

**Timm v Barilli**

2012 NY Slip Op 32125(U)

July 31, 2012

Supreme Court, Queens County

Docket Number: 14795/08

Judge: Howard G. Lane

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE  
Justice

IAS PART 6

SUA SPONTE ORDER

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STEFANIE TIMM,

Index No. 14795/08

Motion

Plaintiff,

Date January 24, 2012

-against-

Motion

COSMO BARILLI, et al.,

Cal. No. 28, 29

Defendants.

Motion

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Sequence No. 5, 6

The Court, sua sponte, recalls its decision/order dated February 14, 2012 and hereby issues the following decision/order in its place:

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Upon the foregoing papers it is ordered that this motion by defendant Cosmo Barilli ("Barilli") seeking summary judgment pursuant to CPLR 3212 dismissing the complaint of plaintiff Stephanie Timm and any and all cross claims asserted against him on the grounds that plaintiff failed to establish a prima facie case of negligence against him and motion by defendant All Boro Rehab Construction seeking summary judgment pursuant to CPLR 3212 dismissing the complaint of the plaintiff, Stephanie Timm and any and all cross claims asserted against it are hereby consolidated solely for purposes of disposition of the instant motions and are both hereby denied.

This is an action arising out of a three-car motor vehicle

accident which occurred on May 22, 2008 in Queens County on Bell Boulevard at or near its intersection with 85<sup>th</sup> Avenue, and which accident involved plaintiff, Stephanie Timm's vehicle, defendant Barilli's vehicle, and a vehicle owned by defendant Lin Vlacic and operated by defendant Mariana Timm. It is alleged that defendant Barilli was negligent and defendant Barilli was operating his vehicle in the course and scope of his employment at the time of the accident, and as such, defendant All Boro should be held liable under the doctrine of *respondeat superior*.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (see, *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradley's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4th Dept 2000]).

Moving defendant, Cosmo Barilli established a prima facie case that there are no triable issues of fact. In support of the motion, defendant Barilli submitted, inter alia: a copy of the police accident report, the examination before trial transcript testimony of defendant Barilli himself, wherein he testified inter alia, that: on the day of the accident, he was driving southbound on Bell Boulevard at approximately 25 to 30 miles per hour for about two blocks before the accident with the two other vehicles occurred, both Bell Boulevard and 85<sup>th</sup> Avenue at the time

of the accident, were two-way roadways with one lane for moving traffic in each direction, there were no traffic control devices in the direction he was traveling on Bell Boulevard at its intersection with 85<sup>th</sup> Avenue, but 85<sup>th</sup> Avenue is controlled by a stop sign, when he was one car length away from the intersection, he saw a Ford Escape [defendant Marianna Timm's vehicle], traveling on 85<sup>th</sup> Avenue to his left enter the intersection at a high rate of speed, he immediately applied his brakes and stopped his vehicle upon seeing the Ford Escape, when he stopped his vehicle, he saw a gold Chevy Cavalier [plaintiff's vehicle], driving at a high rate of speed in the opposite direction on Bell Boulevard, while stopped, he saw the front driver's side of the Ford Escape strike the front passenger side of the Cavalier that caused the Cavalier to be airborne and land on its driver's side with the roof facing his vehicle, the front driver's side of the Cavalier then struck the front driver's side of his stopped vehicle, there was only one impact to his vehicle, the Escape never struck his vehicle; the examination before trial transcript testimony of plaintiff herself, wherein she testifies, inter alia, that: she was the driver of a Cavalier that was involved in the accident, she had been driving northbound on Bell Boulevard for less than one minute with no traffic before the accident occurred, there were no traffic control devices for traffic in the direction plaintiff was traveling on Bell Boulevard, there were stop signs regulating traffic on both sides of 85<sup>th</sup> Avenue, she did not recall if her vehicle had entered the intersection when the accident occurred or with how many vehicles her vehicle struck, she could not see to her right down 85<sup>th</sup> Avenue as she entered the intersection, she did not see the vehicle that struck her, only the headlights, but it came from her right side and struck her vehicle on the right side by the tire in a hard impact a "split second" after she saw it, she first learned that the vehicle that struck her from the right was a Ford Escape Jeep operated by defendant Mariana Timm when the police called her mother's cellular telephone and it rang in the other vehicle involved in the accident, she did not know if defendant Timm's vehicle was in the intersection at the time of the accident or if it stopped for the stop sign before the accident, she did not apply her brakes before the accident, she did not see another vehicle until she exited her vehicle, that was resting on its left side, after the accident and saw a white van [defendant Barilli's vehicle], to the left of her vehicle facing the opposite direction from her vehicle, although she could see three car lengths down Bell Boulevard in the direction that she was traveling, she did not see the white van at any time before the accident, and she did not know if her vehicle ever struck the white van; and an expert report of defendant Barilli's Engineering Consultant, William J. Meyer, P.E., who concludes

that: "[i]t is the writer's concluding opinion within a reasonable degree of engineering certainty that the subject 5/22/08 motor vehicle accident event resulted solely from the combined actions of Mariana Timm and Stephanie Timm with no contribution on the part of Mr. Barilli. Had Mariana Timm stopped and observed traffic conditions prior to entering the subject intersection and/or had Stephanie Timm made reasonable observations of traffic in her travel path, the subject accident and associated injuries would have been avoided".

