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SHORT FORM ORDER

INDEX No. 07-31747
CAL No. 12-00270MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 5-17-12 (#001)
MOTION DATE 7-11-12 (#002)
MOTION DATE 8-15-12 (#003)
ADJ. DATE 10-24-12
Mot. Seq. # 001- MotD # 003 - MD
002 - MD

KARAN COLE and JALENA COLE, infants by their mother and natural guardian, KAREN COLE, and KAREN COLE, individually,

Plaintiffs,

- against -

RAMP MOTORS, INC., TASHIA AUSTIN and EDGAR A. MARCA,

Defendants.

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Upon the following papers numbered 1 to 42 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-15; (002) 16-19; (003) 18-30; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 31-32; 33-35; 36-40; Replying Affidavits and supporting papers 41-42; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (001) by defendants Tashia Austin and Ramp Motors, Inc. pursuant to CPLR 3211 (10), (5), (7) and (8), and 3212 for an order dismissing the complaint as asserted against defendant Ramp Motors, Inc. on the basis of the Graves Act is granted; for an order dismissing co-defendant Edgar Marca's cross claim against Ramp Motors, Inc. is granted; for further order dismissing the complaint against defendant Tashia Austin and the cross claim by Marca on the issue of Austin's liability is denied; and for further order dismissing the complaint as asserted by the infant plaintiff, Jalena Cole, on the basis that she has not sustained a serious injury as defined by Insurance Law § 5102 and 5104 is denied; and it is further

ORDERED that motion (002) by defendant Edgar A. Marca pursuant to 3212 dismissing the plaintiff's complaint on the basis that the plaintiff has not sustained a serious injury as defined by Insurance Law § 5102 and 5104 is denied; and it is further

ORDERED that motion (003) by plaintiffs pursuant to CPLR 3211 (b) and 3212 dismissing defendant Ramp's affirmative defense asserting the Graves Amendment is denied as moot, having been rendered academic by the decision herein in motion (001) dismissing the complaint as asserted against defendant Ramp Motors, Inc.

In this action, the plaintiff, Karen Cole, seeks damages personally and derivatively for injuries alleged to have been sustained by her infant daughters, Karan Cole and Jalena Cole, as a result of a motor vehicle accident on February 4, 2007 at 10:10 a.m. The infant plaintiffs were passengers in the vehicle operated by Tashia Austin and owned by Ramp Motors, Inc., when it collided with co-defendant Edgar A. Marca's vehicle which was making a left turn. The accident is alleged to have occurred on Victory Avenue at its intersection with the entrance ramp to Route 27 in Brookhaven, New York. It is alleged that the Austin vehicle was traveling eastbound on Victory Avenue, and the Marca vehicle was traveling westbound on Victory Avenue attempting to make a left turn onto the entrance ramp to Sunrise Highway, when the front of the Marca vehicle made contact with the front driver's side of the Austin vehicle.

By way of her answer, Tashia Austin has inter alia asserted two cross claims against defendant Marca for indemnification and judgment over against him. By way of its answer, Ramp Motors, Inc. (Ramp) has asserted a first affirmative defense that the claims interposed by the plaintiffs and their alleged damages, based upon alleged vicarious liability for the negligent operation of motor vehicle by another is expressly preempted by Federal Law Title 49 USC § 30106. Ramp has also asserted two cross claims against co-defendant Marca for indemnification and judgment over against him. Defendant Marca has asserted a cross claim against Austin and Ramp Motors for judgment over against them.

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. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]; ***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

Turning to motion (001), Tashia Austin seeks summary judgment pursuant to CPLR 3211 and 3212 dismissing the complaint and the cross claim of Marca on the basis that she is not liable for the occurrence of the accident, and on the basis that the plaintiff Jalena Cole did not sustain a serious injury, and for

