| **Stoves v Courier Car Rental, Inc.** |
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| 2019 NY Slip Op 30389(U) |
| February 14, 2019 |
| Supreme Court, Kings County |
| Docket Number: 505062/13 |
| Judge: Carolyn E. Wade |
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At an IAS Term, Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 14th day of February, 2019.

P R E S E N T:

HON. CAROLYN E. WADE,
Justice.

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JOHANES STOVES,

Plaintiff,

- against -

Index No. 505062/13

COURIER CAR RENTAL, INC., RGIS LLC, WOLLETTE KWAMEN AND LUIS G. VELAZCOR,

Defendants.

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The following papers numbered 1 to 8 read herein:

| | Papers Numbered |
|---|---|
| Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed | 1-3 |
| Opposing Affidavits (Affirmations) | 4, 6 |
| Reply Affidavits (Affirmations) | 5 |
| Affidavit in Connection With July 19, 2018 Affidavit in Opp. | 7 |
| Notice of Rejection of July Affidavit in Opp. | 8 |

Upon the foregoing papers, defendants RGIS, LLC (RGIS), Courier Car Rental, Inc. (Courier) and Wolette Kwamen (Ms. Kwamen) (collectively, defendants) move, pursuant to CPLR 3212, for an order dismissing the complaint of plaintiff, Johanes Stoves (plaintiff), as against them.

***Background Facts***

This negligence action arises from an April 25, 2013 morning motor vehicle accident on Eastern Parkway at its intersection with Washington Avenue in Brooklyn. Both plaintiff and Ms. Kwamen were RGIS employees at the relevant times herein. Ms. Kwamen was responsible for driving an RGIS leased vehicle to transport her RGIS coworkers, including plaintiff, for RGIS. She drove for RGIS every work day and brought the vehicle home each work night. Then, the next work morning she would resume the routine by picking up her workmates at a specific location for the day's work. "Ms. Kwamen was paid from the time that she started driving in the morning" (*see* Kwamen tr, annexed as exhibit J to defendants' motion papers, at 11). The other workers were not paid until an hour after they had been picked up.

Plaintiff worked for RGIS for a year before the accident and went to different stores at different locations to scan merchandise. Plaintiff and Ms. Kwamen, who lived together and had children, traveled together. Plaintiff testified that "**we would go from the house to work**" (*see* plaintiff's tr, annexed as exhibit G to defendants' motion papers, at 19, line 5), explained that he always went to the meet site with Ms. Kwamen unless she didn't have the van, and, in fact, drove with her to and from the meet site on the day before the accident.[1] Plaintiff and Ms. Kwamen would also drive back to where they

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1 *Id.* at 22, lines 9-15 ("Q. You always went to the meet site? A. **Yes**. Q. Would you ever take public transportation to get the meet site? A. **Unless Wolette don't have the van, then other than that, I take public transportation.**"); *id.* at 26, lines 5-14 ("Q. Did you drive with - - did Wolette drive you to the meet site on the day before the accident? A. **Yes**. Q. Did she drive you home at the end of the day? A. **Yes**. Q. Was that in the same van that was used on the date of the accident? A. **Yes**.").

lived together on those days when she drove the vehicle (*id.* at 24, lines 19-24 and at 25, lines 4-7).

Ms. Kwamen testified that the night before the accident she and plaintiff went to sleep at her sister's house and that at about 4:50 a.m. on April 25, 2013 they left her sister's house and were proceeding in the vehicle to the meeting site when the accident occurred. Ms. Kwamen subsequently sought and was awarded workers' compensation on the theory that, as the driver of the vehicle on her way to pick up her coworkers, she was within the course of her employment. Plaintiff, however, did not file for workers' compensation, has asserted that he was not within the course of employment when the accident occurred and was thus not covered by workers' compensation. Instead, he commenced this negligence action.

Discovery ensued and, following its completion, defendants have moved for summary judgment dismissing plaintiff's complaint. They contend that plaintiff, RGIS's employee, was within the course of his employment when the accident occurred and that the applicable legal theory and exclusive remedy is workers' compensation, not negligence.

***Defendants' Summary Judgment Motion***

Defendants cite cases where an employee on the way to or from work in transportation provided by his employer has been held as acting within the course of employment. They submit that plaintiff in this case was also acting within the course of

his employment when the accident occurred as he rode in the RGIS leased van with Ms. Kwamen heading to the meet site with her.

