Krimendahl v Hurley
2015 NY Slip Op 32482(U)
December 10, 2015
Supreme Court, Suffolk County
Docket Number: 13-23167
Judge: Denise F. Molia
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1]

SHORT FORM ORDER

INDEX No. 13-23167

CAL. No. 15-00564MV

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 6-4-15 (#004)
MOTION DATE 6-26-15 (#005)
MOTION DATE 8-17-15 (#006)
ADJ. DATE 8-21-15 (#004 & #005)
ADJ. DATE 10-16-15 (#006)
Mot. Seq. #004 - MotD
#005 - XMD
#006 - MD

-----X

ELIZABETH K. KRIMENDAHL, Individually and as Mother and Natural Guardian of THADDEUS KRIMENDAHL,

Plaintiffs,

- against -

WILLIAM C. HURLEY and PECONIC BEVERAGE EAST, INC.,

Defendants.

-----X

KEVIN M. FOX, PLLC
Attorney for Plaintiffs
33 West Second Avenue, P.O. Box 570
Riverhead, New York 11901

SHAYNE, DACHS, CORKER, SAUER & DACHS, LLP
Attorney for Defendant Hurley
114 Old Country Road, Suite 410
Mineola, New York 11501

HAMMILL, O'BRIEN, CROUTIER, DEMPSEY, PENDER & KOEHLER, P.C.
Attorney for Defendant Peconic Beverage East
6851 Jericho Turnpike, Suite 250
Syosset, New York 11791

Upon the following papers numbered 1 to 127 read on these motions for summary judgment and motion for contempt; Notice of Motion/ Order to Show Cause and supporting papers 1-63 (#004); 102-108 (#006); Notice of Cross Motion and supporting papers 69-98 (#005) ; Answering Affidavits and supporting papers 64-66 (#004); 99-100 (#005); 109-110 (#006); 111-112 (#006); 113-120 (#006); Replying Affidavits and supporting papers 67-68 (#004); 100 -101 (#005); 121- 127 (#006) Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions (#004,#005, and #006) are hereby consolidated for purposes of this determination; and it is

RST

ORDERED that the motion (#004) by plaintiffs for an order granting summary judgment in their favor on the issues of liability and their entitlement to punitive damages is granted to the extent set forth, and is otherwise denied; and it is

ORDERED that the cross motion (#005) of defendant Peconic Beverage East, Inc. for an order granting summary judgment dismissing the complaint and all cross claims against it is denied; and it is further

ORDERED that the motion (#006) by defendant William Hurley for an order, among other things, punishing nonparty Maidstone Country Club for contempt is denied.

This action was commenced to recover damages for personal injuries allegedly sustained by plaintiffs as the result of a motor vehicle accident which occurred on July 6, 2013.

Plaintiffs now move for summary judgment on the issue of liability under the doctrine of collateral estoppel, arguing defendant Hurley's criminal conviction arising out of the subject accident bars him from relitigating the issue of his liability. In support of their motion, plaintiffs submit copies of the pleadings, the verified bill of particulars, the transcript of defendant Hurley's deposition testimony, toxicology and crime reports, and the transcripts and certificate of disposition from the criminal proceeding.

Defendant Hurley testified that he is the sole shareholder and officer of defendant Peconic Beverage East, Inc., a retail wholesale beverage distributor. He testified that he also is an employee of defendant Peconic Beverage and worked at the company's store every day during the week of July 1, through July 6, 2013, from 9:00 a.m. to 9:00 p.m. on Monday through Saturday, and from 10:00 a.m. to 6:00 p.m on Sunday. He testified that he does the company's paperwork at home and that he uses his own vehicle to conduct company business. Defendant Hurley testified that on the day of the accident he was tired, as he woke up at 5:20 a.m., and that he barely ate anything. He testified that he drank two 16 ounce cups of vodka with grapefruit juice prior to leaving the store at approximately 6:00 p.m., and that he intended to go home and then go back to the store prior to 9:00 p.m. Hurley further testified that prior to the accident he was driving northbound on Route 114 in the Town of East Hampton, that there was one lane of traffic in each direction, and that the lanes were separated by double yellow lines. He testified that he fell asleep while he was driving and woke up when his vehicle collided with a vehicle driven by plaintiff Elizabeth Krimendahl. He testified that he was taken by ambulance from the scene to Southampton Hospital, where he made a statement to a detective and a blood alcohol test was administered. Hurley testified that he was arrested for driving while intoxicated. The sworn statement Hurley gave to the detective was submitted with plaintiffs' motion. In his statement, Hurley states that he is the owner of Peconic Beverage East, Inc. and that on July 6, 2013, at approximately 6:00 p.m., he drank two strong drinks before he left his store to go home to walk his dog.

