

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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ADRIANA MELNICHENKO,

Index No.: 15999/05

Plaintiff,
-against-

**PLAINTIFF’S AFFIRMATION
IN OPPOSITION TO DEFENDANTS’
CROSS-MOTION FOR SUMMARY
JUDGMENT & REPLY AFFIRMATION
IN FURTHER SUPPORT OF
PLAINTIFF’S MOTION
FOR SUMMARY JUDGMENT**

DONNA A. DASHOSH, CAB EAST LLC, KINGS
JAGUAR, INC. and JAGUAR CREDIT
CORPORATION,

Defendants.
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KENNETH S. FINK, an attorney duly admitted to practice in the courts of the State of New York, affirms the following to be true under the penalties of perjury:

1. I am a shareholder of CHERIFF & FINK, P.C., attorneys for Plaintiff ADRIANA MELNICHENKO, and I am familiar with the facts set forth below based upon my conversations with Plaintiff and my review of the file.

2. This affirmation is respectfully submitted in opposition to Defendants’ cross-motion for summary judgment because VTL §388 is constitutional and in further support of Plaintiff’s motion because there are no triable issues of fact on the subject of liability.

3. Plaintiff’s Memorandum of Law in opposition to Defendants’ cross-motion for summary judgment accompanies this Affirmation.

OVERVIEW

4. Defendants do not dispute that Plaintiff ADRIANA MELNICHENKO was a pedestrian knocked down by a car owned by Defendant Jaguar and operated by Defendant DONNA A. DASHOSH. There is no dispute that the accident occurred on May 22, 2005 at approximately 5:44 pm on the sidewalk, in

front of the Sheepshead Bay Road Subway Station located on Sheepshead Bay Road at East 15th Street, Brooklyn, New York. As a result of Defendants' negligence, Plaintiff sustained an above knee amputation of her right leg necessitating eight (8) surgical procedures, pelvic fractures, a spine fracture, a left elbow fracture requiring surgical repair and insertion of hardware, a laceration of her right kidney, bladder damage, liver damage, a fractured rib, and depression.

5. The instant affirmation addresses three issues now before this Court:

a) Whether VTL §388 is constitutional. Defendants CAB EAST LLC and JAGUAR CREDIT CORPORATION are vicariously liable under VTL §388 because the State and Federal Courts of New York have repeatedly held that VTL §388 is constitutional as to lessors such as the moving Defendants herein. As set forth below and in the accompanying memorandum of law, Defendants' cross-motion, seeking an order that VTL § 388 is unconstitutional, should be denied in its entirety;

b) Whether this Court should grant Plaintiff's motion for summary judgment on liability as against all Defendants because there are no material issues of fact concerning Defendants' liability. Defendant DONNA A. DASHOSH admits that she was the operator of the Jaguar when it hit Plaintiff ADRIANA MELNICHENKO was struck. The only "issues of fact" Defendants have raised are either incorrect or not material. As set forth below and as demonstrated in Plaintiff's motion papers, Defendants have not raised any material issues of fact in opposition to Plaintiff's motion for summary judgment. Thus, Plaintiff's motion for summary judgment on liability should be granted;

c) Whether Defendants' answer should be stricken because of their failure to schedule Plaintiff's medical examinations. Inasmuch as Defendants have finally scheduled medical examinations of the Plaintiff, albeit only after Plaintiff sought to have Defendants' answer stricken, Plaintiff withdraws that portion of her motion that sought to strike Defendants' Answers.

**DEFENDANTS CAB EAST AND JAGUAR CREDIT CORPORATION
ARE VICARIOUSLY LIABLE UNDER VTL § 388**

6. VTL §388 imposes vicarious liability on lessors of automobiles. Accordingly, the law is clearly in Plaintiff's favor. Moreover, the facts herein favor Plaintiff, as well. As the old law school adage goes, "When the law isn't on your side, argue the facts. When the facts aren't on your side, argue the law. And, when neither the law nor the facts are on your side, bang on your desk!" In the instant case, rather than banging on the proverbial desk, Defendant CAB EAST LLC and JAGUAR CREDIT CORPORATION's counsel has

chosen to challenge the well established constitutionality of VTL §388.

7. Defendant DONNA A. DASHOSH admits that she operated the Jaguar, a leased vehicle, on the day she hit Plaintiff ADRIANA MELNICHENKO. Defendant DASHOSH was the lessee of the car, but title ownership remained with the lessors --- the movants herein, Defendants CAB EAST LLC and JAGUAR CREDIT CORPORATION. Defendants' cross-motion challenges the constitutionality and applicability of §388 of the New York State Vehicle & Traffic Law. These questions, however, have been answered repeatedly by the Courts of this state.

8. Defendants CAB EAST LLC and JAGUAR CREDIT CORPORATION, as well as other long-term lessors, have, for many years, challenged the constitutionality of §388 of the Vehicle & Traffic Law as it applies to automobile leasing companies. See Accompanying Memorandum of Law. The leasing companies have repeatedly lost such challenges.

