SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LISA HEADLEY** **PART** **22**

Justice

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LINDA CROSBY, AS THE ADMINISTRATOR OF THE ESTATE OF FIRSTESS E.M. CROSBY, DECEASED,

Plaintiff,

- v -

CUENCA CORONEL TRUCKING INC.,CHRISTIAN CORDOVA VINTIMILLA

Defendant.

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INDEX NO. 154904/2019

MOTION DATE 05/18/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31

were read on this motion to/for DISMISSAL.

This action stems from a fatal motor vehicle-pedestrian accident that occurred on February 28, 2019, in New York County. At the time of the accident, defendant, Christian F. Cordova Vintimilla ("defendant Vintimilla"), was employed by defendant, Cuenca Coronel Trucking Inc. ("defendant Trucking Inc."). Plaintiff alleges that defendant Cordova was operating a 2016 Peterbilt dump truck in the course of his employment with defendant Trucking Inc, when defendant Cordova made a right turn at the intersection of West 17th Street and 9th Avenue, in New York, New York and struck the decedent plaintiff, Firstess E.M. Crosby ("plaintiff-decedent") who was walking in the crosswalk. The complaint alleges, *inter alia*, that defendant Cordova operated the truck in a grossly negligent and reckless fashion in that he failed to properly use the truck's brakes, as well as its steering and signaling mechanisms; failed to follow defensive driving rules and to observe the rules of the road; failed to observe the roadway and traffic conditions at the time and place of the accident; failed to keep a reasonably adequate and proper lookout or be reasonably alert at all times; failed to yield, or to stop, slow down, steer or veer so as to avoid hitting the plaintiff-decedent; and made an unsafe right turn thereby striking plaintiff-decedent, violating sections of the Vehicle and Traffic Law and the NYC Administrative Code. As a result, plaintiff-decedent suffered severe and serious injuries which resulted in her death on June 22, 2019.

In addition, plaintiff claims that co-defendant Trucking Inc.'s ownership, management, control and supervision of the truck involved in the accident was reckless, wanton and grossly negligent in that Trucking Inc. failed to maintain its brakes, signaling and steering mechanisms "in a safe and operable condition," which were inadequate and failed to function properly. Further, the complaint alleges that defendant Trucking Inc. was grossly negligent in hiring, training, retaining and supervising defendant Vintimilla.

This action was originally commenced in May 2019, and after the decedent plaintiff's death, the caption was amended to substitute decedent's mother, Linda Crosby (plaintiff), who was granted Letters of Administration. The amended complaint brings three causes of action: (1)

conscious pain and suffering, arising out of defendants' "negligence, recklessness and carelessness" and "willful, wanton, [and] grossly negligent" acts; (2) negligent hiring, training, supervising and retention, as against Cuenca; and (3) wrongful death. Plaintiff also seeks punitive damages. Defendants have filed their verified answer with affirmative defenses. (*See, NYSCEF Doc No. 14*).

In the instant motion, defendants, Trucking Inc. and Vintimilla, move to dismiss the first and second causes of action, pursuant to *CPLR § 3211(a)(7)*, including their claims of punitive damages. Defendants concede that the complaint alleges negligence. Defendants argue, *inter alia*, that the complaint fails to allege "something more" than mere negligence for which punitive damages would be appropriate as to either defendant.

Specifically, the complaint alleges only that defendant Vintimilla "[m]ade a right turn and struck the decedent…in the crosswalk…" while operating a truck owned by Trucking Inc. with its permission and consent, in the course and scope of his employment. It alleges that Vintimilla failed "to stop, slow down, steer or veer so as to avoid this accident." Defendants contend that there are no facts to suggest "that Vintimilla acted maliciously, willfully, wantonly, recklessly, with an improper motive or vindictiveness, or engage[d] in outrageous or oppressive intentional misconduct or with reckless or wanton disregard of safety or rights."