The toxicology report from the Suffolk County Office of the Medical Examiner indicates that defendant's blood alcohol level was .14% and the blood test revealed the presence of carboxy-Tetrahydrocannabinol, indicating marijuana use. The crime report and inventory record made by the East Hampton Town Police Department indicates that a money bag and black leather folder from Peconic Beverage containing checks, cash, and business papers were recovered from defendant's vehicle at the accident scene.

Plaintiffs submit a certificate of disposition from the County Court, Suffolk County with the moving papers. According to the certificate of disposition, defendant was arrested on July 6, 2013, the date of the subject accident, and was convicted on January 28, 2014 after pleading guilty to the following offenses: operating a motor vehicle while under the influence of alcohol or drugs in violation of Vehicle and Traffic Law §§1192.2 and 1192.3, assault in the third degree in violation of Penal Law § 120.00 (2), assault in the second degree in violation of Penal Law §120.05 (4), vehicular assault in the second degree in violation of Penal Law§ 120.03 (1), and reckless driving in violation of Vehicle and Traffic Law §1212. On October 14, 2014, the Honorable Hector Comacho imposed Hurley's sentence for such offenses.

It is well settled that a party moving for summary judgment 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 Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). The failure of the moving party to make a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***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 (***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]. The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [1987]).

Plaintiffs seek to invoke the doctrine of collateral estoppel to establish their entitlement to summary judgment on the issue of defendant Hurley's liability. Plaintiffs contend that defendant Hurley's criminal conviction arising out of the subject accident bars him from relitigating the issue of his liability, as the issue of defendant's negligence has already been determined in the criminal proceeding. The Court notes that even without barring defendant from relitigating the issue of his liability, plaintiffs have established as a matter of law that defendant Hurley is liable through Hurley's own deposition testimony.

The Vehicle and Traffic Law establishes standards of care for motorists, and an unexcused violation of such standards of care constitutes negligence per se (*see* ***Barbieri v Vokoun***, 72 AD3d 853, 900 NYS2d 315 [2d Dept 2010]; ***Coogan v Torrisi***, 47 AD3d 669, 849 NYS2d 621 [2d Dept 2008]; ***Dalal v City of New York***, 262 AD2d 596, 692 NYS2d 468 [2d Dept 1999]). Pursuant to Vehicle and Traffic Law § 1126 (a), when official markings are in place indicating those portions of any highway where overtaking and passing or driving to the left of such markings would be especially hazardous, "no driver of a vehicle proceeding along such highway shall at any time drive on the left side of such markings." While every driver also has a duty to see that which should be seen through the proper use of his or her senses and to exercise reasonable care to avoid colliding with another vehicle (*see* ***Weigand v United Traction Co.***, 221 NY 39, 116 NE 345 [1917]; ***Zweeres v Materi***, 94 AD3d 1111, 942 NYS2d 625 [2d Dept 2012]; ***Domanova v State of New York***, 41 AD3d 633, 838 NYS2d 644 [2d Dept 2007]), a driver is not required to anticipate that an automobile going in the opposite direction will cross over into

oncoming traffic (***Sullivan v Mandato***, 58 AD3d 714, 873 NYS2d 96 [2d Dept 2009]). Such conduct constitutes negligence as a matter of law unless justified by an emergency situation which is not created by the driver (***DiSiena v Giammarino***, 72 AD3d 873, 898 NYS2d 664 [2d Dept 2010]).

