

Limperis v Six Star Taxi Inc.

2018 NY Slip Op 31856(U)

July 31, 2018

Supreme Court, Kings County

Docket Number: 505815/014

Judge: Debra Silber

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

X

CONSTANTINE LIMPERIS and ANJA LIMPERIS,

Plaintiffs,

-against-

**SIX STAR TAXI INC., ASGHAR IFTIKHAR,
KENNETH SIMMONS, RYDER TRUCK RENTAL, INC.
and NYP HOLDINGS, INC.,**

Defendants.

X

DECISION / ORDER

**Index No. 505815/2014
Motion Seq. No. 5, 7, 8
Date Submitted: 6/28/18
Cal No. 41, 42, 43**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' motion and cross motion for summary judgment and plaintiffs' cross motion for leave to amend their Bill of Particulars.

| Papers | NYSCEF Doc. |
|--|------------------------------|
| Notice of Motion, Affirmation, Affidavits and Exhibits..... | <u>64-85</u> |
| Notices of Cross Motion, Affirmations, Affidavits and Exhibits.... | <u>108-114, 117-129, 130</u> |
| Affirmations in Opposition and Exhibits..... | <u>132-133</u> |
| Reply Affirmations..... | <u>134-141, 144</u> |
| Memoranda..... | <u>115, 143</u> |

Upon the foregoing cited papers, the Decision/Order on these applications is as follows:

This is a personal injury action arising out of a June 29, 2013 motor vehicle accident on the Brooklyn Queens Expressway ("BQE") at approximately 6:00 A.M. Plaintiff Constantine Limperis was the front seat passenger and plaintiff Anja Limperis was a rear seat passenger in a taxi owned by defendant Six Star Taxi and operated by defendant Asghar Iftikhar. The taxi rear-ended a disabled truck owned by defendant Ryder Truck Rental and operated by defendant Kenneth Simmons, who was employed

by defendant NYP Holdings, (hereinafter "NYP") the lessee of the truck.¹ The truck had stalled in the center lane of the BQE eastbound, just past the Queens Boulevard overpass. Simmons claims he immediately engaged the hazard lights and called for a tow truck. Being in the center lane, Simmons deemed it unsafe to exit the truck to deploy safety triangles. The truck had been stopped in the middle lane for about 20 minutes when Iftikhar's taxi struck it. He was apparently trying to go around the truck on the left, when he claims another vehicle in the left lane "caused" him to have to swerve back into the middle lane. Plaintiff Constantine Limperis testified that he saw the disabled truck from 100 yards away and that Iftikhar could have slowed down and moved into the right lane to go around the truck, as there was no traffic in the right lane.

Defendants Simmons and NYP seek summary judgment dismissing the complaint (motion sequence # 5). They contend that the undisputed facts establish that Iftikhar was the sole proximate cause of the accident and that the disabled truck merely "furnished the condition for the occurrence of the accident." They also claim that Ryder was responsible for the maintenance and repair of the truck, not NYP as a lessee.

Defendant Ryder cross-moves for summary judgment (motion sequence # 7). Ryder contends, based upon an expert's affidavit, that the truck stalled without warning despite regular maintenance. The affiant states that the breakdown was caused by the failure of the injector wiring harness and the ICP sensor, which was learned subsequently, from the vehicle's diagnostic codes, and that this failure occurred suddenly and without warning. In addition, Ryder contends that it has no vicarious

¹At the facility which Simmons worked from in the Bronx, NYP leased about 100 trucks from Ryder to deliver the NY Post, the Wall Street Journal and Barrons (EBT of Padula at 7, 18).

liability under the Graves Amendment for the negligence of the driver or the lessee of the truck.

