Zwibel v Midway Auto. Group
2012 NY Slip Op 33966(U)
December 12, 2012
Supreme Court, Queens County
Docket Number: 14754/10
Judge: Robert J. McDonald
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SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : **HON. ROBERT J. McDONALD** **IAS PART 34**
Justice

- x

MARCIA ZWIBEL,

Plaintiff,

- against -

MIDWAY AUTOMOTIVE GROUP, HELMS BROS, INC., KEVIN M. HENDERSON JR. and MERCEDES-BENZ, USA, LLC,

Defendant.

- x

Index No.: 14754/10

Motion Date: 8/2/12

Motion No.: 46

Motion Seq.: 3

The following papers numbered 1 to 16 read on this motion by defendant Helms Bros Inc. (Helms), for summary judgment dismissing the complaint on the ground that plaintiff Marcia Zwibel (plaintiff) did not sustain a serious injury as defined in Insurance Law § 5102 (d) and on the issue of liability; and on the cross motion by defendant Mercedez-Benz USA, LLC (Mercedes-Benz) for summary judgment dismissing the complaint and all cross-claims also on the ground that plaintiff did not sustain a serious injury and on the issue of liability.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-4
Notice of Cross Motion - Affidavits - Exhibits	5-8
Answering Affidavits - Exhibits	9-11
Reply Affidavits	12-16

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

This is an action in which plaintiff has alleged that she sustained personal injuries as a result of a motor vehicle accident which occurred on October 7, 2008, at the intersection of Utopia Parkway and Underhill Avenue, in the County of Queens.

Plaintiff has alleged that a vehicle operated by defendant Kevin M. Henderson, Jr. (Henderson), and owned by Mercedes-Benz , came into contact with her vehicle. Plaintiff testified that, on the date of the accident, she was operating her vehicle eastbound on Underhill Avenue at the intersection of Utopia Parkway, that the subject intersection was controlled by a traffic light, and that Henderson's vehicle collided with hers as she proceeded into the intersection with a green light in her favor. In her bill of particulars, plaintiff has alleged that she sustained injuries to both eyes and to her lumbar spine. Henderson was employed as a valet by Helms on the date of the subject accident. The action has been dismissed against defendant Midway Automotive Group (Midway) in a prior order dated March 7, 2011, and entered on March 15, 2011. Furthermore, in an order dated April 20, 2011, and entered on April 26, 2011, this court granted plaintiff a default judgment against Henderson and set the matter down for an inquest on the issue of damages at the time of trial.

Helms has moved for summary judgment dismissing the complaint and has argued that plaintiff did not sustain a serious injury as a result of the subject accident. Mercedes-Benz has also cross-moved on this basis and has adopted Helms' arguments and evidence. On these branches of their motion and cross motion, Helms and Mercedes-Benz have the initial burden of establishing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 352 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 956-957 [1992]). Helms and Mercedes-Benz have relied upon, among other things, the affirmed medical reports of Edward Toriello, M.D., an orthopaedist, and Mark Fromer, M.D., an ophthalmologist.

Dr. Fromer examined plaintiff and concluded in his report that her visual acuity was 20/20 in both eyes, that she had no vitreous floaters or hemorrhages in either eye because the alleged trauma to her eyes has been resolved. However, after objective testing, Dr. Toriello concluded in his report that plaintiff had limited range of motion in her lumbar spine. Therefore, Helms and Mercedes-Benz have failed to satisfy their initial burden and the opposition papers need not be considered (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 352 [2002]; *Coppage v Svetlana Hacking Corp.*, 31 AD3d 366 [2006]).

In light of the above determination, the court will next turn to the alternative branch of the motion by Helms for summary judgment dismissing the complaint on the issue of liability. Helms has argued that it was not vicariously liable in the happening of the subject accident because it did not give Henderson permission to operate the vehicle and that Henderson

was acting outside the scope of his employment duties at the time of the accident. As a movant, Helms 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" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). "Pursuant to the doctrine of respondeat superior, an employer can be held vicariously liable for torts committed by an employee acting within the scope of employment" (*Horvath v L & B Gardens, Inc.*, 89 AD3d 803 [2011]; *see Riviello v Waldron*, 47 NY2d 297, 302 [1979]). "However, "liability will not attach for torts committed by an employee who is acting solely for personal motives unrelated to the furtherance of the employer's business'" (*Horvath v L & B Gardens, Inc.*, 89 AD3d at 803, quoting *Fernandez v Rustic Inn, Inc.*, 60 AD3d 893, 896 [2009]). In support of this branch of its motion, Helms has relied upon Henderson's deposition testimony and the affidavit of Suzanne Cochrane (Cochrane), its general manager.

Cochrane stated in her affidavit that, on the date of the accident, Henderson was employed as a valet by Helms and that his employment duties did not include test-driving vehicles, that a test-drive program administered by Mercedes-Benz was being held, and that non-party Transcend Creative Group was responsible for providing applications to those who wanted to test-drive vehicles. Henderson testified that he was employed by Helms as a valet on the date of the accident, that he and other Helms employees were given permission by his supervisor, a Helms employee, to take part in a test-drive program, wherein they test-drove competitor's vehicles. In light of the conflicting testimony regarding Henderson's participation in the test-drive program, Helms has failed to satisfy its initial burden because issues of fact exist as to whether Henderson was acting within the course of his employment at the time of the subject accident (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324). Therefore, Helms is not entitled to the relief sought on this branch of its motion and the opposition papers need not be considered.

Mercedes-Benz has cross-moved, in the alternative, for summary judgment dismissing the complaint on the issue of liability and has argued that it did not own the vehicle that Henderson was operating at the time of the subject accident and that it did not permit Henderson to operate the vehicle. In support of this branch of its cross motion, Mercedes-Benz has relied upon, among other things, the affidavit of David Smith, Jr. (Smith), the Director of Business Development for Midway, and the affidavit of James Perry (Perry), a Learning Manager for Mercedes-Benz. Smith and Perry's affidavits have served to

demonstrate that Mercedes-Benz did not own the vehicle operated by Henderson that was involved in the subject accident and that Mercedes-Benz did not operate the test-drive program that Henderson was participating in at the time of the accident.

In opposition, plaintiff has raised a triable issue of fact. Plaintiff has relied upon, among other things, Cochrane's deposition testimony, wherein she testified that Mercedes-Benz offered, and was in control of, the test-drive program and that Mercedes-Benz was in control of the vehicles offered for a test-drive as a part of the program. In light of this evidence, Mercedes-Benz is not entitled to the relief sought on this branch of its motion (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Accordingly, Helms' motion for summary judgment dismissing the complaint is denied in its entirety. Mercedes-Benz's cross motion for summary judgment dismissing the complaint and all cross claims is denied in its entirety.

Dated: Long Island City, NY
December 12, 2012

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ROBERT J. McDONALD
J.S.C.