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| <b>Medeck v City of New York</b>                                                                                                                                                                                                 |
| 2008 NY Slip Op 32095(U)                                                                                                                                                                                                         |
| July 24, 2008                                                                                                                                                                                                                    |
| Supreme Court, New York County                                                                                                                                                                                                   |
| Docket Number: 0103016/2005                                                                                                                                                                                                      |
| Judge: Eileen A. Rakower                                                                                                                                                                                                         |
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| This opinion is uncorrected and not selected for official<br>publication.                                                                                                                                                        |

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

**EILEEN A. RAKOWER**

PRESENT: \_\_\_\_\_ **J.S.C.**

PART 5

Index Number : 103016/2005

*Justice*

MEDECK, KEITH H.

INDEX NO. 103016/05

vs

CITY OF NEW YORK

MOTION DATE \_\_\_\_\_

Sequence Number : 002

MOTION SEQ. NO. 002

SUMMARY JUDGMENT

MOTION CAL. NO. \_\_\_\_\_

\_\_\_\_\_ is motion to/for \_\_\_\_\_

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1  
2, 3  
4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

**FILED**

JUL 28 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 7/24/08

**EILEEN A. RAKOWER** **J.S.C.**

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

[\* 2 ]  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5

-----X  
KEITH H. MEDECK,

Plaintiff,

Index No.  
103016/05

Seq No.: 002

- against -

Decision and  
Order

THE CITY OF NEW YORK, THE NEW YORK CITY  
POLICE DEPARTMENT, NEW YORK CITY CENTRAL  
REPAIR SHOP, DANIEL J. CORIO, UNITED PARCEL  
SERVICE, INC. AND JOHN DOE, THE UNKNOWN  
EMPLOYEE OF UNITED PARCEL SERVICE, INC.

Defendants.

**FILED**  
JUL 28 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

-----X  
HON. EILEEN A. RAKOWER

Plaintiff brings this action for personal injuries allegedly sustained when he was struck by a police vehicle while crossing the street at the intersection of 11<sup>th</sup> Avenue and 45<sup>th</sup> Street in the County and State of New York on December 5, 2003 at approximately 3:30 a.m. Defendant United Parcel Service, Inc ("UPS") is alleged to have obscured the police vehicle's view of the intersection. UPS moves for summary judgment pursuant to CPLR 3212. Plaintiff opposes; and City of New York ("City") adopts plaintiff's arguments in its opposition.

UPS, in support of its motion, submits the following exhibits: (1) the pleadings; (2) plaintiff's bill of particulars; (3) the note of issue; (4) nine color photocopies of photographs of the subject location; (5) the deposition transcript of plaintiff; (6) the deposition transcript of Police Officer Daniel Corio ("Corio"); (7) the continuing deposition transcript of Corio; (8) the deposition transcript of Kevin Cash, Transportation Supervisor for UPS; (9) the deposition transcript of Police Officer Richard Mingoia ("Mingoia"); and (10) the deposition transcript of Sergeant Bucky Rhoades, Sergeant at the 10<sup>th</sup> Precinct. Plaintiff submits evidence which is duplicative of UPS' submissions and City does not submit any evidence.

Plaintiff explains that preceding the accident, plaintiff had been out with friends at various bars. Plaintiff's last stop for the evening was the "Executive Lounge," which is located on the corner of 45<sup>th</sup> Street and 11<sup>th</sup> Avenue. Plaintiff left the Executive Lounge at about 3:30 a.m. and headed east. As he stepped off the sidewalk, he was struck by a police vehicle that was moving southbound on 11<sup>th</sup> Avenue. Plaintiff claims that he was in the crosswalk and that the walk sign was lit, giving him the right of way. The police vehicle was driven by P.O. Corio. Corio's partner, P.O. Mingoia, was riding in the passenger seat. Corio testifies that he had the green light at the intersection. Corio contends that plaintiff was running when Corio's vehicle struck him. Plaintiff claims that he was walking normally across the street.

All parties involved in the accident state that they recall at least one large truck being parked along Eleventh Avenue on the side of the street where plaintiff was struck. All parties testify that the truck had a UPS logo on it, except for Corio who testifies that he does not remember exactly what kind of truck it was. Testimony is conflicting as to whether the truck was in the parking lane next to the curb or "double parked" in one of the two "moving" lanes on 11<sup>th</sup> Avenue.

UPS argues that there is no proof that the truck on 11<sup>th</sup> Avenue was illegally parked. UPS asserts that even if the truck was double -parked, it is legally permitted to double park for the purpose of loading and unloading merchandise. In any event, UPS claims that if its truck was parked on 11<sup>th</sup> Avenue, it was not the proximate cause of plaintiff's accident.

Plaintiff, in opposition, argues that there are questions of fact precluding summary judgment. Specifically, (1) whether the truck was parked illegally, thus obscuring the view of motorists traveling on 11<sup>th</sup> Avenue; and (2) whether, if the answer to the first question is answered affirmatively, the illegally parked UPS truck was a proximate cause of plaintiff's accident.

Plaintiff testifies that he observed a UPS truck double parked and that it was maybe "25 to 30 feet maybe a little further approximately 40 feet up the road" and that it did not really obstruct his view of Eleventh Avenue. (Plaintiff Deposition Pages 32-33). Corio testifies that there was a truck parked at the corner on his right hand side which obstructed his view of the intersection. He did not recall if it was a UPS truck or if it was double parked. (Corio Continuing Deposition Pages 44-45). In Corio's initial deposition, he testifies that the truck he saw was not double parked, it was "just parked along the street . . . along the parking lane. . ." but that it was "close to the

intersection.” (Corio Deposition, Pages 59-60). Mingoia testifies that he definitively saw a UPS truck double parked in the first moving lane next to the parking lane and that he and Corio were “right on top of” the truck when their vehicle hit plaintiff. (Mingoia Deposition, Page 62). The truck was on his right “maybe one or two feet from my door, on the passenger side.” (Id. at 18). Mingoia testifies that Corio swerved to his right to miss plaintiff and ended up in front of the truck. Sergeant Rhoades, who filled out the accident report at the scene, testifies that he saw more than one UPS truck and that the trucks were not double parked but were next to the curbside. Sergeant Rhoades, who was not a witness to the accident himself, states that plaintiff ran out from in between these two trucks. (Rhoades Deposition Pages 47-48). The police officers testify that there was no citation issued as a result of the location of the truck.