Defendants reference plaintiff's deposition testimony acknowledging that (a) he would travel to the meet site by either public transportation or in the RGIS leased van Ms. Kwamen operated and that (b) RGIS knew and acquiesced in plaintiff's work travel in the RGIS leased van with Ms. Kwamen (*see* plaintiff's tr at 25, lines 15-17). Such circumstances, defendants submit, allow workers' compensation and warrant summary judgment dismissing the action.

Defendants' assert that this case aligns with other cases holding that a passenger employee is deemed within the course of employment where the employee was traveling to or from work in a vehicle provided by the employer and a coworker drove such vehicle. Defendants emphasize that, as a general principle, merely because an accident did not occur on the job site does not preclude applying workers' compensation, and they contend that cited case law allows workers' compensation where vehicles are considered ancillary to the place of employment.

Defendants further contend that just because plaintiff and his coworker were en route to the meet site to pick up other employees is immaterial as they were heading to work, and thus, still in the course of employment thereby triggering workers' compensation coverage. Defendants therefore urge that workers' compensation is plaintiff's exclusive remedy barring him from bringing this action and warranting its summary judgment dismissal.

***Opposition***[2]

Plaintiff identifies "five (5) narrow exceptions and specific conditions which permit the application of Workers' Compensation to cover injuries incurred during travel-time" (affirmation of plaintiff's counsel in opposition, dated February 1, 2018, at 4)[3] and then excludes them all as inapplicable in this case. Plaintiff contends that none of the exceptions apply here as he was not acting within the course of his employment at the time of the accident and therefore workers' compensation is not his applicable remedy. Consequently, plaintiff submits that he is not barred from bringing a case against his employer as he was not working and ineligible to file for workers' compensation unlike Ms. Kwamen who has already availed herself of the workers' compensation opportunity.

Plaintiff regards arriving at the meet site and signing in to work as the beginning of his work day and posits that just because he tends to travel with Ms. Kwamen on his own volition and for his own convenience does not mean that he is within the course of employment. He further argues that whether the employer is aware of or even approved of his arrangement to occasionally ride in RGIS's vehicle with Ms. Kamen to arrive at the meet time is immaterial to his argument that he was not in the course of employment on

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2 Co-Defendant Luis G. Velazcor's opposition, belatedly filed on August 21, 2018, is not considered as the court, in its March 23, 2018, required filing that opposition by April 16, 2018.

3 Such exceptions cover (1) an "outside worker" e.g., a door-to-door salesperson, i.e. one who does not work at a fixed work site and must travel to reach customers; (2) an employee who performs a "special errand," i.e. a task an employer or supervisor encouraged or specifically requested which benefits the employer or supervisor; (3) an employee who must provide his or her own car for use during the workday and receives travel expenses from the employer; (4) an employee whose home is considered an extension of the employment premises by the workers' compensation board; and (5) where entering or exiting the employer's premises creates a "special hazard' for the employee (*see* 27 N.Y. Prac., Workers' Compensation § 2:24 (2d ed.)

the morning when the accident occurred. Plaintiff considers that his employment begins when he reaches the meet site where the other employees join the van and everyone signs the sign in form.

Plaintiff contends that it was not part of his job to be in the vehicle at the time of the accident, that he was there only for his own convenience, that defendant derives no direct benefit from his traveling with Ms. Kwamen, and that his use of the RGIS van had no connection or benefit at all to his employer. Plaintiff cites several cases where the course of employment has not included travel to and from the job site or a meet site, as here, and views RGIS's position as contravening case law and attempting to avoid responsibility for its negligence that resulted in his injuries. Instead, plaintiff tethers recovery to pursuing his negligence action and sees no legal impediment for simply having traveled in an RGIS controlled vehicle when the accident occurred. He thus urges being allowed to proceed herein.

***Reply***

Defendants reject, as inapplicable, plaintiff's contention that under the general rule an employee's daily commute either to or from a place of employment is not covered by workers' compensation except under the five exceptions and circumstances plaintiff enumerates. They claim that those five exceptions and circumstances do not apply herein and that the inquiry as to whether plaintiff was within the course of his employment when the accident occurred goes beyond the scope of the five exceptions and circumstances.

