Hardwick v Inter-County Motor Coach, Inc.
2015 NY Slip Op 31706(U)
August 7, 2015
Supreme Court, Suffolk County
Docket Number: 11-22903
Judge: Arthur G. Pitts
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[* 1]

SHORT FORM ORDER

INDEX No. 11-22903

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 10-30-14 (#014)
MOTION DATE 11-20-14 (#013 & #015)
MOTION DATE 1-22-15 (#016 & #017)
ADJ. DATE 3-5-15
Mot. Seq. # 013 - MD # 016 -XMotD
014 - MG # 017 - XMG
015 - MG

JONATHAN HARDWICK & PAMALA BURNET,

Plaintiffs,

- against -

INTER-COUNTY MOTOR COACH, INC., JOSE C. SOTO, COUNTY OF SUFFOLK, ANDREA M.V. GILPIN, KADIA FLETCHER, JOSEPH C. MACINA, MARIA E. UMANZOR, VICTOR M. PAZ, SIMA ANAND, M.D., JIMMY U. LIM, M.D., TRIUMPH ASSOCIATES PHYSICAL THERAPY, P.C. & HUNT CITY CHIROPRACTIC, LLP,

Defendants.

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Upon the following papers numbered 1 to 101 read on these motions for summary judgment and various other relief; Notice of Motion/ Order to Show Cause and supporting papers 1 -15 ; Notice of Cross Motions and supporting papers 26-36; 41-61; 68-75; 81-97 ; Answering Affidavits and supporting papers 16-20; 21-23; 24-25; 37-38; 62-63; 64-65; 76-78; 79-80; 98-99 ; Replying Affidavits and supporting papers 39-40; 66-67; 100-101 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff, Jonathan Hardwick (013), for leave to file an amended complaint, and a second amended bill of particulars, pursuant to CPLR § 3025 is denied; and it is further

ORDERED that the motions by defendants, Triumph Associates Physical Therapy, P.C. (017), and Hunt City Chiropractic, LLP (015), for summary judgment dismissing plaintiff's complaint and all cross claims as asserted against them are granted; and it is further

ORDERED that the branch of the motion by plaintiff, Jonathan Hardwick (016), for partial summary judgment in his favor on the issue of liability pursuant to CPLR 3212 as against Andria M.V. Gilpin and Kadia Fletcher is granted; and it is further

ORDERED that the branch of the motion by plaintiff, Jonathan Hardwick (016), for partial summary judgment in his favor on the issue of liability as against Victor M. Paz and Maria Umanzor is denied; and it is further

ORDERED that the motion by defendants, Inter-County Motor Coach, Inc., Jose C. Soto, and the County of Suffolk (014), for summary judgment in their favor pursuant to CPLR 3212 dismissing plaintiff's complaint as asserted against them is granted.

This action was commenced to recover damages for personal injuries that plaintiffs allegedly sustained in a motor vehicle accident that occurred on September 20, 2010. Plaintiffs allege they were passengers in a coach bus owned by Inter-County Motor Coach, Inc. and Suffolk County. The bus, operated by Jose C. Soto was involved in a collision with a vehicle owned by Kadia Flectcher, and operated by Andria M.V. Gilpin.

Plaintiff, Jonathan Hardwick, was involved in a second motor vehicle accident on October 23, 2010. He alleges he was a passenger in a vehicle owned by Maria Umanzor, and operated by Victor M. Paz. That vehicle collided with a vehicle owned and operated by Joseph C. Macina. Hardwick alleges that Victor Paz was employed by Triumph Associates Physical Therapy, P.C. and Hunt City Chiropractic, LLP transporting medical patients. On March 12, 2014, this court (Pitts J.) consolidated this action under index number 22903-2011 with another action 20997-2013, Burnet v Umanzor, Paz, and Macina and conditionally precluded Paz for failing to appear at a court ordered deposition. Hardwick now moves (013) to amend his complaint to add causes of action against Triumph and Hunt City for negligent hiring and retention of Paz. In support of the motion, Hardwick supplies, among other things, the pleadings, his bill of particulars, the depositions of Pamela Burnett (suing herein as Pamela Burnet), Triumph, and Hunt City, the proposed amended complaint and second amended bill of particulars, and Paz's certified drivers abstract. Plaintiff Burnett does not oppose the motion. Triumph and Hunt City oppose the motion contending that Paz was an independent contractor, not an employee, and submit Paz's 1099 and separately (015)(017) cross move for summary judgment. On the motions for summary judgment Hunt City supplies, among other things, the

