

Gaison-Diveglio v Stroehmann Line-Haul, L.P.

2016 NY Slip Op 31377(U)

June 3, 2016

Supreme Court, Queens County

Docket Number: 702071/2014

Judge: Denis J. Butler

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DENIS J. BUTLER IAS Part 12
Justice

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KEISHA GAISON-DIVEGLIO Number 702071/2014
and LEONARD DIVEGLIO

Plaintiff(s), Motion
Date April 1, 2016

-against-

STROEHMANN LINE-HAUL, L.P. Motion Seq. No. 2
1724 5th Avenue
Bay Shore, New York 11706;

BIMBO BAKERIES USA, INC.
1724 5th Avenue
Bay Shore, New York 11706;

BIMBO FOODS BAKERIES DISTRIBUTION, INC.
255 Business Center Drive
Horsham, Pennsylvania 19044;

BIMBO FOODS BAKERIES DISTRIBUTION, LLC
255 Business Center Drive
Horsham, Pennsylvania 19044;

OROGRAIN BAKERIES SALES, INC.
4801 Cox Road, Ste 1
Glen Allen, VA 23060;

OROGRAIN BAKERIES MANUFACTURING, INC.
4801 Cox Road, Ste 1
Glen Allen, VA 23060;

OROGRAIN BAKERIES PRODUCTS, INC.
255 Business Center Drive
Horsham, Pennsylvania 19044;

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COUNTY CLERK
QUEENS COUNTY

JOHN DOE I,
(The name JOHN DOE I being
fictitious, as the true name and
identity is presently unknown to the
Plaintiff. The Defendant JOHN DOE I,
being the employer of the Decedent
AHMAD KARIMZADA.); and

LONG ISLAND RAILROAD
Sutphin Boulevard
Jamaica Station
Jamaica, New York, 11435,

Defendant(s).

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The following papers were read on this motion by plaintiffs for an order granting summary judgment on the issue of liability against defendants Stroehmann Line Haul (Stroehmann), Bimbo Bakeries USA, Inc. (Bimbo Bakeries) and Ahmad Karimzada (Karimzada), dismissing the affirmative defenses of contributory negligence and ordering a trial restricted to the issue of damages only, pursuant CPLR 3212 and 3211(b).

	<u>Papers Numbered</u>
Notice of Motion, Affirmation, Affidavit, Memorandum and Exhibits.....	E47-58
Affirmation In Opposition, Exhibits.....	E59-62
Reply Affirmation and Exhibits.....	E65-73
Affirmation In Partial Opposition.....	E74

Upon the foregoing papers it is ordered that the motion is determined as follows:

At the outset, the Court points out that the caption on the face of the motion does not reflect the pleading served in this action. Attached to the opposition is a stipulation to amend the caption, dated April 21, 2014, executed by all parties except defendant Long Island Railroad (LIRR), which was electronically filed on May 20, 2014, prior to an appearance by the LIRR. Even if plaintiffs were exercising their right to amend the pleading as a matter of right, no amended pleadings were filed or served on any of the parties. In fact, after the date of the stipulation, defendants Stroehmann Line-Haul, L.P. Bimbo Bakeries USA, Inc., Bimbo Foods Bakeries Distribution, Inc., Bimbo Foods Bakeries Distribution, LLC, Orograin Bakeries Sales, Inc., Orograin Bakeries

Manufacturing, Inc. and Orograin Bakeries Products, Inc. (collectively Stroehmann defendants) served an answer to the complaint under the pre-stipulation caption. While a party may also seek an amendment by leave of court or to conform to the evidence pursuant to CPLR 3025, such relief has never been sought. Thus, the Court deems the caption on the moving papers to be incorrect. The correct caption is reflected in this decision and order.

This is an action for personal injuries sustained in a collision between a locomotive train owned by defendant LIRR and operated by plaintiff and a motor vehicle owned by corporate defendants and operated by Karimzada, who died as a result of the accident. The plaintiffs in this action are the locomotive engineer of the LIRR, Keisha Faison-Diveglio, and her spouse, Leonard Diveglio. According to the complaint, on May 17, 2011, at approximately 7:00 a.m., plaintiff operated the train at an authorized speed and was sounding the train horn near the Executive Drive crossing near the Deer Park Station in Deer Crossing, Suffolk County, New York, when Karimzada drove his vehicle onto the railroad tracks around the lowered gates while the gate bells were ringing, causing the train to strike the vehicle despite plaintiff's efforts to apply the emergency brakes. In addition, the complaint states that at the time of the accident, plaintiff and Karimzada were both acting in the course of their employment.

Plaintiffs move for summary judgment arguing that Karimzada's violation of Vehicle and Traffic Law §§ 1170 and 1685 is negligence per se and, thus, they are entitled to judgment as a matter of law in their favor against defendant Stroehmann as owner of the vehicle, Bimbo Bakeries as the employer of Karimzada, and Karimzada as the operator of the vehicle.

Plaintiffs established Karimzada's negligence when he or she violated Vehicle and Traffic Law §§ 1170 and 1685 by failing to stop at a railroad grade crossing where a stop sign is erected and by disobeying the signal of an approaching train, which has the right of way over an automobile on an intersecting street.

The Court must point out that neither Ahmad Karimzada nor his or her estate were named as a party to this action. Therefore, no relief may be granted as against said individual or his or her estate. Thus, to the extent the motion seeks summary judgment as against Ahmad Karimzada, it is denied.

Plaintiffs established entitlement to summary judgment against Stroehmann as the owner of the vehicle pursuant to Vehicle and Traffic Law § 388, which provides that "[e]very owner of a vehicle

used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner." In addition, plaintiff established entitlement to summary judgment against Karimzada's employer, Bimbo Bakery, under the doctrine of respondeat superior. "An employer is vicariously liable for its employee's torts under the theory of respondent superior if the acts were committed while the employee was acting within the scope of his employment (see *Carnegie v. J.P. Phillips, Inc.*, 28 A.D.3d 599, 815 N.Y.S.2d 107). 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 (see *Oliva v. City of New York*, 297 A.D.2d 789, 748 N.Y.S.2d 164; *Smith v. Midwood Realty Assoc.*, 289 A.D.2d 391, 734 N.Y.S.2d 237)." (*Felberbaum v Weinberger*, 54 AD3d 717, 719 [2d Dept 2008].)

In opposition, defendants fail to raise a triable issue of fact. Defendants Stroehmann and Bimbo Bakery argue that Karimzada did not have authority to violate Vehicle and Traffic Law and that if Bimbo Bakery knew of the violation, Karimzada would be disciplined. It is undisputed that Karimzada was using the vehicle with said defendants' consent and in furtherance of his or her employment as a route driver. Contrary to said defendants' argument, the testimony of Ronald Villano fails to raise an issue of fact as to whether Karimzada was acting within the scope of his or her employment.

Accordingly, plaintiff's motion for summary judgment on the issue of liability is granted solely as against defendants Stroehman Line-Haul, L.P. and Bimbo Bakery USA, Inc. and the affirmative defenses raised by said defendants are dismissed.

This constitutes the Decision and Order of the Court.

Dated: June 3, 2016



 Denis J. Butler, J.S.C.

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