

**Freeman v Prince Leasing Corp.**

2007 NY Slip Op 30984(U)

April 16, 2007

Supreme Court, New York County

Docket Number: 0116664/2005

Judge: Deborah A. Kaplan

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

SUPREME COURT OF THE STATE OF YORK — NEW YORK COUNTY

PRESENT: HON. DEBORAH A. KAPLAN

PART 22

*Justice*

CHERYL FREEMAN

INDEX NO. 116664/05

- v -

MOTION DATE 2-21-07

MOTION SEQ. NO. 001

PRINCE LEASING CORP.,  
ANTHONY G. CARDOZO and  
LYNN A. SCHAPER

MOTION CAL. NO. 34

The following papers, numbered 1 to 4 were read on this motion by defendant, Lynn A. Schaper for summary judgment on the issue of liability.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits (Memo) \_\_\_\_\_

Replying Affidavits (Reply Memo) \_\_\_\_\_

Answering Affidavits — Exhibits (Memo) \_\_\_\_\_

Cross-Motion:  Yes  No

PAPERS NUMBERED

1

2

3

4

**FILED**

APR 30 2007

NEW YORK  
COUNTY CLERK'S OFFICE

This is an action for damages allegedly sustained as a result of a motor vehicle accident which occurred on August 28, 2005, at the intersection of East 86<sup>th</sup> Street and Park Avenue in Manhattan. Plaintiff Cheryl Freeman was a passenger in a vehicle operated by defendant Anthony G. Cardozo and owned by defendant Prince Leasing Corp.. It is alleged that vehicle made a left turn from Park Avenue onto East 86<sup>th</sup> Street striking a vehicle driven by defendant Lynn A. Schaper.

Defendant Schaper now moves, pursuant to CPLR 3212, for summary judgment on the issue of liability. Additionally, the plaintiff Freeman has submitted an "Affirmation in Support" of a "Cross-Motion," without a Notice of Motion. While the plaintiff's submission may be procedurally defective, the court, in any event, may search the record and grant summary judgment to a non-moving party. See Mashawari v City of New York, 2 NY3d 288 (2004); Atlas Credit Corporation v. Ezrine, 25 N.Y.2d 219 (1969); Eighty Eight Bleecker Co. v 8 88 Bleecker Store Owners, 34 AD3d 244 (1st Dept. 2006); Backer v. Bouza Falco Co., 28 A.D.2d 503 (2<sup>nd</sup> Dept., 2006).

In support of her motion, defendant Schaper proffers the police report of the accident, her own deposition testimony and the deposition testimony of the plaintiff. These submissions establish that Cardozo's vehicle, which was traveling northbound on Park Avenue in the far right lane made a left turn, across two lanes of traffic and against a red light, through the intersection striking Schaper's vehicle. Schaper had been traveling southbound on Park Avenue and proceeding with the light. Defendant Cardozo has been precluded from testifying at trial due to his failure to comply with the Court's (Tingling, J.). discovery orders dated August 18, 2006 and September 26, 2006.

It is well settled that 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. See Alvaraz v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). VTL section 1141 provides: "the driver of a vehicle intending to turn to the 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." Where, as here, defendant's negligence was the proximate cause of the accident due to their failure to adhere to a statute and exercise the proper amount of care to avoid a hazardous situation, the victim is entitled to compensation. See Bogorad v. Fitzpatrick, 38 A.D.2d 923 (1<sup>st</sup> Dept. 1972). Furthermore, "a prima facie case is established if defendant's negligence was established as a matter of law and defendant's opposition papers failed to raise any material issues of fact as to defendants' liability or plaintiffs' comparative negligence." Perez v. Brux Cab Corp., 251 A.D.2d 157 (1<sup>st</sup> Dept. 1998).

In opposition to the motion, defendants Cardozo and Prince Leasing Corp. have failed to come forward with evidentiary proof in admissible form that would raise a triable issue of fact as to whether defendant Schaper was contributorily negligent in failing to exercise reasonable care in entering the intersection or in avoiding the collision. See Salenius v. Lisbon, 217 A.D.2d 692 (2<sup>nd</sup> Dept. 1999); Wilke v. Price, 221 A.D.2d 846 (3<sup>rd</sup> Dept. 1995); Cassidy v. Valenti, 211 A.D.2d 876 (3<sup>rd</sup> Dept. 1995); Hill v. Luna, 195 A.D.2d 1000 (4<sup>th</sup> Dept. 1993). See Alvaraz v Prospect Hospital, *supra*; Zuckerman v City of New York, *supra*. They have submitted only the affirmation of their attorney, who claims no personal knowledge of the accident. Thus, the affirmation is without probative value. See Zuckerman v City of New York, *supra* at 563; Johannsen v Rudolph, 34 AD3d 338 (1<sup>st</sup> Dept. 2006); Diaz v New York City Tr. Auth., 12 AD3d 316 (1<sup>st</sup> Dept. 2004). Moreover, as noted above, defendant Cardozo is precluded from testifying at trial, thus foreclosing the possibility of a contrary account of the collision.

Since this record warrants the granting of summary judgment as against defendants Cardozo and Prince Leasing Corp. on the issue of liability, the plaintiff is also entitled to summary judgment on that issue. See Mashwari v. City of New York, *supra*; Backer v. Bouza Falco Co., *supra*; Atlas Credit Coproraton v. Ezrine,

supra; Eighty Eight Bleecker Co. v 88 Bleecker Store Owners, supra; AC Transport. v Board of Education of the City of New York, supra.

For these reasons and upon the foregoing papers as well as oral argument held, it is

ORDERED that the motion of defendant Lyn A. Schaper for summary judgment on the issue of liability as against the defendants Anthony G. Cardozo and Prince Leasing Corp. Is granted, and it is further

ORDERED that the plaintiff Cheryl Freeman is granted summary judgment on the issue of liability as against defendants Prince Leasing Corp. and Anthony G. Cardozo; and it is further

ORDERED that upon the filing of the Note of Issue, the Clerk shall set a date upon which an inquest will be held assessing damages against the defendants Prince Leasing Corp. And Anthony G. Cardozo and entering judgment in accordance therewith; and it is further, ~~note of issue to be filed by~~

ORDERED, that the plaintiff shall serve a copy of this order with notice of entry upon all parties, the County Clerk, and the Clerk of the Trial Support Office within forty-five days of entry. This constitutes the decision and order of the Court.

Dated: April 16, 2007

  
Deborah A. Kaplan J.S.C.

**DEBORAH A. KAPLAN**  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

**FILED**  
APR 30 2007  
NEW YORK  
COUNTY CLERK'S OFFICE