

<b>Flynn v Hometown Taxi, Inc.</b>
2017 NY Slip Op 31848(U)
July 27, 2017
Supreme Court, Suffolk County
Docket Number: 06-27161
Judge: Joseph C. Pastorella
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INDEX No. 06-27161  
CAL. No. 16-0083OT

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 34 - SUFFOLK COUNTY

**COPY**

**PRESENT:**

Hon. JOSEPH C. PASTORESSA  
Justice of the Supreme Court

MOTION DATE 1-27-17  
ADJ. DATE 3-15-17  
Mot. Seq. # 003 - MD

<p>-----X</p> <p>KAREN FLYNN, as Administratrix of the Estate of ROBERT HUGH FLYNN Individually and KAREN FLYNN Individually,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">- against -</p> <p>HOMETOWN TAXI, INC., and THE PUBLIC ADMINISTRATOR OF THE COUNTY OF SUFFOLK as Fiduciary for the Estate of JACOB JOHN SMITH JR., a/k/a JACOB SMITH JR., Deceased,</p> <p style="text-align: center;">Defendants.</p> <p>-----X</p>	<p>X</p> <p>-----X</p>	<p>SULLIVAN, PAPIN, BLOCK MCGRATH &amp; CANNAVO, P.C. Attorney for Plaintiffs 1140 Franklin Avenue - Suite 200 Garden City, New York 11530</p> <p>LAW OFFICES OF THOMAS NOLAN Attorney for Defendant Hometown Taxi One Union Square P.O. Box 826 Aquebogue, New York 11931</p> <p>PHILIP J. RIZZUTO, P.C. Attorney for Defendants The Public Administrator of the County of Suffolk as Fiduciary for the Estate of Jacob John Smith Jr., a/k/a Jacob Smith Jr., Deceased 50 Charles Lindbergh Blvd. Suite 501 Uniondale, New York 11553</p>
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Upon the following papers numbered 1 to 52 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 38; Notice of Cross Motion and supporting papers     ; Answering Affidavits and supporting papers 39 - 50; Replying Affidavits and supporting papers 51 - 52; Other     ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the renewed motion by the defendant Public Administrator of the County of Suffolk, as fiduciary for the Estate of John Jacob Smith, Jr., a/k/a John Smith, Jr., deceased, for an order pursuant to CPLR 3212 granting summary judgment in his favor is denied.

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This is an action to recover damages for wrongful death and personal injury against the defendants. In her complaint, the plaintiff alleges, among other things, that the defendant Hometown Taxi, Inc. (Hometown) “owned a taxicab that was operated by defendant SMITH.” As reflected in the caption, after issue was joined in this action, John Jacob Smith, Jr. passed away, a representative for his estate was appointed, and a proper substitution was made naming as defendant the Public Administrator of the County of Suffolk, as fiduciary for the Estate of John Jacob Smith, Jr., also known as John Smith, Jr., deceased (Smith). In her complaint, the plaintiff further alleges that her decedent, Robert Hugh Flynn (Flynn), was a passenger in said taxicab on March 8, 2005, and that the defendants negligently discharged Flynn from their care and custody causing his injuries and death.

It appears that, on the evening of March 8, 2005, Flynn was inebriated, and that the weather that evening was marked by very cold temperatures, severe winds, and a snow storm in progress. Flynn made a number of telephone calls to the Town of Southampton (Town) 911 system reporting that he was underneath his motor vehicle, and that he was “freezing.” However, it appears that he was unable to give his location to the 911 operators taking his calls. It is undisputed that the Town of Southampton Police Department (SPD) undertook a search for Flynn, and called in the assistance of multiple agencies and entities. Nonetheless, Flynn was not found until hours later after he had died due to exposure to the elements.

Thereafter, the plaintiff commenced four separate actions against the Town, the defendants herein, another taxicab company, and two local bars that serve alcohol. By order dated March 19, 2014, a motion for a joint trial with the three other related actions was granted. On or about June 1, 2016, Smith improperly moved for summary judgment in the action commenced by the plaintiff against the Town, ostensibly seeking relief in this action. By order dated December 1, 2016, the prior application for summary judgment was denied with leave to renew in this action within 30 days of the entry date of said order.

Smith now moves herein for an order pursuant to CPLR 2221 for leave to renew his motion for summary judgment and, upon renewal, for summary judgment in his favor. Under the circumstances, the branch of the motion which seeks leave to renew is deemed academic, and the renewed motion is deemed a motion for summary judgment dismissing the complaint.

