Hirschhorn v Ayarick
2017 NY Slip Op 32790(U)
December 5, 2017
Supreme Court, Bronx County
Docket Number: 22694/2015E
Judge: Mary Ann Brigantti

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : PART 15

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RALPH HIRSCHHORN,

Plaintiff,

Index No: 22694/2015E

-against-

DECISION/ORDER

LILY AYARICK, ENTERPRISE HOLDINGS, INC. and SEFAKOR DOVLO,

Defendants.

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HON. MARYANN BRIGANTTI:

This negligence action arises out of a motor vehicle accident that occurred on January 8, 2015. Plaintiff alleges he was a pedestrian when he was struck by the vehicle owned and operated by defendant Seafakor Dovlo ("Dovlo"). Defendant Lily Ayarick ("Ayarick"), an employee of defendant Enterprise at the time of the accident, was a passenger in Dovlo's vehicle when the accident occurred. Plaintiff alleges that Enterprise was careless, reckless and negligent in hiring and retaining Ayarick, and further, that Ayarick was operating the vehicle during the course and scope of her employment when the accident occurred.[1] Enterprise seeks summary judgment dismissing the complaint and all cross claims as against it on the issue of liability.

The motion is determined as follows:

Enterprise submits a copy of the pleadings; the verified bill of particulars; deposition transcripts from Ayarick and Celestine Crivaro ("Crivaro"), General Manager on behalf of

[1]There is no evidence to support plaintiff's claim that Ayarick was operating the subject vehicle at the time of the accident, and in fact, testimony from Ayarick and Dovlo confirm that Dovlo was the actual operator of the vehicle when the accident occurred.

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Enterprise; Ayarick's time sheet; and a sworn affidavit from Dovlo.

Plaintiff alleges he was a pedestrian walking past a driveway belonging to Enterprise when Dovlo drove her vehicle over plaintiff's foot. On the date of the subject accident, Dovlo, who was not an employee of Enterprise, was dropping Ayarick off to go to work at a location owned and operated by Enterprise. Ayarick disembarked from Dovlo's vehicle at a driveway two doors away from Enterprise's premises. Although Ayarick did not drive to work on the date of the accident, she had previously driven Dovlo's vehicle to her place of employment at Enterprise.

Enterprise contends that the accident occurred prior to Ayarick clocking in for work on the date in question, and further, that Ayarick's shift for work did not begin until after the subject accident occurred. Crivaro testified on behalf of Enterprise as its General Manager of Human Resources at the time of the subject accident. The location where the accident occurred had been part of Crivaro's territory for approximately five years prior to the date of the subject accident. She stated that at the time of the accident, Dovlo was not employed by Enterprise and further, that Enterprise did not own Dovlo's vehicle. Crivaro also testified that Ayarick had not yet reported to work at the time of the subject accident, and that Enterprise was not responsible for Ayarick getting to or from work. Additionally, Crivaro stated that an employee was not considered to be working until that employee arrived at Enterprise's location and picked up a company vehicle. Ayarick was not paid by Enterprise for her time in commuting to and from work.

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 eliminate any material issues of fact from the case (*see Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Failure to make such a showing requires denial of the

motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]). CPLR 3212(b) requires that for a court to grant summary judgment the court must determine if the movant's papers justify holding as a matter of law, "that the cause of action or defense has no merit" (*Id*). The evidence submitted by the movant must be viewed in the light most favorable to the non-movant (*see Jacobsen v N.Y. City Health & Hosps. Corp.*, 22 NY3d 824 [2014]; *see also Torres v Jones*, 26 NY3d 742 [2016]; *Andre v Pomeroy*, 35 NY2d 361 [1974]). Summary judgment should be granted only where there are no issues of material fact, dictating that the court direct judgment in favor of the movant as a matter of law (*see Friends of Animals, Inc. v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]). Once the movant makes a prima facie showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of triable issues of fact warranting denial of the motion (*see Alvarez v Prospect Hosp.*, supra; *Zuckerman v City of New York*, supra).

Plaintiff alleges that Enterprise is liable for the actions of Ayarick pursuant to the theory of respondeat superior. "Under the doctrine of [r]espondeat superior, an employer will be liable for the negligence of an employee committed while the employee is acting in the scope of his employment (*Sauter v. New York Tribune*, 305 N.Y. 442, 113 N.E.2d 790). An employee acts in the scope of his employment when he is doing something in furtherance of the duties he owes to his employer and where the employer is, or could be, exercising some control, directly or indirectly, over the employee's activities . . . 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" (*Lundberg v State*, 25 NY2d 467 [1969][citations omitted]; *Beres v Terranera*, 153 AD3d 483 [2d Dept 2017]["deposition testimony demonstrated that, at the time of the accident, [defendant] was commuting to work from his home in his personal vehicle, he was not required to drive to work

as part of his job, and he was not acting in furtherance of his employer's business at the time"]).

While an employee ordinarily is not acting within the scope of employment when traveling to and from work, there is an exception when the employee uses their vehicle in furtherance of their employment (*see Lundberg v State of New York*, supra; *Baguma v Walker*, 195 AD2d 263 [1st Dept 1993]; *McBride v Schenectady County*, 110 AD2d 1000 [3d Dept 1985]). Here, the following facts are not in dispute: Ayarick was not the operator of Dovlo's vehicle on the date in question; the subject accident occurred prior to Ayarick beginning her shift with Enterprise, and the subject accident occurred during the course of Ayarick coming to work for Enterprise. No evidence was submitted in opposition that would raise an issue of fact as to whether Dovlo's vehicle was operated during the scope of or was incidental to, Ayarick's employment with Enterprise.

Enterprise also contends that Vehicle and Traffic Law § 388 applies. Vehicle and Traffic Law § 388 states "[e]very owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner" (*Id*). In this instance there is no question that the vehicle in question was owned and operated by Dovlo and that Dovlo was not an employee of Enterprise at the time of the subject accident.

In opposition, plaintiff fails to raise a triable issue of fact warranting denial of the motion. To the extent counsel for plaintiff contends that the motion is premature, the mere hope that a party might be able to uncover some evidence during the discovery process is insufficient to deny summary judgment (*see Planned Bldg. Servs., Inc. v S.L. Green Realty Corp.*, 300 AD2d 89 [1st Dept 2002]; *Pow v Black*, 182 AD2d 484 [1st Dept 1992][citations omitted]).

For the foregoing reasons, it is hereby

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ORDERED that the motion is granted, and the action is dismissed as against defendant Enterprise Holdings, Inc.; and it is further

ORDERED that the clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: December 5 2017

Maryann Brigantti, J.S.C.