

**Junior Nurse v BEK Trans Group, Inc.**

2024 NY Slip Op 33009(U)

August 26, 2024

Supreme Court, Kings County

Docket Number: Index No. 507244/2019

Judge: Ingrid Joseph

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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.

At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 26<sup>th</sup> day of August 2024.

PRESENT: HON. INGRID JOSEPH, J.S.C.  
SUPREME COURT OF THE STATE OF  
NEW YORK COUNTY OF KINGS

-----X  
Junior Nurse,  
  
Plaintiff(s)

**Index No: 507244/2019**  
**Motion Seq. 7**

-against-

BEK Trans Group, Inc., Farruh Amonov, and Sherzod  
Faidmurodov,  
  
Defendant(s)

**ORDER**

-----X

The following e-filed papers read herein:

Notice of Motion/Petition/Affidavits Annexed

Exhibits Annexed/Reply.....

Affirmation in Opposition/Affidavits Annexed/Exhibits Annexed.....

NYSCEF Nos.:

125-156; 158 160 177; 193  
157; 179-189

In this action, BEK Trans Group, Inc., (“BEK”) and Farruh Amonov (“Amonov”) (Collectively “Defendants”) move (Motion Seq. 7) for summary judgment pursuant to CPLR 3212, dismissing Junior Nurse’s (“Plaintiff”) complaint against Defendants on the grounds that Defendants did not employ Defendant Sherzod Faidmurodov, (who is referred to incorrectly in the caption and will be referred to hereinafter as Sherzon Saidmurodov [“Saidmurodov”]) as a driver at the time of the underlying automobile accident and that the Federal Transportation Equity Act of 2005 codified at 49 USC 30106, also known as the Grave’s Amendment precludes liability to the lessor of a motor vehicle. Plaintiff has opposed the motion on the grounds that Defendants motion is procedurally defective, untimely, and that there are triable issues of fact present warranting a trial.

This action stems from a rear-end motor vehicle collision that occurred on November 2, 2017. Plaintiff was a front seat passenger in a vehicle that was owned and operated by his employer, non-party Roy Smith (“Smith”). Defendant Saidmurodov was the driver of a vehicle owned by Defendant BEK and leased to him. Defendant Aminov was the owner of BEK, and a separate non-party entity Sultan Trans at the time of the accident.

The Summons and Complaint in this action was filed on April 2, 2019. Plaintiff commenced a second action stemming from the alleged accident on June 12, 2019, under Index #51299/2019. The Parties stipulated to consolidate the actions on September 10, 2020. Plaintiff’s Note of Issue and Certificate of Readiness was filed on July 21, 2021. On July 29, 2021, Defendants filed a motion to vacate the Note of Issue on the ground that there was outstanding discovery. Additionally, Defendants requested that the court compel Saidmurodov to appear for a deposition. By order dated September 13, 2021, Justice Knipel held, in part, that the Note of Issue was not vacated, that the case remains on the trial calendar, and that Saidmurodov was scheduled to appear for deposition by November 5, 2021. The order did not address

extending the time to file a motion for summary judgment. On September 23, 2021, Defendants filed a proposed compliance order, stipulated and signed by all parties, seeking to extend the time to file a motion for summary judgment for 60 days from the completion of discovery and reiterating that Saidmurodov's deposition was to be held before November 5, 2021. That proposed order was rejected by the court and returned for correction.

On January 26, 2022, an Order to Show Cause was signed for Saidmurodov's counsel to be relieved as counsel, which was granted by order dated March 3, 2022. Defendants submitted partial opposition to the Order to Show Cause on the ground that counsel for Saidmurodov repeatedly failed to produce him for scheduled depositions beyond the November 5, 2021, deadline. Additionally, in their opposition, Defendants assert that the parties were able to resolve the motions to vacate pursuant to the September 23, 2021, proposed order that was rejected. An amended proposed order to extend the time to file summary judgment was never filed. Defendant Saidmurodov was deposed on September 16, 2022. On November 16, 2022, Defendants filed their original motion for summary judgment made returnable on December 5, 2022. On November 28, 2022, the parties stipulated to adjourn the motion from December 5, 2022, to January 5, 2023. The motion was scheduled for a return date on October 11, 2023, and thereafter was accelerated to March 1, 2023, the court's closest available date to accommodate the requested return date submitted in the stipulation. On March 1, 2023, Defendants failed to appear for the conference and the motion was marked off the calendar. On October 11, 2023, Defendants counsel appeared, and was informed that the matter was marked off at the March 1, 2023, conference. On November 2, 2023, Defendants emailed the court seeking clarification on the appearance dates regarding this action, where they were again informed of acceleration and marking off of the motion. On November 21, 2023, Defendants filed this second motion for summary judgment.

