Thompson v Futri Transp. Corp.
2014 NY Slip Op 30031(U)
January 6, 2014
Supreme Court, New York County
Docket Number: 102457/11
Judge: Arlene P. Bluth
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[* 1]
ANNEX ON 1/8/2014

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ARLENE P. BLUTH J.S.C. **PART** 22
Justice

Index Number : 102457/2011
THOMPSON, KENNETH
VS.
FUTRI TRANSPORTATION CORP.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

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

The following papers, numbered 1 to 4 **, were read on this motion to/for** Summary judgment by Futri & Pozzino

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** 1

Answering Affidavits — Exhibits _____ **No(s).** 2, 3

Replying Affidavits _____ **No(s).** 4

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

FILED
JAN 08 2014
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: JAN 06 2014

_____, J.S.C.
HON. ARLENE P. BLUTH

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 NEW YORK
COUNTY OF NEW YORK: IAS PART 22

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KENNETH THOMPSON,

Plaintiff,

- against-

FUTRI TRANSPORTATION CORP., WALTER O. PAZMINO, and GREG ADWAR,

Defendants.

---------- X

Index No. 102457/11

FILED
JAN 08 2014
COUNTY CLERK'S OFFICE
NEW YORK

ARLENE P. BLUTH, J.:

The defendants Futri Transportation Corp. (Futri) and Walter O. Pazmino (Pazmino) move, pursuant to CPLR 3211 and 3212, for an order granting summary judgment dismissing the complaint and cross claims.

This is an action to recover damages for personal injuries (a broken right ankle) suffered by the plaintiff Kenneth Thompson (Thompson) in a collision between Thompson's Vespa motor scooter and the passenger side rear door of a taxi cab owned by Futri and driven by Pazmino. The defendant Greg Adwar (Adwar) was the passenger who, after paying the fare, who opened the door.

In support of their motion, Futri and Pazmino allege that at the time of the collision the taxi cab had been stopped for 30 seconds on 47th Street behind three cars waiting for a red light at Fifth Avenue when Adwar decided to end the trip just short of his destination. At the time of the accident, the cab was in the road's right lane, just two feet away from the cars parked on the right at the curb. Futri and Paxmino argue that the taxi cab did not cause the collision, and that

Thompson's overtaking, and squeezing past the taxi on the right, was the sole proximate cause of the collision.

In opposition, Thompson argues that opening a car's door in an active lane of traffic poses a risk of injury to others. Thompson also argues that Pazmino violated Vehicle and Traffic Law § 1214 by: complying with the passenger Adwar's request to end the ride, failing to warn Adwar that Thompson's scooter was approaching from behind, failing to wait and pull to the curb, and failing to stop Adwar from getting out thereby causing Adwar to open the door of the taxi on a side which was available to moving traffic.

Also in opposition, Adwar argues that there are triable issues of fact concerning: whether Pazmino violated Vehicle and Traffic Law § 1214, the speed of the Vespa scooter, Pazmino's observations of the Vespa, and whether Pazmino violated NYC Taxicab rules for dropping off a passenger in a safe location.

"[T]he 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 issue of fact from the case (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008] [internal quotation marks and citation omitted]). The "[f]ailure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" for this purpose (*Zuckerman v City of New York*, 49 NY2d 557, 562

[1980]). "It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012]).

"In considering the motion for judgment as a matter of law, the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant" (*Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]). However, "the mere happening of an accident does not constitute negligence" (*Candelier v City of New York*, 129 AD2d 145, 148 [1st Dept 1987]).

Contrary to the plaintiff's assertion, it is undisputed that the taxi cab was in the right lane, parallel to, and just two feet away from a row of cars parked at the curb. The deposition testimony, together with the Police accident report, make it clear that the taxi cab was in the right lane.

Vehicle and Traffic Law § 1252 provides in relevant part that:

> "(b) The operator of a motorcycle shall not overtake and pass in the same lane occupied by the vehicle being overtaken.
> (c) No person shall operate a motorcycle between lanes of traffic or between adjacent lines or rows of vehicles."