Defendant Hurley's testimony and admissions establish that he was the sole proximate cause of the accident. Defendant admitted that he consumed alcoholic beverages immediately prior to the accident, that he fell asleep while operating his vehicle, and that he was asleep at the time the accident occurred (***People v Case***, 113 AD3d 872,979 NYS2d 383 [2d Dept 2014] *lv denied* 23 NY3d 961, 988 NYS2d 568, [2014]; ***Amann v Edmonds***, 306 AD2d 362, 760 NYS 2d 858 [2d Dept 2003]).

The doctrine of collateral estoppel, or issue preclusion, mandates that when an issue of fact has been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit (***People v Aguilera***, 82 NY2d 23, 603 NYS2d 392 [1993]). To successfully invoke the doctrine, the issues in both proceedings must be identical, the issue in the prior proceeding must have been actually litigated and decided, there must have been a full and fair opportunity to litigate the issues in the prior proceeding, and "the issue previously litigated was necessary to support a valid and final judgment on the merits" (***Conason v Megan Holding, LLC***, 25 NY3d 1, 6 NYS3d 206 [2015]). The plaintiff in a civil action may invoke the doctrine of collateral estoppel when the prior proceeding is a criminal proceeding and the defendant was convicted based upon facts identical to those in the civil action (***Bazazian v Logatto***, 299 AD2d 433, 749 NYS2d 537 [2d Dept 2002]). Whether the conviction is based on a plea or after trial is of no consequence, the doctrine may be applied if "there is an identity of issues" and the defendant "had a full and fair opportunity to litigate the issues in the criminal action" (***Blaich v Van Herwynen***, 37 AD3d 387, 388, 829 NYS2d 639 [2d Dept 2007]). The burden is on the party seeking to invoke the bar of collateral estoppel to prove that the identical issues were decided in the prior proceeding and are decisive of the present action (***Hartman v Milbel Enters***., 130 AD3d 978, 15 NYS 3d 125 [2d Dept 2015] *citing* ***City of New York v College Point Sports Assn., Inc***., 61 AD3d 33, 876 NYS2d 409 [2d Dept 2009]). The party opposing the use of the doctrine has the burden of establishing the absence of a full and fair opportunity to contest the prior determination (*id*).

Here, plaintiffs sustained their burden by submitting evidence that defendant Hurley was convicted for the manner in which he operated his vehicle at the time of the subject accident. The complaint alleges, among other things, that on July 6, 2013, defendant Hurley operated his vehicle under the influence of alcohol and drugs, that he operated his vehicle in a reckless manner, and that such conduct caused a collision between his vehicle and plaintiffs' vehicle resulting in serious personal injuries to both plaintiffs. At his plea allocution, defendant Hurley admitted that on July 6, 2013, he was operating his vehicle with .08 of one percent of alcohol in his blood, that his vehicle crossed the dividing lines into oncoming traffic, and that he was reckless in causing the accident and resulting injuries to both plaintiffs. Thus, plaintiffs met their burden of establishing their prima facie entitlement to judgment as a matter of law on the issue of liability against defendant Hurley (*see* ***Morrow v Gallagher***, 113 AD3d 827, 979 NYS2d 395 [2d Dept 2014]).

Plaintiffs, having established a prima facie case of entitlement to judgment as a matter of law, shifted the burden to defendants to submit evidentiary proof in admissible form raising a triable issue of material fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). To defeat a

motion for summary judgment, a party opposing such motion must lay bare his proof, in evidentiary form. Conclusory allegations are insufficient to defeat the motion (*see* ***Friends of Animals, Inc. v Associated Fur Mfrs.***, 46 NY2d 1065; ***Burns v City of Poughkeepsie***, 293 AD2d 435 [2d Dept 2002]). In opposition to the motion, defendant Hurley has submitted an affirmation of his counsel, who lacks personal knowledge of the facts. Thus, the affirmation has no probative value (*see* ***Cullin v Spiess***, 122 AD3d 792, 997 NYS2d 460 [2d Dept 2014]).