dismissal of the cross claim. In that this motion was filed subsequent to the filing of the Note of Issue, and in that it was noticed pursuant to CPLR 3212, it is treated as a motion pursuant to CPLR 3212. In support of this motion, defendant Austin has submitted, inter alia, an attorney's affirmation, a copy of the summons and complaint, defendants' answers with cross claims and response to cross claims, and plaintiffs' verified bill of particulars; an uncertified and unauthenticated copy of a Ramp Motors lease agreement which is partially legible and not in admissible form pursuant to CPLR 3212; an uncertified copy of a police accident report which is deemed hearsay and is not in admissible form (*see*, ***Lacagnino v Gonzalez***, 306 AD2d 250, 760 NYS2d 533 [2d Dept 2003]; ***Hegy v Coller***, 262 AD2d 606, 692 NYS2d 463 [2d Dept 1999]); the affidavit of Wayne Rampone Jr. which is not dated and is not properly notarized; a signed and certified copy of the deposition transcripts of Karan Cole, Karen Cole, and Jalena Cole dated November 11, 2009; the unsigned but certified transcript of the deposition of Tashia Austin dated July 29, 2010 which is deemed admissible and adopted as accurate by Austin (***Ashif v Won Ok Lee,*** 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]); an unsigned partial transcript of Edgar Marca dated May 25, 2010 which is not in admissible form and is objected to by plaintiffs; the sworn report of Michael J. Katz, M.D. concerning his independent orthopedic examination of the plaintiff on February 16, 2010; a notarized witness statement of Donna Ayala, and a witness statement by Christine Knowell which are part of the MV Police Accident Report which is not in admissible form as set forth above; and an incomplete, uncertified, and unsigned transcript of the Department of Motor Vehicles Administrative Adjudication testimony by Edward J. McDonald, Detective, which is not in admissible form.

The issue of serious injury is addressed first.

Pursuant to Insurance Law § 5102(d), " '[s]erious injury' means a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medical determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

The term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102(d), the initial burden is on the defendant to "present evidence in competent form, showing that plaintiff has no cause of action" (***Rodriquez v Goldstein***, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (***DeAngelo v Fidel Corp. Services, Inc.***, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the

non-moving party, here the plaintiff (***Cammarere v Villanova***, 166 AD2d 760, 562 NYS2d 808, 810 [3d Dept 1990]).

In order to recover under the "permanent loss of use" category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, *supra*).

By way of her bill of particulars, the infant plaintiff Jalena Cole has alleged that she sustained injuries consisting of a left knee sprain, a left shoulder sprain, and contusion to the left extremity, and headaches and dizziness.

Based upon a review of the foregoing, it is determined that the defendant failed to establish prima facie entitlement to summary judgment dismissing the complaint on the basis that the infant plaintiff, Jalena Cole, did not sustain a serious injury as defined by Insurance Law § 5102 (d). The moving papers raise factual issues which preclude summary judgment. The defendants examining physician, Dr. Michael Katz, has not submitted a copy of his curriculum vitae to establish his qualifications as an expert for the purpose of proffering his opinions in this matter. The MRI report of the infant's left shoulder, and the x-ray report of her lumboscaral spine, both dated March 27, 2007 reviewed and referred to by the examining physician, have not been provided as evidentiary proof in support of this application, as required pursuant to CPLR 3212. Expert testimony is limited to facts in evidence (*see* ***Allen v Uh,*** 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Marzuillo v Isom,*** 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; ***O'Shea v Sarro***, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]; ***Hornbrook v Peak Resorts,*** Inc. 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]), which evidence has not been provided in this case.

Notably, in his diagnosis after his examination of the infant plaintiff, Dr. Katz has set forth that she is status post left shoulder Salter-Harris fracture grade 1, by history, now healed clinically. In that a fracture is considered a serious injury pursuant to Insurance Law § 5102(d), the defendants have not established that the infant plaintiff has failed to sustain a serious injury. Dr. Katz's opinion that the fracture is healed clinically, is conclusory and unsupported by a review of any post-fracture radiographic studies.

Accordingly, that part of motion (001) which seeks summary judgment on the basis that the infant plaintiff did not sustain a serious injury as defined by Insurance Law § 5102(d) is denied.

Turning to that part of motion (001) wherein defendant Austin seeks summary judgment on the issue that she bears no liability for the occurrence of the accident, and for dismissal of the cross claim asserted by defendant Marca, it is determined that there are factual issues which preclude summary judgment on this basis.

