Alaverdi v Bui
2019 NY Slip Op 33535(U)
December 3, 2019
Supreme Court, New York County
Docket Number: 159549/2017
Judge: Adam Silvera

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA **PART** IAS MOTION 22

Justice

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LOURA ALAVERDI, AN INCAPACITATED PERSON, BY HER TEMPORARY GUARDIAN, RUDYARD WHYTE, ESQ,

Plaintiff,

- v -

HUEY BUI, JENNY YMOUI CHEV, ROSEANN BIRRITTELLA, RALPH LAUREN CORPORATION,

Defendant.

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INDEX NO. 159549/2017

MOTION DATE N/A, N/A, N/A

MOTION SEQ. NO. 010 014 015

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 010) 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 284, 306, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 387, 388, 395, 413

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 014) 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 390, 391, 392, 393, 406, 407, 408, 409, 410

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 015) 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 394, 397, 398, 399, 400, 401, 402, 403, 404, 405, 411, 412, 418

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, and after oral arguments, plaintiff's motion for summary judgment on the issue of liability against the defendants (mot. seq. no. 010), defendant Roseann Birrittella's cross-motion for summary judgment of dismissal (mot. seq. no. 010), defendant Birrittella's order to show cause for summary judgment on her cross-claim against defendant Ralph Lauren Corporation (mot. seq. no. 014), and defendant Ralph Lauren Corporation's motion for summary judgment of dismissal (mot. seq. no. 015) are decided herein for the reasons set forth below.

This action arose from a motor vehicle accident on July 20, 2017 in which plaintiff, a pedestrian, was struck by a motor vehicle operated by defendant Huey Bui and owned by defendant Jenny Ymoui Chev. At the time of the accident, defendant Bui was driving defendant Birrittella who was a passenger in the vehicle when the accident occurred. Defendant Birrittella was employed by defendant Ralph Lauren Corporation at the time of the accident. As a result of the accident, plaintiff was catastrophically injured and has been in a persistent vegetative state ever since, leaving behind her partner and their two young children.

As to plaintiff's motion, she moves for summary judgment on the issue of liability against all defendants. Plaintiff's motion, which contends that she was a pedestrian on the sidewalk when the vehicle driven by defendant Bui ran up onto the sidewalk and collided into her, has made out a prima facie case of negligence. Thus, the burden shifts to defendants to raise a triable issue of fact. *See Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985); *see also Zuckerman v City of New York*, 49 NY2d 557, 560 (1980).

Here, it is uncontested, and conceded at oral arguments by counsel for all parties, that no issues of fact exist as to defendant Bui's liability. Moreover, all counsel further conceded that there is no claim of comparative negligence on plaintiff's part. Thus, without opposition, plaintiff's motion for summary judgment on the issue of liability is granted against defendants Huey Bui and Jenny Ymoui Chev only.

As to the portion of plaintiff's motion seeking summary judgment on the issue of liability against defendants Birrittella and Ralph Lauren Corporation, plaintiff contends that, despite defendants' arguments, the facts bear out that defendant Bui was an employee of defendant Ralph Lauren Corporation based upon, *inter alia*, the fact that defendant Bui drove defendant Birrittella for approximately 17 years, a Ralph Lauren Corporation employee, Mary Haas, made

defendant Bui's schedule and communicated such schedule to him, defendant Bui had no discretion to veer from such schedule, and he was not free to engage in other employment. Plaintiff further argues that a driver for defendant Birrittella's travel to and from work was a perk of her employment with defendant Ralph Lauren Corporation such that defendants Birrittella and Ralph Lauren Corporation are liable for defendant Bui's negligence under the doctrine of respondeat superior. Furthermore, plaintiff argues that defendants Birrittella and Ralph Lauren Corporation are negligent in the hiring and retention of defendant Bui.

