SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____ PART 22
Justice

Index Number : 151882/2012
LABADY, GINA
vs.
NEW YORK CITY TRANSIT
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 5, were read on this motion to/for and cross motion summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits City's _____ No(s). 1
Answering Affidavits — Exhibits Plaintiff's Cross Motion _____ No(s). 2
Replying Affidavits Opp to Motion _____ No(s). 3
Reply Opp to Cross Motion 4-5

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

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

Dated: 5/8/13

_____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NY
COUNTY OF NEW YORK: PART 22

Index No.: 151882/12
Motion Seq. 001

GINA LABADY, EDDY C. LEMIEUX, an infant by his mother and natural guardian, MARIE F. LADINY, and MARIE F. LADINY, individually,

Plaintiffs,

-against-

NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSIT AUTHORITY, STAR CRUISER TRANSPORTATION INC., MARATHON TAXI, INC., IGOR KHOMYSHKIN and ALI AGAG,

Defendants.

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

This motion by defendants NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSIT AUTHORITY, STAR CRUISER TRANSPORTATION INC., and IGOR KHOMYSHKIN ("the moving defendants") for an order (1) dismissing the complaint as against them pursuant to CPLR §3211(a)(7) on the grounds that the complaint fails to state a cause of action, or in the alternative (2) for summary judgment on liability, is denied in its entirety. Plaintiffs' cross-motion for summary judgment on liability is granted.

This accident happened when an Access-A-Ride van (the van) was hit in the rear by a taxi on Second Avenue between 18th and 19th Streets in Manhattan on December 6, 2011. Plaintiffs Labady and Lemieux were passengers in the van. Labady was a home health aide for Lemieux. Plaintiff Ladiny, Lemieux's mother, asserts only a derivative claim. The two other passengers in the van, Carlos and Maria Laboy, are not parties to this action. Defendant Khomyshkin was the driver of the van. The taxi was owned by Marathon Taxi, Inc. and operated by Agog.

The branch of the main motion seeking to dismiss the complaint pursuant to CPLR §3211 (a)(7) (failure to state a cause of action), which was made after the moving

defendants interposed their answer, is denied. The complaint alleges, inter alia, that plaintiffs were injured in a motor vehicle accident involving a taxi and the vehicle in which they were passengers, an Access-A-Ride van, that NYCTA and/or MTA and/or Star Cruiser Transportation Inc. owned, operated, managed, maintained and/or controlled the van, that Khomyshkin was the driver of the van, and that defendants were careless and negligent on the manner in which they owned, operated or controlled their motor vehicles (moving papers, exh A, para. 49). As such, the complaint clearly states a cause of action for negligence against the moving defendants.

The branch of the main motion seeking summary judgment dismissing the complaint as against them is also denied. In order to prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact. *Alvarez v Prospect Hospital,* 68 NY2d 320, 508 NYS2d 923 (1986). Once the movant demonstrates entitlement to judgment, the burden shifts to the opponent to rebut that prima facie showing. *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872, 433 NYS2d 1015 (1980). In opposing such a motion, the party must lay bare its evidentiary proof. Conclusory allegations are insufficient to defeat the motion; the opponent must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact. *Zuckerman v City of New York,* 49 NY2d 557 at 562, 427 NYS2d 595 (1980).

In deciding the motion, the court must draw all reasonable inferences in favor of the non-moving party and must not decide credibility issues. (*Dauman Displays, Inc. v Masturzo,* 168 AD2d 204, 562 NYS2d 89 [1st Dept 1990], *lv. denied* 77 NY2d 939, 569 NYS2d 612 [1991]). As summary judgment is a drastic remedy which deprives a party of being heard, it should not be granted where there is any doubt as to the existence of a triable issue of fact (*Chemical Bank v*

West 95th Street Development Corp., 161 AD2d 218, 554 NYS2d 604 [1st Dept.1990]), or where the issue is even arguable or debatable (*Stone v Goodson,* 8 NY2d 8, 200 NYS2d 627 [1960]).

In support of their motion, defendants cite to the 50-h testimony of passengers Labady, Lemieux, Carlos and Maria Laboy who all testified that while they felt the impact of the collision, they did not know how the accident happened (exhs D-G).