Tashia Austin testified that on the date of the accident, Saturday, February 4, 2007, she was operating a Ford Expedition which she rented from Ramp Motors a couple of weeks prior to the accident. In 1999, she was convicted for felony possession of cocaine, but she stated that she did not use drugs. At the time of the accident, she had five passengers, including the infant plaintiffs whom she was dropping off at their home. She had never been to their home, so Jalena was giving her directions. She traveled past the Yaphank Jail on a road which she could not remember the name of, and made a left turn at the stop sign and entered onto Victory Avenue, which she had traveled frequently in the past. She stated that she traveled about four or five minutes on Victory Avenue until she reached the point where the accident occurred, and described it as a dry, level roadway. She described the day as clear and sunny. She then testified that she traveled east on Victory Avenue a couple of seconds (five or ten-not a mile-a half mile even), prior to the accident, then stated that she could not remember. She thought she might have been traveling about five or ten miles per hour, less than fifteen miles per hour, as she had just pulled onto Victory Avenue and put her foot on the gas after she made the left turn. She testified that she did not see the car traveling in the other lane as she "wasn't looking in the other lane," that she was looking to just where she was driving. She stated she could see about a mile or two miles ahead. She continued that the cars traveling west on Victory could turn (left) to gain access to the Sunrise Highway entrance ramp to travel westbound on Sunrise Highway. She initially testified that vehicles traveling east could not turn right to turn onto the entrance ramp, but then corrected her testimony. She later testified that she had "seen a car driving...heading westbound in its lane" when she entered onto Victory Avenue. Their vehicles were separated by about a car length or two at the time. She added that she was about four or five car lengths from the stop sign when she saw the other car. She had no visual impairments or obstructions to her direct or peripheral vision. When she first saw the Marca vehicle, she said it was traveling straight with no turn signals, and it had not yet reached the turn lane, but she did not know how far from that turn lane it was. When she first saw the Marca vehicle, her vehicle and his were about equal distance to the entrance ramp. She then stated that she could not remember. Up until the accident occurred, she did not change her speed or compass direction of her vehicle or apply her brakes. She only saw the other vehicle change direction when it hit her. She did not see the other vehicle begin to make its left turn prior to the accident and never saw it travel south prior to impact. The last time she saw the other vehicle, it was still traveling straight in a westbound direction. The drivers' front side of her vehicle was impacted. She did not know what portion of the Marca vehicle impacted with her vehicle.

Veh. & Traf. Law §1141 provides that the driver of a vehicle intending to turn left within an intersection shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard (***Kiernan v Edwards, et al,*** 97 AD2d 750, 468 NYS2d 381 [2d Dept 1083]; ***Mass et al v Leinker et al,*** 46 AD2d 383, 362 NYS2d 552 [2d Dept 1975]; ***Bogorad v Fitzpatrick,*** 38 AD2d 923, 329 NYS2d 874 [1st Dept 1972]). Failure to yield the right of way in such circumstances is negligence (***Hamby v Bonventre et al,*** 36 AD2d 648, 318 NYS2d 178 [3d Dept 1971]). Here, in view of Austin's contradictory and inconsistent testimony, she did not meet the burden of establishing prima facie entitlement to summary judgment dismissing the complaint. Moreover, if, as Austin testified, she observed defendant Marca's vehicle on Victory Avenue prior to her executing her left turn onto Victory Avenue, an issue of fact exists as to whether she was maintaining a proper lookout, and as to whether she could have avoided the accident by changing her speed or applying her brakes prior to the accident. Accordingly, that part of motion (001) which seeks dismissal on the issue of liability is denied, and the further application for dismissal of the cross claim asserted by Marca for judgment over against Austin is denied as well.

Turning to that part of motion (001) wherein defendant Ramp Motors seeks dismissal of the complaint by virtue of the Transportation Equity Act of 2005 (49 USCS § 30106, Graves Amendment), it is determined that "The Graves Amendment," by its express language, preempts all state statutory and common law to the extent those laws hold owners in the business of renting or leasing motor vehicles vicariously liable for the negligence of drivers, except when there is negligence or criminal wrongdoing on the part of the vehicle's owner" (***De La Cruz Sigaran v ELRAC, Inc. et al,*** 2008 NY Slip Op 52569U, 22 Misc3d 1101A, 875 NYS2d 824 [Sup Ct, Bronx County 2008]; *see* ***Novovic v Greyhound Lines, Inc.*** 2008 US Dist. Lexis 94176 [ED NY 2008]; ***American Association for Justice, AAJ Annual Convention Reference Materials,*** 2 Ann 2007 AAJ-CLE 1873 [2007])." Here, the plaintiff asserts that defendant Ramp Motors, as owner of the subject vehicle, is vicariously liable for the negligence of its lessee, defendant Austin in operating the Ramp vehicle at the time of the accident on the basis of New York State Vehicle and Traffic Law Section 388 (1) which imposes vicarious liability upon the owner of any vehicle involved in an accident (***De La Cruz Sigaran v ELRAC, Inc.,*** supra).