pleadings, the deposition of plaintiffs Hardwick and Burnett, and the depositions Joseph C. Macina, and Robert Buurma. Triumph, in addition to the above, supplies the stipulation of the parties, and Paz's 1099's. Burnett does not oppose the motions. Paz and Umanzor oppose Hunt City's motion, but not Triumph's, and contend that Hunt City is vicariously liable, as an independent contractor, for negligence in the selection, instruction, and supervising that contractor, themselves. Hardwick also moves (016) for partial summary judgment on the issue of liability regarding both accidents. Inter-County, Soto, and the County of Suffolk move for summary judgment regarding the September 20, 2010, accident. Gilpin and Fletcher oppose that motion.

Turning to the application by Hardwick for leave to amend the complaint to include claims against Triumph and Hunt City for negligent hiring and retention of Paz, applications for leave to amend pleadings under CPLR 3025 (b) should be freely granted unless the proposed amendment (1) would unfairly prejudice or surprise the opposing party, or (2) is palpably insufficient or patently devoid of merit (*see* ***Maldonado v Newport Gardens, Inc.***, 91 AD3d 731, 937 NYS2d 260 [2d Dept 2012]; ***Lucido v Mancuso***, 49 AD3d 220, 851 NYS2d 238 [2d Dept 2008]). A determination whether to grant such leave is within the Supreme Court's broad discretion, and the exercise of that discretion will not be lightly disturbed (*see* ***Gitlin v Chirinkin***, 60 AD3d 901, 875 NYS2d 585 [2d Dept 2009]; ***Ingrami v Rovner***, 45 AD3d 806, 847 NYS2d 132 [2d Dept 2007]). Further, in exercising its discretion, a court should consider how long the party seeking the amendment was aware of the facts upon which the motion is based, whether a reasonable excuse for the delay was offered, and whether prejudice resulted from such delay (***American Cleaners, Inc. v American Intl. Specialty Lines Ins. Co.***, 68 AD3d 792, 794, 891 NYS2d 127 [2d Dept 2009]; ***Sunrise Harbor Realty, LLC v 35th Sunrise Corp.***, 86 AD3d 562, 927 NYS2d 145 [2d Dept 2011]; ***Al-Khilewi v Turman***, 82 AD3d 1021, 919 NYS2d 361 [2d Dept 2011]. Here, the proposed amendments are palpably insufficient or patently devoid of merit on their face, and there is evidence that defendants are prejudiced or surprised by plaintiff's delay in seeking leave to amend his complaint after the discovery had herein (*see* ***Giunta's Meat Farms, Inc. v Pina Constr. Corp.***, 80 AD3d 558, 914 NYS2d 641 [2d Dept 2011]; *see also* ***Chenango County Indus. Dev. Agency v Lockwood Greene Engineers, Inc.***, 111 AD2d 508, 488 NYS2d 890 [3d Dept 1985]). It is undisputed given the deposition testimony by representatives of Triumph and Hunt City, the documentary evidence of 1099's, and Hardwick's own moving papers, that Paz was an independent contractor and not an employee. An employer who hires an independent contractor, as distinguished from an employee or servant, is not vicariously liable for the negligent acts of the independent contractor (***Kleeman v Rheingold***, 81 NY2d 270, 598 NYS2d 149 [1993]; ***Sanabria v Aguero-Borges***, 117 AD3d 1024, 986 NYS2d 553 [2d Dept 2014]; ***Lombardi v Overhead Doors, Inc.***, 928 AD3d 921, 939 NYS2d 528 [2d Dept 2012]. Hardwick has known for more than three years that Paz was an independent contractor and has offered no reasonable excuse for the untimely application to amend. Moreover, discovery is substantially complete. Accordingly, plaintiff's request for leave to amend the complaint and for a second amended bill of particulars is denied.