Defendants assert that they made a prima facie showing of their entitlement to summary judgment because RGIS provided employee transportation and thus shifted the

burden to plaintiff, who, they claim, has provided no evidence to rebut their position. Defendants urge granting their motion even upon analyzing cases plaintiff cites.

***Plaintiff's July 19, 2018 Affidavit in Opposition***

Plaintiff has sought to further challenge defendants' motion by submitting his personal affidavit to "clarify" his deposition testimony. He principally seeks to now amend his testimony regarding the frequency of his travel with Ms. Kwamen. His affidavit states (at ¶¶ 7-8) that he "**would usually take the subway or bus to work on the days that I worked for RGIS**" and that "[he] had **only** gone with her in the van to or from the meet site . . . **on approximately three (3) other occasions before my April 25, 2013 accident**." Plaintiff also requests that RGIS produce records showing dates and locations where he and Ms. Kwamen worked together and dates that Ms. Kwamen had a van to drive to a meet site during the time he worked for RGIS.

***Defendants' Rejection of Plaintiff's July 19, 2018 Affidavit in Opposition***

Defendants responded with a formal notice of rejection of plaintiff's affidavit as untimely, improper, designed only to raise a feigned issue of fact and insufficient to defeat their summary judgment motion. They highlight that plaintiff's July 19, 2018 affidavit comes long after October 10, 2014, when he was sent his September 18, 2014 deposition transcript, and well after the February 2, 2018 stipulated deadline for filing opposition on this motion. Defendants also stress that plaintiff never previously sought production of the records he now seeks and never served defendants with notice to preserve such records.

***Discussion***

Summary judgment is a drastic remedy and should be granted only when it is clear that no triable issues of fact exist (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). The moving party bears the burden of prima facie showing its entitlement to summary judgment as a matter of law by presenting evidence in admissible form "demonstrat[ing] the absence of any material issue of fact" (*see* CPLR 3212 [b]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see* CPLR 3212 ). Failing to make that showing requires denying the motion, regardless of the adequacy of the opposing papers (*see Vega v Restani Constr. Corp.,* 18 NY3d 499, 502 [2012]; *Ayotte v Gervasio*, 81 NY2d 1062 [1993]).

Making a prima facie showing then shifts the burden to the opposing party to produce sufficient evidentiary proof to establish the existence of material factual issues (*see Alvarez*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Accordingly, issue-finding rather than issue-determination is the key in deciding a summary judgment motion (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404, [1957], *rearg denied* 3 NY2d 941 [1957]). "The court's function on a motion for summary judgment is to determine whether material factual issues exist, not resolve such issues" (*Ruiz v Griffin,* 71 AD3d 1112, 1115 [2010] [internal quotation marks omitted]).

Furthermore, the court must evaluate whether the issues of fact alleged by the opposing party are genuine or unsubstantiated (*Gervasio v Di Napoli*, 134 AD2d 235, 236 [1987]; *Assing v United Rubber Supply Co.*, 126 AD2d 590 [1987]; *Columbus Trust Co. v*

*Campolo*, 110 AD2d 616 [1985], *affd* 66 NY2d 701 [1985]). Mere conclusory statements, expressions of hope, or unsubstantiated allegations are insufficient to defeat a motion for summary judgment (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Spodek v Park Prop. Dev. Assoc.*, 263 AD2d 478, 478 [1999]).

Employees are entitled to receive workers' compensation benefits for injuries "arising out of and in the course of the[ir] employment" (Workers' Compensation Law § 10 [1]). The Appellate Division Second Department explained in *Schauder v Pfeifer* (173 AD2d 598, 599 [1991]), that:

> "While it is the general rule that injuries incurred by an employee while commuting to and from work are not deemed to arise out of the course of employment for the purposes of the Workers' Compensation Law, an employer who assumes, by contract or custom, the responsibility of transporting its employees must likewise bear the responsibility for the risks encountered in that transportation (*see, Matter of Holcomb v Daily News*, 45 NY2d 602, 606-607)."

The Court of Appeals in *Holcomb* found that the employer had a common practice of transporting employees to and from work and upheld awarding workers' compensation benefits to the widow of the decedent-employee who was fatally injured when he fell from the truck transporting him to his work site. The decision, as quoted above, recognized that the employer bore "responsibility for the risks encountered in that transportation" and stressed that "[t]his is especially true when the employer is in exclusive control of the conveyance" (*Holcomb,* 45 NY2d at 606-607).

