

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SCOTT W. GICKING : CIVIL ACTION
 :
v. : No. 06-2390
 :
ROBERT HOCH, JR. et al. :

MEMORANDUM AND ORDER

Juan R. Sánchez, J.,

December 15, 2006

John Tiedemann, Inc. asks for summary judgment relieving it of liability for damages resulting from an accident involving its employee, Robert Hoch Jr.'s. Because I find at the time of the accident, Defendant Hoch was outside the scope of his employment, I will grant Tiedemann's motion. Tiedemann's failure to instruct Hoch to remove "John Tiedemann" decals from his personal car did not create an agency relationship with regards to the accident.

FACTS

On Sunday May 22, 2005, at approximately 10:30 p.m., Scott Gicking's and Robert Hoch's cars collided in Bucks County, Pennsylvania. Hoch was driving his own car from his home in Ohio to his place of employment in New Jersey. Hoch worked for John Tiedeman, Inc., but at the time of the accident, Hoch was on his own time, not "on the clock" for John Tiedeman, Inc. Hoch's Dep. 45:2-13. Hoch did not receive any reimbursement for travel, nor did Tiedemann require that Hoch drive his own car to work. Hoch, by his own initiative and without compensation or reimbursement, placed a decal promoting John Tiedemann, Inc., on both side doors of his car.¹

¹ Hoch placed the following in the center of his Ford Explorer's side doors directly below the side door handles:

Hoch placed the decals on his car to provide Tiedemann with “free advertisement.” Hoch’s Dep. 16:20. John Tiedemann knew about the decals, but never asked Hoch to remove them. Hoch claims these decals led to a contract for St. Paul’s Cathedral in Pittsburgh, Pennsylvania, but Tiedemann disagrees. However, both parties agree Hoch was outside the scope of his employment at the time of the accident.

DISCUSSION

A motion for summary judgment will only be granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Rule 56(c) “mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex Corporation v. Catrett*, 477 U.S. 317, 322 (1986).

The moving party bears the burden of proving no genuine issue of material fact is in dispute, and the court must review all of the evidence in the record and draw all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Once the moving party has carried its initial burden, the nonmoving party must then “come forward with specific facts showing there is a genuine issue for trial.” *Id.* (citing Fed. R. Civ. P. 56(e)). A motion for summary judgment will not be denied because of the mere existence of some evidence in support of the nonmoving party. The nonmoving party must present sufficient evidence for a jury to reasonably find for them on that issue. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

John Tiedemann, Inc.,
Church Painting and Decorating
North Arlington, NJ 07031
1-866-600-2666.

Pl.’s Resp. Summ. J. Mot. Ex. 1

249 (1986).

Pennsylvania's general agency and *respondeat superior* case law provide a well-established rule with few exceptions. Under *respondeat superior*, an employer is liable for its employees' negligent actions while they are working within the scope of employment. *Wilson v. United States*, 315 F. Supp. 1197, 1198 (E.D. Pa. 1970). Generally, Pennsylvania law excludes driving to one's work from the scope of employment and *respondeat superior*'s vicarious liability unless special circumstances apply. *Id.* at 1198-99 (deciding driver was outside of scope of employment even though he was driving while on call 24 hours). Hoch was not within the scope of his employment because he was driving his own car to New Jersey on a Sunday when the accident occurred. Hoch's Dep. 45:2-13.

I will only deviate from the scope of employment limitation if a special circumstance applies. *Owle v. Public Service Drive Yourself, Inc.*, 500 F. Supp. 19, 20 (E.D. Pa. 1971). A decal containing an employer's information raises a presumption the employer owns the car and it was being used for business purposes. Agency is a jury issue unless the evidence shows the employer did not own the car nor was it used in the employer's business. *Id.* In *Owle*, Judge Giles applied this rule and denied the defendant's summary judgment motion because the defendant provided the car to the driver for both personal and commercial purposes. *Id.* at 19-20. In this case, the evidence proves Hoch owned the car, not Tiedemann. This evidence rebuts the presumption, and the jury is not required to hear the issue. Thus, the "Tiedemann" decal does not create a special circumstance meriting deviation from the general rule.

