# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** HON. ADAM SILVERA **PART** IAS MOTION 22

*Justice*

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ARLENE HENRY,

Plaintiff,

- v -

JORGE NAVA GARCIA, ANNA VUKSANOVIC, 3151 BROADWAY LLC,CACO & SON REALTY CORP.

Defendant.

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**INDEX NO.** 161114/2015

**MOTION DATE** 10/02/2019

**MOTION SEQ. NO.** 002

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 74, 75, 76, 77, 78, 79, 80

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is ORDERED that defendants Anna Vuksanovic, 3151 Broadway, LLC, and Caco & Son Realty Corp.'s (hereinafter referred to as the "Moving Defendants") motion to dismiss plaintiff's action pursuant to CPLR § 3211 (a) or, alternatively, for summary judgment pursuant to CPLR § 3212 is denied. The accident at issue occurred on August 3, 2015, when a vehicle owned and operated by defendant Jorge Nava Garcia struck plaintiff Arlene Henry, a pedestrian.

The Moving Defendants argue that plaintiff's action against them should be dismissed as the action is untimely. The Moving Defendants argue that the Statute of Limitations ran on August 3, 2018, but the instant action was not commenced against the Moving Defendants until September 6, 2018. *See* Notice of Motion, Aff. ¶ 13. Additionally, the Moving Defendants preemptively notes that plaintiff cannot rely on CPLR § 203 (f) to argue that plaintiff's claim against them relates back to the original claim.

CPLR 203(f) codifies the relation back doctrine. Such statute states that "[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions [or] occurrences ... to be proved pursuant to the amended pleading". The Appellate Division, First Department, has held that "the relation back doctrine allows a plaintiff to correct a pleading error—by adding either a new claim or a new party—after the statutory limitations period has expired". *Ramirez* v *Elias-Tejada*, 168 AD3d 401, 403 (1st Dep't 2019)(internal quotations omitted). The Appellate Division in *Ramirez* went on to hold that "the following three conditions must be met before claims against one defendant may relate back to claims against another: (1) both claims arose out of same conduct, transaction or occurrence, (2) the new party is 'united in interest' with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits and (3) the new party knew or should have known that, but for a[ ] ... mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him as well". *Id.* at 402-403(internal quotations and citations omitted).

The Court finds the Moving Defendants' argument that plaintiff has failed to meet the second and third requirements of the relation back doctrine unavailing. First, plaintiff's claims against the Moving Defendants arise from the same motor vehicle accident as alleged against defendant Garcia. Second, plaintiff has satisfied the second condition, "because under the doctrine of respondeat superior, an employer will be vicariously liable for the negligence of an employee committed while the employee is acting in the scope of his or her employment." *Id.* at 403 (internal citations omitted). Based on defendant Garcia and defendant Vuksanovic's employer/employee relationship, they are united in interest as a judgment against one would

similarly affect the other. *See Id.* Therefore, as defendant Garcia's employer, the Moving Defendants can be found to have had notice of plaintiff's potential claims against them, based upon the claims asserted against defendant Garcia in the original summons and complaint. *See Id.*

Lastly, plaintiff has shown that but for a mistake, the action would have been brought against the additional defendants. Here, plaintiff established that she was not aware that the accident occurred during defendant Garcia's work hours until defendant's deposition on May 19, 2018. *See* Aff. in Opp. ¶ 5. Promptly after learning of the employer/employee relationship between defendant Garcia and defendant Vuksanovic, plaintiff moved on June 4, 2018 to amend the Summons and Complaint pursuant to CPLR Section 3025 (b) to add the Moving Defendants. On August 24, 2018, this Court granted plaintiff's motion to amend the summons and Complaint to add such defendants. Therefore, despite the Moving Defendants' argument to the contrary, plaintiff has satisfied the three-prong requirement of the relation back doctrine such that the instant motion to dismiss plaintiff's action pursuant to CPLR § 3211 (a) is denied.

Furthermore, the portion of the Moving Defendants' motion seeking summary judgment to dismiss plaintiff's claims pursuant to CPLR 3212 is denied as a triable issue of fact exists. The law is clear that "[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case". *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]. Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure … to do [so]". *Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]. The court's role

is "issue-finding, rather than issue-determination". *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957) (internal quotations omitted). As such, summary judgment is rarely granted in negligence actions unless there is no conflict at all in the evidence. *Ugarriza v Schmieder*, 46 NY2d 471, 475-476 (1979).

In opposition, plaintiff argues that a clear question of fact exists as to whether defendant Garcia was within the scope of employment of the Moving Defendants at the time of the subject accident. *See* Aff. in Opp. ¶ 11. To support her argument, plaintiff relies on defendant Garcia's May 19, 2018 deposition where he stated that he was working for his boss defendant Vuksanovic at the time of the accident. *See Id.* ¶ 4. Thus, there is a conflict in the evidence as to whether defendant Garcia was within the scope of his employment with defendant Vuksanovic at the time of the accident such that a triable issue of fact exists precluding summary judgment. The Moving Defendants' motion seeking summary judgment is denied.

Accordingly, it is

ORDERED that defendants' motion is denied in its entirety; and it is further

ORDERED that all counsel shall appear for a previously scheduled status conference on January 13, 2020 at 9:30am in room 106 of 80 Centre Street, New York, NY; and it is further

ORDERED that, within thirty days of entry, plaintiff shall serve a copy of this order upon all parties, together with notice of entry.

This constitutes the Decision/Order of the Court.

12/23/2019
DATE

ADAM SILVERA, J.S.C.

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| CHECK ONE: | | CASE DISPOSED | | X | NON-FINAL DISPOSITION | | |
| | | GRANTED | X DENIED | | GRANTED IN PART | | OTHER |
| APPLICATION: | | SETTLE ORDER | | | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | FIDUCIARY APPOINTMENT | | REFERENCE |

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