

O'Keefe v Pasqualini
2018 NY Slip Op 34432(U)
May 31, 2018
Supreme Court, Westchester County
Docket Number: Index No. 68417/2015
Judge: Terry Jane Ruderman
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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
COUNTY OF WESTCHESTER

-----X
CHRISTOPHER O'KEEFE,

Plaintiff,

-against-

DECISION AND ORDER

Sequence Nos. 4 and 5

Index No. 68417/2015

CORINNE PASQUALINI and FRANCIS PASQUALINI,
and ZODIAC INDUSTRIES, INC.,

Defendants.
-----X

RUDERMAN, J.

The following papers were considered in connection with the plaintiff's motion for partial summary judgment pursuant to CPLR 3212 on the issue of liability against defendant Zodiac Industries, Inc. ("Zodiac") (sequence 4), and the cross-motion by defendant Zodiac for summary judgment in its favor on the complaint and any cross-claims (sequence 5):

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation, Exhibits 1- 32	1
Notice of Cross-Motion, Affirmation, Exhibits A - F	2
Affirmation in Reply and Opposition, Exhibits 1 - 3	3

This action arises out of a motor vehicle collision that occurred on December 30, 2013 in which a vehicle driven by defendant Corinne Pasqualini and owned by her father, defendant Francis Pasqualini, struck plaintiff's vehicle in the rear while it was stopped at a traffic light. Summary judgment on the issue of liability has already been granted against the Pasqualini defendants. Plaintiff now proceeds against Zodiac upon the lifting of an automatic bankruptcy stay in Zodiac's favor.

In seeking summary judgment against Zodiac on a theory of respondeat superior, plaintiff relies on the deposition testimony of Corinne Pasqualini, as well as video recordings with audio that plaintiff made at the scene immediately after the accident. In her deposition, Corinne Pasqualini stated that at the time of the accident she was on her way home from work at Zodiac's office, having left for the day, and that she does not use her father's car in the course of her employment. However, plaintiff points to a portion of the recording he made, in which Corinne Pasqualini said, "I just came out of the bank." Notably, however, in her deposition she stated "I don't remember being at the bank."

While she acknowledged that she only goes to that particular bank to perform defendant Zodiac's banking, and that she does not do her personal banking there, nowhere in Corinne Pasqualini's testimony did she state that she had just completed conducting a banking transaction at TD Bank, in the course of her employment as an office manager for Zodiac.

Plaintiff also cites Francis Pasqualini's deposition testimony that the TD bank was just next to where the accident occurred, and that Corinne Pasqualini "very well could be going through the drive-through and then going home." However, he had no personal knowledge of the facts of that day.

Consequently, plaintiff's assertion that Corinne Pasqualini had just conducted banking for Zodiac when the collision occurred is essentially founded upon the recorded statement and a number of inferences.

Zodiac's cross-motion relies on Corinne Pasqualini's protests that she was simply going home from work, and on the so-called "dual purpose principle," "if the travel would still have occurred even though the business purpose was canceled, then the employer cannot be held liable" (*Matos v Depalma Enters.*, 160 AD2d 1163, 1164 [3d Dept 1990]; see also *Cicatello v*

Sobierajski, 295 AD2d 974, 975 [4th Dept 2002]).

Analysis

Plaintiff's claim against Zodiac turns on whether Corinne Pasqualini was acting in the scope of her employment at the time of her accident. "Under the doctrine of respondeat superior, an employer will be liable for the negligence of an employee committed while the employee is acting in the scope of his employment" (*Lundberg v State*, 25 NY2d 467, 470 [1969]). "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 [or her] employer, or if his [or her] act may be reasonably said to be necessary or incidental to such employment" (*Beres v Terranera*, 153 AD3d 483, 486 [2d Dept 2017] [internal quotation marks and citations omitted]). Of course, driving home from work is generally not within the scope of employment; "[a]s a general rule, an employee driving to and from work is not acting in the scope of his employment" (*Lundberg v State*, 25 NY2d 467, 471 [1969]).

However, if an employee is performing a task for the employer in the course of his or her trip home, that may render the doctrine of respondeat superior applicable. "[T]he crucial test is whether the employment created the necessity for the travel' i.e., the need to be on the particular route on which the accident occurred" (*Swartzlander v Forms-Rite Bus. Forms & Print. Serv.*, 174 AD2d 971, 972 [4th Dept 1991], *aff'd for reasons stated* 78 NY2d 1060 [1991] [quoting *Matos v Depalma Enters.*, 160 AD2d 1163, 1164 [3d Dept 1990]). It has been held that under the so-called "dual purpose principle," "if the travel would still have occurred even though the business purpose was canceled, then the employer cannot be held liable" (*Matos v Depalma Enters.*, 160 AD2d at 1164; *see Cicatello v Sobierajski*, 295 AD2d 974, 975 [4th Dept 2002]).

The question of whether Corinne Pasqualini was acting within the scope of her

employment at the time of the accident cannot be determined as a matter of law on the submitted evidence. Her recorded statement "I just came out of the bank" does not establish as a matter of law that she was conducting her employer's business; indeed, without further development, it is insufficient to conclusively establish exactly what she meant. On the other hand, that evidence is sufficient to preclude a determination that she was merely driving home, and was *not* engaged in her employer's business. Nor can this court determine as a matter of law whether she would have been at the location of the accident even if the business purpose had been canceled.

Zodiac relies on *Greer v. Ferrizz* (118 AD2d 536 [2d Dept 1986]), which reversed a judgment against the employer of a driver involved in a fatal accident, on the ground that

"[t]he evidence was insufficient to establish that Mr. Ferrizz was still acting within the scope of his employment. Viewed most favorably to plaintiff, the evidence fails to show that Mr. Ferrizz was on any route other than his normal route home when the accident occurred. Mr. Ferrizz would have driven along that route whether or not his travels still had a business purpose"

(118 AD2d at 538). However, that reversal was based on an assessment of the trial evidence.

Here, there is no clear proof regarding Corinne Pasqualini's normal route home from work and whether, if she stopped at the TD bank for her employer, it took her out of her usual route.

Nor does the *Matos* case require dismissal of the claim against Zodiac. There, the driver for a bakery business was on his way from home to work when he was involved in an accident. The fact that he was carrying cash to deliver to the workplace did not avoid the applicability of the "dual purpose" doctrine so as to clear the employer of vicarious liability. The evidence submitted here does not clearly fall within the *Matos* rule.

Based upon the foregoing discussion, it is hereby

ORDERED that plaintiff's motion for summary judgment on the issue of liability against Zodiac (sequence 4) is denied; and it is further

ORDERED that Zodiac's cross-motion for summary judgment dismissing all claims and cross-claims against it (sequence 5) is denied; and it is further

ORDERED that the parties are directed to appear, *as previously directed*, in the Compliance Part for conference on June 21, 2018 at 9:30 a.m. at the Westchester County Supreme Courthouse, 111 Dr. Martin Luther King, Jr. Boulevard room 800, White Plains, New York 10601.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
May 31, 2018


HON. TERRY JANE RUDERMAN, J.S.C.