Alcide v New York City Transit Auth.
2016 NY Slip Op 30293(U)
February 9, 2016
Supreme Court, Queens County
Docket Number: 22187/12
Judge: Darrell L. Gavrin
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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

RICOT ALCIDE and MELVIN VEGA,	Index No. 22187/12
Plaintiffs,	Motion
- against-	Date September 22, 2015
NEW YORK CITY TRANSIT AUTHORITY, WILLIAM H. CASTRO, THE CITY OF NEW YORK, TRANSIT OPERATING AUTHORITY, METROPOLITAN SUBURBAN BUS AUTHORITY, ABEL CEBELLO and EAN HOLDINGS, LLC,	Motion Cal. No. 1 & 2
	Motion Seq. No. 3 & 4
Defendants.	

The following papers numbered 1 to 20 read on these separate motions by defendants, Abel Cebello and Elrac LLC d/b/a Enterprise Rent-A-Car f/k/a EAN Holdings, LLC s/h/a EAN Holdings, LLC (Elrac), pursuant to CPLR 3212 for summary judgment in favor of defendant, Elrac, as the application of 49 U.S.C. § 30106 bars plaintiffs' action as it relates to Elrac as same is wholly predicated upon the application of New York Vehicle and Traffic Law § 388 (2) and pursuant to CPLR 3212 granting defendants, Cebello and Elrac, summary judgment dismissing plaintiffs' complaint for their failure to satisfy Insurance Law §§ 5102(d) and 5104 (a) as plaintiffs have not sustained "serious injuries" within the meaning of the Insurance Law, and by defendants, New York City Transit Authority, also sued herein as Transit Operating Authority (NYCTA), William H. Castro, and MTA Long Island Bus sued herein as Metropolitan Suburban Bus Authority (MTA) pursuant to CPLR 3212 and/or CPLR 3211 for summary judgment in their favor dismissing plaintiffs' complaint on the grounds that plaintiffs Ricot Alcide and Melvin Vega have not sustained a "serious injury" as that term is defined in the New York Insurance Law § 5102 (d), and as such, do not have a cause of action under New York Insurance Law § 5104 (a), and on this cross motion by plaintiffs to disqualify defense counsel from joint representation of defendants, Cebello and Elrac, on the grounds that a conflict of interest exists pursuant to Rule 1.7 of the Rules of Professional Conduct (22 N.Y.C.R.R. 1200).

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	1-8
Notice of Cross Motion - Affirmation - Exhibits.....	9-12
Affirmation in Opposition - Exhibits.....	13-16
Reply Affirmation.....	17-20

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

This action arises from a motor vehicle accident that occurred on August 1, 2011, at approximately 5:00 P.M., on Atlantic Avenue at or near its intersection with 100th Street, in Queens County, New York. Plaintiffs, Ricot Alcide and Melvin Vega, were passengers on a bus, owned by defendant, NYCTA, and operated by defendant, William H. Castro, which was in a collision with a vehicle, owned by defendant, Elrac, and operated by defendant, Cebello. Defendant, Cebello, had leased the vehicle he was operating from defendant, Elrac, on July 30, 2011. This action was consolidated for joint trial with nine other actions arising from the same motor vehicle accident. Plaintiffs, in their complaint, allege, among other things, that defendants, Elrac and Cebello, and defendants, NYCTA, Castro and MTA, were negligent in the ownership, operation, management, maintenance, supervision, use and control of their respective vehicles.

It is well-settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. (*See Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *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 Univ. Med. Ctr.*, *supra*.) Furthermore, the court's function on a motion for summary judgment is issue finding, not issue determination (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]), or credibility assessment. (*See Ferrante v American Lung Association*, 90 NY2d 623 [1997].) Once this showing has been made, however, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a triable issue of fact. (*See Alvarez v Prospect Hosp.*, *supra*.)

49 USC § 30106 (the Graves Amendment) is federal legislation that has been enforced as preempting the vicarious liability imposed on commercial lessors by Vehicle and Traffic Law § 388. (*See Graham v Dunkley*, 50 AD3d 55 [2008]; *see also Hernandez v Sanchez*, 40 AD3d 446 [2007]; *Kuryla v Halabi*, 39 AD3d 485 [2007].) The Graves Amendment states, in pertinent part, that: "An owner of a motor vehicle that rents or leases the vehicle to a person . . . shall not be liable under the law of any State . . . by reason of being the owner of the vehicle . . . for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if– (1) the owner . . . is engaged in the trade or business of renting or leasing motor vehicles; and (2) there is no negligence or criminal wrongdoing on the part of the owner. . . ." (*See Olmann v Neil*, 132 AD3d 744 [2015]; *see also Bravo v Vargas*, 113 AD3d 579 [2014]; *Ballatore v HUB Truck Rental Corp.*, 83 AD3d 978 [2011].)

Defendants, Cebello and Elrac, here, failed to establish, *prima facie*, defendant, Elrac's entitlement to judgment as a matter of law pursuant to the Graves Amendment. In support of this branch of their motion, defendants, Cebello and Elrac, rely on the affidavit of Lauren R. Farrell, a risk manager for defendant, Elrac. While this affidavit establishes that defendant, Elrac, is engaged in the business of renting vehicles, it fails to establish that the subject accident was not caused by the condition of the rented vehicle as a consequence of defendant, Elrac's allegedly negligent failure to maintain it. (*See Olmann v Neil*, *supra*; *cf. Bravo v Vargas*, *supra*.) In her affidavit, Farrell simply avers that her search of a file pertaining to the subject vehicle revealed no complaints registered by renters concerning the maintenance or performance of the vehicle. Farrell fails to indicate what maintenance, if any, was performed on the subject vehicle, or the condition of the vehicle on the date of the accident. (*See Olmann v Neil*, *supra*.) While Farrell avers that defendant, Elrac, would view its vehicles between rentals, such visual inspection, alone, is insufficient to establish the condition of the vehicle and/or that it is properly maintained. Since defendants, Cebello and Elrac, failed to satisfy their initial burden on this branch of the motion, it is unnecessary to consider the papers submitted by plaintiffs and defendants NYCTA, Castro and MTA in opposition thereto. (*See Winegrad v New York Univ. Med. Ctr.*, *supra*.)

