

**Green v City of New York**

2018 NY Slip Op 30944(U)

May 15, 2018

Supreme Court, New York County

Docket Number: 161441/2014

Judge: George J. Silver

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

PRESENT: GEORGE J. SILVER PART 10

Justice

SIAN GREEN

Plaintiff

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MOTION SEQ. NO. 002

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, NEW YORK CITY TAXI & LIMOUSINE COMMISSION, FAYSAL KABIR MOHAMMAD HIMON, NYC TAXI GROUP, INC., (D/B/A SHOE TAXI CORP), A+ COURIERS, KENNETH OLIVO, MITSUI FUDOSAN AMERICA, INC., NEW YORK CITY'S HEALTH AND HOSPITALS CORP (BELLEVUE HOSPITAL CENTER), XYZ CORP. 1-99, ABC INC., 1-99, JOHN AND JANE DOES, 1-99,

Defendants.

Cross-Motion:  Yes  No

In this medical malpractice action, defendant A Plus Messenger Service, Inc. i/s/h/a A+ Couriers ("A Plus") moves, pursuant to CPLR § 3211(a)(7), to dismiss all cross-claims asserted against it by defendants NYC Taxi Group Inc. d/b/a Shoe Taxi Corp. ("NYC Taxi Group") and Faysal Kabir Mohammad Himon ("Himon", collectively "Taxi defendants"). A Plus submits that dismissal of the cross-claims is appropriate in this case because the Appellate Division, First Department ("First Department") has determined that A Plus was not actively negligent in causing plaintiff Sian Green's ("plaintiff") alleged accident (see *Green v. Himon*, 151 AD3d 516, 516 [1st Dept. 2017]). Indeed, the First Department unanimously reversed this court's previous findings to the contrary, and granted A Plus' pre-answer motion to dismiss the complaint as against it pursuant to CPLR § 3211(a)(7) (*id.*). The Taxi defendants partially oppose the instant motion, arguing that if the court is inclined to grant A Plus' request, that it do so based solely on the First Department's findings rather than its own.

BACKGROUND

This action stems from an incident that occurred on August 20, 2013, when plaintiff was walking on the sidewalk near West 49th Street and 6th Avenue. According to plaintiff, she witnessed a verbal altercation between a taxi driver,

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

Himon, and a bike messenger, co-defendant Kenneth Olivo ("Olivo"), whereupon Olivo was banging on the hood of Himon's taxi. At the time Himon was working for NYC Taxi Group. Thereafter, Olivo rode towards the sidewalk and Himon swerved his vehicle towards Olivo, accelerated, and struck Olivo. The taxi then hopped the curb and struck plaintiff, causing serious injuries. Specifically, plaintiff's left leg was severed below the knee and she is now permanently disabled. Plaintiff commenced suit by filing of a Summons and Complaint on November 18, 2014. Plaintiff's only cause of action against A Plus was based upon the doctrine of *respondeat superior* since Olivo was employed by A Plus at the time of the accident. By order dated June 13, 2017, the First Department, granted A Plus' motion seeking dismissal of all claims contained in plaintiff's complaint as against it (*Green*, 151 AD3d 516-17, *supra*). The First Department found that Olivo's alleged altercation could not reasonably be construed as part of his duties as a bike messenger or as acting in furtherance of his employer's interest, and as such, plaintiff's complaint as against A Plus was deemed deficient as a matter of law (*id.* at 517).