Both defendants Birrittella and Ralph Lauren Corporation oppose plaintiff's motion, and both defendants separately move for summary judgment to dismiss this action as against them. According to defendant Ralph Lauren Corporation, defendant Bui was under its employ pursuant to an independent contractor agreement from 2003 through 2011 whereupon defendant Ralph Lauren Corporation restructured the compensation packets for certain employees such as defendant Birrittella. Pursuant to such restructuring, defendant Ralph Lauren Corporation no longer provided defendant Birrittella with a driver. Rather, defendant Ralph Lauren Corporation provided defendant Birrittella with monetary compensation with which, according to defendant Ralph Lauren Corporation, defendant Birrittella could have chosen to do anything with. Defendant Ralph Lauren Corporation argues that in 2011, defendant Birrittella unilaterally chose to hire defendant Bui as her driver who was then paid for by defendant Birrittella personally. Defendant Ralph Lauren Corporation further argues that at the time of the accident, defendant Birrittella was not within the scope of her employment such that defendant Ralph Lauren Corporation is not liable for the negligence of defendant Bui. As such, defendant Ralph Lauren Corporation contends that plaintiff's motion should be denied as to it, and its motion for summary judgment of dismissal should be granted.

Defendant Birrittella similarly opposes plaintiff's motion for summary judgment and cross-moves for summary judgment of dismissal arguing that defendant Bui was not her employee, rather he was an independent contractor. Alternatively, defendant Birrittella argues that if it is determined that defendant Bui was her employee, then defendant Bui was also an employee of defendant Ralph Lauren Corporation in that the employment of a driver was in furtherance of her employment with defendant Ralph Lauren Corporation. According to defendant Birrittella, defendant Ralph Lauren Corporation entered into an independent contractor agreement with defendant Bui from 2003 to 2009, whereupon the last contract expired. One such contract was signed by defendant Birrittella on behalf of defendant Ralph Lauren Corporation. Defendant Birrittella argues that from 2009 to 2011, defendant Ralph Lauren Corporation continued to pay defendant Bui for his services as defendant Birrittella's driver without a contract. She further argues that in 2011, after defendant Ralph Lauren Corporation restructured the compensation benefits, there was no change as defendant Bui continued to drive her, a defendant Ralph Lauren Corporation employee continued to make defendant Bui's daily schedule, and such defendant Ralph Lauren Corporation employee continued to write the checks to pay defendant Bui.

After a careful review of all the papers, and after oral arguments, the evidence reveals multiple issues of fact sufficient to preclude summary judgment for plaintiff. It is well settled that summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established that it is warranted as a matter of law. *See Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). "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 issues of fact from the case". *Winegrad v New York University Medical Center*, 64

NY2d 851, 853 (1985). Additionally, summary judgment motions should be denied if the opposing party presents admissible evidence establishing that there is a genuine issue of fact remaining. *Zuckerman v City of New York*, 49 NY2d 557, 560 (1980). "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility." *Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 (1st Dep't 1992), citing *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 (1st Dep't 1990). The court's role is "issue-finding, rather than issue-determination". *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957) (internal quotations omitted). As such, summary judgment is rarely granted in negligence actions unless there is no conflict at all in the evidence. *Ugarriza v Schmieder*, 46 NY2d 471, 475-476 (1979). , 46 NY2d 471, 475-476 (1979).

Here, the record is clear that numerous factual inconsistencies exist to preclude summary judgment. Even with regards to just the arguments and recitation of facts by counsel and the documents submitted, issues of fact exist. Defendant Ralph Lauren Corporation contends that defendant Bui was under its employ as an independent contractor from 2003 through 2011. Defendant Birrittella contends that defendant Bui was employed by defendant Ralph Lauren Corporation as an independent contractor from 2003 through 2009 when the last contract expired, but that defendant Ralph Lauren Corporation continued to pay defendant Bui for his services to drive defendant Birrittella without a contract. In support of its motion, defendant Ralph Lauren Corporation attaches as exhibit G the independent contractor agreements between defendant Bui and defendant Ralph Lauren Corporation. The Court notes that two (2) contracts are provided as well as 2 contract extensions. According to the terms of the first contract, defendant Bui commenced his employment, whether as employee or independent contractor, in

2003. By the terms of the contract dated April 1, 2005, the contract expired on April 1, 2008. Thus, the documents provided and counsels' version of the facts conflict.