Accordingly, the branch of the motion of defendants, Cebello and Elrac, for summary judgment dismissing plaintiffs' complaint as against defendant Elrac pursuant to the Graves Amendment is denied.

Plaintiffs cross-move to disqualify defense counsel, Carman Callahan & Ingham, LLP, from the joint representation of defendants, Cebello and Elrac, on the ground that a conflict of interest exists pursuant to Rule 1.7 of the Rules of Professional Conduct.

Once the Graves Amendment is determined to be inapplicable to a matter, or a particular action falls outside the ambit of the Graves Amendment, it is reasonable to conclude that the potential for a conflict of interest exists between the interests of the rental/leasing company and the driver of the vehicle, both of whom are defendants in the same negligence action with foreseeable cross-claims against one another. (*See* Rules of Professional Conduct [22 NYCRR 1200.0] Rule 1.7 [a][1].)

Since, however, in this case, there has been no such determination, plaintiffs' cross motion seeking to disqualify defense counsel, Carman Callahan & Ingham, LLP, from the joint representation of defendants, Cebello and Elrac, on the ground that a conflict of interest exists pursuant to Rule 1.7 of the Rules of Professional Conduct is premature.

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[1]Rule 1.7(a)(1) of The Rules of Professional Conduct [22 NYCRR 1200.0] provides that, "Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that . . . the representation will involve the lawyer in representing differing interests."

Moreover, paragraph (b) of Rule 1.7 sets forth necessary conditions that allow an attorney to represent parties with differing interests. Specifically, Rule 1.7(b) of The Rules of Professional Conduct [22 NYCRR 1200.0] provides that "Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consent, confirmed in writing."

Accordingly, paintiffs' cross motion seeking to disqualify defense counsel from the joint representation of defendants, Cebello and Elrac, on the ground that a conflict of interest exists pursuant to Rule 1.7 of the Rules of Professional Conduct is denied without prejudice to renew.

Defendants, Cebello and Elrac, also move for summary judgment in their favor dismissing plaintiffs' complaint and all cross claims against them on the ground that both plaintiffs, Alcide and Vega, did not sustain "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the subject accident. In a separate, belated motion for summary judgment, defendants NYCTA, Castro and MTA adopt the arguments and evidence offered by defendants, Cebello and Elrac, on their serious injury motion. Although the motion of defendants NYCTA, Castro and MTA for summary judgment was untimely made (*see* CPLR 3212[a]), since it was made on identical grounds as the timely motion of defendants, Cebello and Elrac, there is "good cause" for permitting the late motion. (*See Alexander v Gordon*, 95 AD3d 1245 [2012].)

Defendants failed to meet their respective *prima facie* burdens of showing that both plaintiffs, Alcide and Vega, did not sustain "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the subject accident. (*See Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *see also Gaddy v Eyler*, 79 NY2d 955 [1992].) In support of their motions, defendants rely upon, among other things, the affirmed medical reports of their examining physicians, Dr. Edward A. Toriello and Dr. Jean-Robert Desrouleaux. When Dr. Toriello examined plaintiffs Vega and Alcide almost four years post-accident, in February and March 2015, respectively, he noted significant limitations in the cervical regions of both plaintiffs' spines. (*See Cheour v Pete & Sals Harborview Transp., Inc.*, 76 AD3d 989 [2010]; *see also Smith v Hartman*, 73 AD3d 736 [2010]; *Leopold v New York City Tr. Auth.*, 72 AD3d 906 [2010].) While Dr. Toriello intimated that the limitations noted were subjective in nature, he failed to explain or substantiate with any objective medical evidence, the basis for his

conclusions that the noted limitations were self-restricted. (*See Swensen v MV Transp., Inc.*, 89 AD3d 924 [2011]; *see also Granovskiy v Zarbaliyev*, 78 AD3d 656 [2010]; *Bengaly v Singh*, 68 AD3d 1030 [2009].) Although, in contrast to Dr. Torriello's findings, Dr. Desrouleaux found that plaintiffs Vega and Alcide had full ranges of motion in the cervical regions of their spines, this conflicting medical evidence by defendants' examining physicians as to the actual cervical ranges of motion which plaintiffs Vega and Alcide displayed also raises triable issues of fact which preclude the granting of summary judgment.

Since defendants failed to meet their respective prima facie burdens on their motions for summary judgment, it is unnecessary to determine whether plaintiffs' papers, submitted in opposition, are sufficient to raise any triable issues of fact. (*See Bengaly v Singh*, *supra*; *see also Chang Ai Chung v Levy*, 66 AD3d 946 [2009]; *Coscia v 938 Trading Corp.*, 283 AD2d 538 [2001].)

Accordingly, the branch of the motion of defendants Cebello and Elrac and the motion of defendants NYCTA, Castro and MTA seeking summary judgment dismissing plaintiffs' complaint on the ground that both plaintiffs, Alcide and Vega, did not sustain serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident are denied.

Dated: February 9, 2016

DARRELL L. GAVRIN, J.S.C.