded such circumstances in the second third-party complaint.

Regarding the Fifth cause of action for indemnification and contribution, it is undisputed that there exists no contract in which the second third-party defendants agreed to indemnify the third-party plaintiffs in connection with the subject accident. As such, the third-party plaintiffs could only proceed on a theory of implied indemnification. The general rule is that a right of implied indemnification will arise in favor of one who is compelled to pay for another's wrong (*Margolin v New York Life Ins. Co.*, 32 NY2d 149 [1973]; 23 NY Jur Contribution, Indemnity, and Subrogation § 2). One whose liability is premised upon active negligence cannot obtain common law or implied indemnity (*D'Ambrosio v City of New York*, 55 NY2d 454 [1982]). "The predicate for common-law indemnity is vicarious liability without fault on the part of the proposed indemnitee" (*Kagan v Jacobs*, 260 AD2d 442 [1999]; *see Barry v Hildreth*, 9 AD3d 341 [2004]; *Tulley v Straus*, 265 AD2d 399 [1999]). Here, the third-party plaintiffs have already been found liable, at least in part, for causing the subject accident. Therefore, the third-party plaintiffs cannot proceed on a theory of common law indemnification against the second third-party defendants.

With respect to the claim for contribution, under New York's contribution statute, two or more persons who are subject to liability for damages for the same injury to property may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought (CPLR 1401). The critical requirement for apportionment under CPLR article 14 is that the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought (*see Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599 [1988]; *Schauer v Joyce*, 54 NY2d 1 [1981]; *Roma v Buffalo Gen. Hosp.*, 103 AD2d 606 [1984]; *Jakobleff v Cerrato, Sweeney & Cohn*, 97 AD2d 786 [1983]). The third-party plaintiffs have pleaded such elements in support of their claim for contribution.

Therefore, upon favorably viewing the facts alleged, and affording the third-party plaintiffs "the benefit of every possible favorable inference" (*AG Capital Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582 [2005]), without expressing opinion as to whether they can ultimately establish the truth of their allegations before the trier of fact, the Court finds that the third-party plaintiffs have sufficiently pleaded causes of action for *respondent superior* and contribution against the second third-party defendants.

In view of the foregoing, these motions by the second third-party defendants to dismiss are **GRANTED** to the extent that the First and Second causes of action are hereby dismissed, with leave to replead such allegations in an amended second third-party complaint, and the Fifth cause of action is dismissed to the extent that it asserts a claim for indemnity against the second third-party defendants.

The foregoing constitutes the decision and Order of the Court.

Dated: June 10, 2015

HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ **FINAL DISPOSITION**

__X__ **NON-FINAL DISPOSITION**