

Blassberger v Varela
2013 NY Slip Op 34105(U)
December 11, 2013
Supreme Court, Nassau County
Docket Number: 2856/12
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

DAVID BLASSBERGER,

Plaintiff,

- against -

ANA VARELA and OSCAR A. JACOBS,

Defendants.

TRIAL/IAS PART 33
NASSAU COUNTY

Index No.: 2856/12
Motion Seq. Nos.: 02, 03
Motion Dates: 08/09/13
10/04/13

The following papers have been read on these motions:

	<u>Papers Numbered</u>
<u>Notice of Motion (Seq. No. 02), Affirmation and Exhibits and Memorandum of Law</u>	<u>1</u>
<u>Notice of Cross-Motion (Seq. No. 03), Affirmation and Exhibits and Memorandum of Law</u>	<u>2</u>
<u>Affirmation in Opposition to Cross-Motion Seq. No. 03 and in Reply to Motion Seq. No. 02</u>	<u>3</u>

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendant Ana Varela ("Varela") moves (Seq. No. 02), pursuant to CPLR § 3211(a)(7), for an order dismissing the Verified Complaint as against her on the basis that plaintiff failed to state a cause of action against her; or moves, in the alternative, pursuant to CPLR § 3212, for an order granting her summary judgment on the basis that the subject vehicle was in a state of theft when the subject accident occurred and that she did not breach any duty owed to plaintiff under General Municipal Law § 205-e.

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Plaintiff opposes the motion and cross-moves (Seq. No. 03), pursuant to CPLR § 3025(b), for an order granting him leave to amend the Verified Complaint. Defendant Varela opposes the cross-motion.

Plaintiff was a New York State trooper. He was injured in the course of his duties on September 19, 2010, while in pursuit of defendant Oscar Jacobs ("Jacobs"). Plaintiff followed defendant Jacobs during a high speed car chase. When defendant Jacobs jumped out of his moving vehicle to get away on foot, plaintiff exited his vehicle and followed defendant Jacobs on foot. In the course of apprehending defendant Jacobs, plaintiff was injured. On or about March 6, 2012, plaintiff commenced the instant action against defendant Jacobs and defendant Varela, the owner of the vehicle that defendant Jacobs was driving before he abandoned it. *See* Defendant Varela's Affirmation in Support Exhibit A.

Defendant Varela's daughter, Kristen Varela ("Kristen"), had a child with defendant Jacobs and lived with defendant Jacobs for a few months. The relationship ended in November, 2009, when Kristen and her son moved in with defendant Varela in Merrick. Defendant Varela gave her daughter Kristen unrestricted permission to use her vehicle on the night of the incident.

Kristen testified at her Examination Before Trial ("EBT") that, on the date of incident, she picked up defendant Jacobs in East Meadow and drove him to a birthday party in the Bronx. Kristen and defendant Jacobs left the party early. Defendant Jacobs allegedly was so drunk he could not stay awake. Kristen had no GPS and got lost on the way home. She drove to an ATM to get money for tolls, but could not get any money. When Kristen got back in the vehicle, a physical fight ensued. The record contains testimony that Kristen was punched by defendant Jacobs and became scared. She ran out of the car quickly and went to a nearby gas station

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attendant for assistance. She left the keys in the car and, at that point, defendant Jacobs slid into the driver's seat and drove away. *See* Defendant Varela's Affirmation in Support Exhibit D.

According to Kristen's EBT testimony, she called the police and reported that the vehicle she was driving was stolen. She was told she could not file a police report because she was not the owner of the vehicle. Kristen called defendant Varela to tell her to file a police report. The police arrived and brought Kristen to a different gas station where a friend picked her up. *See id.*

The Nassau County Police went to defendant Varela's home in the early morning hours of September 19, 2010. Defendant Varela was told that the report had to be filed in the police precinct where the incident occurred, namely, Hunt's Point in the Bronx. Although the Nassau County Police typed up something in their car, they did not give defendant Varela a copy of it. *See* Defendant Varela's Affirmation in Support Exhibit C.

Defendant Varela called Kristen to tell her to file the report, so Kristen called the Bronx police again, and different police officers came to her friend's house. There, Kristen was told that she had to go back to that part of the Bronx where the car was stolen in order to file a report. She had already missed a day of work and asked her friend to drive her home instead. *See* Defendant Varela's Affirmation in Support Exhibit D.