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 issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth***

v Barreto, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

Turning to the dismissal motions (017) (015) by Hunt City and Triumph regarding the October 23, 2010 accident as discussed above, generally vicarious liability does not exist for the alleged negligent acts of an independent contractor with certain exceptions. The Restatement of Torts § 409 groups the exceptions into three broad categories: (1) negligence of the employer in selecting, instructing, or supervising the contractor; (2) non-delegable duties of the employer, arising out of some relation toward the public or the particular plaintiff;(3) work which is specially, peculiarly, or inherently dangerous. Paz and Umanzor argue that negligence of the employer in selecting, instructing, or supervising the contractor gives rise to vicarious liability for the acts of an independent contractor under those exceptions (***Bros. v New York State Elec. & Gas Corp.***, 11 NY3d 251, 869 NYS2d 356 [2008]). The exceptions of nondelegable duty and inherently dangerous work do not apply here. Hiring a car or van service to transport patients is a delegable duty. Transporting children by bus, "while demanding though it may be ... does not involve that sort of inherent risk for the nonnegligent driver and is simply not an inherently dangerous activity so as to trigger vicarious liability" ***Chainani v Board of Education of the City of New York***, 87 NY2d 370, 639 NYS2d 971 [1995]). Medical transportation therefore is not inherently dangerous. Suprisingly, Paz is now alleging that his own "hiring" was a negligent act by Hunt City. Yet, Paz argues in opposition to Hardwick's summary judgment motion that he was not negligent and did not pass the red light. Paz's certified abstract indicates that on June 3, 2004, he was convicted of driving while impaired by alcohol and on February 25, 2005, he was convicted of driving while intoxicated. His license was suspended for failure to pay child support in 2006, 2009, and 2012. Each suspension was cleared and there is no indication that alcohol contributed to the accident of October 23, 2010. On September 23, 2010, Paz's license was suspended for failing to answer a summons in Staten Island. He was convicted on March 7, 2011, for operating a motor vehicle without a license on October 23, 2010, the date of the incident herein, without a license based upon the failure to answer the Staten Island summons. While an unexcused violation of the standards of care imposed on motorists and pedestrians by the Vehicle and Traffic Law constitutes negligence per se (*see* ***Barbiei v Vokoun***, 72 AD3d 853, 900 NYS2d 315 [2d Dept 2010]; ***Dalal v City of New York***, 262 AD2d 596, 692 NYS2d 468 [2d Dept 1999]), the absence of a driver's license is not even presumptive evidence of negligence, as it relates only to the authority to operate a vehicle and not its manner of operation (*see* ***Bready v CSX Transp., Inc.***, 89 AD3d 1386, 933 NYS2d 787 [4th Dept 2011], *affd* 19 NY3d 834, 946 NYS2d 93 [2012]; ***Almonte v Marsha Operating Corp.***, 265 AD2d 357, 696 NYS2d 484 [2d Dept 1999]; ***Hanley v Albano***, 20 AD2d 644, 246 NYS2d 380 [2d Dept 1964]). Thus, a violation of Vehicle and Traffic Law regarding licensing, which may create criminal liability on the part of the owner of a motor vehicle, is not a basis for a finding of negligence per se on the part of Paz or Umanzor.

Moreover, when first retained by Triumph as an independent contractor Paz was questioned about his employment history. He had prior experience transporting medical patients and was recommended as a very good driver. He produced proof of his license and insurance. Triumph was unaware of any complaints concerning his driving. Hunt City never received a complaint about Paz's driving. Driving suspensions for failure to pay support or a summons, which are later paid, are not evidence of reckless, negligent, or inattentive driving.

Both Triumph and Hunt City have demonstrated their prima facie entitlement to summary judgment. In opposition, Paz and Umanzor have failed to raise a triable issue of fact that demonstrates that Triumph and Hunt City exercised anything other than incidental control over Paz, as an independent contractor, and have not shown they were negligent in the selecting, instructing, or supervising of Paz. Accordingly, the motions by Triumph and Hunt City for summary judgment pursuant to CPPR 3212 in their favor are granted.