Having determined that defendant Hurley is liable to plaintiffs for the injuries they sustained in the subject accident, the Court turns to the branch of plaintiffs' motion seeking summary judgment on their claim for punitive damages against defendant Hurley. Punitive damages, unlike compensatory damages, serve to deter the defendant, as well as persons similarly situated, from engaging in the wrongful behavior that was the basis for the award (*see* ***Ross v Louise Wise Servs., Inc.***, 8 NY3d 478, 836 NYS2d 509 [2007]). They further serve to punish the wrongdoer, much like criminal sanctions do (*id.*). An award of punitive damages in a civil action is allowable even if the wrongdoer was previously convicted for the same conduct (***Wittman v Gilson***, 70 NY 2d 970, 595 NYS2d 795 [1988]). Punitive damages are not available in an ordinary negligence action, as the wrongdoer must have acted maliciously, wantonly, or recklessly (***Kopec v Hempstead Gardens,*** 264 AD2d 714, 696 NYS 2d 53 [2d Dept 1999]). Furthermore, the award must advance a strong public policy of the state by deterring its future violation, and the conduct must be sufficiently blameworthy (***Randi A. J. v Long Is. Surgi-Center***, 46 AD3d 74, 842 NYS 2d 558 [2d Dept 2007]).

The standard of proof for an award of punitive damages in the Second Department is clear and convincing evidence (***Randi A. J. v Long Is. Surgi-Center***, 46 AD3d 74, 842 NYS2d 2d 558; ***Orange & Rockland Util. v Muggs Pub***, 292 AD2d 580, 739 NYS2d 610 [2d Dept 2002]). Evidence that a defendant was driving while intoxicated, unaccompanied by additional evidence that the defendant engaged in wanton or reckless conduct, is insufficient to support an award of punitive damages (***Chiara v Dernago***, 128 AD3d 999, 11 NYS3d 96 [2d Dept 2015]; ***Rodgers v Duffy***, 95 AD3d 864, 944 NYS2d 175 [2d Dept 2012]; ***Deon v Fortuna***, 283 AD2d 388, 389, 724 NYS2d 450 [2d Dept 2001]). Inquiry must be made on a case-by-case basis to account for the nature of the wrongdoer's conduct and the level of intoxication (*id*). Here, such inquiry is unnecessary, as the issue of defendant's conduct was determined in the prior criminal proceeding under a more stringent standard of proof. The three assault charges that defendant was convicted of all require a mental state of recklessness. Thus, defendant is estopped from relitigating this issue, and the previous determination of his recklessness, established by his criminal conviction, entitles plaintiffs to an award of punitive damages (***Chiara v Dernago***, 128 AD3d 999, 11 NYS3d 96). The determination of the amount of the award, however, necessitates a trial on damages.

With respect to defendant Peconic Beverage East, plaintiffs seek to hold the corporation liable for the actions of its sole shareholder and employee, defendant Hurley, under the doctrine of respondeat superior. Business corporations are vicariously liable, under the doctrine of respondeat superior, for the torts of their employees committed within the scope of the corporate business (***Poplawski v Gross***, 81 AD3d 801, 917 NYS2d 247 [2d Dept 2011]; ***Connell v Hayden,*** 83 AD2d 30, 59, 443 NYS2d 383 [2d Dept 1981]). Whether an act of the employee falls within the scope of the employer's business depends upon whether the act furthers the employers interest or business (***Holmes v Gary Goldberg & Co., Inc.***, 40 AD3d 1033, 838 NYS2d 105 [2d Dept 2007]). An employer, however, cannot be held vicariously

liable for its employee's alleged tortious conduct if the employee was acting solely for personal motives unrelated to the furtherance of the employer's business at the time of the incident (***Gui Ying Shi v McDonald's Corp.***, 110 AD3d 678, 972 NYS 2d 307 [2d Dept 2013]). Whether a particular act was within the scope of employment depends heavily on factual considerations and is generally a question of fact for the jury (*see* ***Petrescu v College Racquet Club***, 40 AD3d 947, 838 NYS 2d 574 (2nd Dept 2007]). In general, travel to and from work is not considered to be within the scope of employment (***Lundberg v State***, 25 NY2d 467, 306 NYS2d 947 [1969]). However, an exception known as the "dual purpose" rule may impose liability upon the employer where the employment created the necessity for travel. It may be applied only when it has been determined that there was a dual purpose for the travel, i.e., business and personal (***Swartzlander v Forms-Rite Bus. Forms & Print. Serv.***, 174 AD2d 971, 572 NYS2d 537 [4th Dept], *affd* 78 NY2d 1060, 576 NYS2d 214 [1991]).