9. Automobile leasing companies have long lobbied members of the New York State Legislature to enact legislation which would insulate automobile leasing companies from liability under §388 of the Vehicle and Traffic Law and end "vicarious liability" for leasing companies. The State Legislature has refused to do so. It remains clear that the present state of the law results in Defendants CAB EAST LLC and JAGUAR CREDIT CORPORATION being vicariously liable for the actions of their lessee, Defendant DONNA A. DASHOSH, because of her negligent operation of the Jaguar when she struck Plaintiff, a pedestrian who was on the sidewalk.

10. As set forth in Plaintiff's Memorandum of Law, the constitutional arguments of defense counsel herein have been consistently rejected by the Appellate Divisions, the New York State Court of Appeals, as well as by the Federal District Courts and the Second Circuit Court of Appeals.

11. The Court of Appeals has long held that automobile leasing companies such as Defendants herein are indeed "owners" of the vehicles for purposes of vicarious liability under §388 of the Vehicle and

Traffic Law. This section has been held to be constitutional. This section has not been held to violate the due process clause of the United States Constitution. In short, the statute is in accord with both Federal principles and New York State Law and was properly enforced by the Court below.

12. While the specific facts of the instant case may be attractive to the Defendants CAB EAST LLC and JAGUAR CREDIT CORPORATION as a stage for the “vicarious liability battle”, the result is the same. The Defendants knew what the law of New York was when they chose to enter the New York market. The Defendants leased this vehicle to Defendant DONNA A. DASHOSH with full knowledge of New York’s law with regard to lessors such as themselves. They are vicariously liable for her negligent use and operation of the Jaguar, and therefore, they are responsible for the life altering injuries sustained by Plaintiff ADRIANA MELNICHENKO in this accident caused by Defendant DONNA A. DASHOSH.

**PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT
ON LIABILITY SHOULD BE GRANTED**

13. The negligence of Defendant DONNA A. DASHOSH, is incontestable. By application of VTL §388, the vicarious liability of co-defendants is also incontestable.

14. The following facts are not in dispute. Defendant CAB EAST LLC was the owner of the Jaguar. Defendants CAB EAST LLC and JAGUAR CREDIT CORPORATION leased the Jaguar to Defendant DONNA A. DASHOSH. On May 22, 2005, DONNA A. DASHOSH was operating the Jaguar when she hit Plaintiff ADRIANA MELNICHENKO, a pedestrian, who was standing on the sidewalk. Given these facts, there can be no dispute that Plaintiff ADRIANA MELNICHENKO has no comparative fault. Given the facts set forth herein, there is no conceivable conclusion but that Defendant DONNA A. DASHOSH was negligent and her negligence caused the accident.

15. Defense counsel, Craig A Leslie, Esq., erroneously asserts that Plaintiff’s motion is prematurely brought as Defendant DASHOSH’s criminal proceedings remain unresolved. This is irrelevant. Mr. Leslie suggests that Ms. Dashosh was not the operator of the vehicle at the time of the accident. In fact,

in Defendant DONNA A. DASHOSH's Verified Answer she admits that she was the operator of the

Jaguar:

“9. Upon information and belief, at all relevant times, Defendant DONNA A. DASHOSH was the operator of the Jaguar.” (See Affirmation of Kenneth S. Fink dated January 23, 2007 in support of the instant motion, Exhibits A and B. Emphasis added).

16. Defendants complain that the pending criminal proceedings have prevented them from conducting discovery. Both the civil and criminal actions have been pending since May 2005. At no time has a stay been granted or even requested due to the pending criminal action. At no time have Defendants sought court intervention to assist with discovery. Mr. Leslie states that non-party witnesses have been reluctant to provide him information because of the criminal investigation, yet he offers no proof in support of same. In any event, there is no need for non-party witness testimony for Plaintiff to establish on this motion that Defendant DONNA A. DASHOSH was negligent. This office has had little difficulty conducting our investigation. Numerous newspapers provided detailed accounts of the accident. Mr. Leslie suggests that because my office had previously attempted to set up Ms. Dashosh's deposition last year, we somehow cannot move for summary judgment now. This is simply not true. An analysis of the pleadings and discovery to date led my firm and Plaintiff to conclude that no more discovery was necessary to decide the liability issue. Also, in light of Defendants' failure to schedule Plaintiff's physical examinations, we could move for summary judgment on liability and also force Defendants to stop stalling this litigation. Ms. Dashosh or others could offer no material fact that will change Defendants' liability for the Mary 22, 2005 accident caused by Defendant DONNA A. DASHOSH.

17. Plaintiff testified that she was standing on the sidewalk waiting for a bus about five feet from the curb when she was struck by the leased Jaguar. **Defendant DASHOSH's vehicle had entered upon the sidewalk** in reverse at high speed pinning Plaintiff to a wall/doorway of the neighboring subway station.

18. **Once again, Plaintiff was on the pedestrian sidewalk prior to and at the time of the**

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