Gicking accepts Hoch was not in the scope of his employment at the time of the accident. Instead, Gicking argues Tiedemann should be held liable under agency or ostensible agency because he failed to ensure Hoch remove the Tiedemann decals from his car. Thus, Gicking argues the decals

coupled with the resulting Pittsburgh contract demonstrate ratification.² Gicking further argues this ratification leads to an agency relationship between Hoch and Tiedemann which binds Tiedemann for the resulting accident. Gicking argues the jury should hear the question of whether a principal-ostensible agent relationship existed between Hoch and Tiedemann at the time of the accident.

Ostensible agency makes a principal liable for its agent's torts. *Davis v. Hoffman*, 972 F. Supp. 308, 312-13 (E.D. Pa. 1963). Further, ratification allows an agent's unauthorized prior act to bind a principal if the principal knowingly fails to "disavow the act." *Sheppard v. Aerospatiale, Aeritalia*, 165 F.R.D. 449, 452 (E.D. Pa. 1996); Restatement (Second) of Agency § 83 (1958). A jury should decide whether an agency relationship existed, unless the facts pertaining to the relationship are undisputed. *Benevenuto v. Life USA Holding, Inc.*, 61 F. Supp. 2d. 407, 415 (E.D. Pa. 1999).

Ostensible agency has been applied to cases involving independent contractors with medical providers, lessors and lessees, franchisors and franchisees. Ostensible agency does not apply to a case involving an established and undisputed employee and employer relationship. *Compare Davis*, 972 F. Supp. at 312-13 (analyzing ostensible agency between a surgeon, the independent contractor, and the hospital he performed the surgery in, the principal); *Jones v. Century Oil U.S.A., Inc.*, 957 F.2d 84, 88-89 (3d Cir. 1991) (applying ostensible agency to independent contractor, but not employee), *with Owle*, 500 F. Supp. at 20; *Simpson v. United States*, 484 F. Supp. 387, 393 (W.D. Pa. 1980) (analyzing defendant-employer's vicarious liability under *respondeat superior*, not ostensible agency).

² Gicking's response brief analyzed the following two issues: "Whether an employer can be held vicariously liable for the negligence of an employee who, while intending to confer a benefit upon the employer, holds himself out to the public as an ostensible agent of the employer, and the employer, although aware of the employee's actions, takes no action to prohibit those actions, and does nothing to dispel the appearance that the employee is acting as its agent?" and whether this issue should be presented to the jury. Pl.'s Resp. Br. Mot. Summ. J. 5.

At the time of the accident, Hoch was a Tiedemann employee outside the scope of his employment. Gicking asks me to extend the agency relationship between the employer and employee beyond its established limits of *respondeat superior* by applying ostensible agency. This I cannot do because the agency relationship between Hoch and Tiedemann arises from Hoch's employment with Tiedemann. He voluntarily placed the decals on his own car promoting his employer John Tiedemann with hopes of soliciting more jobs for his employer.

Ratification does not apply to this case because John Tiedemann did not ratify Hoch's presumed negligent driving on May 22, 2005. Gicking's cases analyze ratification when the agent's unauthorized transaction/act resulted in the third party's harm. *Aerospatilale, Aeritalia*, 165 F.R.D. at 452 (analyzing whether plaintiff's cashing the settlement check ratified her attorney's decision to settle the case); *SEI Corp v. Norton Co.*, 631 F. Supp. 497, 502-03 (E.D. Pa. 1986) (discussing whether counsel's failure to notify plaintiff and the court of opposing counsel's unauthorized representations ratified those representations and prevented him from prevailing in post trial motions); Restatement (Third) of Agency § 4.01 (2006).³ Here, Hoch's separate actions led to Gicking's damages and Tiedemann's benefit. Hoch's alleged negligent driving led to Gicking's damages, unrelated to the Tiedemann decals. Gicking argues Tiedemann ratified Hoch's decals by knowing about the them, failing to request him to remove them, and receiving a job from the advertisement. Gicking attempts to bootstrap Tiedemann's benefit from the Pittsburgh contract to Hoch's accident with Gicking, when no evidence has suggested the two are related.

An appropriate order so follows:

³ “[A] person ratifies an act by a) manifesting assent that the act shall affect the person's legal relations or conduct that justifies a reasonable assumption that the person so consents. . . .” The comment explains “the sole requirement for ratification is a manifestation of assent or other conduct indicative of consent by the principal.”

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ORDER

And on this 15th day of December, 2006, Defendant John Tiedemann, Inc.'s Summary Judgment Motion (Document Number 18) is GRANTED.

BY THE COURT:

/s/ Juan R. Sánchez, J.

Juan R. Sánchez, J.