

<b>Lifton v New York City Tr. Auth.</b>
2018 NY Slip Op 31990(U)
July 24, 2018
Supreme Court, New York County
Docket Number: 154984/2016
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2**

*Justice*

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NORMAN LIFTON and DIANE LIFTON, as Co-Executors of the  
Estate of BARBARA LIFTON, Deceased, and NORMAN LIFTON,  
Individually,

Plaintiffs,

INDEX NO. 154984/2016

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

- v -

NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN  
TRANSIT AUTHORITY (MTA), MTA NYC TRANSIT, PREMIER  
PARATRANSIT, LLC and ALVA A. FREDERICK,

Defendants.

**DECISION AND ORDER**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26,  
27, 28, 29, 30, 32, 33, 34, 35, 36, 37, 38, 41

were read on this motion to/for PARTIAL SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered the motion is granted to the extent set forth below.

In this negligence action seeking to recover damages for, inter alia, wrongful death, plaintiffs Norman Lifton and Diane Lifton, as Co-Executors of the Estate of Barbara Lifton, Deceased (the decedent), and Norman Lifton, Individually (collectively plaintiffs) move, pursuant to CPLR 3212, for partial summary judgment on liability as against defendants New York City Transit Authority (NYCTA), Metropolitan Transit Authority (MTA), MTA NYC Transit (MTANYCT), Premier Paratransit, LLC (Premier), and Alva A. Frederick (Frederick) (collectively defendants). Defendants oppose the motion. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion is granted to the extent set forth below.

**FACTUAL AND PROCEDURAL BACKGROUND:**

This case arises from a motor vehicle accident which occurred on December 14, 2015. Doc. 23. On that day, the decedent, a pedestrian, was crossing Second Avenue in Manhattan when she was struck by an Access-A-Ride vehicle owned by Premier and operated by its employee, Frederick. The decedent was badly injured and passed away shortly thereafter. Plaintiffs were then appointed as co-executors of decedent's estate. *Id.*

On June 4, 2016, plaintiffs commenced the captioned action against defendants, asserting causes of action for negligence, wrongful death, and loss of consortium. Doc. 23. Defendants joined issue by service of a verified answer filed August 8, 2016, in which they denied all substantive allegations of wrongdoing and asserted numerous affirmative defenses. Doc. 24.

**Deposition of Frederick**

Frederick was deposed on June 8, 2017. Doc. 34. He testified that, as of the date of the incident, he was employed by Premier. *Id.*, at p. 11. At the time of the incident, he was driving a minibus owned by Premier. *Id.*, at p. 29. Just prior to the accident, he was driving west on East 39<sup>th</sup> Street. *Id.*, at p. 34. Just before he arrived at the intersection of Second Avenue, which goes downtown (south), he stopped for a traffic light. *Id.*, at p. 35-36, 41-42. When the light turned green, he checked his mirrors, looked to his left and his right, and began to make a left turn south onto Second Avenue. *Id.*, at p. 44. When he looked right, he saw a pedestrian crossing the street on his right. *Id.*, at p. 48. As he made the turn, it "felt like the vehicle touched something," so he stopped his vehicle, exited it, and saw the decedent in front of the minibus. *Id.*, at p. 46, 60-62. He did not recall whether she was inside the crosswalk when he saw her on the ground. *Id.*, at p. 62.

He did not see the decedent before his vehicle struck her and did not honk his horn before the impact. *Id.*, at p. 60, 68.

### **Deposition of Antonio Ancilla**

Arcilla, a nonparty witness, testified at his deposition that, prior to the accident, he was driving on East 39<sup>th</sup> Street with a car in front of him and the minibus operated by Frederick ahead of that car. Doc. 35, at p. 10-11. At that time, he saw the decedent walking from the east side to the west side of Second Avenue. *Id.*, at p. 11-12, 36. Arcilla, who had a clear and unobstructed view of the accident, said that the decedent had a “walk” signal and was struck by the front driver’s side of the minibus while she was in the crosswalk. *Id.*, at p. 13, 19, 23, 38, 84-87. He did not hear any horns or screeching tires before the decedent was struck. *Id.*, at p. 20. After the minibus struck the decedent, Frederick backed the minibus up and ran over her foot. *Id.*, at p. 16-17, 31. Arcilla also recalled that the minibus knocked the decedent out of the crosswalk. *Id.*, at p. 84-85.