In opposition, plaintiff raises a triable issues of fact. In opposition to defendant, Barilli's summary judgment motion, plaintiff submits, inter alia: the examination before trial transcript testimony of defendant, Marianna Timm herself, wherein she testified that: the white van being driven by defendant Cosmo Barilli was speeding toward her at the time of the accident, she proceeded into the intersection only after coming to a complete stop, looking left then looking right, when she began to make her right turn, the white van was speeding in her face and hit the front of her vehicle; and a sworn accident reconstruction report of Tim Leggett, P.E., who concluded that: "Ms. Stephanie Timm's injuries are far more consistent with having been sustained in the secondary impact with [defendant Barilli's vehicle] than with the initial impact with [the vehicle operated by defendant Marianna Timm]."

In opposition, co-defendant, Marianna Timm raises a triable issues of fact. In opposition to the moving defendant's summary judgment motion, co-defendant Marianna Timm submits, inter alia: the examination before trial transcript testimony of co-defendant, Marianna Timm, herself, wherein she testifies that: she was involved in the subject motor vehicle accident, prior to the accident, she was traveling on 85<sup>th</sup> Avenue and came to a stop sign at the intersection with Bell Boulevard, after stopping at the stop sign, she looked to the left and to the right and then proceeded to make a right turn onto Bell Boulevard when the accident occurred, there were only two vehicles involved in the accident, her car and a white van, and when she began to make her right turn, the white van, which was speeding, was in her face and hit the front of her vehicle.

The Court finds that there are controverted issues of fact regarding, inter alia, negligence and proximate cause. On these issues, a trial is needed and the case may not be disposed of summarily. As there remains issues of fact in dispute, defendant

Barilli's summary judgment motion is denied.

Moving defendant, All Boro established a prima facie case that there are no triable issues of fact. Pursuant to the doctrine of respondent superior, liability for an employee's tortious acts may be imputed to the employer if the acts were committed in furtherance of the employer's business and are within the scope of employment (*Holmes v. Goldberg*, 40 AD3d 1033 [2d Dept 2007]). "As a general rule, an employee driving to and from work is not acting in the scope of his employment. Although such activity is work motivated, the element of control is lacking. An exception to this rule is, that an employee who uses his car in furtherance of his work is acting in the scope of his employment while driving home from his last business appointment, since such a person is working, and is under his employer's control, from the time he leaves the house in the morning until he returns at night" (*Lundberg v. State*, 25 NY2d 467 [NY 1969] [internal citations omitted]).

Moving defendant, All Boro established a prima facie case that defendant Barilli was not operating his vehicle in the course and scope of his employment at the time of the accident. In support of the motion, defendant All Boro submits, inter alia, the examination before trial transcript testimony of defendant Barilli himself and the affidavits and examination before trial transcripts of Ira Rabinowitz, the owner and president of defendant, All Boro and Sean Nussbaum, the office manager and project manager of defendant, All Boro, which establish that: Barilli worked at two job sites on the date of the accident, Barilli's work hours were from 8:00 a.m.- 4:30 p.m., Monday through Friday, Barilli stopped working at the second job site at 4:30 p.m. on the date of the accident, Barilli left the job site and went to a deli to purchase a soda, Barilli was driving "straight home" when the accident occurred, Barilli had not been asked to perform any errand, task or function on behalf of All Boro after he left work at 4:30 p.m., and the underlying accident occurred at about 5:35 p.m.

In opposition, plaintiff established that there are triable issues of fact. In opposition, plaintiff submitted, inter alia, the examination before trial transcript testimony of defendant Barilli himself, wherein he testified that: he was an employee of All Boro on the day of the incident, on the day of the incident, as part of his and All Boro's usual procedure, he left his home in the morning and drove his own personal van to the job site at which All Boro was performing contracting services, later that

day after he completed work at the first job site, he drove his van to a second job site, Barilli's van was used solely by him for commercial purposes, he was required to use his personal tools for work, which he stored in his van, his gasoline expenses were fully paid by All Boro when he was required to travel from job to job, when the work day concludes, he traveled home in his van, although he stopped along the way for a soda at a convenience store; the examination before trial transcripts of Ira Rabinowitz and Sean Nussbaum, wherein they testified that: All Boro required its employees to travel from job to job, and their own tools on All Boro jobs, All Boro expected those employees with vehicles - such as Barilli - to transport co-workers without transportation from job site to job site, employees were not required to sign in at the beginning of the work day or sign out at the end, and All Boro would notify employees of assignments by telephone.

The Court finds that there are triable issues of fact regarding, inter alia, whether defendant All Boro is liable for any tortious misconduct of its employee, Cosmo Barilli, pursuant to the doctrine of *respondeat superior*. As there are triable issues of fact, summary judgment is unwarranted, and defendant, All Boro's summary judgment motion is denied.

This constitutes the decision and order of the Court.

A courtesy copy of this order is being mailed to counsel for the respective parties.

Dated: July 31, 2012

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**Howard G. Lane, J.S.C.**