In support of its motion, with respect to Defendant BEK, Defendants argue that the Graves Amendment, precludes liability of owners of vehicles who are engaged in the trade or business of renting or leasing motor vehicles that are involved in accidents by the leasee and are not negligent for the cause of an accident. Additionally, with respect to Defendant Amonov, Defendants argue that he is entitled to summary judgment because Saidmurodov was an independent contractor and not a BEK employee at the time of the accident. Defendants concede that it owns the box truck that was driven by Defendant Saidmurodov on the date of the accident, and that the truck was leased to Saidmurodov on October 2, 2017, under a Commercial Lease Agreement between the parties. Pursuant to the agreement, Defendants assert that Saidmurodov agreed to pay \$2,194.00 per month plus \$0.12 per mile, with an option to purchase the truck at the end of the term. Defendants contend that Saidmurodov, who initially worked as an independent contractor for BEK, transitioned to an independent contractor under the motor carrier authority of Sultan Trans as a for-hire interstate motor carrier and was working for Sultan Trans at the time of the accident.

Defendants state that under the Owner/Operator Agreement between Saidmurodov and Sultan Trans, the parties would negotiate a rate per job that Saidmurodov could accept and reject for routes. Defendants allege that at the time of the accident, Saidmurodov was not actively working and was in the process of taking the truck to a repair shop for maintenance. Furthermore, Defendants argue that Plaintiff is not prejudiced by its successive motion because Saimudorov was on notice as demonstrated by their stipulation to extend the return date of the conference. Defendants also contend that the court has discretion to disregard the deadline for filing summary judgment motions to accommodate genuine need and that this action should be decided on its merits.

With respect to the timeliness arguments raised, Defendants state that the original summary judgment was filed 61 days from the conclusion of discovery, due to a law office miscalculation and that due to the genuine need to file the motion, Defendants' meritorious claims, and because Plaintiff is not prejudiced by the delay, that the court should exercise its broad discretion to accept late motions. Additionally, regarding the missed March 1, 2023, appearance, Defendants' counsel contends that his office was never informed about the acceleration date from October 11, 2023, to March 1, 2023. Defendants' counsel states that after appearing on October 11, 2023, that he attempted to request a stipulation to adjourn from Plaintiff's counsel, but he refused.

In opposition, Plaintiff argues that Defendants' motion is procedurally defective and untimely. Plaintiff asserts that Defendant Saidmurodov was not served with a copy of the motion, but rather his former counsel who has been relieved was served. Additionally, Plaintiff argues that both Defendants' original summary judgment motion and this one, are untimely. Plaintiff states that the proposed compliance order submitted by Defendants was rejected and returned for correction and that Defendants never corrected and re-filed the motion nor sought leave to extend time to file a motion for summary judgment. Further, Plaintiff states that Siadmurodov was deposed on September 16, 2022, and that Defendants' original motion was filed on November 16, 2022 -- 61 days from the conclusion of discovery, and that Defendants have not proffered a reasonable excuse for their delay. Assuming *arguendo* that the motion is decided on the merits, Plaintiff argues that Defendants motion should be dismissed because the Graves Amendment does not protect BEK from its own liability if it was negligent in leasing the subject vehicle. Plaintiff claims that Saidmurov's license was suspended in New York State at the time of the accident, and that BEK has failed to show that it was not negligent in leasing the vehicle to him. Plaintiff argues because Saidmurodov testified that he was en route to get the vehicle repaired at the time of the accident, that there is a material issue of fact as to whether BEK was negligent in maintaining or repairing it. However, Plaintiff also claims there is an issue of fact as to whether Siadmurodov was working at the time of the accident, because he also testified that he was driving to New Jersey to park his truck for the day. Additionally, Plaintiff states that there is a material issue of fact as to whether Saidmurodov was employed by BEK at the time of the accident.