Here, plaintiffs' submissions raise a triable issue of fact as to whether defendant Hurley was traveling to or from the bank on behalf of defendant corporation, in furtherance of corporate business, or whether, as defendant Hurley testified, his purpose of travel at the time of the accident was to go home and walk his dog (*see* ***Riviello v Waldron***, 47 NY2d 297, 418 NYS2d 300 [1979]). As plaintiffs failed to establish, prima facie, their entitlement to judgment as a matter of law, there is no need to review the sufficiency of the defendant Peconic Beverage's opposition papers, and the branch of plaintiffs' motion for summary judgment on the issue of liability against defendant Peconic Beverages East is denied (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316). Based upon this determination, the application by plaintiffs for a determination as to whether they are entitled to punitive damages against defendant Peconic Beverage is denied.

The motion of defendant Peconic Beverage East seeking summary judgment in its favor is denied. Defendant Peconic Beverage argues that defendant Hurley was not acting within the scope of his employment or in furtherance of the corporate business. However, this claim is made by its attorney, who has no personal knowledge of those facts. It is well settled that an affirmation of an attorney who lacks personal knowledge of the facts has no probative value (*see* ***Cullin v Spiess***, 122 AD3d 792, 997 NYS 2d 460 [2d Dept 2014]). No affidavit from defendant Hurley has been submitted with the motion nor has any other competent evidence been submitted in support of same. Defendant's submissions are identical to the ones submitted by plaintiffs in their motion for summary judgment. Defendant Peconic Beverage has failed to meet its burden of removing the material facts of this case, namely the purpose of defendant Hurley's travel at the time of the accident. Triable issues of fact exist as to what defendant Hurley was doing, and for whom, at the time of the accident.

Defendant Peconic Beverage argues that it does not have a common law duty to protect plaintiffs from the conduct of defendant Hurley and relies on ***Henry v Vann***, 124 AD2d 785, 505 NYS2d 502 (2d Dept 1986). However, ***Henry v Vann*** is distinguishable from the present case, as that case involved a cause of action against an employer based upon negligent supervision of its employee who was not acting within the scope of his employment. This Court has yet to determine whether defendant Hurley was acting within the scope of his employment and corporate business.

The motion by defendant Hurley for an order punishing nonparty Maidstone Country Club for contempt and compelling it to comply with a subpoena duces tecum is denied, as the motion is facially defective. An application to punish for civil contempt must contain on its face a notice that the purpose

of the hearing is to punish the accused for a contempt of court, and that such punishment may consist of a fine, imprisonment, or both, together with the following legend printed or typed in at least an eight-point bold-face type: WARNING: YOUR FAILURE TO APPEAR IN COURT MAY RESULT IN YOUR IMMEDIATE ARREST AND IMPRISONMENT FOR CONTEMPT OF COURT (see Judiciary Law §756).

Here, defendant Hurley's notice of motion failed to include the requisite language. Moreover, Maidstone Country Club is not a party to this action, and a notice of motion by ordinary mail is insufficient to obtain personal jurisdiction over it. Rather, a special proceeding must be commenced to punish a nonparty for contempt (*see* ***State Farm Fire & Cas. v Parking Sys. Valet Serv.***, 85 AD3d 761, 926 NYS2d 541 [2d Dept 2011]; ***Long Is. Trust Co. v Rosenberg***, 82 AD2d 591, 442 NYS2d 563 [2d Dept 1981]).

Furthermore, the subpoena was not issued by the attorney of record as required by CPLR § 2302. The subpoena was served on Maidstone on June 25, 2015 and issued by John Mulvehill, as counsel for defendant Hurley. However, Mr. Mulvehill did not become the attorney of record until June 26, 2015. On June 26, 2015 the undersigned granted defendant Hurley's motion directing that Mr. Mulvehill be substituted as the attorney of record. Additionally, a subpoena served upon a nonparty requires all parties to be served with a copy of the subpoena CPLR 3120(3). The movant failed to serve a copy upon all parties. In view of the foregoing, the remainder of defendant Hurley's motion seeking to compel compliance with the aforementioned subpoena is denied.

Dated: 12-10-15

Hon. Denise F. Molia
A.J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION