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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. DEBORAH A. KAPLAN Justice PART 22

PATRICK KELLY

- v -

THE CITY OF NEW YORK, ALI AJMAL, ALBEE TAXI CORP., SAYD NOUREDDINE and LEYEDE TAXI INC.

INDEX NO. 113434/04

MOTION DATE 7-25-07

MOTION SEQ. NO. 003

MOTION CAL. NO. 57

The following papers, numbered 1 to 6, were read on this motion by defendant City of New York for summary judgment on the issue of liability.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1
Answering Affidavits — Exhibits (Memo)	2,3,4, 4A
Replying Affidavits (Reply Memo)	5,6

Cross-Motion: ☐ Yes ■ No

In this personal injury action arising from an automobile accident, defendant City of New York seeks summary judgment dismissing the complaint and all cross-claims against it. For the reasons set forth below, the motion is denied.

The complaint alleges that at approximately 3:20 p.m. on September 1, 2003, a taxi operated by defendant Sayd Noureddine and owned by defendant Leye Taxi Inc. collided with a taxi operated by defendant Ali Ajmal and owned by defendant Albee Taxi Corp. at the intersection of East 26th Street and Lexington Avenue. The plaintiff was a passenger in Ajmal's taxi, which was traveling east on East 26th Street. Noureddine testified at his deposition that he was driving south on Lexington Avenue at a speed of about 25-30 miles per hour and all traffic lights were green in his favor from 44th Street to 27th Street and, looking ahead, he could see that they were also green on 25th and 24th Streets. He first noticed the malfunctioning traffic light at 26th Street after he passed 27th Street and, upon seeing it, slowed down. The collision with Ajmal's taxi occurred seconds later. The City now moves for summary judgment dismissing the complaint on the issue of liability. The plaintiff and co-defendants oppose the motion.

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. Once the movant meets this burden, the opponent, in order to defeat the motion, must forward with proof in admissible form to

raise a triable issue of fact. See Alvaraz v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). In deciding a motion for summary judgment, the court must bear in mind that issue finding rather than issue determination is the key. See Sillman v Twentieth Century Fox Film Corp., 3 NY2d 395 (1957). Furthermore, since summary judgment is a drastic remedy which deprives a litigant of his or her day in court, the evidence adduced on the motion must be liberally construed in the light most favorable to the opposing party. See Andre v Pomeroy, 35 NY2d 361(1974); Kesselman v Lever House Restaurant, 29 AD3d 302 (1st Dept. 2006); Goldman v Metropolitan Life Ins. Co., 12 AD3d 289 (1st Dept. 2004). "In general, questions of negligence regarding a road accident are best resolved at a jury trial" (Lindgren v NYCHA, 269 AD2d 299, 302 [1st Dept. 2000]) and the issue of comparative negligence and apportionment of liability are almost always matters for the finder of fact. See Andre v Pomeroy, 35 NY2d 361, 366 (1974); Hazel v Nika, 40 AD3d 430 (1st Dept. 2007); Cabrera v Hirth, 8 AD3d 196 (1st Dept. 2004); Thoma v. Ronai, 189 A.D.2d 635 (1st Dept. 1993), *affd.,* 82 NY2d 736 (1993).

The defendant City of New York does not dispute that the traffic device at that intersection was not functioning at the time of the accident and that it had been repaired several times in the day prior to the accident and once after. The City's co-defendants have submitted those repair records. The City argues, however, that there are no triable issues as the whether the broken traffic signal was a proximate cause of the accident, thus entitling it to summary judgment. The City's position is premised upon the decision of the Appellate Division, Second Department in Minemar v Kharmova, 29 AD3d 750 (2nd Dept. 2006).[1] In that case, the plaintiff stopped at a red traffic light at an intersection in Brooklyn behind two or three other cars that had stopped before him. Realizing after a one to two minutes that the light was not functioning, the plaintiff checked for oncoming traffic and proceeded across the intersection while the light was still red. Plaintiff was struck by the defendant's vehicle in the middle of the intersection. The Court granted a motion by the City of New York for summary judgment, finding that, since the plaintiff "was fully aware