Plaintiff claims that Saidmurodov's EBT testimony conflicts with his affidavit because Saidmurodov testified that he was unsure who he worked for at the time of the accident, and that he did work for BEK in the past. However, in his affidavit, he states that he was not employed with BEK on the date of the accident but was an independent contractor for Sultan Trans. Inc. Further, Plaintiff argues that BEK has failed to submit evidence to establish that Saidmurodov was an independent contractor because Sultan Tran is the sole owner of both BEK and Sultan Trans, and that the submitted contracts are contradictory since one is an employee contract and the other is an independent contractor agreement.

A party seeking to assert personal jurisdiction bears the ultimate burden of proof to establish a basis for such jurisdiction (*Clevenger v Yuzek*, 222 AD3d 931 [2d Dept. 2023]; *WCVAWCK-Doe v. Boys & Girls Club of Greenwich, Inc.*, 216 AD3d 1 [2d Dept. 2023]; see *Sacco v. Reel-O-Matic, Inc.*, 183 AD3d 567 [2d Dept. 2020]). The facts alleged in the complaint...are deemed true and construed in the light most favorable to the plaintiff, and all doubts are to be resolved in favor of the plaintiff (*Id.*). The defense of lack of jurisdiction based on improper service is personal in nature and may only be raised by the party improperly served (see *Lehman Brothers Bank v Hickson*, 186 AD3d 1348 [2d Dept. 2020]; *Rhoe v Reid*, 166 AD3d 919 [2d Dept. 2018]; *Rhoades v Westchester County Bd. of Elections*, 115 AD3d 958 [2d Dept. 2014]; *Wells Fargo Bank, N.A. v Bowie*, 89 ad3D 931 [2d Dept. 2011]; *Home Sav. of America, F.A. v Gkanios*, 233 AD2d 422 [2d Dept. 1996]).

Here, the court finds that Plaintiff lacks standing to assert a lack of jurisdiction defense on behalf of Defendant Saidmurodov who has not filed opposition to Defendants' motion nor asserted the defense.

It is well established that "the 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 demonstrate the absence of any material issues of fact" (*Ayotte v. Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zapata v. Buitriago*, 107 AD3d 977 [2d Dept 2013]). Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the papers in opposition (see *Alvarez*). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

Summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable (*Elzer v. Nassau County*, 111 A.D.2d 212,489 NYS2d 246 [2nd Dept. 1985]; *Steven v. Parker*, 99 AD2d 649, 472 NYS2d 225 [2nd Dept. 1984]; *Galeta v. New York News, Inc.*, 95 AD2d 325,466 NYS2d 321 [1st Dept. 1983]). When deciding a summary judgment motion, the Court must construe facts in the light most favorable to the non-moving party (*Marine Midland Bank N.A. v. Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept. 1990]).

Generally, successive motions for summary judgment are not permitted (*Verizon New York Inc., v Supervisors of Town of North Hempstead*, 169 AD3d 740 [2d Dept. 2019]; *Kolel Damsek Eliezer, Inc. v Schlesinger*, 139 AD3d 810 [2d Dept. 2016]; *Tolpygina v Teper*, 63 AD3d 722 [2d Dept. 2009]; *Staub v City of New York*, 289 AD2d 560 [2d Dept. 2001]; *Davidson Metals Corp. v Marlo Development Co.*, 262 AD2d 599 [2d Dept. 1999]). However, a court may properly entertain such a motion when it is substantively valid and the granting of the motion will further the interest of justice and eliminate an unnecessary burden on the resources of the courts (*Verizon New York, Inc.* at 744; *Kolel Damsek Elizner, Inc.* at 811 quoting *Graham v City of New York*, 136 AD3d 748 [2d Dept. 2016]). Such a showing may be demonstrated by newly discovered evidence or other good cause (*id.*; *Tolpygina* at 722-733; *Bubige v Siben & Ferber*, 152 AD3d 641 [2d Dept. 2017]). Additionally, the failure of counsel to appear in support of an initial motion which resulted in its being marked off the calendar does not bar a second motion because marking a matter off the calendar does not operate to establish the law of the case or dismiss it on its merits (*Lewis v New York City Tr. Auth.*, 100 AD2d 896, 869 [2d Dept 1984]; citing *Aridas v Caserta*, 41 NY2d 1059 [1977]; *Bernard-Moses v Chick-Fil-A, Inc.*, 81 Misc. 3d 1241(A) [Sup Ct. Kings County 2024]; *Pallotta v Saltru Assoc. Joint Venture, N.Y.*, 32 Misc 3d 1208(A) [Sup Ct Kings County 2011]).

