| **Jurjevic v Singh** |
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| 2018 NY Slip Op 30414(U) |
| March 12, 2018 |
| Supreme Court, New York County |
| Docket Number: 151928/16 |
| Judge: Adam Silvera |
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**SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY**
**PRESENT: Hon. Adam Silvera Part 22**

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**HELEN JURJEVIC,**

**Plaintiff,**

**-against-**

**TARSEM SINGH and FAST OPERATING, CORP.,**

**Defendants.**

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**DECISION/ORDER**

**INDEX NO. 151928/16**
**MOTION SEQ NO. 001**

**ADAM SILVERA, J. :**

In this personal injury action, defendant Fast Operating Corp., doing business as "Carmel" (hereinafter Carmel or Fast Operating) moves for an order: (1) pursuant to CPLR 31116 (a), striking the errata sheet of plaintiff, Helen Jurjevic, as plaintiff made substantive changes to her deposition transcript without the required explanation for such changes; (2) pursuant to CPLR 3212 (b), granting summary judgment dismissing the complaint in favor of Carmel on the issue of liability as there is no triable issue of fact since: (a) plaintiff does not know what caused her accident, and (b) defendant Tarsem Singh (Singh) was not an employee of Carmel such that Carmel cannot be vicariously liable for Singh's actions; and (3) pursuant to CPLR 3212 (b) for summary judgment dismissing the cross complaint by Singh against Carmel as there are no triable issues of fact as Singh does not state a viable claim against Carmel.

Defendant Singh cross-moves for an order: (1) pursuant to CPLR 3212, for dismissal of the complaint and any cross claims brought against him; and (2) pursuant to CPLR 3116, striking plaintiff's errata sheet as plaintiff made substantive changes to her deposition transcript without

the required explanation for such changes. Plaintiff opposes the motion and cross motion.

**Background**

*General Background*

On November 10, 2015, plaintiff, a then 86-year old woman, sustained personal injuries as a result of allegedly being struck by a car. The alleged accident was a one-car motor vehicle accident. Plaintiff alleges that at the time of the accident she was crossing the intersection of 49th Street and Second Avenue in the County, City and State of New York, when she was struck by a motor vehicle bearing the license plate T524345C. The motor vehicle in question was owned, operated and controlled by Singh. Plaintiff alleges that Singh was employed by Carmel. In the verified answer dated April 5, 2016, Singh does not deny that he was the title and registered owner of the vehicle at issue, and does not deny that he operated and controlled said vehicle.

Carmel is a New York City Taxi and Limousine Commission (TLC) licenced "Livery Based Station" (Base) otherwise known as a car service. A livery base station is a business for dispatching for-hire vehicles (*see* RCNY § 59B-03 [f]). When a member of the public seeks transportation from a car service, they are required to contact a licensed Base in order to hire a vehicle. This is because, unlike a taxi, livery vehicles are only permitted to be dispatched from a Base on a prearranged basis (*see* RCNY § 59B-03 [m] [1]). The owner and operator of a for-hire livery vehicle can only transport passengers for-hire via prearrangement through a licensed base station (*see* RCNY § 59A-25 [a] [1]). Carmel is only permitted to send dispatches to for-hire vehicles that are affiliated with its Base (*see* RCNY § 59B-17 [d]). All licensed base stations must comply with the TLC's rules and regulations.

Carmel claims it has no control over vehicles affiliated with its Base, and has no control

over the persons who operate such livery vehicles. Carmel does not own or lease the vehicles and does not hire the drivers. While the vehicle owned and operated by Singh was affiliated with Carmel, Carmel contends that it is not the employer of the affiliated drivers and, therefore, cannot be held vicariously liable under a theory of respondeat superior.

*Deposition Testimony & Errata Sheet*

On November 3, 2016, plaintiff's deposition was held. After the deposition, the transcript was sent to plaintiff's counsel for her examination. On January 9, 2017, counsel for plaintiff sent plaintiff's signed and notarized transcript, as well as an "Affidavit of Correction". Plaintiff made her changes immediately after receiving the transcript. No reason was given for the substantive changes made by plaintiff.

The court's review of the errata sheet reflects the following changes. The transcript reflects the answer "Yes, I do not know how long I was —" (plaintiff tr at 21, lines 4-7). Plaintiff corrected the answer to "Yes, I do not know how long I was *on the street*" (emphasis added) (Shanker affirmation, exhibit F). On page 22, plaintiff changed her answer in response to the question "Do you remember the car actually coming into contact with your body from "No" to "Yes" (*cf.* plaintiff tr at 22, lines 19-21 *with* exhibit F). On page 42 of the transcript, plaintiff was asked "Where did Kathy (plaintiff's daughter) live when this happened?" Plaintiff responded, "We were in Astoria at that time" (plaintiff tr at 42, lines 3-5). On the errata sheet, plaintiff changed her answer to "We live in New York City - 47th Street at that time" (Shanker affirmation, exhibit F). In response to whether plaintiff had gone to physical therapy before the accident, plaintiff changed her response from "Yes" to "see people there inside exercising but I was never there for treatment before the accident" (*cf.* hearing tr at 48, lines 2-4 with exhibit F).