In the instant motion, A Plus argues that since plaintiff's claims of vicarious liability are no longer viable, A Plus cannot be found to have breached any duty to the Taxi defendants or any of the other co-defendants for that matter. A Plus further argues that in the absence of a duty to the Taxi defendants, there is no negligence on its part, and therefore no liability relative to the Taxi defendants. As A Plus did not cause or contribute in any way to the plaintiff's accident for which indemnity or contribution can be sought, it argues that the Taxi defendants' cross-claims as against it necessarily must fail. Instead, A Plus contends that the proper remedial measure here would be for the Taxi defendants to seek indemnification and/or contribution from A Plus in a third-party action commenced pursuant to CPLR § 1007. The Taxi defendants partially oppose A Plus' application, arguing that while the First Department concluded that the alleged actions of Olivo were outside the scope of his employment, there has been no discovery conducted relevant to that

**issue. As such, the Taxi defendants request that if the court is inclined to dismiss the cross-claims asserted against A Plus that such dismissal be premised solely upon the rationale of the decision issued by the First Department rather than based on the court's independent findings.**

**DISCUSSION**

**CPLR § 1007 provides the statutory basis for when third-party practice is allowed:**

**§ 1007. When third-party practice allowed.**

**After the service of his answer, a defendant may proceed against a person not a party who is or may be liable to that defendant for all or part of the plaintiff's claim against that defendant ....**

**The Court of Appeals has stated that “[t]he language of CPLR § 1007 serves only to identify the persons against whom a third-party claim may be brought. It places no limit upon the amount which may be recovered or upon the legal theories which may be asserted as a basis for the claim” (*George Cohen Agency Donald S. Perlman Agency, Inc.*, 51 NY2d 358, 365 [1980]). Here, the First Department has determined that A Plus was not actively negligent in causing plaintiff's alleged accident. To be sure, the First Department found that the alleged altercation between Himon and Olivo cannot reasonably be construed as having occurred as part of Olivo's duties as a bike messenger or as acting in furtherance of A Plus' interest (*Green*, 151 AD3d 516-17, *supra*). As such, the First Department found claims against A Plus untenable as a matter of law (*id.*). As that determination has been rendered, the Taxi defendants cannot sustain cross-claims against A Plus in the instant main action, since it is undisputed that no valid cause of action as against A Plus exists therein (see CPLR §3211[a][7]; *Leon v. Martinez*, 84 NY2d 83 [1994]). However, dismissal of the cross-claims against A Plus still allows co-defendants to institute a third-party action for indemnification and/or contribution at the appropriate time should additional facts surface during the course of**

discovery (see *Jones v. New York City Hous. Autfa.*, 293 AD2d 371, 372 [1st Dept. 2002]).

For these reasons, and upon the foregoing papers, it is hereby

ORDERED that the motion to dismiss all cross-claims against A Plus pursuant to CPLR §3211(a)(7) is granted, to the extent that plaintiff's claims, and any cross-claims stemming therefrom, as against A Plus are dismissed in accordance with the findings of the Appellate Division, First Department [see *Green v. Himon*, 151 AD3d 516, 516 [1st Dept. 2017]]; and it is further,

ORDERED that the clerk is directed to enter judgment dismissing A Plus from the above-captioned case and to amend the caption to read as follows:

SIAN GREEN

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THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, NEW YORK CITY TAXI & LIMOUSINE COMMISSION, FAYSAL KABIR MOHAMMAD HIMON, NYC TAXI GROUP, INC., (D/B/A SHOE TAXI CORP), KENNETH OLIVO, MITSUI FUDOSAN AMERICA, INC., NEW YORK CITY'S HEALTH AND HOSPITALS CORP (BELLEVUE HOSPITAL CENTER), XYZ CORP. 1-99, ABC INC., 1-99, JOHN AND JANE DOES, 1-99,

;and it is further

ORDERED that co-defendants in the main action may make the application to convert any cross-claims asserted against defendant A Plus to a third-party action at the appropriate time pursuant to CPLR §1007; and it is further

ORDERED that the parties are directed to appear for a conference in this matter on Tuesday June 19, 2018 at 9:30 AM at 111 Centre Street, Room 1227 (Part 10).

This constitutes the decision and order of the court.

Dated: May 15, 2018

*George J. Silver*

HON. GEORGE J. SILVER

- 1. Check one: .....  Case Disposed  Non-Final Disposition
- 2. Check as Appropriate: ..... Motion is:  Granted  Denied  Granted in Part