

Diamond v Colarusso Limousine Co., Inc.
2024 NY Slip Op 35048(U)
March 27, 2024
Supreme Court, Rockland County
Docket Number: Index No. 030200/2018
Judge: David Fried
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To commence the statutory time period 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 ROCKLAND

-----X

MELISSA DIAMOND, as Administratrix of the
ESTATE OF ALINE BLOCK,

Plaintiff,

-against-

COLARUSSO LIMOUSINE COMPANY, INC., et al.

Defendants.

-----X

JAMIE CALDERO, as Fiduciary of the Estate of
NEIL BLOCK,

Plaintiff,

-against-

COLARUSSO LIMOUSINE COMPANY, INC., et al.

Defendants.

-----X

ALLSTATE INSURANCE COMPANY a/s/o NEIL
BLOCK,

Plaintiff,

-against-

COLARUSSO LIMOUSINE COMPANY, INC., et al.
and MATTHEW D. SINDONE,

Defendants.

-----x

HON. DAVID FRIED, A.J.S.C.

DECISION & ORDER

Index No. 030200/2018
Motion Sequence No. 9
(Action No. 1)

Index No. 030253/2018
Motion Sequence No. 5
(Action No. 2)

Index No. 033422/2018
(Action No. 3)

The papers filed electronically via NYSCEF (Index No. 030200/2018) numbered 258-272 and 274-276, 278, and 280-283 (“Motion Sequence No. 9”); and (Index No.030253/2018) numbered 155-166, 168-169, 171, and 173-174 (“Motion Sequence No. 5”) were read and considered herein. Upon such reading and consideration, the Motions are disposed as follows:

This action stems from a motor vehicle accident that occurred on June 4, 2017, at or near the intersection of Route 304 and Goebel Road in the County of Rockland, State of New York. Decedents Neil Block and Aline Block were the occupants of a 2016 Toyota that collided with a 2014 Lincoln that was operated by Defendant Matthew Sindone. The 2014 Lincoln (“limo”) was owned by Defendant Colarusso Limousine Company, Inc (“Defendant Colarusso”).

Plaintiff Jamie Caldero as Fiduciary of the Estate of Neil Block and Plaintiff Melissa Diamond as Administratrix of the Estate of Aline Block (collectively, “Plaintiffs”) each bring a Motion (Motion Sequence Nos. 5 and 9, respectively) herein, pursuant to CPLR §2221(e), seeking leave to renew (collectively, “Motion to Renew”) the various applications giving rise to a Decision & Order from the bench (dated June 2, 2020 and entered on June 17, 2020) by the Court (Marx, J.) (Index No. 030200/2018, NYSCEF Doc. No. 205; and Index No. 030253/2018 NYSCEF Doc. No. 208) (“Underlying Decision & Order”) which denied Plaintiffs’ motions for summary judgment on the issue of liability as against Defendants Colarusso and Dennis Sindone, and granted Defendant Colarusso’s and Dennis Sindone’s motions for summary judgment. Said Underlying Decision & Order of the Court (Marx, J.) was rendered from the bench following oral argument. Defendants oppose said Motion to Renew.

The Motion to Renew is based upon purported new facts which were not available at the time of the prior motions. Specifically, new sworn testimony given by Defendant Matthew Sindone, at a parole hearing in 2023 (approximately three [3] years after the Underlying Decision & Order in 2020). Said new testimony at the parole hearing purportedly contradicts his deposition testimony in the case here. The Court (Marx, J.) determined in the Underlying Decision & Order that the evidence demonstrated that Defendant Matthew Sindone fooled Dennis Sidone in order to obtain consent to use the limo. At the parole hearing, Defendant Matthew Sindone purportedly testified that his father, Dennis Sidone, who is deceased, gave him permission to use the limo.

Plaintiffs contend that Judge Marx decided the case over three years ago based on the supposition that Dennis Sidone did not mean to actually give permission for Defendant Matthew Sidone to drive the limo because Dennis Sidone and Defendant Matthew Sidone purportedly both knew that Dennis Sidone would not have given such permission since Dennis Sidone was not allowed to do so by Defendant Colarusso. Plaintiffs further contend that Defendant Mathew Sidone’s EBT testimony about tricking his father was critical. Plaintiffs argue that the crux of the Underlying Decision & Order was also, therefore, that Defendant Matthew Sidone’s EBT testimony provided the corroboration of Defendant Colarusso’s testimony necessary to overcome the strong presumption of consent.

Plaintiffs further contend as follows: that the new parole transcript shows that Dennis Sindone knew that Defendant Matthew Sindone was specifically referring to the Lincoln MKT owned by Defendant Colarusso and gave Defendant Matthew Sindone permission to drive said Lincoln; that Denise Sindone affirmatively instructed Defendant Matthew Sindone to be home with it soon so Dennis Sindone could use it for his next job pick-up that evening; and that said new evidence guts the entire ground upon which Judge Marx granted summary judgment to Defendant Colarusso and Dennis Sindone.