Regarding her testimony on page 52, plaintiff initially answered "When I was sixty-five, now I am soon a hundred (hearing tr at 52, lines 2-3). Plaintiff changed her answer to "I was 65" (Shanker affirmation, exhibit F).

*Singh's testimony regarding work relationship at Carmel*

On December 14, 2016, Singh was deposed. He testified that he bought the vehicle at issue, a 2013 Toyota, new in 2013 (Singh tr at 5-6). Singh testified that he has a written agreement with Carmel that he entered into after 9/11/01 (*id.* at 32). Singh operates his own vehicle under Fast Operating's business name, Carmel (*id.* at 31). When he joined Carmel, Singh attended a one-day training about how to make a pick up and speaking with the customers, but not on how to operate the vehicle (*id.* at 33, 60-61). He also signed a document permitting Carmel to check on his driving record (*id.* at 33-34).

Singh's vehicle is inspected by Carmel two times per week, and if the vehicle does not pass their inspection, even if it is a scratch on the vehicle, or if a customer complains, Carmel will not dispatch a job to the vehicle (*id.* at 35-36, 37-38). For his own benefit, Singh brings the car in for an inspection and approximately every six months he changes the tires and brakes (*id.* at 6-7). Carmel requires the drivers to maintain a particular level of insurance (*id.* at 37). Each year, Singh gives his new insurance and inspection to the company (*id.* at 32). If a driver goes on vacation for more than two weeks, Carmel requires the driver to surrender the plates to the Carmel office, to ensure that the driver is not working anywhere else (*id.* at 56-57) or that no one else is using the vehicle (*id.* at 66). When he is not using the vehicle as a for-hire vehicle, it is parked in his garage (*id.*). Drivers are given stickers to put on their car to indicate that they drive for Carmel (id. at 66-67). Also, Singh has a Carmel company phone that displays which job is

coming in, with the name, client's telephone number and location (*id.* at 11, 26)

Singh determines the days and hours that he is going to work, and is not on any fixed schedule, he can take a break at any time, and can go on vacation at any time (*id.* at 53, 55). The hours are set by the driver, based on how many hours they want and when (*id.* at 36, 43). Carmel does not withhold any taxes; Singh is responsible for paying his own income tax (*id.* at 55). Singh does not receive any health insurance, pension plan or fringe benefits from Carmel (*id.* at 52). Nor does he receive a W-2 from Carmel (*id.* at 59). If Singh does not want to take any more passengers, he simply shuts off his radio (*id.* at 63). There is no requirement that Singh request a certain number of dispatches per day (*id.*). His earnings are determined based on the number of jobs that he chooses to accept (*id.* at 63-64). Singh is paid by credit card and pays a fee of more than 35 percent to Carmel on the total booking, and extra GPS and radio fee, both of which are $5 per day (*id.* at 34-35, 50). If Singh does not perform any jobs for Carmel, Carmel does not pay him for anything (*id.* at 49).

Singh pays his own insurance, registration, gas, and upkeep on the vehicle (*id.* at 45-46). Singh also pays for his own TLC license (*id.* at 43-44). Carmel does not provide the drivers with vehicles, and has no financial interest in the drivers' vehicles (*id.* at 44). Singh may leave Carmel and affiliate with another base at any time, however, he is not allowed to work with another affiliated base while working at Carmel (*id.* at 50-51).

**Discussion**

Defendants argue in their respective motion and cross motion that the errata sheet submitted by plaintiff should be stricken as plaintiff failed to provide the reasons for making substantive changes.

