

Wasserberger v Somers Chase Taxi, Inc.

2007 NY Slip Op 33892(U)

November 20, 2007

Supreme Court, New York County

Docket Number: 0107190/2005

Judge: Deborah A. Kaplan

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

PRESENT: HON. DEBORAH A. KAPLAN
Justice

PART 22

LINDSAY WASSERBERGER

INDEX NO. 107190/05
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MOTION DATE 9-26-07

MOTION SEQ. NO. 001

MOTION CAL. NO. 113

- v -

SOMERS CHASE TAXI, INC., ANWAR MATEER,
WILMOT H. KIDD, CHARLOTTE D. KIDD,
STEVEN MARALLO

The following papers, numbered 1 to 3, were read on this motion by defendant Somers Chase Taxi Inc. and Anwar Mateer for summary judgment on the issue of liability.

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavit Exhibits

1

Affirmation in Opposition

2

Replying Affirmation

3

Cross-Motion: Yes No

FILED
NOV 30 2007
NEW YORK
COUNTY CLERK'S OFFICE

This is an action to recover damages for injuries arising from a three-vehicle accident that occurred on the evening of December 19, 2004, at the intersection of Park Avenue and East 72nd Street in Manhattan. The undisputed facts establish that an Audi operated by defendant Charlotte Kidd and owned by her father, defendant Wilmot Kidd, collided with a Mitsubishi owned and operated by defendant Steven Marallo in the lefthand northbound lane of Park Avenue as Marallo was making a left turn onto 72nd Street. That impact caused the Kidd vehicle to cross the center median and strike a southbound taxi operated by defendant Anwar Mateer and owned by defendant Somers Chase taxi. The plaintiff, Lindsay Wasserberger, was a passenger in the taxi. Upon the impact, her face hit the plexiglass partition, shattering the partition and ten of her teeth. Defendants Somers Chase Taxi, Inc. and Anwar Mateer now move for summary judgment on the issue of liability, dismissing the complaint as against them.

To prevail on a motion for summary judgment, the moving party must produce evidentiary proof in admissible form sufficient to show the absence of any material issue of fact and the right to judgment as a matter of law. If the moving party makes the requisite showing, the burden then shifts to the opposing party to come forward with proof in

admissible form to raise a triable issue of fact requiring a trial. See Kosson v Algaze, 84 NY2d 1019 (1995); Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Winegrad v New York Univ. Med Ctr., 64 NY2d 851 (1985); Zuckerman v City of New York, 49 NY2d 557 (1980).

A driver of a motor vehicle is expected to drive at a safe rate of speed, taking into account weather and road conditions, and to maintain a safe distance from the vehicle in front of him. See Vehicle and Traffic Law § 1129(a); 1180(a); Malone v Morillo, 6 AD3d 324 (1st Dept. 2004); Mitchell v Gonzalez, 269 AD2d 250 (1st Dept. 2000). Further, Vehicle and Traffic Law § 1141 provides in part that "[t]he 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."

In support of their motion, defendants Somers Chase Taxi, Inc. And Anwar Mateer submit, *inter alia*, the pleadings and the deposition testimony of all three drivers - Anwar Mateer, Steven Marallo and Charlotte Kidd - as well as the plaintiff. The deposition testimony establishes that defendant Marallo was in the process of making a left turn from the northbound side of Park Avenue onto 72nd Street when the Kidd vehicle approached from behind, struck his vehicle on the left side, and then proceeded across the median, which consisted of raised flower beds. The deposition testimony further establishes that defendant Mateer was driving the taxi southbound on Park Avenue, approaching 72nd Street with a green light in his favor, when the Kidd vehicle suddenly crossed the median and collided with the taxi on its front left side. The roadways were snow-covered and slippery. The moving defendants' submissions establish, as a matter of law, that they are free of liability in this accident.