In support of the motion, defendants include a copy of the police accident report. (*See* NYSCEF Doc No. 22). Defendants argue that neither the police accident report or the amended complaint, set forth factual allegations to support "a cause of action, claim or allegations of gross negligence, recklessness and the imputation of punitive damages." Defendants further contend that because it is "unequivocally clear" that the accident occurred while defendant Vintimilla was within the scope of his employment for Trucking Inc., by law, the employer becomes liable for damages caused by the employee's negligence under a theory of respondeat superior and may not be sued for negligent hiring and retention. *See, Neiger v City of New York*, 72 A.D.3d 663, 664 (2d Dep't 2010). In addition, defendants argue for dismissal of the second cause of action in its entirety, because "if the employee was not negligent, there is no basis for imposing liability on the employer, and if the employee was negligent, the employer must pay the judgment regardless of the reasonableness of the hiring or retention or the adequacy of the training."

In opposition, plaintiff argues that a motion to dismiss allows the court only to examine the pleadings to determine whether they state a cause of action and does not penalize the plaintiff for any failure to make an evidentiary showing, citing *Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351 [2013]). Plaintiff quotes *Sokol v Leader* for the well-known proposition that a motion to dismiss pursuant to CPLR§ 3211 [a][7] "must be denied unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it" (NYSCEF Doc No. 24, ¶ 9, quoting *Sokol,* 74 AD3d 1180, 1182 [2d Dept 2010] [internal quotation marks and citation omitted]). In support of her motion, plaintiff provides copies of the transcript of Cordova's November 25, 2019, misdemeanor plea allocution in New York County Criminal Court; the autopsy report dated July 23, 2019; and deposition testimony by the plaintiff decedent, signed and dated April 27, 2019. The latter two documents are labeled as exhibits, presumably in the Criminal Case.

Plaintiff argues that the first cause of action alleges, *inter alia*, that defendant Vintimilla drove a "massive dump truck" in an "unsafe state of repair," and "excessively fast," in a "willful, wanton and grossly negligent state of mind,." Further, plaintiff contends that when defendant Vintimilla struck the plaintiff-decedent, he was so distracted and inattentive that he continued to drive forward, running over and crushing her, which ultimately caused her death. Plaintiff argues

that defendant Vintimilla "committed a reprehensible act of violence with a recklessly indifferent state of mind," which sufficiently shows, plaintiff asserts, her entitlement to an award of punitive damages. *See*, *Acker v. Garson*, 306 A.D.2d 609, 609-610 (3d Dep't 2003). Further, plaintiff contends that because defendant Vintimilla pled guilty to criminal charges, including, operating a motor vehicle and failing to yield to a pedestrian who had the right of way and causing the pedestrian to suffer serious injury demonstrates that defendant Vintimilla "acted with a criminal *mens rea*," and punitive damages are appropriate when the conduct in question "has the character of outrage frequently associated with crime." *See*, *Prozeralik v. Capital Cities Communications,* 82 N.Y.2d 466, 479 (1993).

Plaintiff argues as to the second cause of action against Trucking Inc. for negligent hiring, training, supervising and retention, that there is an exception to the rule articulated in *Neiger* which precludes dismissal of her claim and for punitive damages. Plaintiff argues that the general rule is that the employer of an employee acting within the scope of their employment, is liable for damages under the theory of *respondeat superior*. In addition, plaintiff contends that it is premature to dismiss the first and second causes of action as no depositions have been conducted, defendants have not yet responded to plaintiff's discovery demands, and neither the New York City Police Department (NYPD) or the office of the District Attorney have released their files and evidence that resulted in criminal charges and defendant Vintimilla's guilty plea.

