

Short Form Order

**NEW YORK STATE SUPREME COURT - QUEENS COUNTY**

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19

Justice

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LASHANDA BROWN,

Plaintiff,

-against-

Index No: 28016/04  
Motion Date: 8/15/07  
Motion Cal. No: 9  
Motion Seq. No: 2

TRANSPORTATION PLANNING CORP.  
d/b/a OLLIES TAXI AND AIRPORT  
SERVICE, LUXURY LIMITED CORP.,  
ALL ISLAND TAXI, INC., JAMES E.  
HENSON, JR., UDELL M. WILSON  
and PATRICK A. HALL,

Defendants.

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x

The following papers numbered 1 to 11 read on this motion by defendants Udell M. Wilson and Patrick Hall for an order granting them summary judgment, pursuant to 3212, dismissing the complaint and any and all cross-complaints on the basis that there is no material issue of fact regarding the liability of these defendants.

	<u>Papers Numbered</u>
Notice of Motion-Affidavits - Exhibits .....	1 - 4
Co-defendants' Affirmation in Opposition - Exhibits .....	5 - 6
Plaintiff's Affirmation in Opposition.....	7 - 9
Reply Affidavits.....	10 - 11

Upon the foregoing papers, it is hereby ordered that the motion is disposed of as follows:

Plaintiff LaShanda Brown (“plaintiff”) seeks damages in this negligence action against defendants for injuries sustained as a rear-seated passenger in a taxicab owned by defendant Transportation Planning Corp. d/b/a Ollies Taxi and Airport Service (“Ollies Taxi”), and operated by defendant James E. Henson, Jr. (“Henson”), which was involved in a collision on April 12, 2004, on Front Street, at or near its intersection with New Jersey Avenue, in Uniondale, New York, with a vehicle owned by defendant Udell M. Wilson (“Wilson”) and operated by defendant Patrick A.

Hall (“Hall”). Defendants Wilson and Hall move for summary judgment on the issue of liability in their favor dismissing the complaint and all cross claims asserted against them on the ground that there are no triable issues of fact to be determined because the accident occurred due solely to co-defendant Henson’s violation of section 1128 of the Vehicle and Traffic Law (“VTL”).

It is well established that summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980); Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231(1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (1985). The proponent of a motion for summary judgment ““must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers’ ( Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986] [citations omitted].” JMD Holding Corp. v. Congress Financial Corp., 4 N.Y.3d 373 (2005). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

Section 1128 of the VTL, the statutory provisions that defendants Wilson and Hall contend defendant Henson violated, in pertinent part, provides:

Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply:

(a) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

In support of the claimed violation and the instant motion, the moving defendants submit the deposition testimonies of defendant Hall; non-party Randy Ugarte (“Ugarte”), a passenger in the same taxi cab as plaintiff; and plaintiff. Defendant Hall testified that while he was proceeding straight on Front Street in his vehicle, he observed the taxicab driven by defendant Henson in the travel lane in front of his vehicle, that he observed the taxicab veer off to the right shoulder, and that the accident occurred when the taxicab operated by defendant Henson without warning, suddenly pulled out of the shoulder into the travel lane in an attempt to make a left turn and struck the passenger side of defendant Hall’s vehicle. Ugarte testified that at the time of the accident, he was seated in the front passenger seat of the taxicab, which was traveling at a speed between 40 and 45 miles per hour, that there was a car traveling in front of the taxicab that was making a left turn onto New Jersey Avenue, that defendant Henson moved the taxicab to the right shoulder to go around the turning vehicle, and that upon realizing that he too should have been making the left turn, defendant

Henson tried to make the left turn while he was on the right shoulder, which resulted in the accident with the front driver's side bumper of the taxicab coming into contact with defendant Hall's front passenger side. Plaintiff testified that she was a passenger in the taxicab operated by defendant Henson, which was headed to her house on New Jersey Avenue, that the taxicab was moving at a rate of speed higher than 35 miles per hour, that she heard Ugarte tell the cabdriver, defendant Henson, that he missed the block to turn, that the accident occurred when defendant Henson attempted to make the left turn. Based upon this testimonial evidence, defendants Hall and Wilson made a prima facie showing that the accident occurred solely due to defendant Henson's violation of the statutory provision.

