

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

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Plaintiff(redacted),

Plaintiff,

-against-

SAQHIR HUSSAIN and RIBA TRANS CORP.,
Defendants.

-----X
S I R S:

PLEASE TAKE NOTICE, that upon the annexed Affirmation of DANIEL FLANZIG, ESQ., and upon all of the pleadings and proceedings heretofore had herein, the undersigned will cross-move this Court at an IAS Part to be held at the Courthouse located at 60 Centre Street, New York, New York, on the 10th day of December, 2010, at 9:30 in the forenoon of that day, or as soon thereafter as counsel may be heard, for an Order granting plaintiff Summary Judgment on the issue of liability pursuant to CPLR §3212, together with such other and further relief as this Honorable Court deems just and proper.

PLEASE TAKE NOTICE, that answering Affidavits, if any, are to be served at least seven (7) days prior to the return date of this Motion, pursuant to CPLR §2214(b).

Dated: Mineola, New York
November 17, 2010

Yours, etc.,

Index No.:

NOTICE OF
CROSS-MOTION

Hon. George J. Silver

DANIEL FLANZIG
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TO:

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

-----X

,

Plaintiff,

Index No. 107805/09

AFFIDAVIT

-against-

SAQHIR HUSSAIN and RIBA TRANS CORP.,

Defendants.

-----X

DANIEL FLANZIG, ESQ., being duly sworn, deposes and says:

1. That I am an attorney and a member of the firm of FLANZIG and FLANZIG, LLP, attorneys of record for the Plaintiff herein and as such am fully familiar with the facts and circumstances heretofore had herein, based upon a review of the file maintained by this law firm.
2. That I submit this affidavit in support of Plaintiff's Cross-Motion which seeks an Order granting Plaintiff summary judgment pursuant to CPLR §3212 on the issues of liability.

PROCEDURAL HISTORY

3. The within action was commenced by the service of a Summons and Complaint on or about June 2, 2009 . An Answer was interposed by the Defendants on or about August 21, 2009, a copy of Plaintiff's S&C and Defendant's Answer are annexed hereto as Plaintiff's **Exhibit "A"**. Defendant admits that the Defendant RIBA TRANS CORP. was the owner of the subject cab, as well as admits that the Defendant SAQHIR HUSSAIN was operating the cab with consent and permission of the owner and in the scope of his employment.

4. Thereafter, Plaintiff served a Bill of Particulars, a Supplemental Bill of Particulars, Second Supplemental Bill of Particulars, and Third Supplemental Bill of Particulars, copies same are annexed hereto as Plaintiff's **Exhibit "B"**.

5. Plaintiff was produced for the purposes of a deposition on May 21, 2010. Defendant was produced for the purposes of a deposition on June 22, 2010. A copy of Defendant's examination before trial is annexed hereto as Plaintiff's **Exhibit "C"**. A copy of Plaintiff's examination before trial is annexed to Defendant's moving papers as Exhibit "B". Plaintiff next attended both an orthopedic and neurological physical on behalf of the Defendants. A copy of the Defendant's orthopedic physical by Dr. Ronald Mann is annexed hereto as Plaintiff's **Exhibit "D"** and by Dr. Charles Bagley at **Exhibit "E"**. Although both doctors report their findings, neither addresses the issue of her injury and causality to the subject accident. Plaintiff has timely objected to the expert exchange and Defendant has failed to rectify the defect.

POINT I

PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY

10. For the purposes of Plaintiff's Motion, Plaintiff will rely upon her own deposition annexed to Defendant's moving papers as Exhibit "B" as well the Defendant's deposition which has been annexed as Plaintiff's Exhibit "C", and the police accident report annexed hereto as Plaintiff **Exhibit "F"**.

11. On September 22, 2008, at approximately 12:00 noon. The Plaintiff was involved in an accident with a yellow taxicab. Defendant's "B" at 6. At the time of the accident, she was riding her bicycle. Plaintiff got on her bicycle at her apartment at East 16th Street and was heading toward Sixth Avenue. Defendant's "B" at 6-7. She went across town on what she

believed to be 17th or 19th Street to Sixth Avenue heading to the Department of Motor Vehicles located at 34th Street and 6th Avenue. Defendant's "B" at 7-8. She had no particular time to be there that day, and she was going there to replace her lost license. "B" at 8.