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[1] The City also relies upon an unreported decision of the Supreme Court, New York County (Rakower, J.) wherein the court granted summary judgment to the defendant City under circumstances similar to those in Minemar. In Mena v The City of New York, et al., Index No. 109978/04, the defendant taxi driver stopped for several minutes at an intersection controlled by what he recalled to be a red blinking traffic signal. After deciding the light was broken, he proceeded through the intersection to make a left turn and collided with the plaintiff's vehicle, which was traveling through the intersection on a steady green light. The City did not concede and there was no evidence that the traffic signal was actually malfunctioning. The Court concluded that the City could not be found liable since the defendant had a blinking red light, which required him to come to a full stop before proceeding into the intersection. The Court, however, noted that it may have reached a different conclusion were the light steady green in both directions.

of the malfunctioning traffic light and the consequent need to exercise caution in proceeding through the intersection, any negligence on the part of the City in maintaining the traffic light was not a proximate cause of the accident."

However, the City misinterprets Minemar to hold that a malfunctioning traffic light may not constitute the proximate cause of an accident. This is not the law in either the First or Second Department. In Powell v City of New York, 250 AD2d 409 (1st Dept. 1998), the First Department held that it could not find, as a matter of a law, that a broken traffic signal, which indicated a steady red signal in one direction and a steady green signal in the other, was *not* a proximate cause of the accident. In Davilmar v City of New York, 7 AD3d 559 (2nd Dept. 2004), the Second Department, in denying the motion of a defendant who contracted with the City to maintain the traffic signal, similarly held that "the malfunctioning traffic signal may constitute a proximate cause of the accident." There, the Court found significant that the defendant last repaired the signal eight hours before the accident, much like the instant case. See also Wood v State of New York, 112 AD2d 612 (3rd Dept. 1985); Ktenas v Pillar, 101 AD2d 991 (3rd Dept. 1984).

Furthermore, the instant case is factually distinguishable from Minemar, supra, and Mena, supra, in that the proof submitted here does not show that the plaintiff had an opportunity to stop at the light, evaluate its functionality and choose a course of action. Instead, the plaintiff testified that he had been traveling on Lexington Avenue for some seventeen blocks with the traffic lights in his favor and observed two more green traffic lights ahead of him after 26th Street. It was not until he passed the intersection at 27th Street that he realized the broken light and, upon seeing it, slowed down.

As correctly observed by the City, an unexcused violation of a statutory standard of care constitutes negligence per se. See Martin v Herzog, 228 NY 164 (1920); Holleman v Miner, 267 AD2d 867 (3rd Dept. 1999); Weiser v Dalbo, 184 AD2d 935 (3rd Dept. 1992); Cordero v City of New York, 112 AD2d 914 (2nd Dept. 1985); Pattern Jury Instructions 2:26 (1999). A statutory standard of care is provided by Vehicle and Traffic Law §1117, which requires a driver approaching an intersection where the traffic signal is malfunctioning to stop in the manner required for stop signs. Thus, defendant Noureddine may be found negligent for failing to stop at the broken traffic light and treat it as a stop sign. However, it is well settled that a finding of negligence does not equate with a finding of proximate cause (see Rodriguez v Budget Rent -A-Car, – AD3d – , [1st Dept. August 23, 2007]; Ohdan v City of New York, 268 AD2d 86 [1st Dept. 2000] lv denied 95 NY2d 769 [2000]) and there may be more than one proximate cause of an accident. See Rodriguez v Budget Rent-A-Car, supra; Mateiasevici v Daccordo, 34 AD3d 651 (2nd Dept. 2006); Wood

v State of New York, supra.

Thus, the proof submitted may establish at least partial liability on the part of defendant Noureddine in failing to observe and stop at the broken light before proceeding. However, it does not establish, as a matter of law, that the defendant City was free of liability. That is, there are triable issues as to the City's comparative negligence in failing to maintain the traffic signal in proper working order.

For these reasons, and upon the foregoing papers, it is

ORDERED that motion by defendant City of New York for summary judgment on the issue of liability is denied, and it is further,

ORDERED that the parties shall appear at Mediation-2 , 80 Centre Street, on the date previously scheduled.

This constitutes the Decision and Order of the Court.

October 16, 2007

Dated: ~~September 24, 2007~~

OCT 16 2007

Deborah K

Deborah A. Kaplan *J.S.C.*

DEBORAH A. KAPLAN
J.S.C.

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