Law office failure may constitute a reasonable excuse for the delay in moving to restore a motion to the calendar (see CPLR 2005; *Bank of America, N.A. v Russell*, 197 ad3D 448 [2D Dept. 2021]; *Tarcia v Brookhaven National Laboratory*, 186 AD3d 1557 [2d Dept. 2020]; *Ramputi v Timko Contr. Corp.*, 262 AD2d 26, 28 [1st Dept 1999]). In evaluating what constitutes a reasonable excuse, a court may, in the absence of willfulness, deliberate default or a showing of prejudice, accept law office failure as an excuse where such claim is supported by a detailed and credible explanation (see *Columbus v Kourtei*, 218 AD3d 531 [2d Dept. 2023]; *Sauteanu v BJ's Wholesale Club, Inc.*, 210 AD3d 922 [2d Dept. 2022]; quoting *Al Maruf v E.B. Management Properties, LLC*, 181 AD3d 670 [2d Dept. 2020]).

Similarly, Pursuant to CPLR 3212(a), courts have considerable discretion to fix a deadline for filing summary judgment motions, so long as the deadline is not 'earlier than 30 days after filing the note of issue or unless set by the court later than 120 days after the filing of the note of issue, except with leave of court on good cause shown (see *Wittenberg v Long Is. Power Auth.*, 225 AD3d 730, 732 [2d Dept 2024]; *Kuyenova v. R & M Supermarket*, 215 A.D.3d [2d Dept. 2023] quoting *Brill v. City of New York*, 2 NY3d 648 [2004]). Absent a "satisfactory explanation for the untimeliness," constituting good cause for the delay, an untimely summary judgment motion must be denied without consideration of the merits (*Wittenberg* at 732; *Brill* at 652, *Kuyenova* at 941). An untimely motion or cross motion for summary judgment may be considered by the court where a timely motion was made on nearly identical grounds (*Wittenberg* at 732; citing *Sikorjak v. City of New York*, 168 AD3d 778 [2d Dept. 2019]; see also *Sheng Hai Tong v. K & K 7619, Inc.*, 144 AD3d 887 [2d Dept. 2016]).

Here, the court finds that while Defendants' motions for summary judgment were untimely, Defendants have shown good cause, reasonable excuse and a meritorious defense for the court to decide the motion on its merits in the interest of justice. The order denying Defendant's motion to vacate the Notice of Issue, which was timely, was issued close to the deadline for submission of a summary judgment motion and the scheduled date for Defendant Saidmurodov's deposition was well beyond the deadline. Thereafter, Defendants submitted a stipulation signed by all parties to extend the deadline which was rejected. Defendants attempted to schedule the deposition, which was repeatedly adjourned by Saidmurodov's former counsel, and filed their original summary judgment motion one day late due to miscalculation. That motion was marked off the calendar for failure to appear due to Defendants not being aware of the appearance's acceleration, it was not dismissed on the merits nor was a default order entered. Plaintiff in opposition has not established any prejudice imposed.

Under the Graves Amendment, "the owner of a leased or rented motor vehicle cannot be held liable for personal injuries resulting from the use of such vehicle if: (1) the owner is engaged in the trade or business of renting or leasing motor vehicles, and (2) there is no negligence or criminal wrongdoing on the part of the owner" (*Harewood v Zip Car*, 189 AD3d 1192, 1193 [2d Dept 2020]; 49 USC § 30106). Where a plaintiff seeks to hold a vehicle owner liable for the alleged failure to maintain a rented vehicle, the vehicle owner is not afforded protection under the Graves Amendment if it fails to demonstrate that it did not negligently maintain the vehicle (*Couchman v Nunez*, 180 AD3d 645, 646 [2d Dept 2020]) [internal citations and quotation marks omitted]).