12. When she entered Sixth Avenue, she went straight across to the bike lane and made a right on the bike lane heading uptown. She remained in the bike lane up until the time that the accident occurred. "B" at 9. The accident occurred at 32nd Street and Sixth Avenue in the bike lane. Photographs of 6th Avenue and the bike lane are annexed hereto as Plaintiff's **Exhibit "G"**.

13. Plaintiff saw the defendant's cab prior to the accident. It was approximately 10-15 feet away. The cab came quickly from behind her, passed her, and then went in front of her. Defendant's "B" at 13. The Plaintiff did not see any directional signals. Defendant's "B" at 13-14. Immediately to the Plaintiff's left of the bike lane were parked vehicles, trapping the Plaintiff. Defendant's "B" at 14. When the taxicab first came into the Plaintiff's bike lane, she was approximately 5 feet away, and approximately 2-3 seconds elapsed from the time that the cab entered the bike lane until the impact occurred. When Plaintiff saw the cab come into her bike lane she immediately looked to her left, put on her brakes and looked to see if she could get out of the way, but was blocked in by the parked cars on her left. Defendant's "B" at 16.

14. Right before the accident occurred, the Plaintiff saw the rear left door of the taxicab open while she was about 5 feet away. The door was opened by the rear seat passenger. Defendant's "B" at 16. The door was opened directly in front of her and her bicycle struck it. The bicycle slammed into the door and threw her over to her left side of the bike. Defendant's "B" at 18. Plaintiff landed in the roadway. "B" at 20. Plaintiff believes that a police officer witnessed the accident, but she is not sure. A copy of the NYC police department motor vehicle report is annexed hereto as Plaintiff's Exhibit "F". Plaintiff never obtained the names of the

passengers in the cab. Defendant's "B" at 21. She spoke to them and they apologized, but she never obtained a phone number or their names. "B" at 21-22.

15. Plaintiff also submits, for the purposes of this Motion, the deposition of the Defendant, SAQHIR HUSSAIN. A copy of the transcript and Plaintiff's transmittal letter to defense counsel are annexed hereto as Plaintiff's Exhibit "C". Although sent to the Defendants on July 19, 2010, your deponent has never received an executed copy of the deposition. As such it should be deemed signed in accordance with CPLR §3116a.

16. Mr. HUSSAIN was operating a cab on September 22, 2008. See Plaintiff's Exhibit "C" at page 8. It was a company car that he shared with another driver, and RIBA TRANS CORP. owned the cab. "C" at 9. Mr. HUSSAIN testified that the accident occurred on September 22, 2008 at approximately 12-1:00 p.m. involving his cab and a female bike rider. "C" at 22. At the time of the accident, he had two passengers with him. He dropped them off at 6th Avenue between 32nd and 33rd Street. "C" at 22-23. He believes he picked them up on Sixth Avenue at approximately 22-23 Street, "C" at 23-24. In the area of the accident on Sixth Avenue there are four lanes, including a bicycle lane to the left side. To the left of the bike lane is an area for vehicles to park. "C" at 26. He testified that the accident occurred in the middle of the intersection between 32-33 Street on 6th Avenue "C" at 26. His vehicle was stopped at the time of the accident. Immediately prior to the accident occurring he was traveling in the left most lane for approximately 3-4 blocks "C" at 27. Mr. HUSSAIN admits seeing the Plaintiff prior to the accident occurring traveling in the bike lane "C" at 27-28 and at no time prior to the accident did the Defendant ever see the Plaintiff leave the bicycle lane. "C" at 42.

17. When the Defendant stopped his cab, his driver's front wheels were approximately 2 feet from the bike lane. "C" at 47. The defendant did not see the accident occur, but first was

aware when he heard a sound. He was still seated inside the car and the rear passenger door was open. He testified “**when they opened the door at that time, I got the sound**” “C” at 48.

Questions: “**Right immediately after?**”

Answer: “**Yes “ “C” at 49.**”

The passengers got out first and then the Defendant. He saw the two male passengers holding the bicycle and asking if the Plaintiff was okay. The bike was in the bike lane. “C” at 50.

APPLICABLE LAW

18. Plaintiff moves for summary judgment on the issue of liability based upon the Defendant’s violation of Vehicle and Traffic Law Section 1214 and rules of the City of New York Section 4-11, Section C.

19. The owner of the vehicle is vicariously liable for the acts of its passenger by opening a taxicab door into the path of a bicyclist. As the Appellate Division held in Cohn v. Nationwide Mutual Insurance Co., 286 A.D.2d 699, 730 N.Y.S.2d 152 (2001), “the passenger’s act of opening the taxicab door in order to exit the vehicle constitutes ‘use and operation’ of a vehicle pursuant to Vehicle & Traffic Law Section 388, and accordingly, an owner of a taxicab would be liable for the Plaintiff’s injuries.” See also Vehicle & Traffic Law Section 388[1], Argentina v. Emory Worldwide Delivery Corp., 93 N.Y.2d 554, 693 N.Y.S. 493.

20. As the Court of Appeals held in Argentina, supra, the statute [388] has not been limited to situations where the vehicle is in motion and the inclusion of loading and unloading of a vehicle within the statute protection fits logically with previous interpretations of law and continues to fulfill the primary legislative objective. In fact, for claims under Section 388(1) of the Vehicle & Traffic Law, the vehicle itself need not be a proximate cause of the injury. The

purpose of Section 388(1) is not meant to be an expedient in procuring coverage for losses due to motor vehicle use, but instead to insure recourse for the vehicle's owner, a financially responsible party and also seeks to discourage owners from permitting people who are irresponsible or who might engage in unreasonably dangerous activities to use their vehicles. Argentina, supra at 562.

21. Having found that the owner is vicariously responsible for the acts of its passengers, we next must turn to the issue of whether or not the acts of the passenger, in violating the statute, were the sole proximate cause of the accident. Plaintiff alleges, which will be set forth below, that she was confronted with an emergency situation when the passenger door was opened in front of the path of her bicycle, inside the bicycle lane, approximately 3-5 feet ahead of her, giving her 2-3 seconds to react. Plaintiff also alleges that she was trapped between the cab on her right and parked vehicles on her left, giving her no opportunity to maneuver around the cab door.

22. Section 1214 of the Vehicle and Traffic law states “opening and closing vehicle doors – “No person shall open the door of a motor vehicle on the side available to moving traffic, and until it is reasonably safe to do so and can be done without interfering with the movement of other traffic, nor shall 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.”

23. The Rules of the City of New York, Section 4-11, Section C, “[T]axis....while engaged in picking up or discharging passengers must be within 12 inches of the curb or parallel thereto”. Here, the Defendant concedes that they were not within 12 inches of the curb when he brought his vehicle to a stop. Moreover, both parties agree that the door was opened into the path of Plaintiff's bicycle in violation of Section 1214 of the Vehicle & Traffic Law.

24. The New York City police report clearly states “At TPO, [time and place of occurrence], Vehicle 1 [taxicab] pulled over into bicycle lane to let passengers out of the vehicle.

Bicycle was travelling northbound in bicycle lane. Vehicle 1's rear passenger opened rear driver's side door into bicycle lane causing collision with bicyclist".

25. A police report may be considered in support of a motion when there is other admissible evidence to buttress the moving party's proof. "While the portion of the police accident report which contains the statements of the drivers was hearsay, that portion of the report which is based upon the officer's personal observation was admissible as "reports of police officers made upon their own observation and while carrying out their police duties are generally admissible in evidence." Yeargans v. Yeargans, 24 A.D.2d 280, 282. "Since the officer personally observed the stop sign, it was under a business duty to make the report, that portion of the report fell within the business record exception to the hearsay rule. CPLR §4518(a). See also, Westchester Medical Center v. State Farm Mut. Auto Ins., 44 A.D.3d 750. Although the report is not in admissible form, the Courts have noted that under circumstances, we have recognized proof which might not be inadmissible at trial may nevertheless be considered on a motion for summary judgment. Zuilkowski v. Sentry Insurance, 114 A.D.2d 453.