Vehicle and Traffic Law § 1214 provides:

> "Opening and closing vehicle doors
> No person shall open the door of a motor vehicle on the side available to moving traffic unless and until it is reasonably safe to do so, and can be done without interfering with the movement of other traffic, nor shall any person leave a door open on the side of a vehicle available to moving traffic for a period of time longer than necessary to load or unload passengers."

The Rules of the City of New York (34 RCNY 4-11) provide in relevant part:

> "© Pickup and discharge of passengers by taxis, commuter vans and for-hire vehicles. Operators of taxis, commuter vans and for-hire vehicles may, in the course of the lawful operation of such vehicles, temporarily stop their vehicles to expeditiously pick up or discharge passengers at the curb in areas where standing or parking is prohibited. Taxis, commuter vans and for-hire vehicles, while engaged in picking up or discharging passengers must be within 12 inches of the curb and parallel thereto, but may stop or stand to pick up or discharge passengers alongside a vehicle parked at the curb only if there is no unoccupied curb space available within 100 feet of the pickup or discharge location; however, picking up or discharging passengers shall not be made:
> (1) Within a pedestrian crosswalk.
> (2) Within an intersection, except on the side of a roadway opposite a street which intersects but does not cross such roadway.
> (3) Alongside or opposite any street excavation when stopping to pick up or discharge passengers obstructs traffic.
> (4) Under such conditions as to obstruct the movement of traffic and in no instance so as to leave fewer than 10 feet available for the free movement of vehicular traffic.
> (5) Where stopping is prohibited.
> (6) Within a bicycle lane.
> (7) Within horse-drawn carriage boarding areas."

Futri and Pazmino submit evidence establishing their prima facie entitlement to judgment as a matter of law. The evidence establishes that the plaintiff Thompson violated Vehicle and Traffic Law § 1252 both by passing the taxi in the same lane occupied by the taxi, and operating the scooter between adjacent lines or rows of vehicles.

On the other hand, the evidence establishes that Futri and Pazmino did not violate either Vehicle and Traffic Law §1214, or 34 RCNY 4-11. Pazmino was permitted by the Rules of the City of New York to discharge his passenger alongside a vehicle parked at the curb. Vehicle and Traffic Law § 1214 was not violated because the opened door was on the right/curb side of the taxi while it was stopped in the right lane, and § 1214 speaks in terms of opening a vehicle's door on the side available to moving traffic. For purposes of the statute, the two-foot wide space on the right side of the taxi was not a side of the taxi available to moving traffic.

Nor does Thompson deny that he was squeezing through the space between the cab and the parked cars; that is, Thompson does not deny that he was passing the cab within the cab's own lane. While the movants affirmatively state that, at the time of the impact, the most-right lane had cars parked (as does the police report and police diagram), Thompson does not deny it. Rather, he states that he does not recall (Thompson deposition, page 29 line 19 and page 111 lines 6-19). Elsewhere, he states that he was in the right most lane, but that was before the impact, not at the time of the impact.

There is simply nothing in the motion papers to demonstrate that the movant/taxi breached any duty owed to Thompson or, assuming such a breach, that any conduct on the part of Pazmino was a proximate cause of the accident.

Accordingly, it is

ORDERED that the defendants Futri Transportation Corp. and Walter O. Pazmino's motion for summary judgment dismissing the complaint and cross claims is granted and the complaint and cross claims are dismissed as against Futri Transportation Corp. and Walter O. Pazmino; and it is further

ORDERED that movant shall serve a copy of this order on the Trial Support Office, and the Clerk respectfully requested to remove Futri Transportation Corp. and Walter O. Pazmino from the caption of this case.

Dated: January 6, 2014
New York, New York

ENTER:

J.S.C.

HON. ARLENE P. BLUTH

FILED
JAN 08 2014
COUNTY CLERK'S OFFICE
NEW YORK