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 issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto*, 289 AD2d 557; *Rebecchi v Whitmore*, 172 AD2d 600; *O’Neill v Town of Fishkill*, 134 AD2d 487). Furthermore, the parties’ competing interest must be viewed “in a light most favorable to the party opposing the motion” (*Marine Midland Bank, N.A. v Dino & Artie’s Automatic Transmission Co.*, 168 AD2d 610). However, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557; *Perez v Grace Episcopal Church*, 6 AD3d 596; *Rebecchi v Whitmore, supra*).

In support of his motion, Smith submits, among other things, the pleadings in the four related actions, the transcripts of the deposition testimony of the plaintiff, two nonparty witness, and employees of the Town, and certain reports and documents regarding Flynn's death. At her deposition, the plaintiff testified that her husband left home at 8:00 a.m. on the day in question to work with Brendan O'Brien (O'Brien) in Sag Harbor, that the police arrived at her home at 7:20 p.m., and that the police informed her that her husband had been in an accident and that they were trying to locate his whereabouts. She stated that she told the police that, as far as she knew, her husband was coming home from a job in Sag Harbor, that a police officer used her cell phone to speak with O'Brien, and that she overheard the police officer tell O'Brien that her husband was in trouble and that O'Brien needed to tell the police where her husband was located. She indicated that O'Brien did not provide any helpful information at that time, that later in the evening a detective arrived at her home and spoke with O'Brien by telephone call a second time, and that O'Brien told the detective at that time that her husband had been at a local bar named Shippy's at 4:00 p.m. She stated that her husband would often take taxi cabs from bars to the Shinnecock Golf Club because it is "around the corner" from their home, that "he liked to drink and he wouldn't drink and drive," and that when one parks there "you can't see the car, it's hidden."

At his deposition, Robert Hintze (Hintze) testified that he was employed as a detective sergeant with the SPD from 2003 to 2011, that he was the senior police officer in charge of the investigation to locate Flynn on March 8, 2005, and that the first call from Flynn to 911 came in at 1912 hours (7:12 p.m.). He indicated that the SPD began an immediate search for Flynn, that he went to the Flynn residence and spoke with the plaintiff, and that the plaintiff told him that her husband and a Brendan Patrick O'Brien were working at a construction site in Sag Harbor, New York. He stated that he spoke with O'Brien by telephone, that O'Brien indicated that he had not worked at the construction site that day, and that in a second telephone conversation O'Brien revealed that, rather than going to work that day, Flynn had been at Shippy's. Hintze further testified that he directed a patrol car to Shippy's, that the bartender there informed the responding police officer that Flynn had been picked up by a local taxi company, and that the taxi company informed his offices that the subject taxi had dropped Flynn at the Shinnecock Golf Club. He indicated that Flynn was located in the "maintenance parking lot of the Shinnecock Golf Club at approximately 2147 hours (9:47 p.m).

James C. Cavanagh (Cavanagh) was deposed on November 24, 2014 and testified that he is employed by the SPD as a police officer, that he was involved in the search for Flynn on the day in question, and that he recalls receiving a radio transmission to the effect that he was to look for "a man under a car by a body of water." He stated that it was snowing, with heavy winds, at the time, that he searched "all over the entire area" along County Road 39, and that he eventually discovered Flynn's body in the golf club parking lot located off Tuckahoe Road. He indicated that, when he first drove into the subject parking lot, he passed Flynn's vehicle without seeing it because the visibility was so poor, that he first saw the vehicle when the wind died down as he was backing out of the parking lot, and that he noted the license plate number and confirmed with police headquarters that this was the vehicle that he had been trying to locate. Cavanagh further testified that he exited his patrol car to determine if there was anyone inside the vehicle, that he then went around the back of the vehicle, and that he found Flynn's body there. He stated that he checked Flynn for life signs and did not find any.

O'Brien was deposed on March 20, 2008 and testified that he is a self-employed contractor, that he met Flynn approximately 10 to 12 years ago in a bar, and that he hired Flynn part-time to assist him in his work. He stated that he spoke to Flynn "around lunchtime" on the date of this incident, and that Flynn was having lunch at Shippy's." He indicated that "[i]t was common knowledge that [Flynn] would drive over to the guest parking lot and leave his car there and take a taxi to local bars and pubs to go drinking during the day," that Flynn had a drinking problem which was "a big issue between him and his wife," and that it was his understanding that Flynn parked in said lot to deceive his wife. He stated that he had dropped Flynn off at the Shinnecock Golf Club parking lot off Tuckahoe Road on occasion.