Plaintiffs contend, based upon an expert's affidavit, that Simmons, the driver of the truck, failed to move the truck to a safe location when it stalled, in violation of VTL 1201.² The plaintiffs claim that rather than applying the brakes when the truck stalled, Simmons should have shifted the transmission into neutral and steered the vehicle to a safer location—a concrete island at the upcoming entrance ramp from Queens Boulevard, or the acceleration lane after that entrance ramp, or at the very least, into the right lane, where Simmons could have exited the vehicle and placed warning triangles. In addition, plaintiffs contend that Simmons should have been trained how to do this by his employer NYP, who had not provided any safety training for its drivers. Further, plaintiffs contend that there is an issue of fact as to whether Ryder had notice of prior problems with the truck.

Plaintiffs cross-move for leave to amend their bill of particulars (motion sequence # 8) to particularize the basis of their negligence claims against Simmons and NYP. Plaintiffs maintain that the basis of their negligence claims against Simmons and NYP

²VTL § 1201 provides as follows:

§ 1201. Stopping, standing, or parking outside of business or residence districts

(a) Upon any highway outside of a business or residence district no person shall stop, park, or leave standing any vehicle, whether attended or unattended, upon the paved or main-traveled part of the highway when it is practicable to stop, park, or so leave such vehicle off such part of said highway, but in every event an unobstructed width of the highway opposite a standing vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicles shall be available from a distance of two hundred feet in each direction upon such highway.

(b) This section shall not apply to the driver of any vehicle which is disabled while on the paved or main-traveled portion of a highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such disabled vehicle in such position.

was clearly spelled out in the bill of particulars served on the co-defendants, but it was inadvertently omitted from the bill of particulars served on Simmons and NYP, and that Simmons and NYP were on notice of their claims, as they received copies of the bills of particulars served on the other defendants.

The court finds that defendants Simmons and NYP have made a prima facie showing of their entitlement to summary judgment and plaintiffs have failed to raise an issue of fact to the contrary.³ As NYP and Simmons note, pursuant to VTL 1642, VTL 1201 is specifically superceded in New York City by the New York City Traffic Rules, 34 RCNY 4-02(e), and Simmons did not violate § 4-02(a)(8),⁴ which is the applicable section (*see Siegel v Boedigheimer*, 294 AD2d 560, 561-562 [2d Dept 2002] [vehicles were immobilized and assistance was required to remove them]). Therefore, defendants have demonstrated, as a matter of law, that Simmons did not violate any statute, rule or regulation and thus were not negligent by virtue of any violation thereof (*id.*).

The disabled truck was not a proximate cause of the accident here, but merely “furnished the condition for its occurrence” (*see Whitehead v Reithoffer Shows, Inc.*, 304 AD2d 754, 755 [2d Dept 2003] [disabled “tractor-trailer, situated as it was in the roadway, was not the proximate cause of the accident, but merely furnished the condition or occasion for the occurrence of the accident”]; *Siegel v Boedigheimer*, 294

³Defendants Six Star and Iftikhar’s objection to the Court’s reliance on unsigned deposition transcripts is without merit, as the transcripts were certified by the stenographer and they were not challenged as to their accuracy (*see Thomas v City of New York*, 124 A.D.3d 872, 873 [2d Dept 2015]).

⁴4-02(a)(8) provides that “[a] vehicle that becomes disabled must be pushed to the side of the road so that it obstructs traffic as little as possible, and must be removed expeditiously.”

AD2d at 562 [disabled vehicles merely furnished the conditions for the accident and were not proximate cause – “plaintiff saw (disabled) tractor trailer from a safe distance and safely changed lanes to avoid hitting it, when the black Nissan suddenly entered the intersection against the light, forcing the injured plaintiff to swerve to his right and hit (disabled) truck”]; see also *Lee v Daniels Contr., Ltd.*, 113 AD3d 824, 825 [2d Dept. 2014] [“defendants demonstrated their entitlement to judgment as a matter of law by presenting evidentiary proof that Prise's conduct in stopping his truck partially in the roadway merely furnished the condition for the accident, but was not a proximate cause thereof”]; *Blasso v Parente*, 79 AD3d 923, 925 [2d Dept. 2010] [“plaintiff's vehicle suffered a mechanical failure and came to a complete stop on the Long Island Expressway at least several minutes before it was struck in the rear by the defendants' vehicle . . . establish[ing plaintiff's] prima facie entitlement to judgment as a matter of law”]; *Morales v Cox*, 74 AD3d 922 [2d Dept. 2010] [“Assuming, arguendo, that the Cox vehicle was negligently stopped in the roadway, the location of her vehicle merely furnished the condition or occasion for the occurrence of the accident”]; *Williams v Envelope Transit Corp.*, 186 AD2d 797, 798 [2d Dept. 1992] [“the stalling of the defendants' taxi may have furnished the occasion for the accident - it was not one of its causes”]).