*Schauder* similarly involved an employee injured while riding home from work as a passenger, being driven by an individual the Second Department characterized as "under the direct control of the defendant employer" (173 AD2d at 599), in a van the employer provided for such employee transportation. The Second Department recognized that "the defendant employer had assumed a sole obligation to transport its employees to and from work" (*id.* citing *Holcomb* 45 NY2d at 606). In addition, the *Schauder* decision noted that "Significantly, the driver . . . applied for and received Workers' Compensation benefits in connection with the automobile accident at bar." Hence, the court concluded "upon a review of the facts, that the plaintiff's injuries arose out of the course of her employment as a matter of law, such that the plaintiff's sole remedy is the one provided by the Workers' Compensation Law" (*id.*).

Indeed, the Court of Appeals recounted that "[i]n *Holcomb*, the record indicated that the Daily News had an established custom of permitting its truck drivers to regularly provide other News employees rides to work on its trucks. The company's supervisors and dispatchers were aware of this practice . . ." *Matter of Lemon v New York City Tr. Auth.* (72 NY2d 324, 329 [1988]).

Here, too, plaintiff himself testified that RGIS knew that he and Ms. Kwamen lived together and that he rode home together with her in the RGIS van, that he had driven with her to the meet site on the day before the accident and that she had driven him home at the end of the day before the accident . Hence, this case closely parallels *Matter of Noboa v International Shoppes, Inc.* (122 AD3d 978, 979 [2014]) where the Appellate

Division Third Department affirmed a Workers' Compensation Board ruling awarding benefits. There, too, the appellate decision, quoting *Holcomb,* noted workers' compensation applies "when the employer takes responsibility for transporting employees, particularly where the employer is in exclusive control of the means of conveyance" [internal citations omitted]). The opinion stressed that "[t]he key determination in establishing compensability is whether there is 'some nexus between the accident and the employment'" (*id.* quoting *Matter of Lemon*, 72 NY2d at 329). In *Matter of Noboa*, the nexus existed as the employer also provided a van for transportation which a supervisor drove. Hence, the court recognized that the employer had taken responsibility "for the inherent risks of transporting its employees from the work site and had exclusive control of the conveyance . . ." and held that the "injury arose out of and in the course of [claimant's] employment" (*id.).*

The Appellate Division Second Department had likewise concluded in *Constantine v Sperry Corp.* (149 AD2d 394, 395 [1989]) that a plaintiff-employee's "injuries arose out of, and in the course of his employment" where the employee suffered those injuries while a passenger, being driven by his fellow employee, in a van leased by the employer "for the purpose of transporting its employees to and from work . . ." The appellate decision therefore upheld granting summary judgment to defendant as "plaintiff's sole remedy is the one provided by the Workers' Compensation Law (*see*, Workers' Compensation Law §29 [6])." These rulings cover the present situation where plaintiff was traveling in RGIS's leased van driven by his coworker, to a meeting point to pick up

other employees and continued to the work site as part of RGIS's employee transportation "to and from work."

Workers' Compensation benefits apply for injuries sustained in transporting employees even, as here, where the employee received no pay for the time in transit (*see Matter of Gay v American Janitor Serv.* (122 AD2d 402, 403 [1986] [Third Department upheld Workers' Compensation award to employee injured while being transported to work, pursuant to employer practice of providing transportation in employer vehicle, and employee not compensated for travel time]).

All these factors makes plaintiff's belated July 19, 2018 affidavit in opposition inconsequential even if it were considered. Initially, plaintiff's affidavit, which seeks to change his deposition testimony, is rejected as untimely. Plaintiff has presented his affidavit over three years and eight months after October 14, 2014, when the deposition transcript was submitted to him for review, and thus way beyond the 60-day period for making changes allowed by CPLR 3116 (a).[4] It also comes more than five-and-a half months after plaintiff's February 2, 2018 stipulated date for filing opposition to this motion.

In addition, plaintiff fails to show the requisite good cause for extending the sixty-day time limit.[5] Indeed, plaintiff's counsel attributes the delay simply because "my client

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4 Specifically, that section pertinently states that "[n]o changes to the transcript may be made by the witness more than sixty days after submission to the witness for examination."