Indeed, the facts of this case are strikingly similar to those presented in White v. Gooding, 21 A.D.3d 485 (2<sup>nd</sup> Dept. 2005), in which the Second Department stated:

The plaintiff made a prima facie showing of negligence on the part of the defendant based on the deposition testimony of the parties that the motor vehicle accident occurred when the defendant pulled her vehicle to the right to allow an ambulance to pass and then proceeded back across a moving lane of traffic, without ascertaining what traffic was behind her, in order to make an unexpected left turn across the plaintiff's lane of travel in violation of Vehicle and Traffic Law §§ 1128(a) and 1143 ( see Jacino v. Sugerman, 10 A.D.3d 593, 781 N.Y.S.2d 663; Ferrara v. Castro, 283 A.D.2d 392, 393, 724 N.Y.S.2d 81). In opposition, the defendant failed to raise a triable issue of fact as she merely alleged, unsupported by any evidence, that the [] plaintiff could have taken some unspecified action to avoid the accident or that he somehow contributed to its cause ( see Jacino v. Sugerman, supra; Stoebe v. Norton, 278 A.D.2d 484, 485, 718 N.Y.S.2d 642; Williams v. Econ, 221 A.D.2d 429, 430, 633 N.Y.S.2d 392). Accordingly, the plaintiff was entitled to summary judgment on the issue of liability.

See, also, Calandra v. Dishotsky, 244 A.D.2d 376, 377 (2<sup>nd</sup> Dept. 1997)[The plaintiff made a prima facie showing of negligence on the part of the appellant, Robert Dishotsky, based on Dishotsky's deposition testimony that the motor vehicle accident at issue occurred when he pulled out of a parking spot and into a lane of moving traffic (see, Vehicle and Traffic Law § 1128 [a])"]; Deblasi v. City of New York, 306 A.D.2d 308 (2<sup>nd</sup> Dept. 2003)[“The plaintiff, in support of his motion for summary judgment, submitted evidence in admissible form which established as a matter of law that the accident occurred when the bus operator negligently changed lanes, striking the plaintiff's vehicle (see, Vehicle and Traffic Law § 1128[a]; Calandra v. Dishotsky, 244 A.D.2d 376, 664 N.Y.S.2d 95)”. Having established their prima facie entitlement to summary judgment, the burden then shifted to plaintiff and the co-defendants to raise an issue of material fact. This they failed to do.

The co-defendants contend that there is a triable issue of fact concerning whether defendant Hall operated his vehicle with reasonable care, arguing that there is an issue as to whether defendant Hall violated Section 1180(e) of the VTL, which requires a driver to drive at an appropriate reduced speed when approaching and crossing an intersection, and whether defendant Hall “faced with a vehicle stopped in front of him and a taxi that pulled over to the shoulder” kept a “proper lookout, under the circumstances existing, and to see and be aware of what is in his view.” Plaintiff similarly argues that there are issues of fact as to whether defendant Hall exercised reasonable care in the operation of his vehicle. Co-defendants’ and plaintiff’s speculative and conclusory arguments are insufficient to demonstrate the existence of an issue of fact. See, Ferrara v. Castro, 283 A.D.2d 392 (2<sup>nd</sup> Dept. 2001). Aside from their conjecture, they presented no evidence that defendant Hall’s vehicle was being operated in excess of the speed limit, or in any other way contributed to the happening of the accident. See, Neryaev v. Solon, 6 A.D.3d 510, 511 (2<sup>nd</sup> Dept. 2004).

Based upon the foregoing, defendants Hall and Wilson are entitled to summary judgment dismissing the complaint and all cross claims insofar as asserted against them as they demonstrated their prima facie entitlement to such relief, and the opposition was insufficient to establish a triable issue of fact warranting a denial of the motion. Accordingly, the complaint and all cross claims hereby are dismissed as to defendants Patrick A. Hall and Udell M. Wilson.

Dated: September 24, 2007

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J.S.C.