In reply, defendants argue, *inter alia*, that plaintiff relies on "boiler plate allegations" for her claims of negligence, gross negligence and recklessness, with the complaint only alleging that Vintimilla "made a right turn and struck the decedent…in the crosswalk." A claim for recklessness must assert conduct "close to criminality," quoting *Camillo v Geer*, 185 AD2d 192, 194 [1st Dept 1992] [internal quotation marks and citation omitted]. In support of their argument, defendants refer to defendant Vintimilla's transcript of his misdemeanor plea allocution which indicates that he was not charged with a "felony or a crime involving intent and moral turpitude," but for failure to exercise due care and causing an injury, in violation of *Vehicle and Traffic Law § 1146 (c)(1)*, and failure to yield the right of way to a pedestrian, causing injury, violating *NYC Administrative Code § 19-190 (b)*. Defendants contend that plaintiff fails to assert facts to suggest that in the course of Vintimilla's employment, he acted maliciously or willfully, engaged in outrageous intentional misconduct, or acted with reckless or wanton disregard for the safety of others. Further, defendants argue that for a plaintiff to hold an employer liable for punitive damages, where liability is vicariously derived for an employee's acts, the plaintiff must establish that the employer "knowingly ordered, participated in, or ratified the conduct of the employee," and they argue that in this case defendant Trucking Inc. did not knowingly order or participate in the actions of the defendant Vintimilla regarding the subject accident. Lastly, defendants contend that discovery and depositions of defendant Vintimilla and defendant Trucking Inc are not needed because there is nothing to suggest that they would change the "undisputed facts."

Discussion

On a motion for dismissal for failure to state a cause of action pursuant to *CPLR § 3211 (a)(7)*, the court must accept factual allegations as true. *See, Leviton Mfg. Co., Inc. v. Blumberg*, 242 A.D.2d 205, 208 (1st Dep't 1997). Only where a defendant shows that a material fact is "not a fact at all and…that no significant dispute exists regarding it," will the claim be dismissed. *Guggenheimer v. Ginzburg,* 43 N.Y.2d 268, 275 (1977). In deciding a motion to dismiss, the court must view the factual allegations in a light most beneficial to plaintiff.

Here, the allegations in the first cause of action sufficiently establish a claim for negligence, and defendants have conceded as such. Further, defendants' second affirmative defense alleges

that plaintiff-decedent was contributorily negligent, which is not supported by the complaint. It is well settled that "a defendant's unexcused violation of the Vehicle and Traffic Law constitutes *negligence per se*." *Devoe v. Kaplan*, 278 A.D.2d 734, 735 (3d Dep't 2000). The question is whether the first cause of action also sufficiently alleges reckless or grossly negligent conduct by defendant Vintimilla in driving the truck which, if true, would support an award of punitive damages.

Punitive damages will only be awarded when the conduct at issue is "exceptional," such as where the actions are malicious or wanton, demonstrate "an improper motive or vindictiveness," are "outrageous or oppressively intentional," or done "with reckless or wanton disregard of safety or rights." *Ross v. Louise Wise Servs., Inc.*, 8 N.Y.3d 478, 489 (2007). It is "a reckless disregard for the rights of others, bordering on intentional wrongdoing." *Haire v. Bonelli*, 57 A.D.3d 1354, 1358 (3d Dept 2008). Conduct need not be intentionally harmful but can nonetheless be "'wanton and reckless' when done under circumstances showing 'heedlessness and an utter disregard' for the 'rights and safety of others'." *Gruber v. Craig*, 208 A.D.2d 900, 901 (2d Dep't 1994), *quoting*, *Home Ins. Co. v. American Home Prods. Corp*, 75 N.Y.2d 196, 204 (1990); *see Rinaldo v Mashayekhi*, 185 A.D.2d 435, 436 (3d Dep't 1992). Conduct can be grossly negligent when it is "so flagrant as to transcend mere carelessness." *Gruber v. Craig*, *supra* at 901.

"Reckless driving" is a synonym for gross negligence or reckless disregard for life or property of others. *See, Matter of Pask v. Hults*, 30 A.D.2d 96, 98 (4th Dep't 1968); *Vehicle and Traffic Law §510*. "Recklessness is more than ordinary negligence, more than want of ordinary care. It is a wanton or heedless indifference to consequences. The word 'reckless' implies a substantially greater degree or grosser form of negligence." *Application of Kafka*, 272 A.D. 364, 368 (1st Dep't 1947). The line between "casual, or slight negligence," and "gross negligence" can be difficult to determine; "essentially the issue is predominantly one of fact and not of law." *Matter of Pask v Hults*, *supra at 99*.

According to the police accident report, both defendant Vintimilla and plaintiff decedent had the right of way, at the time of the accident. There is nothing to suggest that defendant Vintimilla drove "with reckless or wanton disregard of safety or rights." Defendant Vintimilla's driving, including his alleged failure to observe the traffic conditions at the time and place of the accident, and to yield, slow down or steer the truck so as to avoid hitting plaintiff decedent, do not rise to the "very high threshold of moral culpability" needed to support a claim for punitive damages. *See, Giblin v. Murphy,* 73 N.Y.2d 769, 772 (1988). Even taking plaintiff's allegations in their broadest sense, they do not assert that defendant Cordova acted with anything other than a lack of ordinary care, although it resulted in the tragic injury and ultimate death of plaintiff decedent.

Notably, Vintimilla did not plead in criminal court to a violation of *Vehicle and Traffic Law § 51-510(3)(e)*, which provides that a license may be suspended or revoked "for gross negligence in the operation of a motor vehicle." He was found to have violated *Vehicle and Traffic Law § 1146 (c) (1)*, which addresses the failure to exercise due care. This evidence, submitted as part of the motion to dismiss, simply does not support a claim of gross negligence or recklessness by defendant Vintimilla at the time of the accident. Therefore, the defendants' motion to dismiss the claim for punitive damages in the first cause of action is therefore granted.

Turning to the second cause of action, there is no dispute that defendant was acting in the scope of his employment at the time of the accident. By law, his employer Trucking Inc. becomes vicariously liable for damages as a result of his actions, and normally no claims can proceed against it based on a claim of negligent hiring, supervising and retention. *See, Neiger v. City of New York*,

72 A.D.3d at 664. However, plaintiff's claims that defendant Trucking Inc. was negligent and reckless in its hiring, supervision and training of Vintimilla. Here, the complaint makes no allegations that defendant Trucking Inc. knowingly ordered or ratified defendant Vintimilla's conduct or was grossly negligent in its management, control and supervision of its trucks, and that defendant Trucking Inc. negligently hired, retained, supervised and trained Vintimilla. Thus, this court finds in favor of defendants' argument that the complaint does not support punitive damages and negligent and reckless hiring and supervision claims at this juncture.

Accordingly, it is

ORDERED that defendants' motion to dismiss the first cause of action and its claim of punitive damages is granted to the extent the claim for punitive damages as against Vintimilla is dismissed without prejudice; and it is further

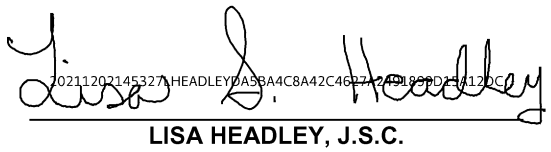
ORDERED that defendants' motion to dismiss the second cause of action for negligent hiring, and its claim of punitive damages as against Trucking Inc. is also granted to the extent said claims as against Trucking Inc. are dismissed without prejudice; it is further

ORDERED that the parties shall proceed with discovery expeditiously and in good faith; and it is further

ORDERED that any relief sought not expressly addressed herein has nonetheless been considered; and it is further

ORDERED that within 30 days of entry, defendants shall serve a copy of this decision/order upon plaintiff with notice of entry.

This constitutes the decision and order of the Court.



11/16/2021
DATE

LISA HEADLEY, J.S.C.

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