Notably, plaintiff Constantine Limperis' testimony establishes that the disabled truck was visible from a sufficient distance that Iftikhar should have been able to safely maneuver around it, but he attempted to move into the left lane when another faster vehicle was approaching, and then swerved back into the center lane, striking the disabled truck. Moreover, plaintiffs' expert's contention that the truck could have been

safely maneuvered to another location while "coasting" after it stalled in the middle lane of the BQE is totally speculative in the absence of relevant information about the traffic conditions at the time it stalled, whether the roadway was level, and other factors, and is also unsupported by the record.⁵ Likewise, Iftikhar's testimony that he did not notice that the truck's hazard lights were flashing prior to the accident but realized they were on afterwards is insufficient to raise an issue of fact as to whether Simmons was negligent in failing to activate them, as Iftikhar's counsel argues.⁶

Since the disabled truck was not a proximate cause of the accident, Ryder's role, if any, in the truck's stalling cannot be a proximate cause of the accident. In addition, there is no evidence that Ryder's alleged failure to repair or maintain the truck contributed to the occurrence. While a repair report from NYP from the date of the accident suggests that this was not the first time the truck had stalled (see Exhibit G), deposition testimony from NYP makes it clear that this statement was mere hyperbole,

⁵Simmons testified that he did not think it was fair to characterize the road as empty (movant's exhibit 12 at 12); "[t]hat traffic [was] moving fairly freely, but there [were] significant vehicles on the road. Because it was, frankly, a frightening situation, because, you know, cars were whizzing by after I – after I broke down; trucks whizzing by" (movant's exhibit 12 at 13).

Further, Simmons estimated that it took about 10 seconds for the truck to come to a full stop after it stalled (movant's exhibit 12 at 16). Simmons was not sure that he had applied the brakes after he stalled, but guessed that he had in order to try and restart the truck (movant's exhibit 12 at 15, 18).

Finally, Simmons testified that while coasting after the truck stalled he wanted to get to the right lane but when he attempted to steer the truck into the right lane he had no power and said "it just wasn't going to move" (movant's exhibit 12 at 68-69).

⁶The testimony was (plaintiffs' exhibit A at 9):

Q. Let me see if I understand. Did the truck have the emergency flashers going?

A. No. From rear, I didn't see. After the impact I realized. I didn't see previously. After the impact I just realized that there was something, I didn't see before.

and that there had been no prior instances of this truck stalling or otherwise breaking down (exhibit F to plaintiffs' cross motion at 24-26). In any event, even if this was not the first time the truck had stalled, there is no evidence that Ryder received notice that it had stalled previously.

Accordingly, it is

ORDERED that defendants Kenneth Simmons and NYP Holdings, Inc.'s motion for summary judgment is granted and the complaint and any cross claims against defendants Kenneth Simmons and NYP Holdings, Inc. are dismissed, and it is further

ORDERED that Ryder Truck Rental, Inc.'s cross motion for summary judgment is granted and the complaint and any cross claims against Ryder Truck Rental, Inc. are dismissed, and it is further

ORDERED that plaintiffs' cross-motion for leave to amend their bill of particulars with regard to defendants Simmons and NYP, despite the absence of opposition, is denied as moot.

This constitutes the decision and order of the court.

Dated: July 31, 2018

ENTER:



Hon. Debra Silber, J.S.C.

**Hon. Debra Silber
Justice Supreme Court**