Mr. Cash testifies that UPS drivers would park empty “trailers” on the side streets near the UPS depot when the lot was full. Mr. Cash testifies that the UPS carriers would not be making deliveries at the time of the night that plaintiff’s accident occurred. The night shift drivers would go to the airport to load their tractor trailers with packages but not until 5:00 or 6:00 a.m. The UPS depot building takes up the entire block from 11<sup>th</sup> and 12<sup>th</sup> Avenues from 43<sup>rd</sup> to 44<sup>th</sup> Street. Mr. Cash claims that the trailers are never parked on the Avenues and that he has never observed or been told that one of the trailers was double parked on any street or avenue. He stated further that if a driver cannot locate a parking space, he or she would have to drive around until they found one.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. ( *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. ( *Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). ( *Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

Initially, UPS’ reliance on New York State Vehicle & Traffic Law §1200( c) is not supported by the facts here. That section states, in relevant part:

When parking is prohibited by this article, or by local law, ordinance, order, rule or regulation, no person shall park a vehicle, whether occupied or not, but may stop or stand temporarily for the purpose of and while actually engaged in loading or unloading merchandise or passengers.

The UPS truck which was alleged to have been double parked was observed at approximately 3:30 a.m. UPS' own employee, Mr. Cash, states unequivocally in his deposition that his drivers would not be delivering packages at that time of night. Indeed, Mr. Cash testifies that the drivers on the night shift would only transporting packages from one UPS facility to another or traveling to the airport in order to pick up packages. These deliveries would involve only tractor trailers and not regular delivery vans. Various witnesses testified that what they observed was a tractor trailer, not the traditional UPS van used to deliver packages. Thus, UPS cannot claim that truck observed at the accident scene was there for the purpose for which §1200( c) was intended.

The remaining issue before the court is whether UPS has shown, as a matter of law, that it was not the proximate cause of plaintiff's accident. The court in *White v. Diaz*, 49 AD3d 134[1st Dept 2008]; 854 NYS2d 106 acknowledges the difficulty that arises when determining whether a defendant's alleged negligence is a proximate cause of plaintiff's injuries or merely "furnished the condition or occasion for the occurrence of the event." (quoting *Spence v. Lake Serv. Sta., Inc.*, 13 AD3d 276[1st Dept. 2004]). That case involved a double parked van which was struck in the rear by another vehicle. The defendant owner of the van in that case moved for summary judgment and the court found that there were questions of fact for the jury in deciding whether the double parked van proximately caused the accident. (*Id.*). The court went on to note that "while it is appropriate to decide the question of legal cause as a matter of law where only one conclusion may be drawn from the established facts, where there is any doubt, confusion, or difficulty in deciding whether the issue ought to be decided as a matter of law, the better course is to leave the point for the jury to decide." (*Id.* at 109)(internal citations omitted).

Here, while it is clear that the factual scenario raises several material questions of fact as between City and plaintiff, the inquiry must not stop there but must also include whether the UPS truck was parked illegally and, if it is determined that it was, whether it was a proximate cause of plaintiff's accident. The evidence introduced by

both UPS and plaintiff on the parking issue produces differing witness accounts of the location of the UPS truck. While Corio and Sergeant Rhoades testify that the subject truck was not double- parked, both plaintiff and Magnoia testify that it was. It is also disputed whether the truck obstructed Corio's or plaintiff's view of Eleventh Avenue. Plaintiff states that the truck was not that close to the intersection and that it did not obstruct his view. However, Corio, while not claiming that the truck was double parked, testifies that it was much nearer to the intersection and that it did obstruct his view. It is well settled that where there are conflicting witness accounts, summary judgment should not be granted. (*Rodriguez v. 1585 Broadway Associates*, 243 A.D.2d 351[1st Dept. 1997]).

The court in *O'Connor by O'Connor v. Pecoraro*, 141 AD2d 443[1st Dept. 1988] held that: "owners of improperly parked cars may be held liable. . . depending on the determinations by the trier of fact of the issues of foreseeability and proximate cause unique to the particular case ." (*Id.* at 443). (where defendant illegally parked his car in front of a store, obstructing the view of plaintiff so that he did not see another vehicle approaching in time to push his sister out of the way). If a jury determines that the UPS truck was parked illegally, the next logical question is whether it was reasonably foreseeable that parking the truck in that location could cause the type of accident that occurred here. Proximate cause and foreseeability are generally issues for a finder of fact and it is not necessary that defendant must have foreseen the precise manner in which the accident happened. (*Derdiarian v. Felix Contracting Corp.*, 51 NY2d 308[1980]). Specifically in cases involving double-parked or illegally parked vehicles, courts have declined to rule as a matter of law on the issue of whether the violation was a proximate cause of the accident. (*White* at 109).

Wherefore it is hereby

ORDERED that Defendant United Parcel Service, Inc.'s motion for summary judgment is denied.

Dated: July 24, 2008

**FILED**  
JUL 28 2008  
EILEEN A. RAKOWER, J.S.C.  
COUNTY CLERK'S OFFICE  
NEW YORK