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

PRESENT: ARLENE P. BLUTH (DCM) **PART** 22
Justice

COLLIN M. LAKE, JR. and WILLIS GIBSON LAKE, *Plaintiffs*,

- V -

HOLZER, LESLEY E. and JOSEPH HOLZER, *Defendants.*

INDEX NO. 158929/2012

MOTION DATE

MOTION SEQ. NO. 002

The following papers, numbered 1 to 4, were read on this motion and cross motion

Notice of Motion/ Petition/ OSC - Affidavits - Exhibits	No(s)	1
Answering Affidavits - Exhibits and cross-motion	No(s)	2
Replying Affidavits	No(s)	3,4

Upon the foregoing papers, it is ordered that defendants' motion for summary judgment dismissing the action is denied, and plaintiffs' cross-motion for summary judgment on liability is granted.

It is uncontested that plaintiff Collin Lake, a pedestrian, was standing on the raised median island which separates the north and southbound lanes of Broadway, when Lesley Holzer, defendant driver of the car owned by Joseph Holzer, traveling in the northbound lane closest to the median, drove up onto the median and struck him. (Plaintiff Willis Gibson Lake asserts only a derivative claim).

Defendant Holzer testified that she was moving slowly in traffic when she became afraid that a car, which was to her right and a little behind her, was going to sideswipe her; in order to avoid that possible low impact contact, she drove onto the median and hit plaintiff. This maneuver was unreasonable as a matter of law.

The emergency doctrine recognizes that when a driver is faced with a sudden and unforeseen occurrence not of his/her own making which causes the driver to be reasonably so disturbed that he/she must act quickly, it is inappropriate to second-guess that driver's decisions

made in the heat of the moment. *See Rivera v NYCTA* 77 NY2d 322 (1991).

Here, defendant Holzer simply felt crowded in traffic in Manhattan; this is absolutely not an unforeseen circumstance. Even if the cars had touched, low impact fender benders are not unforeseen events on busy Manhattan streets. And avoiding a low impact fender bender does not constitute an emergency; an emergency is avoiding a head-on collision or a body flailing in the road. Defendants, who have moved here for summary judgment on their emergency doctrine defense, have not demonstrated that it was reasonable as a matter of law to be so disturbed by the mere possibility of incurring some car body damage to justify jumping the curb where plaintiff stood. The emergency doctrine is not meant to give drivers who panic a free pass to jump the curb and mow into pedestrians who are standing on a sidewalk or median, waiting to cross the street.

Accordingly, defendants' motion for summary judgment dismissing the complaint is denied, and plaintiffs' cross-motion for summary judgment on liability is granted. Defendants are solely liable for the accident; the first (plaintiff culpable), third (assumption of risk) and sixth (emergency doctrine) affirmative defenses are stricken.

Dated: New York, New York
February 9, 2015

HON. ARLENE P. BLUTH, JSC

NON-FINAL DISPOSITION