Here, Plaintiff's complaint does not allege that Defendants' negligent maintenance or repairs of the vehicle caused the accident. Defendants have established that they are a business engaged in the trade of leasing motor vehicles and leased the subject vehicle to Defendant Saidmurodov herein. With respect to Plaintiff's claim that Defendants were negligent in leasing the subject vehicle to Saidmurodov because his license was suspended at the time of the accident, Plaintiff failed to cite any legal authority that Defendants were under an obligation to check his driver's record beyond verifying that he had a valid driver's license (see generally, *Byrne v Collins*, 77 AD3d 782 [2d Dept. 2010]; *Vedder v. Cox*, 18 Misc.3d 1142[A] (Sup.Ct. Nassau 2008)). Thus, Defendants have established entitlement to summary judgment as a matter of law as to BEK.

In most cases, a party who retains an independent contractor is not liable for an independent contractor's negligent acts (*Allstate Vehicle & Property Insurance Company v Glitz Construction Corp.*, 214 AD3d 691 [2d Dept. 2023]). Control of the method and means by which the work is to be done is the critical factor in determining whether one is an independent contractor or an employee for purposes of tort liability (*Id.*; *Sanabria v Aguero-Borges*, 117 AD3d 1024 [2d Dept. 2014]; *Meehan v County of Suffolk*, 144 AD3d 640 [2d Dept. 2016]). Whether a worker is an independent contractor or an

employee for the purposes of tort liability is usually a factual issue for the jury. However, where there is no conflict in the evidence, the question may properly be determined as a matter of law (*Lombardi v. Alpine Overhead Doors, Inc.*, 92 AD3d 921 [2d Dept. 2012]).

Factors relevant to assessing control include whether the worker (1) worked at [her or] his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll, and (5) was on a fixed schedule (*D. S. v Positive Behavior Support Consulting and Psychological Resources, P.C.*, 197 AD3d 518, 520 [2d Dept 2021]; citing *Bynog v Cipriani Group, Inc.*, 1 NY3d 193 [2003]). Incidental control over the results produced without further indicia of control over the means employed to achieve the results will not constitute substantial evidence of an employer-employee relationship (*Id.*; *Matter of Ted is Back Corp. [Roberts]*, 64 NY2d 725 [1984]; see *Weinfeld v HR Photography, Inc.*, 149 AD3d 1014 [2d Dept. 2017]).


Here, Defendants have satisfied their prima facie burden establishing that Defendant Saidmurodov was employed by non-party Sultan Trans Inc. at the time of the accident. Defendants submit a driver application by Saidmurodov to Sultan Trans Inc. and an Owner Operator Agreement with Sultan Trans Inc. signed September 11, 2017. In his affidavit Amonov stated that, Saidmurodov worked for BEK prior to September 17, 2017, as an independent contractor for BEK, during a period when BEK was a trucking and transportation company and was not in the business of leasing vehicles. Thereafter, pursuant to the agreement with Sultan Trans. Inc., he transitioned to a for-hire driver for the company, wherein Sultan Trans Inc., would offer Saidmurodov available loads and if he approved, would negotiate rates for his services. In opposition, Plaintiff fails to rebut or proffer admissible evidence to establish or raise triable issues of fact that Saidmurodov was an employee of BEK at the time of the accident.

With respect to the issue of whether Saidmurodov was working at the time of the accident, Defendants argue that based on his Daily Electronic Logging Device ("ELD") records, that he was not on duty. Contrary to Plaintiff's argument that Saidmurodov testified that he was driving to New Jersey to Park his truck conflicting with his statement in his affidavit that he was en route to a repair shop, Saidmurodov testified that he would pay to park his truck in a mechanical shop in New Jersey, which is where he was headed at the time of the accident. Thus, Defendants have established that there is no issue of fact that Saidmurodov was not working at the time of accident.

Accordingly, it is hereby,

ORDERED, that Defendants' motion for summary judgment to dismiss Plaintiff's complaint is granted.

This constitutes the decision and order of the court.

  
\_\_\_\_\_  
Hon. Ingrid Joseph J.S.C.

Hon. Ingrid Joseph  
Supreme Court Justice