Plaintiff, Hardwick, moves for summary judgment as against Andria Gilpin and Kadia Fletcher regarding the September 20, 2010, motor vehicle accident. He contends that as a passenger in a coach bus operated by Jose C. Soto, and owned by Inter-County and Suffolk County, he was injured when Gilpin at the intersection of 18th Street and Nicolls Road in Wyandanch, New York failed to stop at a stop sign and struck the bus. Vehicle and Traffic Law §1142 (a) requires a driver of a motor vehicle approaching a stop sign to stop and yield the right of way to any vehicle that has entered the intersection or is approaching so closely as to constitute an immediate hazard (*see* ***Stanford v Dushey***, 71 AD3d 988, 900 NYS2d 64 [2d Dept 2010]; ***Yelder v Walters***, 64 AD3d 762, 883 NYS2d 290 [2d Dept 2009]. Further, a driver with the right of way is entitled to assume that other drivers will obey traffic laws requiring them to yield (*see* ***Luke v McFadden***, 119 AD3d 533, 987 NYS2d 909 [2d Dept 2014]; ***Gallagher v McCurty***, 85 AD3d 1109, 925 NYS2d 897 [2d Dept 2011]; ***Wilson v Rosedom***, 82 AD3d 970, 919 NYS2d 59 [2d Dept 2011]. A driver who fails to yield the right of way in violation of Vehicle and Traffic Law § 1142 (a) is negligent as a matter of law (*see* ***Luke v McFadden***, 119 AD3d 533, 987 NYS2d 909 [2d Dept 2014]; ***Williams v Hayes***, 103 AD3d 713, 959 NYS2d 713 [2d Dept 2013].

Of course, there can be more than one proximate cause of an accident, and evidence that one driver was negligent does not preclude a finding that the comparative negligence of another driver contributed to an accident (*see* ***Exime v Williams***, 45 AD3d 633, 845 NYS2d 450 [2d Dept 2007]; ***Cox v Nunez***, 23 AD3d 427, 805 NYS2d 604 [2d Dept 2005]). Thus, a driver who lawfully enters an intersection may be found partially at fault for an accident if he or she failed to use reasonable care to avoid colliding with another vehicle in the intersection (*see* ***Bonilla v Gutierrez***, 81 AD3d 581, 915 NYS2d 634 [2d Dept 2011]; ***Cox v Weil***, 66 AD3d 634, 887 NYS2d 170 [2d Dept 2009].

Plaintiff's submissions establish a prima facie case that Soto, the bus driver, had the right of way and that Gilpin violated Vehicle and Traffic Law § 1142 by failing to yield the right of way (*see* ***Rodriguez v Klein***, 116 AD3d 939, 983 NYS2d 851 [2d Dept 2014]; ***Harris v Linares***, 106 AD3d 873, 964 NYS2d 657 [2d Dept 2013]; ***Bonilla v Guiterrez***, 81 AD3d 581, 915 NYS2d 634 [2d Dept 2011]). Plaintiff's proof also demonstrates as a matter of law that, as a passenger on a bus, he was free from comparative negligence in the happening of the subject accident, as was Soto, the bus driver (*see* ***Bonilla v Guiterrez***, 81 AD3d 581, 915 NYS2d 634 [2d Dept 2011]). Here, Soto testified at his deposition that prior to the accident, he was traveling west on Nicolls Road, and there were no traffic control devices for vehicles on Nicolls Road. He testified that as he approached the intersection, he never saw Gilpin's vehicle, "she just went right through me." Gilpin testified that she had just moved from the stop sign and that her view was obstructed by trees covered with snow. She denies that the accident took place in September of 2010 and believes it actually occurred in November of 2010. Looking to the right, she could only see about the space of a car length. Only a couple of seconds passed, she testified, from that point to impact. Regardless of the weather, Gilpin failed to yield the right of way to the bus. Plaintiff has established his prima facie entitlement to summary

judgment. In opposition, Gilpin has failed to raise an issue of fact that warrants a trial. Accordingly, that branch of Hardwick's motion for partial summary judgment pursuant to CPLR 3212 in his favor on the issue of liability as against Gilpin and Fletcher is granted.