The moving defendants have also submitted an uncertified police report which includes a statement, attributed to defendant Charlotte Kidd, that Marallo was attempting to make a left turn from the center lane when she struck his vehicle. However, a police report which contains hearsay statements regarding the ultimate issues of fact may not be admitted into evidence for the purpose of establishing the cause of the accident. See Stankowski v Kim, 286 AD2d 282 (1st Dept. 2001); Figueroa v Luna, 281 AD2d 204 (1st Dept. 2001); Aetna Casualty & Surety Co. v Island Transportation, 233 AD2d 157 (1st Dept. 1996); Sansevere v United Parcel Service, Inc., 181 AD2d 521 (1st Dept. 1992).

The motion is opposed by defendants Wilmot Kidd and Charlotte Kidd by way of an affirmation of their attorney who argues that material issues of fact are raised by the plaintiff's testimony that Mateer was using a cell-phone and traveling at a speed of 40 miles per hour at the time of the collision. However, affirmations of attorneys who claim no

personal knowledge of the accident are without probative value on summary judgment motions. See Zuckerman v City of New York, *supra* at 563; Johannsen v Rudolph, 34 AD3d 338 (1st Dept. 2006); Diaz v New York City Transit Authority, 12 AD3d 316 (1st Dept. 2004). While they may serve as vehicles for submitting documentary evidence or other proof in admissible form as an attachment (see Alvarez v Prospect Hospital, *supra* at 325; Zuckerman v City of New York, *supra* at 563), there are no attachments here. The affirmation merely refers to the deposition testimony submitted in the moving papers which, as stated above, establishes the movants' lack of liability. Counsel's arguments regarding Mateer's cellphone use and speed, even absent the contradictory deposition testimony contained in the depositions, do not require a different result in this case.

Inasmuch as defendant Kidd's vehicle struck Marallo's and was propelled, under slippery road conditions, across the median and into the path of oncoming traffic, application of the emergency doctrine is warranted. That is, Mateer was faced with "sudden and unexpected circumstances which [left] little or no time for thought, deliberation or consideration." Rivera v New York City Transit Authority, 77 NY2d 322, 327, (1977); Alama v McDaniel, - AD2d -- , 2007 WL2265131 (1st Dept. 2007). Consequently, the moving defendants are entitled to summary judgment unless the opposing defendants come forth with evidence that Mateer's "actions prior to the cross-over contributed to the emergency or that after the cross-over he could have taken one or more actions that would have avoided the accident or minimized the plaintiff's injuries." Gonzales v City of New York, 295 AD2d at 122 (1st Dept. 2002). The opposing defendants "have failed to identify what action, if any [Mateer] could have taken to avoid the accident or minimize the damages." Edwards v Gaines Service Leasing Corp., 244 AD2d 279, 280 (1st Dept. 1997).

Since the opposing defendants have failed to come forward with proof in admissible form to raise a triable issue as to the liability of Somers Chase Taxi, Inc. and Anwar Mateer, the instant motion must be granted, and the complaint dismissed as to those defendants. This leaves for determination at a later date the issues of comparative negligence as between the remaining defendants, including Charlotte Kidd, who testified that she was traveling about thirty miles per hour while only two car lengths behind Marallo, who was nearly stopped and was not certain when he left the center lane, and the plaintiff, who testified that she was not using a seat belt.

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

ORDERED that the motion of defendants Somers Chase Taxi, Inc. and Anwar Mateer for summary judgment on the issue of liability is granted, and the complaint and all-cross claims against those defendants are dismissed, and the Clerk is directed to enter

judgement in favor of those defendants only; and it is further;

ORDERED that the remainder of the action shall continue; and it is further,

ORDERED that the remaining parties shall appear for a pre-trial conference on December 20, 2007, at 9:30 a.m. at Part 22, 80 Centre St., Room 136, as previously scheduled.

Dated: November 20, 2007

Deborah Kaplan

Deborah A. Kaplan J.S.C.

DEBORAH A. KAPLAN

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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