Moreover, the Court of Appeals has held that "[t]he nature of the relationship existing [whether employee or independent contractor is] a question of fact [for] the trier of the facts". *Johnson v R.T.K. Petroleum Co.*, 289 NY 101, 104 (1942). To that end, the Appellate Division, First Department has consistently held that " 'whether the operator of a…vehicle is an agent or independent contractor is a question for the trier of fact'." *Carrion v Orbit Messenger*, 192 AD2d 366, 367 (1st Dep't 1993), citing *Bermudez v Ruiz* 185 AD2d 212, 213 (1st Dep't 1992). With regards to defendants Birrittella and Ralph Lauren Corporation's argument that defendant Bui was not under their employ, but rather an independent contractor, the record provides proof of communications between defendant Birrittella and defendant Bui with regards to warnings for his behavior and his ultimate discharge. The record further provides proof of communications between Ms. Mary Haas, an employee of defendant Ralph Lauren Corporation, and defendant Bui with regards to his work schedule, testimony that Ms. Haas wrote the checks to pay defendant Bui, and testimony that defendant Bui drove other defendant Ralph Lauren Corporation employees other than defendant Birrittella. Here, "summary judgment…is unwarranted…[as all parties] failed to eliminate all triable issues of fact as to whether defendant [Bui], the driver of the offending vehicle, was an independent contractor or, instead, [an] employee when the accident occurred." *Allstate Ins. Co. v Groundlink Holdings LLC*, 980 NYS2d 274, 274 (1st Dep't 2013).

As to defendant Ralph Lauren Corporation's argument that defendant Birrittella was not acting within the scope of her employment at the time of the accident, such contention is in direct contradiction to defendant Birrittella's sworn testimony in which she clearly and consistently

testified that she needed a driver to do her job, and that she needed a driver in order to perform the functions for defendant Ralph Lauren Corporation. *See* Plaintiff's Motion, Exh. N. Ms. Birrittella's Tr., p. 281, ln 9-15. She further testified that she worked while in the car. *Id.* at p. 302, ln. 2-7, and p. 303, ln. 2-5. Defendant Ralph Lauren Corporation employee, Ms. Haas, testified that defendant Birrittella would transport material related to defendant Ralph Lauren Corporation's business to and from work. *See* Plaintiff's Motion, Exh. O, Ms. Haas Tr., p. 159, ln. 5-11. Thus, issues of fact exist as to whether defendant Birrittella was within the scope of her employment at the time of the accident. As there is conflicting evidence, plaintiff's motion for summary judgment on the issue of liability is denied as to defendants Birrittella and Ralph Lauren Corporation.

For the same reasons as set forth above, defendant Birrittella's cross-motion for summary judgment to dismiss the complaint is denied as issues of fact exist to preclude the granting of summary judgment. Similarly, defendant Ralph Lauren Corporation's motion for summary judgment to dismiss the complaint is also denied.

With regards to the portion of defendant Ralph Lauren Corporation's motion seeking summary judgment to dismiss defendant Birrittella's cross-claims, and defendant Birrittella's order to show cause for summary judgment on her cross-claims against defendant Ralph Lauren Corporation, defendant Ralph Lauren Corporation argues that defendant Birrittella's cross-claim is barred by a release entered into by defendants Birrittella and Ralph Lauren Corporation. In opposition, defendant Birrittella argues that, at the time of the accident, defendant Birrittella was an employee of defendant Ralph Lauren Corporation. She further argues that her employment was governed by her Employment Agreement dated January 1, 1995. In fact, according to defendant Birrittella, at the deposition of an employee of defendant Ralph Lauren Corporation,

Mr. Jeff Mandel, on February 7, 2019, counsel for all parties stipulated that such agreement was in effect at the time of the accident. *See* defendant Ralph Lauren Corporation's Motion, Exh. C, Mr. Mandel Tr., p. 79 ln. 21 – p. 80 ln. 7.