Plaintiffs now move, pursuant to CPLR 3212, for partial summary judgment on liability as against defendants. In support of the motion, plaintiffs allege that “[d]efendant was [n]egligent as a [m]atter of [l]aw” and that decedent had no comparative negligence.

In opposition to the motion, defendants assert that only Premier owned and operated the minibus. They further assert that Frederick was not negligent because he checked his surroundings and his mirrors after the light turned green. Defendants also argue that they objected when plaintiffs sought to conduct Ancilla’s deposition and that they will move to preclude his testimony at trial. Finally, defendants assert that the photographs marked at Ancilla’s deposition establish that the decedent was not in the crosswalk at the time she was struck by the minibus.

In reply, defendants assert, inter alia, that plaintiffs mischaracterized Ancilla's testimony regarding marks he made on photographs of the crosswalk indicating where the accident occurred.

#### LEGAL CONCLUSIONS:

The movant on a motion for summary judgment must satisfy its initial burden to "make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact," after which the burden shifts to the opposing party "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986); see *Schmidt v One N.Y. Plaza Co. LLC*, 153 AD3d 427, 428 (1st Dept 2017); *Bartolacci-Meir v Sassoon*, 149 AD3d 567, 570 (1st Dept 2017).

Here, plaintiffs established their entitlement to partial summary judgment on liability by submitting the testimony of Frederick and Ancilla regarding how the incident occurred. As noted above, Frederick stated that he was headed west on East 39th Street and made a left turn southbound onto Second Avenue when he struck the decedent, and that he did not see the decedent before the minibus struck her. Ancilla said that he had a clear view of the decedent, who had a "walk" signal, in the crosswalk walking from the east side to the west side of Second Avenue when she was struck by the front driver's side of the minibus and was pushed out of the crosswalk. Ancilla also saw the minibus stop and then drive in reverse over the decedent's foot. Given that the decedent was stricken while she was in the crosswalk, with the light in her favor, by a vehicle which was making a left turn, she is entitled to summary judgment. See *Torres v Werner Bus Lines, Inc.*, 157 AD3d 624 (1st Dept 2018), citing *Hines v New York City Tr. Auth.*, 112 AD3d 528 (1st Dept 2013); see also *Quintavalle v Perez*, 139 AD3d 182, 187 (1st Dept 2016) (Appellate

Division, First Department held, as a matter of law, that “plaintiff, who was struck by a bus that approached from behind and to the right, and which turned left into the crosswalk where it struck plaintiff, may not be held comparatively negligent based on a theory that he could have seen and avoided the bus through the exercise of ordinary care.”).

However, this Court grants partial summary judgment only as against defendants Frederick, the operator of the minibus, and Premier, Frederick’s employer and the owner of the minibus. Plaintiffs have not established the liability of any of the other defendants and Premier and Frederick have not raised any material issue of fact warranting the denial of the motion as against them.

Despite defendants’ contention that Ancilla’s deposition should not have been conducted, they fail to set forth any basis, legal or otherwise, why this Court should not consider the testimony of this eyewitness. Finally, although defendants assert that markings made on the photographs marked at Ancilla’s deposition establish that the decedent was not in the crosswalk at the time she was struck by the minibus, Ancilla testified that the markings reflected where the decedent was in the crosswalk before she was struck by the minibus and where she was after the minibus pushed her out of the crosswalk. Doc. 35, at 88-89.

In light of the foregoing, it is hereby:

ORDERED that plaintiff’s motion for partial summary judgment is granted in favor of plaintiffs Norman Lifton and Diane Lifton, as Co-Executors of the Estate of Barbara Lifton, Deceased and Norman Lifton, Individually, and against defendants Premier Paratransit, LLC and Alva A. Frederick, and the motion is otherwise denied; and it is further


ORDERED that plaintiffs' damages as against defendants Premier Paratransit, LLC and Alva A. Frederick are to be determined at the time of trial of this action; and it is further

ORDERED that plaintiffs' claims against defendants New York City Transit Authority, Metropolitan Transit Authority, and MTA NYC Transit shall continue; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and it is further

ORDERED that this constitutes the decision and order of the Court.

7/24/2018  
DATE

  
KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE