Berger v Rokeach
2017 NY Slip Op 31192(U)
June 1, 2017
Supreme Court, Kings County
Docket Number: 502140/15
Judge: Debra Silber

At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 1st day of June, 2017.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

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SHMUEL BERGER,

Plaintiff,

- against -

SHEM ROKEACH, CLARK C. MCNEIL, BREADBERRY INC., BREADBERRY USA LLC, MEAT AT BREADBERRY INC. ROYAL PARKING SERVICES, INC., and MEG SERVICES, INC.,[1]

Defendants.

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DECISION / ORDER

Index No. 502140/15
Mot. Seq. # 9, 10, 11

SHEM ROKEACH,

Third-Party Plaintiff,

-against-

MEG SERVICES INC. and ROYAL PARKING SERVICES, INC.,

Third-Party Defendants.

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The following papers numbered 1 to 12 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2 6-7 9-10
Opposing Affidavits (Affirmations)	3, 4 3, 4 3, 4, 11
Reply Affidavits (Affirmations)	5 8 12

[1] The above caption properly reflects that Royal Parking Services, Inc. and Meg Services, Inc. (Meg) are defendants in this action, pursuant to a stipulation dated March 7, 2016 between plaintiff and Royal Parking and the June 23, 2016 order of the court (Knipel, J.), which consolidated this action with a second action entitled *Berger v Royal Parking Services Inc. and Meg Services, Inc.*, Kings County index No. 503299/15. The motion papers do not have the correct caption.

Upon the foregoing papers in this personal injury action, defendant, Breadberry USA LLC (Breadberry USA), moves (in motion sequence 9) for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the amended complaint filed by the plaintiff, Shmuel Berger (Berger), and all cross claims asserted against it.

Defendant Breadberry Inc. (Breadberry Inc.) moves (in motion sequence 10) for an order, pursuant to CPLR 3212, granting it summary judgment dismissing Berger's *original* complaint.

Defendant/Third-Party Defendant Royal Parking Services, Inc. (Royal Parking), moves (in motion sequence 11) for an order, pursuant to CPLR 3212, granting it summary judgment dismissing: (1) the third-party complaint filed by the third-party plaintiff, Shem Rokeach (Rokeach) and all cross claims asserted against it in the third-party action; (2) Berger's amended complaint and all cross claims asserted against it in the main action; and (3) Berger's complaint in Action No. 2 and all cross claims asserted against it.[2]

Background

The Accident

On February 17, 2015, Berger, a pedestrian, sustained personal injuries when he was struck by a vehicle owned by defendant Rokeach and operated by defendant Clark C. McNeil (McNeil), a valet parking attendant who was providing valet parking for customers of "Breadberry," a kosher supermarket at 1689 60th Street in Brooklyn (Breadberry Market). The accident occurred at the intersection of 12th Avenue and 62nd Street in Brooklyn when McNeil was returning Rokeach's vehicle from a valet parking lot, where it had been parked, back to the Breadberry Market. At the time of the accident, Steven Pittsley (Pittsley), another valet parking attendant, was a passenger in the vehicle driven by McNeil.

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[2] This third branch of Royal Parking's motion concerning Berger's complaint in Action No. 2 is moot because the court's June 23, 2016 order (Knipel, J.) consolidated this action with Action No. 2.

The Valet Parking Contracts

1. The Valet Parking Contract

Under a September 30, 2014 contract between Breadberry Inc. and Royal Parking (Valet Parking Contract), Royal Parking agreed to provide valet parking services at the Breadberry Market. The Valet Parking Contract provides, in relevant part, that:

> "**Royal Parking** . . . is performing valet parking services at Breadberry [Market] located at 1689 60th Street, Brooklyn, NY 11204. Royal Parking . . . releases and discharges and will indemnify and hold Breadberry Inc. harmless . . . of and against any and all rights and claims for damages, losses and/or injuries arising out of the ordinary course of business. Royal Parking . . . takes all responsibility for any customer losses and lawsuits that may arise which relate to and/or involve our employees performing their valet duties. These losses include but are not limited to damages to customers' vehicles, bodily injury of customers due to the negligence of our employees, missing property and/or valuables out of customers' cars. This release includes claims against Breadberry Inc., subsidiaries, affiliates, predecessors, successors, and assignees, and it's or their respective officers, directors, employees or representatives. Royal Parking . . . will perform its services and maintain insurance coverage in the amount of Two Million Dollars ($2,000,000) liability and theft . . ."[3]

2. The Valet Parking Subcontract

Under a September 24, 2014 subcontract between Royal Parking and Meg (Valet Parking Subcontract), Royal Parking subcontracted with Meg to perform valet parking services at the Breadberry Market. The Valet Parking Subcontract provides:

> "Royal parking . . . subcontracts MEG . . . to perform valet parking service at its contracted location Breadberry [Market] located at 1689 60th Street, Brooklyn, New York, 11204. Royal Parking . . . will maintain insurance coverage throughout the contract period for any employees hired/managed by MEG . . . at the contracted location Breadberry [Market.] Royal Parking . . . releases and discharges and will indemnify and hold MEG . . . of and against any and all rights and claims for damages, losses and/or injuries arising out of the ordinary course of business. Royal Parking . . . takes all responsibilities for any

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[3] *See* Exhibit J to the the November 2, 2016 affirmation of Anthony E. DeLuca, Esq., submitted in support of Breadberry USA's summary judgment motion (DeLuca Affirmation).

> customer losses and lawsuits that may arise which relate to and/or involve MEG . . . employees performing their valet duties."[4]

The Personal Injury Action

1. Berger's Complaint

On February 24, 2015, Berger commenced this personal injury action against Rokeach, McNeil, Breadberry Inc., Breadberry USA and Meat At Breadberry Inc. (Meat) by filing a summons and a verified complaint, asserting a single cause of action sounding in negligence.

Berger's complaint alleges that defendants Breadberry Inc., Breadberry USA and Meat "jointly operate a gourmet food market located at 1689 60th Street . . ." and "McNeil provided valet services for the Breadberry defendants" (complaint at ¶¶ 7 and 8). The complaint further alleges that "[d]ue to the defendants' recklessness, carelessness and negligence, plaintiff was caused to suffer severe and permanent personal injuries when he was struck by the vehicle owned by defendant Rokeach, being operated by defendant McNeil in the scope of his employment for the Breadberry defendants" (*id.* at ¶ 12).

On or about March 26, 2015, Rokeach answered Berger's complaint, denying the material allegations therein and asserting affirmative defenses and a cross claim for indemnification against McNeil.

On or about April 21, 2015, McNeil answered Berger's complaint, denying the material allegations therein and asserting affirmative defenses and a cross claim for indemnification against Rokeach, Breadberry Inc., Breadberry USA and Meat.

On or about June 2, 2015, Breadberry USA answered Berger's complaint, denying the material allegations therein and asserting affirmative defenses and a cross claim for indemnification against Rokeach, McNeil, Breadberry Inc. and Meat.

Breadberry Inc. and Meat failed to answer or otherwise respond to the complaint.

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[4] *See* DeLuca Affirmation, Exhibit K.

2. Rokeach's Third-Party Complaint

On or about November 16, 2015, Rokeach filed a third-party complaint against Meg, Royal Parking, Breadberry Inc. and Meat, alleging that Meg and Royal Parking "offered and operated a valet parking service at the Breadberry Food Market . . ." (third-party complaint at ¶¶ 9 and 10). The third-party complaint alleges that McNeil "was acting as an agent, servant and/or employee of" Meg, Royal Parking, Meat and Breadberry Inc. (*id.* at ¶¶ 11, 12, 19 and 20). In addition, the third-party complaint alleges that Breadberry Inc. and Meat owned and operated the Breadberry Market and "offered, operated and provided valet parking service to its customers" (*id.* at ¶¶ 13-18). Rokeach asserted three claims: (1) alleging that his negligence was "secondary and/or derivative only" (presumably he means vicarious only); (2) for indemnification; and (3) alleging that he is an intended third-party beneficiary under the third-party defendants' liability insurance policies.

Rokeach subsequently discontinued the third-party action against third-party defendants Breadberry Inc. and Meat. Rokeach as third-party plaintiff sought and obtained a default judgment against third-party defendant Meg on March 2, 2017.

3. Berger's Amended Complaint

On March 1, 2016, Berger amended his complaint to add Royal Parking as a direct defendant, alleging that Royal Parking "contracted to provide" and "provided" valet parking services for the Breadberry Market (amended complaint at ¶¶ 11 and 12). The amended complaint alleges that Berger was struck and injured by a vehicle operated by defendant McNeil "in the scope of his employment for the Breadberry defendants" and "in the scope of his employment for [Royal Parking]" (*id.* at ¶¶ 15 and 16).

On or about March 8, 2016, Royal Parking answered Berger's amended complaint, denying the material allegations therein and asserting affirmative defenses and a cross claim for contribution against Rokeach, McNeil, Meg, Breadberry Inc. and Meat.

On or about March 14, 2016, McNeil answered Berger's amended complaint, denying the material allegations therein and asserting affirmative defenses and a cross claim for indemnification against Rokeach, Breadberry Inc., Breadberry USA, Meat and Royal Parking.

On or about March 15, 2016, Rokeach answered Berger's amended complaint, denying the material allegations therein, asserting affirmative defenses and the following cross claims for indemnification: (1) against McNeil; (2) against Breadberry Inc., Breadberry USA, Meat and Royal Parking; (3) as a third-party beneficiary under the liability insurance policies held by Breadberry Inc., Breadberry USA, Meat and Royal Parking; (4) against Breadberry Inc., Breadberry USA, Meat and Royal Parking as a third-party beneficiary under the Valet Parking Contract and/or the Valet Parking Subcontract; and (5) based on a breach of duty to safeguard his vehicle by Breadberry Inc., Breadberry USA, Meat and Royal Parking.

On or about March 23, 2016, Breadberry USA answered Berger's amended complaint, denying the allegations therein and asserting affirmative defenses and a cross claim for indemnification against Rokeach, McNeil, Breadberry Inc., Meat and Royal Parking.

On June 23, 2016, an order was issued in the second action, *Berger v Royal and Meg*, 503299/15 which consolidated that action with this one and thus added Meg as a direct defendant in the instant action.

Breadberry Inc.'s Default

Meanwhile, on March 18, 2016, Breadberry Inc. moved to vacate its default in the main action and for leave to interpose an answer to Berger's *original* complaint, which was granted by a June 9, 2016 order. Breadberry Inc. subsequently served an answer to Berger's *original* complaint.

The record does not reflect that Breadberry Inc. answered the *amended* complaint at any time.

Other Defaults

Meg did not answer the plaintiff's complaint in the action that was consolidated with this action (503299/15) or Rokeach's third-party complaint. Meg was not named as a defendant in the plaintiff's complaint in this action. Meat did not answer either of plaintiff's complaints or the third-party complaint. Plaintiff obtained a default judgment against Meg in the related action before it was consolidated, by order dated September 21, 2015. Rokeach obtained a default judgment against Meg in its third-party action by order dated March 2, 2017.

Note Of Issue

On September 8, 2016, after the parties engaged in discovery, Berger filed a note of issue indicating that his personal injury action is ready for trial.

The Summary Judgment Motions

1. Breadberry USA's Summary Judgment Motion (Motion Sequence 9)

Breadberry USA moves for summary judgment dismissing Berger's amended complaint and all cross claims asserted against it on the grounds that "the parking valets assigned to the Breadberry store were hired, supervised and paid by" Meg, and it "had no relationship, contractual or otherwise, with either" Royal Parking or Meg.[5]

Breadberry USA asserts that "[i]t is uncontested that on the date of the subject incident . . . McNeil was employed as a parking valet by Meg . . . and was assigned to serve as a parking valet at a Kosher Supermarket known as 'Breadberry.'"[6]

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[5] *See* DeLuca Affirmation at 5.

[6] *Id.* at 3.

2. Breadberry Inc.'s Summary Judgment Motion (Motion Sequence 10)

Breadberry Inc. moves for summary judgment dismissing the *original* complaint on the grounds that "the person who hires an independent contractor, is not vicariously liable for any alleged wrongdoing of the independent contractor."[7] Breadberry Inc. contends that it cannot be held liable because it "did not exercise any control as to the manner in which the services [provided by Meg] were carried out" based on the affidavits of Zalmen Herman, the manager of Breadberry Inc., and Mark Sherman, the president of Meg.[8]

3. Royal Parking's Summary Judgment Motion (Motion Sequence 11)

Royal Parking moves for summary judgment dismissing Berger's amended complaint, Rockeach's third-party complaint and all cross claims asserted against it. Royal Parking asserts that "[i]t cannot be disputed that [it] had no employees performing any valet services at the Breadberry supermarket on the date of the alleged incident, nor did [it] supervise or control the MEG employees."[9] Royal Parking argues that it cannot be held liable for the negligence of McNeil, an employee of an independent contractor.

Royal Parking relies on the deposition testimony of Edouard Petrovski, its president,[10] who testified that: (1) Royal Parking never performed valet services at Breadberry Market; (2) Royal Parking's employees never worked at Breadberry Market; (3) McNeil never worked for Royal Parking; (4) the valet services at Breadberry Market were performed by Meg, which was paid by Breadberry Market; (5) Royal Parking did not direct the Meg valet

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[7] *See* the November 4, 2016 affirmation of Garry Pogil, Esq., submitted in support of Breadberry's summary judgment motion (Pogil Affirmation) at 1.

[8] Pogil Affirmation at 2 and Exhibits D and E.

[9] *See* ¶ 22 of the November 7, 2016 affirmation of Richard A. Walker, Esq., submitted in support of Royal Parking's summary judgment motion (Walker Affirmation).

[10] *See* Walker Affirmation, Exhibit M.

attendants how to perform their duties; and (6) Meg controlled the work performed by its valet attendants at the Breadberry Market.

Royal Parking further argues that it did not owe a duty of care to either Berger or Rokeach, since it was not the company performing valet services on the date of the accident. Royal Parking contends that, for the foregoing reasons, any cross claims for contribution and common law indemnification are subject to dismissal.

Berger and Rokeach's Opposition

Berger, in opposition to all three summary judgment motions, argues that questions of fact preclude summary judgment.

Regarding Royal Parking, Berger contends that "McNeil's testimony creates an issue of fact as to whether he was an employee of ROYAL PARKING, MEG or both."[11] While McNeil testified that he believed that he was employed by Meg, he also testified at his deposition that his paycheck reflected that it was from Royal Parking.[12]

Regarding Breadberry Inc. and Breadberry USA, Berger contends that they are "one in the same" based on the affidavit of Zalmen Herman, the manager of Breadberry Inc. Berger further argues that Breadberry Inc. and Breadberry USA "had a duty to make sure that the valet service company they hired provided skillful and competent drivers to park their customers' vehicles" and that they "failed to produce any evidence to establish that they were prudent in hiring a reputable valet parking service provider."[13] Berger asserts that McNeil,

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[11] *See* ¶ 41 of the January 23, 2017 affirmation of Michael Levine, Esq., submitted in opposition to defendants' summary judgment motions (Levine Opposition Affirmation).

[12] *See* Walker Affirmation, Exhibit Q, McNeil tr at 10, line 24-11, line 7.

[13] Levine Opposition Affirmation at ¶¶ 45, 47 and 48.

who served 7 ½ years in prison prior to the accident, "was incompetent [and] inexperienced in operating a motor vehicle."[14]

Rokeach has adopted Berger's arguments in opposition to defendants' motions.

Defendants' Reply

Breadberry USA, in reply, argues that it cannot be held liable for negligently hiring McNeil because: (1) McNeil testified that he was hired and paid by Meg, and (2) the Valet Parking Contract and the Valet Parking Subcontract "unambiguously place responsibility upon '**ROYAL**' for the actions of [it's] employees and '**MEG's**' employees" and "neither contract places any hiring or supervision responsibility" upon either Breadberry Inc. or Breadberry USA.[15] In response to Berger's contention that Breadberry Inc. and Breadberry USA are the same entity, Breadberry USA asserts that printouts from the New York Secretary of State reflect that Breadberry Inc. and Breadberry USA are separate and distinct entities.

Breadberry Inc., in reply, contends that the evidence shows that "[it] had no role in the selection process of any valet-parking drivers of MEG or ROYAL as these entities were independent contractors . . ."[16]

Royal Parking, in reply, argues that it cannot be held liable to either Berger or Rokeach under the Valet Parking Contract or the Valet Parking Subcontract because "there

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[14] *Id.* at ¶¶ 50-51.

[15] *See* the February 22, 2017 reply affirmation of Anthonly E. DeLuca, Esq., submitted in further support of Breadberry USA's summary judgment motion (DeLuca Reply Affirmation) at 6 (bold in original).

[16] *See* the January 24, 2017 reply affirmation of Garry Pogil, Esq., submitted in further support of Breadberry Inc.'s summary judgment motion (Pogil Reply Affirmation) at 2.

can be no liability for a contractual duty to a non-contracting party . . ."[17] Royal Parking contends that it is irrelevant if it occasionally shared drivers with Meg because "Royal had no employees performing any valet services at the Breadberry supermarket on the date of the alleged incident, nor did [it] supervise or control the MEG employees."[18]

Discussion

(1)

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, therefore, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). However, a motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party, as a matter of law (CPLR 3212 [b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Summary judgment should be granted where the party opposing the motion for summary judgment fails to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Zuckerman*, 49 NY2d at 562).

"The proponent of a motion for summary judgment 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" (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez*, 68 NY2d at 324; *see also Zuckerman*, 49 NY2d at 562; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant

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[17] *See* ¶ 4 of the January 4, 2017 reply affirmation of Richard A. Walker, Esq., submitted in further support of Royal Parking's summary judgment motion (Walker Reply Affirmation).

[18] Walker Reply Affirmation at ¶ 11.

has made a prima facie showing of entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]; *see also Zuckerman,* 49 NY2d at 562).

In determining whether to grant summary judgment, the court must evaluate whether the issues of fact raised by the opposing party are genuine or unsubstantiated (*Gervasio v Di Napoli*, 134 AD2d 235, 236 [1987]; *Assing v United Rubber Supply Co.*, 126 AD2d 590 [1987]; *Columbus Trust Co. v Campolo*, 110 AD2d 616 [1985], *affd* 66 NY2d 701 [1985]). Mere conclusory statements, expressions of hope, or unsubstantiated allegations are insufficient to defeat a motion for summary judgment (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Spodek v Park Prop. Dev. Assoc.*, 263 AD2d 478 [1999]). "[A]verments merely stating conclusions, of fact or of law, are insufficient to defeat summary judgment" (*Banco Popular N. Am. v Victory Taxi Mgt.*, 1 NY3d 381, 383-384 [2004], quoting *Mallad Constr. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]). Lastly, if there is no genuine issue of fact, the case should be summarily determined (*Andre*, 35 NY2d at 364).

(2)

Breadberry USA's Summary Judgment Motion

Breadberry USA is not entitled to summary judgment dismissing Berger's amended complaint or the cross claims for indemnification asserted by McNeil and Rokeach.

The Appellate Division, Second Department, has held that a restaurant that provided valet parking services can be held liable for the negligence of a valet parking company and its valet parking attendants who are alleged to have caused a car accident in which a

pedestrian was killed, as the restaurant contracted with the entity that employed the valet parking attendants (*see Spadero v Parking Systems Plus, Inc.*, 113 AD3d 833 [2014]).

Here, Breadberry USA has failed to eliminate all triable issues of fact as to whether or not it owned and operated the Breadberry Market, where valet parking services were provided to customers, such as Rokeach. Although Breadberry Inc. is the entity that entered into the Valet Parking Contract with Royal Parking, Breadberry Inc. produced uncontradicted testimonial evidence that Breadberry Inc. and Breadberry USA are alter egos. Zalmen Herman, a manager of Breadberry Inc., provided affidavit testimony confirming that Breadberry Inc. and Breadberry USA "are essentially the same company, having the same CEO, Samuel Gluck and the same primary place of business: 1733 60th Street [in] Brooklyn . . ."[19] Consequently, Breadberry USA, which allegedly owned and operated the Breadberry Market, is not entitled to summary judgment dismissing Berger's amended complaint or the cross claims asserted by Rokeach or by McNeil, the valet parking attendant who was driving Rokeach's vehicle at the time of the accident.

(3)

Royal Parking's Summary Judgment Motion

Royal Parking's summary judgment motion seeking an order dismissing Berger's amended complaint, Rokeach's third-party complaint as well as all cross claims asserted against it for indemnification, is denied.

There are three circumstances which have been held to be exceptions to the general rule, in which a duty of care to a third party may arise out of a contractual obligation or the performance thereof and thereby subject the contracting promisor to tort liability for failing to exercise due care in the execution of the contract. *Church v Callanan Indus*, 99 NY2d 104; *Fried v Signe Nielsen Landscape Architect, PC*, 34 Misc 3d 1212.

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[19] *See* Pogil Affirmation, Exhibit D at ¶ 4.

The first and third are applicable here. The first circumstance is where the promisor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk. This is sometimes described as "launching an instrument of harm." *Espinal v Melville Snow Contrs.*, 98 NY2d 136; *Church v Callanan Indus.*, 99 NY2d 104; *Fried v Signe Nielsen Landscape Architect, PC*, 34 Misc 3d 1212.

The third circumstance is where the obligor contracting party has entirely displaced the obligee party's duty to perform a function, such as snow removal. The promisor under such circumstances may be liable for failing to make conditions safe for the injured party, even without an unreasonable risk of harm to others, as is required in the first circumstance, above. *Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579 [1994]; *Church v Callanan Indus*, 99 NY2d 1 at 110-112 [internal quotation marks and citations omitted]; *Fried v Signe Nielsen Landscape Architect, PC*, 34 Misc 3d 1212.

This analysis arises from long-standing authority in New York. Thus, "a contractor may be liable for an *affirmative act of negligence* which results in the creation of a condition dangerous to the public, such as on a street or sidewalk." See, *Church v Callanan Indus*, 99 NY2d 104; *Minier v City of New York*, 85 AD3d 1134, 1134-35 [2nd Dept 2011] [emphasis added]; *Brown v Welsbach Corp.*, 301 NY 202, 205 [1950]; *Gurriell v Town of Huntington*, 129 AD2d 768, 770 [2nd Dept 1987]; *Fried v Signe Nielsen Landscape Architect, PC*, 34 Misc 3d 1212.

In addition, it is well-settled that "[a]n employer is vicariously liable for its employees' torts under the theory of respondent superior if the acts were committed while the employee was acting within the scope of his employment" *Davis v Larhette*, 39 AD3d 693, 694 [2007]).

Here, there is no dispute that McNeil was acting within the scope of his employment as a valet parking attendant when the vehicle he was driving struck Berger. Royal Parking

failed to eliminate all issues of fact regarding its alleged employment of McNeil, who testified at his deposition that his paycheck was from Royal Parking.

The court notes that the common law of bailment is also the law of New York in so far as 11 NYCRR § 60-1.1(c)(3)(i) permits auto insurance policies to exclude coverage for any liability that arises after an insured's vehicle is turned over to a "car business." A car business is defined as a business "engaged in operating a . . . repair shop, service station. storage garage or public parking." *Id.* Thus, when Rokeach entrusted his vehicle to the valet parking employee, his insurance coverage was no longer in effect and the bailee's business insurance was required to commence. Whether the insurance policy is provided by the supermarket or the valet parking company is between them. But it is clear that once Mr. Rokeach handed his car keys to the valet, his insurance coverage stopped. Therefore, it would be totally contrary to the public policy of this State if the business that provided the valet parking service was not responsible for any injuries and losses that arose while the vehicle was in the care and custody of the supermarket's employees or subcontractors. Otherwise, the Legislature's entire statutory scheme, one that requires all cars on the road to be insured, would fail every time someone brought their car to a repair shop, a parking lot or a restaurant or other business with valet parking. Therefore, the court finds this to be a separate and sufficient reasons to deny Royal's motion, and finds their argument, that they cannot be liable as they had no duty of care to plaintiff or the vehicle owner, that they didn't employ the valet McNeill and that they didn't supervise the employees hired by Meg, to be totally unavailing.

Thus, to the extent that, after a trial between the plaintiff pedestrian and the driver McNeill, whereby the percentages of comparative fault are ascertained, as Rokeach is purely vicariously liable as the owner of the vehicle pursuant to VTL §388, there is a presumption that he is entitled to common law defense and indemnification. See *Coque v Wildflower*

Estates Devs., Inc., 31 AD3d 484, 485 [2nd Dept 2006]. See also *Hernandez v Lamar*, 2014 Misc LEXIS 3120 (Sup Ct Suffolk Co).

The legislative history of VTL §388 makes it clear that one of its purposes is "make the owners of motor vehicles exercise some degree of care in respect to the persons employed [or authorized] by them to operate such motor vehicles" *Murdza v Zimmerman*, 99 NY2d 375 at footnote 3 (2003). That level of inquiry is not required of a vehicle owner for the bailment of a vehicle to a "car business" such as an auto repair shop or a parking lot, as the owner's vehicle insurance is not required in New York to cover the use of the vehicle by an employee of such a "car business." See 11 NYCRR §60-1.1; *National Union Fire Ins. Co. v Progressive Ins. Co.*, 287 AD2d 697 (2d Dept 2001); *Eagle Insurance Co. v Rosario*, 8 AD3d 483 (2d Dept 2004).

(4)

Breadberry Inc.'s Summary Judgment Motion

Breadberry Inc.'s summary judgment motion for an order dismissing Berger's *original* complaint is denied, since Berger's amended complaint superseded his original complaint, which became a nullity. The amended complaint (E-file Document # 80) was served by e-file prior to the service of defendant's motion (E-file Document # 187). This denial is without prejudice to Breadberry Inc. filing a renewed summary judgment motion against Berger's amended complaint after Breadberry Inc. serves an answer to Berger's amended complaint.

Accordingly, it is

ORDERED that the branch of Breadberry USA's summary judgment motion seeking an order dismissing Berger's amended complaint as well as McNeil and Rokeach's cross claims is denied; and it is further

ORDERED that Royal Parking's summary judgment motion seeking an order dismissing Berger's amended complaint, Rockeach's third-party complaint and the cross claims asserted against it in both actions is denied; and it is further

ORDERED that the branch of Royal Parking's summary judgment motion seeking an order dismissing Berger's complaint in Action No. 2 is denied as moot as the actions have been consolidated; and it is further

ORDERED that Breadberry Inc.'s summary judgment motion seeking an order dismissing Berger's *original* complaint is denied without prejudice to renewal, and the court grants Breadberry Inc. 30 days to answer the plaintiff's amended complaint and 60 days to renew its motion if it wishes to do so, the time to be computed from the date of the court's e-filing of this decision and order.

This shall constitute the decision and order of the court.

E N T E R:

Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court