In support of this application, the affidavit of Wayne Rampone, Jr. has been submitted, wherein he states that he is the Vice President of Ramp Motors, Inc. He stated that Ramp Motors, Inc. was the lawful owner of the vehicle allegedly involved in the subject accident. Rampone continued that Ramp Motors, Inc. was in the business of renting and leasing automobiles on the date of the alleged accident. He concluded that co-defendant Austin was not, and has never been, an employee of Ramp Motors, Inc.

In opposition, the plaintiff has submitted entity information from the New York State Department of State, Division of Corporations, current through May 18, 2012, which identified a corporation known as Ramp Motors Leasing Corporation of which Charles Rampone is chairman or chief executive officer, with principal executive offices at 4 Oak Road, Setauket. However, it is not known by this court whether Ramp Motors, Inc. and Ramp Motors Leasing Corporation are one and the same entity or different entities. In any event, the uncertified document standing alone does not raise a factual issue to dispute the averment by Wayne Rampone that Ramp Motors, Inc. was the owner of the subject vehicle.

It is determined as a matter of law, that Ramp Motors, Inc. is not vicariously liable for the negligence of the lessor of the subject vehicle, Tashia Austin. Plaintiff's tort claim against the lessor of the vehicle involved in the accident based solely upon vicarious liability, should be dismissed as it is preempted by the federal statute, The Graves Amendment, 49 § 30106, which preempted Vehicle and Traffic Law § 388 by barring vicarious liability actions against professional lessors and renters of vehicles (***Graham v Dunkley***, 50 AD3d 55, 852 NYS2d 169 [2d Dept 2008]).

In the instant action, the complaint does not allege affirmative negligence on the part of defendant Ramp Motors, but instead asserts that Ramp Motors is vicariously liable for the actions of defendant Austin. Here, there has been no factual issue raised by the plaintiff, supported by evidentiary proof, except for conclusory assertions, that Ramp Motors, Inc. was not the owner of the vehicle, or that there was negligence or criminal wrongdoing on the part of the owner. Accordingly, that part of the complaint which asserts that defendant Ramp Motors, Inc. is vicariously liable for the alleged negligence of Tashia Austin is barred by 49 USCS § 30106, the Graves Amendment, and is accordingly dismissed.

Turning to motions (002) and (003), it is determined that the respective applications have not been timely served. CPLR 3212 (a) provides in pertinent part that a motion for summary judgment shall be made

within 120 days of the filing of the Note of Issue except with leave of the court on good cause shown. The court's computer reflects that the Note of Issue was filed on February 21, 2012, thus all motions were to be served by June 20, 2012. Motion (002) was served on June 27, 2012, and motion (003) was served on July 11, 2012, both beyond the statutory 120 days. Neither moving party has demonstrated good cause for the delay in making said late applications, and in fact, neither party has set forth any cause for the delay (***Brill v City of New York***,2 NY3d 648, 781 NYS2d 261 [2004]). As set forth in ***Brill v City of New York***, no excuse, or a perfunctory excuse, cannot be "good cause," and the appropriate remedy for a failure to satisfy the 120-day deadline is to return the case to the trial calendar, where a motion to dismiss after plaintiff rests or a request for a directed verdict may dispose of the case during trial. Thus both motion (002) by defendant Marca, and cross-motion (003) by the plaintiffs, are deemed untimely (*see*, CPLR 3212(a); ***Certified Electrical Contracting Corp. v City of New York,*** 23 AD3d 596, 804 NYS2d 794 [2d Dept 2005].

It is further determined that even if motion (002) were timely served, that defendant Marca adopted by reference all the facts, legal arguments, and exhibits set forth by co-defendants Ramp Motors and Tashia Austin relative to the application for dismissal on the basis that the infant plaintiff, Jalena Cole, did not sustain a serious injury. In that motion (001) was denied due to the failure of defendant Austin to establish prima facie that Jalena Cole did not sustain a serious injury, Marca's application must fail on that basis as well had it been timely served. Although motion (003) is untimely, it has been rendered academic by the decision in motion (001), however, it has been considered in opposition to motion (001).

Based upon the foregoing, motion (002) by defendant Marca for summary judgment dismissing the complaint is denied and motion (003) by the plaintiffs to dismiss Defendant Ramp's affirmative defense of the Graves Amenment are denied.

Dated: Dec. 3, 2012

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**

HON. JERRY GARGUILO