Here, defendant Ralph Lauren Corporation seeks to rely solely on the language in the general releases to preclude defendant Birrittella's cross-claim. By the plain language of the releases, defendant Birrittella released defendant Ralph Lauren Corporation "from any and all manner of actions, causes of action, suits, complaints, debts, … attorneys' fees, expenses, liabilities, charges, claims, obligations, promises, agreements, … foreseen or unforeseen, … arising from the beginning of the world until the Effective Date". Defendant Ralph Lauren Corporation's Motion, Exh. K, Employment Separation Agreement and Release dated September 30, 2016, ¶6(a). A second release was signed by defendant Birrittella on October 6, 2016 which explicitly states that she "acknowledges that this Second Release shall not be valid and that she will not be entitled to the severance benefits contained in … the Agreement unless she signs this Second Release on the Termination Date". *Id.* at p. 12. The Court notes that such separation agreement was signed by defendants Birrittella and Ralph Lauren Corporation on October 6, 2016 and amended on March 13, 2017 prior to the instant action. According to the amendment, defendant Birrittella remained an employee of defendant Ralph Lauren Corporation until December 31, 2017. On December 20, 2017, five (5) months after the subject accident and a mere two (2) months after the instant action was filed, defendant Birrittella signed the Second Release once more in order to obtain the severance benefits.

The Court of Appeals has explicitly held that the existence of a disputed fact may preclude summary judgment even where the language of the release seems clear. *See Mangini v McClurg*, 24 NY2d 556, 560 (1969). The Court of Appeals has specifically held that

> "releases contain standardized, even ritualistic, language and are given in circumstances where the parties are sometimes looking no further than the precise matter in dispute that is being settled. Thus, while it has been held that an unreformed general release will be given its full literal effect where it is directly or circumstantially evident that the purpose is to achieve a truly general settlement, the cases are many in which the release has been avoided with respect to uncontemplated transactions despite the generality of the language in the release form".

Id. at 562. As such, the Court of Appeals in *Mangini* held that "[s]ince the issue turns on a matter of intention developable … the literal language should not be determinative of the ultimate result or be applied mechanically." *Id.* at 563.

Here, two of the three releases were signed prior to the instant accident and the third release was signed in December 2017 at the time originally scheduled by the amended separation agreement dated March 13, 2017. Such third release was signed a mere 5 months following the accident, less than 2 months after service of the papers, and less than a month from the issuance of the case scheduling order. Thus, the releases were signed prior to discovery herein. There exists issues of fact as to whether defendant Birrittella intended to release defendant Ralph Lauren Corporation from the instant cross-claims, or rather signed such releases as a matter of course in order to obtain a compensation package and continue her employment with defendant Ralph Lauren Corporation as a consultant. Thus, both defendant Birrittella's order to show cause for summary judgment on her cross-claims and the portion of defendant Ralph Lauren Corporation's motion for summary judgment to dismiss the claim are denied.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment (mot. seq. no. 010) is granted in part, and summary judgment on the issue of liability it granted as against defendants Huey Bui and Jenny Ymoui Chev only; and it is further

ORDERED that plaintiff's motion for summary judgment on the issue of liability is denied as against defendants Roseann Birrittella and Ralph Lauren Corporation; and it is further

ORDERED that defendant Roseann Birrittella's cross-motion for summary judgment to dismiss the complaint (mot. seq. no. 010) is denied in its entirety; and it is further

ORDERED that defendant Roseann Birrittella's order to show cause for summary judgment on her cross-claims (mot. seq. no. 014) is denied in its entirety; and it is further

ORDERED that defendant Ralph Lauren Corporation's motion for summary judgment to dismiss the complaint and the cross-claims (mot. seq. no. 015) is denied in its entirety; and it is further

ORDERED that all parties and counsel appear on December 4, 2019 at 9:30am in Part 40 of 60 Centre Street, New York, NY for a previously scheduled final trial date. Counsel shall be ready to pick a jury and proceed to trial on such date.

This constitutes the Decision/Order of the Court.

12/3/2019
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE