

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. ARLENE P. BLUTH

PART 22

PRESENT: _____ Justice

Index Number : 158018/2012
SAMARSKAYA, KSENYA
vs.
MOTOR VEHICLE ACCIDENT
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for Summary judgment
Notice of Motion/Order to Show Cause -- Affidavits -- Exhibits _____ No(s). 1
Answering Affidavits -- Exhibits _____ No(s). 2
Replying Affidavits _____ No(s). 3

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

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

Dated: 9/18/14

[Signature], J.S.C.
HON. ARLENE P. BLUTH

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 22

-----X
KSENYA SAMARSKAYA,

Plaintiff,

-against-

DECISION/ORDER

Index No. 158018/12
Motion Seq. 001

MOTOR VEHICLE ACCIDENT INDEMNIFICATION
CORPORATION, "JOHN DOE", "ACME CAB
CORPORATION" and SARAH KING,

Defendants.
-----X

Defendant Motor Vehicle Accident Indemnification Corporation's (MVAIC) motion for summary judgment dismissing the complaint is denied.

In this personal injury action, plaintiff alleges that as she was riding her bicycle on October 27, 2011 she was struck by an opened rear passenger-side door of a taxi; that taxi left the scene after discharging the passenger, Sarah King. By decision, order and judgment dated May 16, 2012, plaintiff was deemed to be a "qualified person" and was granted leave to bring this action against MVAIC. King, although named as a defendant in this action¹, was never served and never appeared.

Pursuant to Insurance Law Section 5201 (Title and Purpose), a "qualified person" whose death or bodily injury arises from a motor vehicle accident in this state, and who has a cause of action against an owner or operator of an uninsured vehicle, or a cause of action against a person whose identity is unascertainable, may file a notice of claim with MVAIC (see Insurance Law §

¹The July 31, 2012 stipulation of discontinuance referred to in para. 4 of the moving papers bears the index number of the special proceeding for leave to sue MVAIC, and was filed in that matter.

5208). MVAIC may investigate such accidents, assume the defense of actions against uninsured defendants (see Insurance Law § 5209), and settle claims against financially irresponsible motorists (see Insurance Law § 5213), defined, inter alia, as the owner or operator of a motor vehicle without collectible insurance (see Insurance Law § 5202[j]). See *Archer v Motor Vehicle Acc. Indemnification Corp.*, 118 AD3d 5, 985 NYS2d 96, 98 (2d Dept 2014).

Insurance Law Section 5218(a) sets forth the procedure for commencing an action against MVAIC in hit and run cases. This section provides that a qualified person (such as plaintiff) may sue MVAIC for personal injuries “arising out of the ownership, maintenance or use of a motor vehicle” where the identity of the owner and operator at the time of the accident cannot be ascertained.

MVAIC claims that it “does not provide coverage or indemnification for injuries produced by the negligence of the back seat passenger-patron that are outside the covered use and operation of a commercial motor vehicle” (aff. in supp., para. 2). Notably, the only citation for this bold statement is to Vehicle and Traffic Law 370(1)(b). However, that section of the VTL is inapplicable because there are no bonds or insurance policies involved here.

Instead, in order to support its claim that MVAIC does not cover this type of accident, MVAIC cites a Court of Appeals decision, *Kohl v American Tr. Ins. Co.*, 15 NY3d 763, 906 NYS2d 809 (2010), which has nothing to do with MVAIC. *Kohl* involved a cyclist who was injured when the back seat passenger of a taxi opened the rear door into the cyclist’s path, causing a collision. The cyclist sued the passenger, and then sued the taxi operator’s insurance company when it failed to indemnify him. The Court held:

The Appellate Division correctly held that Kohl was not insured under the taxi owner's policy of automobile liability insurance. The policy says that it "shall inure to the benefit of any person legally operating" the insured vehicle in the business of the insured. The word "operating" cannot be stretched to include a passenger's riding in the car or opening the door.

Although the facts of the accident are the same – a cyclist "doored" by a taxi's passenger – the similarities between *Kohl* and the case at bar end there. The legal issue in *Kohl* involved an *insured* operator and a *written* automobile liability policy. *Kohl* is inapplicable here, where the owner of the taxi is not known and there is no insurance policy to interpret; the Court interpreted the word "operation" in the context of the policy, not the word "use" in the statute governing MVAIC.

Moreover, the word "use" is not interchangeable with the word "operate"; it is more expansive. The very purpose of a taxi is to pick up and discharge passengers—to do that, the doors have to be opened and closed. Whether the owner is using the taxi to make money or the passenger is using the taxi to take a ride, a passenger opening the door when exiting involves the "use" of the taxi. Although MVAIC asserts that the act of opening the door was outside the use and control of the operator (reply, para. 7), that is not the proper inquiry. The question is whether plaintiff's injuries arose out of the use *of the vehicle*. Opening and closing the passenger doors is part of the use of a taxi. Thus any injuries caused by King by opening the door and making contact with plaintiff arise "out of theuse of a motor vehicle". According, MVAIC has not demonstrated that it is entitlement to summary judgment dismissing the complaint as a matter of law.

Please note that the Court is not making any finding that the cab driver was negligent – he

or she may not have been – this Court only finds that MVAIC has not demonstrated that this action must be dismissed as a matter of law because a passenger “doored” a cyclist while exiting a taxi that left the scene.

Accordingly, defendant Motor Vehicle Accident Indemnification Corporation’s motion for summary judgment dismissing this action is denied.

This is the Decision and Order of the Court.

Dated: New York, NY
September 18, 2014



HON. ARLENE P. BLUTH, JSC

HON. ARLENE P. BLUTH