26. A Plaintiff has established a prima facie case that the Defendants were negligent when they open a car door adjacent to moving traffic when it was not reasonably safe to do so. In Montesinos v. Cote, 46 A.D.3d 774, 848 N.Y.S.2d 329, (2 Dept. 2007), a Plaintiff attempted to exit her vehicle and her driver's door came into contact with the trailer portion of a tractor-trailer owned by the Defendants. The Court granted summary judgment to the Defendant and held they were entitled to dismissal on the sole basis that the Plaintiff violated Vehicle and Traffic Law Section 1214 by opening her door into a moving traffic lane, and being negligent in failing to see what by the reasonable use of her senses, she should have seen. The violation of Vehicle and

Traffic Law Section 1214 required dismissal as a matter of law. See also, Abbas v. Salavel, 73 A.D.3d 1100 (2nd Dept 2010).

27. In Williams v. Persaud, 10 A.D.3d 686, 798, N.Y.S.2d 495, the Appellate Division held that a motorist was not liable for injuries incurred when the driver of a parked vehicle opened the driver's side door and struck motorist's passing vehicle. "on these facts alone, the Defendant established prima facie entitlement to judgment as a matter of law." In opposition, the Plaintiff failed to raise a triable issue of fact... there is nothing in the record to demonstrate that the Defendant breached any duty owed to the Plaintiff or, assuming such a breach, that any conduct on the part of the Defendant was a proximate cause of the accident citing Williams v. City of New York, 240 A.D.2d 734, 659 N.Y.S.2d 302. To the contrary, the evidence established that the Plaintiff violated Vehicle & Traffic Law Section 1214 by opening her door on the side adjacent to moving traffic when it was not reasonably safe to do so, was negligent in failing to see what, by the reasonable use of her senses, she should have seen. Williams, supra. Based upon the facts of the case, the Plaintiff, -----, should be granted summary judgment on the issue of liability.

28. Plaintiff assumes the Defendant will argue the acts or omissions of the Plaintiff creating an issue of fact as to Plaintiff's comparative negligence. It is clear that the Plaintiff was confronted with an "emergency" situation and should be entitled to a standard of care under this doctrine. Based upon these facts, Plaintiff cannot be held comparatively negligent because she was "faced with a sudden and unexpected circumstance that was not of her own making". Bello v. Transit Authority of N.Y. City, 12 A.D.3d 58 (2nd Dept. 2004)

29. A Plaintiff who acts reasonably when confronted with an emergency situation and is compelled to make a quick decision is entitled to the benefit of the doctrine and should not be held comparatively negligent. A mistake in judgment, wrong choice of action or speculation

concerning possible accident avoidant measures do not render the emergency doctrine inapplicable Barber v. Young, 238 A.D.2d 822. This issue, of the adaptability of the doctrine may be determined by the Courts as a matter of law. Vitale v. Levine, 44 A.D.3d 935 (2nd Dept. 2007), Alomo v. McDaniel, 44 A.D.3d 149 (1st Dept. 2007).

30. Here, the sudden opening of a car door five feet in front of Plaintiff with two to three seconds to react, placed Plaintiff in a sudden emergency situation. This coupled with parked vehicles to her left and the cab to her right, left her no opportunity to avoid the collision with the cab door and placed her in a sudden and unexpected emergency situation entitling her to no finding of comparative negligence.

WHEREFORE, your deponent respectfully requests this honorable Court deny Defendant's motion and grant Plaintiff's Cross Motion , together with such other and further relief as the Court may seem just and proper.

Dated: Mineola, New York
November 17, 2010

DANIEL FLANZIG