Defendants contend, among other things, that Defendant Matthew Sindone is merely changing his testimony to obviate the consequences of earlier testimony in order to get out of prison and that his self-serving affidavit is insufficient to raise a triable issue of fact.

The relevant portion of the Underlying Decision & Order, given orally from the bench of Judge Marx, is as follows:

“The Court finds, as a matter of law, that Matthew Sindone lacked permissive use, permission to use the vehicle owned by Colarusso Limousine Company, Inc. Consequently, there are no questions of fact that require a determination by a jury on this particular issue. There has been substantial evidence to the Court to the effect that Matthew, in fact, did not have permission to use the vehicle; and in point of fact, his own counsel, Mr. Fitzgerald indicates that Matthew fooled his father as to his intent. It would be a far stretch of the facts to make a determination that Matthew has permission, based upon his own concession that he, in fact, fooled his father, in an effort to obtain consent. Even if that were not the case, Matthew’s testimony, at his Examination Before Trial, is clear that he did it in such a manner so as to obtain permission and use of the vehicle in a nefarious way. There has been nothing of any significance offered to rebut that, that denial of permissive use.”

Accordingly, in rendering the Underlying Decision & Order, Judge Marx relied substantially on the testimony and or statements of Defendant Matthew Sindone, and as such his credibility as well. Therefore, the aforementioned change in Defendant Matthew Sindone’s testimony and or statements raise a genuine issue of material fact. Moreover, there is a very strong presumption of permission and consent under VTL §388 which can only be overcome if the defendant submits substantial evidence to the contrary. *Han v. BJ Laura & Son, Inc.*, 122 A.D.3d 591 (2nd Dept. 2014) (VTL §388 creates a strong presumption of consent, which can only be rebutted by substantial evidence demonstrating that the vehicle was not operated with the owner’s express or implied permission).

Additionally, where an employer, such as Defendant Colarusso, allows an employee to bring the employer’s car home over the weekend or off-hours, and then testifies that the permission was only for work-related purposes, such evidence by itself is not sufficient to overcome the presumption of permissive use, unless something more substantial is submitted, including independent admissible

corroboration of the self-serving disavowals of the interested party. See, e.g., *Marino v. City of New York*, 95 A.D.3d 840, 841 (2d Dept. 2012) (presumption of permission not overcome by self-serving testimony of employer that employee could only use the vehicle for work-related purposes did not, by itself, overcome the presumption of permissive use [multiple citations omitted]).

Here, in support of their contention, Defendants cite to a few cases (*Singleton v. Summus*, 219 A.D.3d 1366, 196 N.Y.S.3d 484 [2d Dept. 2023]; *Bloch v. RT Long Island Franchise, LLC*, 70 A.D.3d 993, 895 N.Y.S.2d 511 [2d Dept. 2010]; and *Patterson v. New York City Tr. Auth.*, 151 A.D.3d 519, 55 N.Y.S.3d 43 [1st Dept. 2017]) wherein a determination was made that subsequent testimony created a feigned issue of fact. However, the aforesaid cases are distinguishable as they involve the scenario wherein summary judgment was granted in favor of defendant against a plaintiff, whose subsequent testimony created the feigned issue of fact. In the matter at hand, it is a co-defendant and not the Plaintiff whose statement has changed.

An order "granting . . . summary judgment dismissing the complaint . . . [does] not preclude the Supreme Court from deciding the plaintiffs' motion for leave to renew." *Olsen v. We'll Manage, Inc.*, 238 A.D.2d 556, 557 (2d Dept. 1997); See also *Harrell v. Koppers Co.*, 154 AD2d 340, 342 2nd Dept. 1989). Hence, given the aforementioned new facts not offered on the prior motion that would change the prior determination (CPLR §2221[e]) raising genuine issue of material fact as well as the aforementioned very strong presumption of permission and consent under VTL §388, Plaintiffs' Motion to Renew is granted. As a result, Defendant Colarusso's and Dennis Sindone's prior motions for summary judgment on the issue of liability, as against Plaintiffs, are denied.

In light of the foregoing, it is hereby

ORDERED, that Motions Sequence Nos. 5 and 9, as above-captioned, seeking leave to renew the various applications giving rise to a Decision & Order from the bench (dated June 2, 2020 and entered on June 17, 2020) (Index No. 030200/2018, NYSCEF Doc. No. 205; and Index No. 030253/2018 NYSCEF Doc. No. 208) is GRANTED to the extent set forth above; and it is further

ORDERED, that upon such renewal as granted herein, Defendant Colarusso Limousine Company Inc.'s and Dennis Sindone's prior motions for summary judgment on the issue of liability, as against Plaintiffs, are DENIED.; and it is further

ORDERED, that all parties are to appear on **May 2, 2024 at 9:15AM** for purposes of a Status Conference.

[SIGNATURE PAGE FOLLOWS]

The foregoing constitutes the Decision & Order of this Court.

Dated: New City, New York
March 27, 2024

ENTER:

A handwritten signature in black ink, appearing to read "David Fried", written over a horizontal line.

HON. DAVID FRIED, A.J.S.C.
STATE OF NEW YORK
COUNTY OF ROCKLAND