Defendant Varela seeks dismissal of the Verified Complaint on the grounds that defendant Jacobs did not drive her vehicle with permission and that she did not breach any duty to plaintiff under General Municipal Law § 205-e.

On a motion to dismiss pursuant to CLR § 3211, the facts as alleged must be accepted as true, the pleader must be accorded the benefit of every favorable inference and the court must determine only whether the facts as alleged fit within any cognizable theory. *See ABN AMRO*

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Bank, N.V. v. MBIA, Inc., 17 N.Y.3d 208, 928 N.Y.S.2d 647 (2011) citing *Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994); *Samiento v. World Yacht Inc.*, 10 N.Y.3d 70, 854 N.Y.S.2d 83 (2008). The criterion on a motion pursuant to CPLR § 3211(a)(7) is whether the pleader has a cause of action. See *Leon v. Martinez, supra* at 88.

New York State Vehicle and Traffic Law § 388 (1) creates a presumption that a driver uses a vehicle with the owner's express or implied consent. See *Murdza v. Zimmerman*, 99 N.Y.2d 375, 756 N.Y.S.2d 505 (2003); *Matter of State Farm Mut. Auto. Ins. Co. v. Fernandez*, 23 A.D.3d 480, 805 N.Y.S.2d 599 (2d Dept. 2005). This vicarious liability statute was enacted to prevent vehicle owners from escaping liability by asserting that their vehicles were being used without their authority, thereby leaving those injured without financial recourse. See *Murdza v. Zimmerman, supra* at 379.

Here, plaintiff has alleged that defendant Jacobs operated and controlled defendant Varela's vehicle with "the express and/or implied consent of the owner." See Defendant Varela's Affirmation in Support Exhibit A Verified Complaint ¶ 6. Consequently, plaintiff has met the standard for alleging a cause of action against defendant Varela, the owner of the vehicle.

Therefore, the branch of defendant Varela's motion (Seq. No. 02), pursuant to CPLR § 3211(a)(7), for an order dismissing the Verified Complaint as against her on the basis that plaintiff failed to state a cause of action against her is hereby **DENIED**.

Summary judgment is the procedural equivalent of a trial. See *S.J. Capelin Assoc., Inc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 357 N.Y.S.2d 478 (1974). The function of the court in deciding a motion for summary judgment is to determine if triable issues of fact exist. See *Matter of Suffolk County Dept. of Social Servs. v. James M.*, 83 N.Y.2d 178, 608 N.Y.S.2d 940 (1994). The proponent must make a *prima facie* showing of entitlement to judgment as a matter of law.

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See Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). Once a *prima facie* case has been made, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact or an acceptable excuse for its failure to do so. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

The presumption of permissive use of a vehicle is rebuttable by “substantial evidence sufficient to show that a vehicle was not operated with the owner’s consent.” *Murdza v. Zimmerman*, *supra* at 380. Although the rule is not absolute or invariable, uncontradicted statements by both the owner and the driver that the driver was operating without the owner’s permission, will generally constitute substantial evidence negating permissive use and entitling the owner to summary judgment. *See Country-Wide Ins. Co. v. National R.R. Passenger Corp.*, 6 N.Y.3d 172, 811 N.Y.S.2d 302 (2006); *Murphy v. Carnesi*, 30 A.D.3d 570, 817 N.Y.S.2d 136 (2d Dept. 2006). Evidence that a vehicle was stolen will rebut the presumption of permissive use. *See Vyrtil Trucking Corp. v. Browne*, 93 A.D.3d 716, 940 N.Y.S.2d 279 (2d Dept. 2012); *Adamson v. Evans*, 283 A.D.2d 527, 724 N.Y.S.2d 760 (2d Dept. 2001).

Failure to report the unauthorized use of a vehicle to a law enforcement agency is a factor to be considered, but will not defeat summary judgment to the owner, where the proof against permission is strong and uncontested, with nothing apart from speculation to cast doubt on plausibility. *See Country-Wide Ins. Co. v. National R.R. Passenger Corp.*, *supra* at 180.

Here both defendant Varela and her daughter Kristen testified that defendant Varela’s vehicle was stolen by defendant Jacobs. *See Defendant Varela’s Affirmation in Support Exhibits C and D*. This testimony, although uncontradicted, is by two interested witnesses, and accordingly does not, without more, rise to the level of “substantial evidence.” *See Vinueza v.*

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Tarar, 100 A.D.3d 742, 954 N.Y.S.2d 160 (2d Dept. 2012); *Minaya v. Horner*, 279 A.D.2d 333, 718 N.Y.S.2d 839 (1st Dept. 2001); *Matter of State Farm Mut. Auto. Ins. Co. v. Fernandez*, *supra*.