At his deposition, Bryan DeParma (DeParma) testified that he is the president of Hometown and another taxicab company, Strickly Suffolk, Inc. (Strickly), and that Smith was a driver for Strickly for approximately two years before this incident. He stated that Strickly owned all of the taxicabs used at the time of this incident, that Hometown was "just a name," and that Smith was an independent contractor who leased taxicabs on a per diem basis, paying Strickly 50 per cent of the fares collected. He indicated that prior the date of this incident, Flynn was a regular customer of Strickly, that he had previously met and conversed with Flynn at local bars, and that Flynn was a caddy at the Shinnecock Golf Club during the summer. DeParma further testified that, when Flynn was not working, "we used to take him from bar to bar throughout the day," and drop him off back at the caddy shack in the evening. He stated that he first learned of this incident when he overheard the radio issued to him as a volunteer firefighter announce the dispatch of search and rescue teams looking for a missing person, and that he did not realize it was Flynn at that time. He indicated that he later learned Flynn was involved when the police arrived at his offices and his manager told them "we dropped him off at Shinnecock Golf Course."

DeParma further testified that he later spoke with Smith and learned that Smith had picked up Flynn at Shippy's on March 8, 2005, that Smith had dropped Flynn off on the road in front of the entrance to the caddy shack at Shinnecock Golf Club, and that, when Flynn got out of the taxicab, he "jumped up and down when he saw the snow." He stated that he recalled that there was a "blizzard" the evening of this incident, that it was his understanding that Smith did not pull into the parking lot for the golf club, and that Smith told him that he watched Flynn walk down the "driveway, and around the corner and that's when he left."

In the death report filed by the SPD regarding this incident it is noted that the medical examiner reported "his findings of hypothermia and a blood alcohol content of .29%." In a Freedom of Information Act (FOIA) request to the Town seeking the reports of Flynn's death signed by DeParma on behalf of Hometown, he states that "we were the Taxi Company that dropped him off." In her bill of particulars, the plaintiff alleges that the defendants were negligent in "discharging [the deceased] in a place of danger given the weather conditions existing at the time of this occurrence; in recognizing that [the deceased] was under a disability at the time of discharge; ... in failing to provide [the deceased] with a safe place to alight given the weather conditions."


Smith has failed to establish his prima facie entitlement to summary judgment herein. In her affirmation in support of the motion, counsel for Smith alleges that Smith cannot be found liable in this action as he owed no duty to Flynn. Counsel contends that a carrier's duty to a passenger ends once it

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has stopped at a place where the passenger “may safely disembark and leave the area” (*see Smith v Sherwood*, 16 NY3d 130]). However, it is well settled that a carrier is under a special duty to exercise reasonable care, precaution and aid to an intoxicated passenger once taking charge of him or her (*Fagan v Atlantic Coast Line R.R. Co.*, 220 NY 301; *Parvi v City of Kingston*, 41 NY2d 553).

It is generally a question for the jury to determine whether the carrier exercised the degree of care required under the circumstances (*O’Leary v American Airlines*, 100 AD2d 959; *Robinson v New York City Tr. Auth.*, 105 AD2d 614). In addition, a carrier owes a duty to an intoxicated passenger “not to leave him in a worse position than when they took charge of him” (*Kelleher v F.M.E. Auto Leasing Corp.*, 192 AD2d 581, 584). Here, issues of fact exist including, but not limited to, whether Flynn was intoxicated at the time he was discharged from the taxicab, whether Smith knew or should reasonably have known that Flynn was intoxicated at that time and whether Smith’s actions were reasonable under the circumstances. The failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hospital, supra; Winegrad v New York Univ. Med. Ctr., supra; Matinez v 123-16 Liberty Avenue. Realty Corp.*, 47 AD3d 901). Accordingly, Smith’s motion for summary judgment dismissing the complaint is denied.

Dated: July 27, 2017

  
HON. JOSEPH C. PASTORESSA, J.S.C.

\_\_\_ FINAL DISPOSITION     X  NON-FINAL DISPOSITION