Hardwick also moves for partial summary judgment against Paz on the issue of liability for the October 23, 2010 accident. On October 23, 2010, he was a passenger in a van driven by Paz. He testified that at the intersection of Pinelawn Road and Colonial Springs Road, the van was struck by a Range Rover. When asked about the light, he testified "everybody else was stopped and [Paz] kept going and then it was the screeching noise. And then the van hit us. The [R]ange [R]over rather." The other passenger in the van, Burnett also testified that the traffic light was red prior to the very heavy impact. Macina, the operator of the Range Rover, who was taking his family pumpkin picking, testified that his traffic control device was clearly green. He was positive that Paz had a red light. The conduct of motorists at a traffic signal is governed by Vehicle and Traffic Law § 1111, and not the more general provisions of the Vehicle and Traffic Law, such as those set forth in §§ 1140 or 1141, which govern the conduct of drivers at intersections that are not controlled by traffic lights (*see* ***Dicke v Anci***, 31 AD3d 696, 821 NYS2d 93 [2d Dept 2006]; ***Saggio v Ladone***, 21 AD3d 407, 799 NYS2d 586 [2d Dept 2005]. Section 1111(d)(1) of the Vehicle and Traffic Law states, in pertinent part, that traffic facing a steady circular red signal shall stop at a clearly marked stop line, and shall remain standing until an indication to proceed is shown. Section 1111 of the Vehicle and Traffic Law allows a driver approaching an intersection with a green traffic signal to proceed through the intersection, provided he or she yields the right of way to vehicles lawfully within the intersection, and exercise reasonable care under the circumstances to avoid a collision (*see* ***Tapia v Royal Tours Serv., Inc.***, 67 AD3d 894, 889 NYS2d 225 [2d Dept 2009]; ***Schiskie v Fernan***, 277 AD2d 441, 716 NYS2d [2d Dept 2000]; ***Siegel v Sweeney***, 266 AD2d 200, 697 NYS2d 317 [2d Dept 1999]; *see generally* ***Shea v Judson***, 283 NY 393, 28 NE2d 885 [1940]). Moreover, a motorist facing a steady green light has the right to assume that the light is red for cross traffic, and that such traffic will obey the law by stopping for the red light and remaining stationary until the light has changed to green (*see* ***Baughman v Libasci***, 30 AD2d 696, 292 NYS2d 588 [2d Dept 1968]).

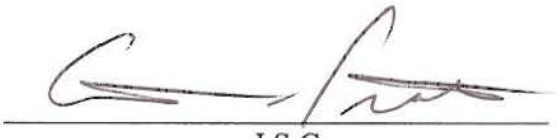
Based upon the adduced evidence, Hardwick has demonstrated his prima facie entitlement to judgment as a matter of law on the issue of liability by establishing that Paz's negligence was the sole proximate cause of the subject accident (VTL § 1111 (d)(1); ***Deleg v Vinci***, 82 AD3d 1146, 919 NYS2d 396 [2d Dept 2011]; ***Monteleone v Jung Pyo Hong***, 79 AD3d 988, 913 NYS2d 755 [2d Dept 2010]. Significantly, the deposition testimony of Hardwick, Burnett, and Macina all confirm that Paz's vehicle unexpectedly failed to heed the red light and collided into the van in which Hardwick was a passenger. This is also confirmed by independent witness, Lynn Davis, who stated, "a green van traveling in the opposite direction proceeded through the red light, a brown land rover was traveling pass (sic) green light and hit the green van with multiple passengers."

In opposition to Hardwick's prima facie showing, Paz raises a triable issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*). In a certified police report Paz told the police he had a green light and in a written witness statement (in spanish) he swore that the light was green. While Paz has been precluded from offering testimony at the time of trial based upon his failure to comply with discovery, that preclusion is conditioned upon him not appearing for depositions within 45 days of the filing of the note of issue. As no

note of issue has been filed, Paz is not yet precluded. Accordingly, the branch of Hardwick's motion for partial summary judgment pursuant to CPLR 3212 as against Paz and Umanzor is denied as triable issues of fact exist.

Inter-County, Soto, and the County of Suffolk move (014) for summary judgment in their favor and maintain that the September 20, 2010, accident was caused solely by Gilpin. Plaintiffs have not opposed the motion. Gilpin opposes the motion. As discussed above, based upon the deposition testimony of Soto, who was driving at 15 miles per hour, the bus was traveling west on Nicolls Road and did not have any traffic control device. As Soto had the right of way, these defendants have established their prima facie entitlement to summary judgment. In opposition, it is incumbent upon Gilpin to produce evidence in admissible form sufficient to require a trial of material issues of fact. Gilpin has failed to do so and has not produced any facts which demonstrate that there was something Soto could have done to avoid the collision. Accordingly, the motion by Inter-County, Soto, and the County of Suffolk pursuant to CPLR 3212 for summary judgment in their favor and dismissal of the complaint as asserted against them is granted.

Dated: August 7, 2015



J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION

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