

**Jones v Big Fish Entertainment LLC**

2018 NY Slip Op 31186(U)

June 11, 2018

Supreme Court, New York County

Docket Number: 158413/2014

Judge: Adam Silvera

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY**  
**PRESENT: Hon. Adam Silvera** **Part 22**

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**ANYA JONES,**

**Plaintiffs,**

**-against-**

**BIG FISH ENTERTAINMENT LLC, KATRINA  
 UYENCO, “XYZ CORP.”, said Name Being Fictitious  
 or Unknown and “JOHN DOE”, said Name Being Fictitious  
 or Unknown,**

**Defendant,**

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**ADAM SILVERA, J. :**

Upon the foregoing papers, it is ordered that defendants’ motion for summary judgment, pursuant to CPLR 3212, to dismiss plaintiff Anya Jones complaint against defendant Big Fish Entertainment LLC and defendant Katrina Uyenco is denied for the reasons set forth below. Before the court is defendants’ motion, Motion Sequence 002, to dismiss plaintiff’s complaint on the basis that defendants were not negligent in any way and did not cause plaintiff’s injuries, which defendants allege resulted solely as a result of plaintiff’s own negligent and reckless conduct. Plaintiff opposes motion.

**BACKGROUND**

Plaintiff’s Complaint alleges that on September 27, 2016, at Second Avenue and East 100<sup>th</sup> Street in the County, City, and State of New York, plaintiff was injured when a taxi, operated by an unknown driver defendant “John Doe” and owned by unknown party defendant “XYZ Corp” rolled over plaintiff’s foot when she attempted to exit the taxi and was restrained by

defendant Katrina Uyenco who was allegedly an employee working under the scope of her employment for defendant Big Fish Entertainment, LLC. Plaintiff was a cast member of a reality TV show who was injured just moments after having had an on-set altercation with a fellow cast member. Defendants allege that plaintiff was injured during the filmed altercation and that under plaintiff's signed Performer Agreement contract she waived all claims for negligence against defendant Big Fish that may arise during the production of the show (Defendants Mot., Exh D).

### DISCUSSION

Defendants' motion for summary judgment to dismiss is denied. "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" (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure ... to do [so]" (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

Under the emergency doctrine, a party faced with a sudden and unexpected circumstance, not of their own making, with little or no time to reflect, may not be negligent if their actions are reasonable and prudent in the context of the emergency (*Weston v Castro*, 128 AD3d 517, 518 [1st Dept 2016] [finding that "the existence of an emergency and reasonableness of a party's response to the situation ordinarily present questions of fact"].)

Here, defendants' motion fails to make a prima facie showing of entitlement to judgment as a matter of law. Issues of fact exist as to whether the taxi was in motion or not during the alleged incident and whether Katrina Uyenco was an independent contractor or working under the scope

of her employment as an employee of Big Fish Entertainment.

Further, defendants' argument that plaintiff contracted away all negligence claims and assumed all risks while participated in the TV show is unavailing. It is well settled law that an exculpatory clause will not be deemed to insulate a party from liability for its own negligent acts (*Willard Van Dyke Prods. V Eastman Kodak Co.*, 12 NY2d 301, 302 [1963] [finding that the language of such a contract must be clear and unequivocal and refer specifically to negligence in order for a claim for liability of negligent acts to be waived]). The contract at issue here, the "Performer Agreement," does not specifically refer to negligence.

An issue of fact exists as to whether defendant Uyenco was an independent contractor or an agent of Big Fish whose acts are imputable to Big Fish. Defendant Uyenco's testimony contradicts defendant Big Fish's assertion that Uyenco is indeed an independent contractor. Summary judgment is not appropriate when a "question with respect to the nature of the relationship between the tortfeasor and his alleged principal" exists (*See Carrion v Orbit Messenger*, 82 NY2d 742, 744 [1993]).

Finally, the defendants rely on the emergency doctrine and allege that it was plaintiff's sudden and unexpected act of jumping out of a moving taxi, which was not of their own making, and gave defendant Uyenco little or no time to reflect. Defendants claim that they are not negligent for Uyenco's attempt to restrain plaintiff as it was reasonable and prudent in the context of the emergency. The Court finds that an issue of fact exists as to the circumstance of plaintiff's exit from the taxi. Plaintiff alleges that the vehicle was at a stop and defendants allege that the vehicle was still moving when plaintiff attempted to exit. It is unclear whether this was indeed an emergency situation and summary judgment on the basis of the emergency doctrine is precluded. Thus, defendants' motion for summary judgment is denied.

Accordingly, it is

ORDERED that defendants' motion to dismiss plaintiff's complaint is denied; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon defendants with notice of entry.

This constitutes the Decision/Order of the Court.

Dated:

6/11/18

ENTER:



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Hon. Adam Silvera, J.S.C.

**HON. ADAM SILVERA**  
**J.S.C.**