In further support, defendants submit the affidavit of the driver Khomyshkin (exh H) who states: "At the time of the accident, I was proceeding on Second Avenue, between 18th and 19th Street, when a taxi contacted the van to the rear. This accident was clearly the fault of the other vehicle in that it contacted the rear bumper while the van was moving and was the proximate cause of the accident" (paras. 4-5). Khomyshkin's affidavit is woefully inadequate. It lacks factual detail as to his conduct immediately prior to the collision, especially in light of the police report which the moving defendants submitted (exh B) wherein the police officer noted that the taxi driver said that Khomyshkin "cut him off". The inclusion of "proximate cause" language is inappropriate in a fact affidavit. While he admits that he was moving at the time, Khomyshkin does not set forth any facts to show that he played no part in causing the accident (by changing lanes and cutting into the taxi's lane). The moving affidavit fails to show the cross-claims have no merit. He does not even address, and certainly does not deny, co-defendants' cross-claims for contribution and common-law indemnification based on the moving defendants' alleged negligence and culpable conduct.[1]

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[1]CPLR §3212(b) requires that a motion for summary judgment be supported, inter alia, by a copy of the pleadings. Here, the moving defendants failed to annex a copy of the co-defendants' answer; they submitted only a copy of their answer (exh C). The Court notes that the omission of the taxi defendants' answer does not render this motion in this e-filed case procedurally defective pursuant to a recent Appellate Division, First Department holding. *See Washington Realty Owners, LLC v 260 Washington Street, LLC*, __NYS2d__, 2013 WL

According to the Court of Appeals, "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 from the case [citations omitted]. Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the opposing papers [citations omitted]." *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985).

Here, the moving defendants have not established their entitlement to judgment as a matter of law by demonstrating that Khomyshkin was lawfully operating the van within his own lane of traffic when the taxi rear-ended the van. *See Rivera v Corbett*, 69 AD3d 916, 892 NYS2d 790 (2d Dept 2010). Thus the burden never shifted to the taxi defendants to oppose this motion, and the sufficiency of their papers need not be addressed.

Plaintiffs' cross-motion for summary judgment on liability is granted. Even though the plaintiffs only moved against the taxi defendants, plaintiffs, as innocent passengers in the van who cannot possibly be found at fault, are entitled to partial summary judgment on liability to the extent that plaintiffs are not liable and they are free from any culpable conduct in the happening of the accident. The rights of these innocent passengers to summary judgment is not in any way restricted by potential issues of comparative negligence as between the drivers of the van and the taxi (*Johnson v Phillips*, 261 AD2d 269 [1st Dept 1999], *Petty v Dumont*, 77 AD3d 466 [1st Dept 2010]), and they entitled to summary judgment (*Garcia v Tri County Ambulette Serv.*, 282 AD2d 206 [1st Dept 2001]). It simply does not make sense to grant the passengers summary

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1799027, 1 (1st Dept 2013) (court has discretion to overlook the procedural defect of missing pleadings when the record is 'sufficiently complete', such as when the pleadings are filed electronically and are available for the Court's inspection).

judgment as to only the taxi defendants, because they are not liable for the happening of the accident at all.

Accordingly, it is hereby

ORDERED that the motion by defendants NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSIT AUTHORITY, STAR CRUISER TRANSPORTATION INC., and IGOR KHOMYSHKIN ("the moving defendants") for an order (1) dismissing the complaint as against them pursuant to CPLR §3211(a)(7) on the grounds that the complaint fails to state a cause of action, or in the alternative (2) of summary judgment on liability, is denied in its entirety; and it is further

ORDERED that plaintiffs' cross-motion for summary judgment on liability is granted to the extent that this Court finds that plaintiffs have no liability and were free from culpable conduct in the happening of the accident, and it is further

ORDERED that the parties are directed to appear at for a preliminary conference on July 19, 2013, 80 Centre Street, Room 103 at 9:30 AM.

This is the Decision and Order of the Court.

Dated: **May 8, 2013**
New York, NY

ARLENE P. BLUTH, JSC