

Wolfe v Modern Cousins LLC
2020 NY Slip Op 35342(U)
October 19, 2020
Supreme Court, Westchester County
Docket Number: Index No. 68584/2019
Judge: Charles D. Wood
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

-----X
MITCHELL J. WOLFE and DOREEN L. WOLFE,

Plaintiff,

-against-

DECISION & ORDER

**Index No. 68584/2019
Seq No. 1**

**MODERN COUSINS LLC d/b/a MODERN
RESTAURANT & LOUNGE, SELECT PARKING
SYSTEMS INC., JUAN A. PENA and GERARDO
GUTIERREZ,**

Defendants.
-----X

WOOD, J.

The court read moving defendant Juan A. Pena’s motion¹ pursuant to CPLR 3212, for summary judgment for common indemnification from defendants, as well as opposition papers from defendants Select Parking Systems Inc., Gerardo Gutierrez, and Modern Cousins LLC d/b/a Modern Restaurant & Lounge.

This case arose on September 21, 2019. Pena left his motor vehicle at the Modern Restaurant, with the valet to park. After Pena entered the restaurant, the subject accident occurred. He did not witness the accident.

Plaintiff claims that Gutierrez, as the valet, was operating the Pena vehicle, and while backing up he did not see Mr Wolfe and hit him.

Non-party Jonathan Dinowitz witnessed the accident, and attests that he believes that the accident was staged by plaintiff:

¹New York State Courts Electronic Filing (“NYSCEF”) Documents Numbers 15-38, were read in connection with defendant Juan A. Pena’s motion for summary judgment.

1. I was a witness to an alleged incident that occurred on Saturday, September 21, 2019 at approximately 6:30 p.m. - 7:00 p.m.
- 2 I was standing outside in front of Modern Restaurant located on Huguenot Street in New Rochelle when the incident occurred.
3. I saw a white male, in his 50's, with his wife and son, who looked to be a teenager.
4. Traffic conditions on Huguenot were heavy at the time. I observed the woman and child dart across the street. The gentleman involved in the incident, who has been identified as Mitchell Wolfe, followed the woman and child. I saw him run across the street and into the side rear portion of the vehicle which was being parked at the time. The valet driver was parallel parking the vehicle and going very slowly, between 2-3 miles per hour. The individual, identified as Mitchell Wolfe, ran into the vehicle. From where I was standing, I observed this individual run directly into the side rear bumper area of the silver Nissan SUV. The individual did not fall to the ground. I then observed him continue over to where his wife and son were standing on the curb. Mr. Wolfe then ran back across the street into Modern Restaurant, where he remained for approximately 5- 10 minutes. When he came back outside, the police and ambulance had already arrived.
5. I observed Mr. Wolfe being examined by the EMT's at the scene. During this time, Mr. Wolfe kept walking back over to speak with his wife. I heard his wife say to him "if we are going to collect any insurance money, you should go in the ambulance and to the hospital."
6. There is no crosswalk in front of Modern Restaurant and Mr. Wolfe ran across the street, midblock, and into the side corner, near the rear bumper area, on the driver's side of the vehicle, as it was backing into a parking spot. He initiated the contact with the vehicle.
7. Based on my observations, the incident was caused by the person running into the side rear side of the vehicle being parallel parked by the attendant at the time of the incident" (NYSCEF#27).

Pena seeks a judgment declaring that co-defendants are required to indemnify him under common-law indemnification, due to his liability can only be vicarious based on his "passive" role. Pursuant to Vehicle and Traffic Law §388(1) Pena, as the owner of a motor vehicle would be imputed with the negligence of co-defendants Gutierrez and Select Parking who operated Pena's vehicle with his permission, express or implied (Allstate Ins. Co. v Jae Kan Shim, 185 AD3d 919 [2d Dept 2020]). Generally, summary judgment on a claim for common-law indemnification "is appropriate only where there are no issues of material fact concerning the precise degree of fault attributable to each party involved" (Coque v Wildflower Estates Developers, Inc., 31 AD3d 484, 489 [2d Dept 2006]).

Here, the Verified Answer of Select and Gutierrez, reflects that Gutierrez was operating a motor vehicle with permission and consent of the vehicle's owner in the course of his employment for Select Parking (NYSCEF#19).

From these facts, Gutierrez (the employee). was acting within the scope of his employment when the subject accident occurred, and a passive owner of a vehicle vicariously liable pursuant to Vehicle and Traffic Law §388 is entitled to common-law indemnification from employer of active tortfeasor acting within scope of his employment (Scherer v N. Shore Car Wash Corp., 32 A.D.3d 426, 427 [2d Dept 2006]).

Pena's uncontroverted affidavit establishes that he was indeed a passive owner of the vehicle at the time of the accident, subject only to vicarious liability pursuant to VTL §388. Pena, as the owner of the offending motor vehicle is entitled to common-law indemnification from the actual tortfeasor or his principal. Nonetheless, Pena as the passive owner of a vehicle may still be vicariously liable to an injured party pursuant to VTL §388, if Pena's liability is not predicated solely upon vicarious liability, such as a possible malfunction of the vehicle (Scherer v North Shore Car Wash Corp., 32 AD3d 426, 427 [2d Dept 2006]); (Traub v Dinzler, 309 NY 395, 401 [1955]).


In opposition, Select and Gutierrez merely argue that this motion is premature, as discovery has not been completed; and that based upon the eyewitness account, plaintiff may be the sole proximate cause of the accident. Select and Gutierrez do not raise that a vehicle malfunction or other cause attributable by Pena occurred, or that discovery might lead to relevant evidence. "The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion" (Cajas-Romero v Ward, 106 AD3d 850 [2d Dept 2013]).

Based upon the record, the liability against Pena is based entirely upon vicarious liability, pursuant to VTL §388, purely as the owner of the vehicle who entrusted his vehicle to the valet service. Pena is entitled to common law indemnification from the alleged active tortfeasor, (Gutierrez and his employer, Select) should they be found to be negligent. However, the same does not hold true for Modern Restaurant, as Gutierrez was not an employee of Modern Restaurant, but rather an employee of Select at the time of the loss, and thus, Pena's motion is denied as against Modern Restaurant.

The parties are directed to appear at a Compliance Conference Part, Room 800, Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Blvd. White Plains, New York 10601, at a date and time to be determined by that Part.

All matters not herein decided are denied. This constitutes the Decision and Order of the court.

Dated: White Plains, New York
October 19, 2020



HON. CHARLES D. WOOD
Justice of the Supreme Court

TO: All Parties by NYSCEF