No evidence has been submitted from defendant Jacobs. For the record, defendant Jacobs is not under the control of defendant Varela, nor of her daughter Kristen. *Cf. Murphy v. Carnesi*, *supra*, where the father ostensibly controlled his son. Defendant Varela testified that defendant Jacobs had never driven her vehicle before. *See* Defendant Varela's Affirmation in Support Exhibit C. Additionally, a criminal proceeding was brought against defendant Jacobs and according to defendant Varela, he was in jail for a few months. *See id.*

A review of the record reveals that it is the circumstances of this case which negate permissive use. This is not a case where car keys were available and consent to one driver may be extended to a third person whom the driver permits to drive the vehicle. *Cf. Bernard v. Mumuni*, 22 A.D.3d 186, 802 N.Y.S.2d 1 (1st Dept. 2005) *aff'd* 6 N.Y.3d 881, 817 N.Y.S.2d 210 (2006).

Here, Kristen testified that defendant Jacobs was drunk. Following a physical altercation, defendant Jacobs drove away leaving her alone at a gas station in a distant county in the middle of the night. Kristen did not know where she was and she did not even have her wallet with her. *See* Defendant Varela's Affirmation in Support Exhibit D. As far as this Court can determine, at least three (3) different groups of police officers were told of the stolen vehicle on September 19, 2010. Overall, the theory of "implied consent" simply cannot be stretched to include these uncontested facts. On this record, the Court finds that defendant Varela has submitted a *prima facie* case of "substantial evidence" of lack of "implied consent."

In opposition to defendant Varela's motion (Seq. No. 02), counsel for plaintiff points to the close relationship between Kristen and defendant Jacobs, the absence of a stolen vehicle

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report, the fact defendant Jacobs was never prosecuted criminally for the alleged theft of defendant Varela's vehicle and the absence of proof of injury from the fight to Kristen on the night of the incident. The Court has considered these factors, but finds that, under all of the circumstances of this case, they do not raise a triable issue of fact as to implied consent. Plaintiff's opposition consists solely of speculation. The only conclusion that can reasonably be drawn from the uncontradicted evidence is that, on the night of plaintiff's injury, defendant Jacobs operated defendant Varela's vehicle without permission. *See St. Andrassy v. Mooney*, 262 N.Y. 368 (1933).

Based on the foregoing, the branch of defendant Varela's motion (Seq. No. 02), pursuant to CPLR § 3212, for an order granting her summary judgment on the basis that the subject vehicle was in a state of theft when the subject accident occurred is hereby **GRANTED**.

There is no need for this Court to consider defendant Varela's additional arguments for dismissal based upon General Municipal Law 205-e, therefore same as hereby **DENIED as moot**.

Plaintiff cross-moves (Seq. No. 03), pursuant to CPLR § 3025(b), for an order granting him leave to amend the Verified Complaint to add an allegation that defendant Varela violated New York State Vehicle and Traffic Law § 1210(a). As the Verified Complaint has been dismissed against defendant Varela, plaintiff's cross-motion must be also be summarily denied as moot.

Had the Court considered the substance of the cross-motion (Seq. No. 03), it would have been denied in any event because defendant Varela's vehicle was never left unattended as required by New York State Vehicle and Traffic Law § 1210(a). Here, it is undisputed that defendant Jacobs did not leave the vehicle when Kristen exited to go to the ATM or to get help

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from the gas station attendant. *See Burke v. City of New York*, 279 A.D.2d 381, 720 N.Y.S.2d 25 (1st Dept. 2001); *Matter of Hartford Ins. Co (Aquaviva)*, 179 A.D.2d 546, 578 N.Y.S.2d 568 (1st Dept. 1992).

Therefore, plaintiff's cross-motion (Seq. No. 03), pursuant to CPLR § 3025(b), for an order granting him leave to amend the Verified Complaint is hereby **DENIED**.

The remaining parties shall appear for a Pre-Trial Conference in Nassau County Supreme Court, Differentiated Case Management Part (DCM), at 100 Supreme Court Drive, Mineola, New York, on December 17, 2013, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
December 11, 2013

ENTERED
DEC 13 2013
NASSAU COUNTY
COUNTY CLERK'S OFFICE