5 Specifically, that section pertinently states that "the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration for the time

had not completely understood some things about the motion" (*see* affirmation of plaintiff's counsel in connection with July 19, 2018 affidavit in opposition at ¶ 3). Cases have rejected such motions involving much shorter delays (*see Marzan v Persaud,* 29 AD3d 652, 653 [2006] [Second Department rejected three-month late correction sheet where "plaintiff made no showing of good cause for submitting the correction sheet more than three months after the expiration of the 60-day period for making [deposition] corrections"]; *Zamir v Hilton Hotels Corp.*, 304 AD2d 493, 494 [2003] [First Department rejected two-month late correction sheet where plaintiff failed to "make any showing of good cause to extend his time to return his deposition"]). The absence of a compelling justification for the three-year delay herein further justifies rejecting plaintiff's July 19, 2018 affidavit.

Plaintiff testified at his deposition that he always went to the meet site with Ms. Kwamen unless she didn't have the van (*see* n 1). His affidavit now states he had only gone with her in the van to or from a meet site about three times before the April 25, 2013 accident and would usually take public transportation to work. This self-serving and contradictory revision, as the Second Department has noted in other cases, "presented feigned issues of fact tailored to avoid the consequences of his earlier deposition, and was, therefore, insufficient to raise a triable issue of fact" *(Garcia-Rosales v Bais Rochel Resort*, 100 AD3d 687, 687 [2012], *lv denied* 20 NY3d 858 [2013]); *see Ashford v Tannenhauser*, 108 AD3d 735, 736 [2013] [Second Department explained that "[s]ince

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fixed."

the injured plaintiff failed to offer an adequate reason for materially altering the substance of his deposition testimony, the altered testimony could not properly be considered in determining the existence of a triable issue of fact"]; *see also Torres v Board of Educ. of City of N.Y.*, 137 AD3d 1256, 1257 [2016] [Appellate Division Second Department noted that plaintiff's stated reasons [which, as here, included] that he was *clarifying* his testimony were inadequate to warrant the corrections"] [emphasis added]).[6]

Considering plaintiff's affidavit, in any event, would be unavailing as he at least still concedes that he went with Ms. Kwamen in the van to or from a meet site about three times before the April 25, 2013 accident. Hence, plaintiff acknowledges availing himself of the transportation service that *RGIS regularly provided through Ms. Kwamen*, which is the key factor (*see Hill v Speckard,* 209 AD2d 1007, 1008 [1994] [Fourth Department recounted that "(a)n exception to that rule (regarding commuting to and from work) exists where, by reason of contractual agreement, policy or custom, the *employer regularly provides a vehicle for the employee's use in commuting to and from work* for reasons that benefit the employer" (citing cases discussed above, namely, *Holcomb*, 45 NY2d at 606; *Schauder*, 173 AD2d 598; *Constantine*, 149 AD2d 394; *Matter of Gay*, 122 AD2d 402)]).

Treating the accident herein as compensable follows both applicable case law and rationally promotes the basic policy of the Workers' Compensation Law as the Court of

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5 Plaintiff's July 19, 2018 demand for records, not previously sought, is similarly untimely as it also came nearly four years after his September 18, 2014 deposition, nearly a year after filing his September 29, 2017 note of issue and five months after having served and efiled opposition on February 2, 2018 to this motion. Plaintiff's records demand, like his additional opposition, equally emerges as designed to present a feigned issue of fact to negate his deposition testimony and is therefore improper (*see Garcia-Rosales*, 100 AD3d at 687).

Appeals reiterated in *Holcomb* (45 NY2d at 607): "[T]he Work[ers'] Compensation Law, being remedial in character, is to be construed liberally to accomplish the economic and humanitarian objects of the act[] (*Matter of Husted v Seneca Steel Serv.*, 41 NY2d 140, 145[])" quoting *Matter of Greene v City of New York Dept. of Social Servs.*, 44 NY2d 322, 326 [1978]). Accordingly, it is

**ORDERED** that moving defendants' summary judgment motion is granted, and the complaint is hereby dismissed.

This constitutes the decision and order of the court.

E N T E R,

HON. CAROLYN E. WADE
ACTING SUPREME COURT JUSTICE

J. S. C.

KINGS COUNTY CLERK
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