Pursuant to CPLR 3116, after testimony is transcribed and certified by the court reporter before whom it was taken, the transcript is to be submitted to the witness to read and sign. The witness is entitled to make "changes in form or substance" at the end of the testimony (CPLR 3116). "[A]ny changes in form or substance which the witness desires to make shall be entered at the end of the deposition with a statement of the reasons given by the witness for making them" (CPLR 3116 [a]). First Department case law suggests that a court may properly reject an errata sheet on the grounds that it lacks the statement of reasons for the corrections (*see e.g., Cataudella v 17 John St. Assoc., LLC*, 140 AD3d 508 [1st Dept 2016]; *Schachat v Bell Atl. Corp.*, 282 AD2d 329 [1st Dept 2001]). However, it remains within the court's discretion to permit changes or corrections to a deposition transcript, even though there was a failure to follow the proper procedure (*Keenan v Munday*, 79 AD3d 1415, 1417 [3d Dept 2010] ["(a) trial court has the inherent power to permit changes or corrections to a deposition transcript, even though there was a failure to follow the proper procedure"]; *Binh v Bagland USA, Inc.*, 286 AD2d 613, 614 [1st Dept 2001]; *Prunty v Keltie's Bum Steer*, 163 AD2d 595, 596 [2d Dept 1990]). Based on the court's review of the errata sheet and corresponding testimony, the court finds that many of the changes were not substantive as defendants contend. Rather, than strike the errata sheet on procedural grounds, the court seeks to make a determination on the merits. Accordingly, the court will permit the continued deposition of plaintiff limited to questions concerning the aforementioned changes to her testimony as indicated in the errata sheet.

The court next turns to defendant Carmel's motion for summary judgment. A 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 demonstrate the absence of any material issues of

fact (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Failure to make this showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853). Once this showing is made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Alvarez v Prospect Hosp.*, 68 NY2d at 324). In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party (*Dauman Displays v Masturzo,* 168 AD2d 204, 205 [1st Dept 1990] [internal citation omitted]).

Plaintiff repeatedly testified that she was hit in the back by a car at the intersection at issue (plaintiff tr at 13, 14, 36, 76-77). Michael Lebowitz, the EMT who provided treatment to plaintiff at the scene, testified that when he asked plaintiff how she was injured, plaintiff responded that she was hit by a car (Lebowitz tr at 11, 18-19; *see also* Owen affirmation, exhibit B). Plaintiff also told the police at the scene that she was hit by a car (Owen affirmation, exhibit D). Plaintiff contends that the only car at the intersection in question that is involved in this matter is owned and operated by Singh. Singh testified that before plaintiff was hit, plaintiff was crossing the street in the crosswalk with the right of way as the light was green for traffic on 49th Street. She was walking from the west side of Second Avenue to the east side, and was crossing directly in the location where Singh was waiting to make a turn from 49th Street onto Second Avenue. Singh testified that he attempted to make a left turn into the extreme lane of Second Avenue, which is on the east side of the downtown lanes of traffic. When he stopped, plaintiff's head and umbrella were by the left front tire of his car and his vehicle had crossed over the

crosswalk (Singh tr at 40).

Viewing the evidence in the light most favorable to plaintiff, the court finds triable issues of fact exist as to whether plaintiff was in the intersection crossing at the time of the accident (*see Moreira v Ramos*, 95 AD3d 561, 561-562 [1st Dept 2012] [finding issue of fact where the defendant testified that the plaintiff was "messing with a radio" and walked into his van, despite the plaintiff's limited recollection of the accident, taking account of the fact that the plaintiff testified she remembered reaching the corner of the intersection and that she was not listening to music]; *Carswell v Banda*, 88 AD3d 604 [1st Dept 2011] [conflicting accounts of damages sustained when struck by a taxi cab raise triable issues of fact]; *Nesper v Goldmag Hacking Corp.*, 77 AD3d 598 [1st Dept 2010] [question of fact where there were conflicting affidavits between the parties - the plaintiff supplied an affidavit stating that she was struck by defendant's vehicle crossing a street in a crosswalk with the green light, the defendant's affidavit stated that his vehicle never struck plaintiff]; *see also Elamin v Roberts Express*, 290 AD2d 291 [1st Dept 2002]). Therefore, this branch of the motion and cross motion by defendants is denied.

Carmel's Employer Status

Carmel asserts that it is entitled to summary judgment because it is not Singh's employer and, therefore, cannot be found vicariously liable for Singh's actions. Singh does not dispute this. Plaintiff, however, opposes, stating that there are questions of fact surrounding whether Singh is in fact an employee of Carmel.

"Employee" is defined in Labor Law article 6 as "any person employed for hire by an employer in any employment" (Labor Law § 190 [2]). This definition excludes independent contractors, and the determination of whether an employee-employer relationship exists depends

on evidence that the employer exercises either control over the results produced or over the means used to achieve the results (*Hernandez v Chefs Diet Delivery LLC*, 81 AD3d 596, 597-598 [2d Dept 2011]). "Factors relevant to assessing control include whether the worker (1) worked at his own convenience, (2) was free to engage in other employment, (3) received fringe benefits, (4) was on the employer's payroll and (5) was on a fixed schedule" (*Barak v Chen*, 87 AD3d 955, 957 [2d Dept 2011], citing *Bynog v Cipriani Group*, 1 NY3d 193, 198 [2003]). "Where the proof on the issue of control presents no conflict in evidence or is undisputed, the matter may properly be determined as a matter of law" (*Barak*, 87 AD3d at 957 [internal quotation marks and citation omitted]). The nature of the relationship, however, is often "fact sensitive and presents a question for the trier of fact" (*Hernandez*, 81 AD3d at 598).

Singh is remarkably silent with respect to this branch of the motion. Similar to this case, in *Barak v Chen* (87 AD3d 955, 957 [2d Dept 2011]), the Second Department found that the defendants, Carmel and Fast Operating, were entitled to judgment as a matter of law, where they showed that people driving for Carmel, "owned and maintained their own vehicles, paid for their own automobile insurance, received no salary but only retained a percentage of the fares and all of the tips, scheduled their own working hours, had discretion to reject dispatches and were not provided with W-2 statements." In *Barak,* the plaintiff's evidence that Chen was required to wear a Carmel uniform, bear the Carmel logo on his vehicle and the presentation of a Carmel coupon for the ride was "insufficient to raise a triable issue of fact as to whether Chen was an employee" of Carmel/Fast Operating (*id.* at 977-978).

The First Department has similarly held likewise (*see Zeng Ji Liu v Bathily*, 145 AD3d 558 [1st Dept 2016] [holding management of taxi cab medallion, without more, insufficient to

raise a triable issue of fact, where no guaranteed compensation, and free from defendant's direction and control]; *Alves v Petik*, 136 AD3d 426 [1st Dept 2016] [affirmed driver was an independent contractor where he worked without a schedule at his own convenience and did not receive a fixed salary or benefits, among other things; handbook containing a general dress code enforced by a committee of fellow drivers found insufficient to raise an issue of fact]; *Chaouni v Ali*, 105 AD3d 424 [1st Dept 2013] [holding driver was an independent contractor, finding that the defendant's drivers own their own vehicles, were responsible for vehicle maintenance, paid for insurance, determined the days and hours they worked, could take breaks or end their shifts whenever they wanted, kept a fix percentage of fares, did not withhold taxes and were not issued W-2 forms]). Moreover, the First Department has found that any background checks of drivers, weekly inspections of vehicles and acceptance of credit card payments on a driver's behalf, as is present in this case, are "indicative of mere incidental or general supervisory control that does not rise to the level of an employer-employee relationship" (*Zeng Ji Liu*, 145 AD3d at 559, quoting *Chaouni*, 105 AD3d at 425 [defendant's weekly inspection of vehicles and acceptance of credit card payments does not rise to the level of an employer-employee relations but is rather "general supervisory control"]).

While plaintiff claims that issues of fact were raised by the testimony of John Roberts, a representative of Fast Operating, who is paid through another company, the court finds that Singh's testimony alone establishes that he was working as an independent contractor. Singh worked at his own convenience, choosing the days and hours he was willing to work, received no fringe benefits, was paid based on a remaining percentage of a trip's fare, and did not receive a W-2 from Fast Operating. While there was testimony that Singh was required to surrender his

plates if he was taking a vacation for more than two weeks and could not work for another dispatch company while working at Fast Operating, the court finds that these two factors alone are not sufficient to raise a triable issue of fact. Moreover, such restrictive covenants are common in an independent contractor relationship (*see e.g., DS Courier Servs., Inc. v Seebarran*, 40 AD3d 271, 271 -272 [1st Dept 2007]; *American Para Professional Sys. v Examination Mgt. Servs.*, 214 AD2d 413, 414 [1st Dept 1995]).

Accordingly, the court grants defendant Fast Operating's motion and the complaint is dismissed as against it. The court also grants defendant Fast Operating's motion to dismiss any and all cross claims against it, as Singh does not oppose this branch of the motion.

**Conclusion**

Accordingly, it is

ORDERED that the motion by defendants Fast Operating Corp. and cross motion by defendant Tarsem Singh seeking to strike the errata sheet of plaintiff, Helen Jurjevic, is denied, and the court will permit the continued deposition of plaintiff limited to questions concerning the changes to her testimony as indicated in the errata sheet; and it is further

ORDERED that the motion by defendant Fast Operating and cross motion of Tarsem Singh seeking dismissal of the complaint on the grounds that there is no triable issues of fact is denied; and it is further

ORDERED that the motion by defendant Fast Operating seeking summary judgment dismissal of the complaint against it as Singh was not an employee of Fast Operating is granted, and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to

enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the motion by defendant Fast Operating seeking summary judgment dismissal of the cross claims as against it are likewise dismissed in their entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further;

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 148), who are directed to mark the court's records to reflect the change in the caption herein.

Dated: March 12, 2018

ENTER:

Hon. Adam Silvera, J.S.C.