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Index No: 28760-08

SUPREME COURT - STATE OF NEW YORK
I.A.S. Part 39 - SUFFOLK COUNTY

PRESENT:
Hon. **DENISE F. MOLIA,**
Justice

GENNARO FERRARO and PHYLLIS FERRARO,

Plaintiffs,

- against -

PAUL REID JR., JORGE ROMAN, ENTERPRISE RENT-A-CAR COMPANY, and ELRAC, INC.,

Defendants.

CASE DISPOSED: NO
MOTION R/D: 10/27/11
SUBMISSION DATE: 5/25/12
MOTION SEQUENCE NO.: 007 MOT D
008 MD

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See Annexed List

Upon the following papers filed and considered relative to this matter:

Notice of Motion dated September 26, 2011; Affirmation in Support dated September 26, 2011; Exhibits A through N annexed thereto; Affirmation in Opposition dated November 8, 2011; Exhibits A through G annexed thereto; Reply Affirmation dated November 29, 2011; Exhibits A and B annexed thereto; Notice of Cross Motion dated November 7, 2011; Affirmation dated November 2, 2011; Exhibit A annexed thereto; Affirmation in Opposition dated December 30, 2011; Exhibits A through G annexed thereto; Affirmation in Opposition dated January 5, 2012; Reply Affirmation dated January 12, 2012; and upon due deliberation; it is

ORDERED, that the portion of the motion by defendants Enterprise Rent-A-Car Company, and Elrac, Inc., pursuant to CPLR 3211, 3212, and 49 U.S.C. §30106, for an Order dismissing all claims and/or granting summary judgment on behalf of moving defendants, as the Federal Transportation Equity Act precludes any such claims against Elrace, Inc., is denied; and it is further

ORDERED, that the portion of the motion by defendants Enterprise Rent-A-Car

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Company, and Elrac, Inc., pursuant to CPLR 3211, for an Order dismissing the Second cause of action for negligent entrustment, is granted; and it is further

ORDERED, that the cross motion by defendant, Jorge Roman, pursuant to CPLR 3212, for an Order directing the entry of summary judgment in favor of cross moving defendant, and dismissing the Complaint against cross movant, based upon the plaintiff's failure to demonstrate a proper claim of negligence against him since he was neither the owner nor operator of any of the vehicles involved in the subject accident, is denied.

The Complaint alleges that the plaintiff, a police officer, sustained personal injuries and economic damages as a result of a motor vehicle accident which on October 2, 2008, at approximately 5:44 a.m. It appears that while during the course of his employment, the plaintiff's vehicle was struck in the rear by a motor vehicle owned by defendant Elrac, Inc./Enterprise Rent-A-Car, rented to defendant Jorge Roman, and operated by defendant Paul Reid, Jr.

Although the subject vehicle had been rented to Roman, the driver at the time of the accident was Reid, who subsequently pleaded guilty to the charges of assault in the second degree, operating a motor vehicle under the influence of alcohol, reckless endangerment in the second degree, and aggravated unlicensed operation of a motor vehicle in the second degree, all in connection with the subject accident. Reid, whose blood alcohol content level exceeded .08, testified that he was asleep behind the wheel of the vehicle when it struck the plaintiff's vehicle. There is evidence that the vehicle he was operating was proceeding at a speed of 98 miles per hour upon impact. Roman testified that at the time of the accident he was asleep in the vehicle.

On August 10, 2005, the Federal Transportation Equity Act of 2005 was enacted. The portion of this bill codified at 49 U.S.C. §30106, known as the "Graves Amendment", provides in relevant part:

> (A) In General - an owner of a motor vehicle that rents or leases the vehicle to a person (or an affiliate of the owner) shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner), for harm to persons or property that results or arises out of the use, operation or possession of the vehicle during the period of the rental or lease, if -
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> > (1) the owner (or an affiliate of 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 (or an affiliate of the owner) . . .
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> (C) Applicability and Effective Date - Notwithstanding any other provision of law, this section shall apply with respect to any action commenced on or after the date of enactment of this section without regard to whether the harm that is the subject of the action, or the conduct that caused the harm, occurred before such date of enactment.

See 49 U.S.C. §30106 (2005).

Congress enacted the Graves Amendment for the explicit purpose of abolishing vicarious liability, such as that imposed by New York State Vehicle and Traffic Law §388, on entities engaged in the business of renting and leasing motor vehicles. The effect of the Amendment is that the owners of vehicles in New York who are in the business of renting motor vehicles, cannot be held vicariously liable for the negligent acts of the drivers of those rented vehicles solely based upon the fact that they hold title to the motor vehicle. See, Infante v. U-Haul Co. of Florida, 11 Misc.3d 529, 815 N.Y.S.2d 921.

However, the claims in the instant action sound, not in vicarious liability, but in negligence and negligent entrustment, and are permitted to proceed despite the Graves Amendment, if negligence or criminal wrongdoing can be demonstrated on the part of the owner (or affiliate of the owner) of the vehicle.

Concerning the cause of action sounding in negligence, there has been testimony which could support a finding that the vehicle was leased to Roman with knowledge by Enterprise/Elrac that mechanical repairs may have been necessary. At his deposition, Roman testified that prior to the accident, the subject vehicle was "unbalanced", the tires were "unbalanced", the vehicle was going to one side as opposed to the other, and it was driving "funny". Roman also testified that he notified Enterprise that the vehicle may have been in need of repair. However, it appears that he never made an appointment to bring the vehicle in for repair. It is also noted that in a related matter in which Roman is the plaintiff, he has provided a contradictory statement concerning the mechanical operation of the vehicle prior to the accident. Enterprise denies that it was ever contacted by Roman concerning the vehicle. The defendants concede that beginning approximately six months prior to the date of the accident, the vehicle had been repaired on at least four occasions, including a computer balancing of the tires less than four months prior to the accident.

The issues of fact as to whether the subject vehicle was in need of repairs when rented to Roman, and if so, whether defendants knew that the vehicle required repairs, or whether the vehicle had been maintained in a non-negligent manner prior to rental to Roman, preclude summary judgment until there is determination as to whether the defendants have any comparative negligence in this matter. See, Brubaker v. Houseknecht, 83 A.D.3d 1539, 921 N.Y.S.2d 607. It would also need to be determined whether the alleged balance issue, or any of the repairs previously made to the vehicle by defendants, was the proximate cause of the accident.

To establish a cause of action under a theory of negligent entrustment, "the defendant must either have some special knowledge concerning a characteristic or condition peculiar to the person to whom a particular chattel is given which renders that person's use of the chattel unreasonably dangerous or some special knowledge as to a characteristic or defect peculiar to the chattel which renders it unreasonable dangerous." See, Zara v. Perzan, 185 A.D.2d 236, 237, 586 N.Y.S.2d 139.

In their opposition to the motion, the plaintiffs infer that Roman may have had a bad driving record or was impaired at the time of the rental, although no proof has been adduced to demonstrate same. Since the adoption of the Graves Amendment, this State has not determined that a rental car facility is obligated to perform a more extensive background check into a renter's

driving history at the time of the rental, other than verifying the expiration dated and photograph appearing on the license. See, Byrne v. Collins, 929 N.Y.S.2d 92; Sigaran v. Elrac, 22 Misc.3d 1101(A), 875 N.Y.S.2d 824; Vedder v. Cox, 18 Misc.3d 1142(A), 859 N.Y.S.2d 900. There is no evidence to suggest that the defendants failed to verify the expiration date and photograph on Roman's license. Inasmuch as neither Elrac nor Enterprise are obligated to research its customers driving histories beyond verifying the existence of a valid driver's license, plaintiffs' cause of action for negligent entrustment against said defendants must be dismissed. See, Tedesco v. Warner, 2009 N.Y. Misc. LEXIS 6499; 2009 NY Slip Op 33129U.

Defendant Jorge Roman seeks a dismissal of the Complaint as against him, maintaining that he was only the renter of the vehicle and was not the driver at the time of the accident, and therefore did not owe a duty to the plaintiffs. However, the evidence adduced indicates that both Roman and Reid had been consuming alcoholic beverages prior to the accident, and there is testimony to indicate that Roman did, or should have known that Reid was intoxicated and should not have been permitted to operate the vehicle. Such determinations of fact must be rendered by the jury at trial.

The foregoing constitutes the Order of this Court.

Dated: September 24, 2012

Hon. Denise F. Molia

HON. DENISE F. MOLIA J.S.C.

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