SHORT FORM ORDER

INDEX No. 07-13388
CAL. No. 08-00825-MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 19 - SUFFOLK COUNTY

PRESENT:

Hon. SANDRA L. SGROI
Justice of the Supreme Court

MOTION DATE 5-28-08
ADJ. DATE 11-13-08
Mot. Seq. # 002 - MG; CASEDISP
003- MD

ROBERT A. MILANA, as Administrator of the Estate of GLORIA M. MILANA, deceased, ROBERT A. MILANA, individually, LINDA JUTTING, as mother and natural guardian of CARL JUTTING, JR. and JESSE JUTTING, infants under the age of 18 years, and LINDA JUTTING, individually,	SARISOHN, SARISOHN, CARNER, et al. Attorneys for Plaintiffs 350 Veterans Memorial Highway Commack, New York 11725
Plaintiffs,	SOBEL & SEIDELL, LLP Attorneys for Defendant Ryan J. Smith 811 West Jericho Turnpike, Suite 105W Smithtown, New York 11787
- against -	MARTIN, FALLON & MULE Attorneys for Defendant Carl J. Jutting 100 East Carver Street Huntington, New York 11743
RYAN J. SMITH and CARL J. JUTTING,	DAVIS & HERSH, LLP Attorneys for Peter & Peggy Knudson 1345 Motor Parkway Islandia, NY 11749
Defendants.	

Upon the following papers numbered 1 to 61 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 23; Notice of Cross Motion and supporting papers 24 - 45; Answering Affidavits and supporting papers 46 - 50; 51 - 52; 56 - 57; Replying Affidavits and supporting papers 54 - 55; Other amended notice of motion 58 - 61; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the defendant Ryan Smith seeking summary judgment dismissing the plaintiffs' complaint and all cross-claims against him is granted; and it further

ORDERED that this cross-motion by Peter Knudsen and Peggy Knudsen seeking summary judgment in their favor and against defendants Carl Jutting and Linda Jutting is denied.

This action arises out of a motor vehicle accident that occurred at the intersection of Express Drive North and Motor Parkway in the Town of Islip on October 4, 2006. The accident allegedly

happened when the defendant Smith, who was traveling westbound on Express Drive North, struck the vehicle operated by the defendant Jutting and owned by the plaintiff Linda Jutting after the defendant Jutting ran the red light controlling the traffic on Motor Parkway. The infant-plaintiffs and Ms. Milana were passengers in the vehicle operated by defendant Jutting. As a result of the subject accident, Gloria Milana died and Police Officer Peter Knudsen sustained a laceration of his right hand's extensor tendon.

Subsequently, the plaintiff Robert Milana, as administrator of the estate of Gloria Milana, and the plaintiff Linda Jutting, individually and as mother and natural guardian of the infant-plaintiffs Carl Jutting, Jr. and Jesse Jutting ("the plaintiffs"), commenced this action against the defendants Ryan Smith and Carl Jutting to recover damages for injuries allegedly sustained by Ms. Milana and the infant-plaintiffs as a result of the accident. Thereafter, Peter Knudsen and Peggy Knudsen (" the Knudsen plaintiffs") instituted an action, assigned index number 07-11131, against Carl Jutting and Linda Jutting to recover damages for the injury to Mr. Knudsen's hand allegedly sustained during the extraction and removal of the Jutting Family and Ms. Milana from the Jutting's vehicle. Thereafter, defendants Carl Jutting and Linda Jutting commenced a third-party action against defendant Ryan Smith, alleging that his negligent operation of his motor vehicle was the proximate cause of the subject accident. Thereafter, this Court (Sgroi, J.), by order dated July 11, 2008, directed that all three actions be tried together.

The defendant Smith now moves for summary judgment dismissing the plaintiffs' claims against him on the basis that the defendant Jutting's violation of Vehicle and Traffic Law §1111 is the sole proximate cause of the subject accident, and that the plaintiffs are unable to prove that he negligently operated his motor vehicle. The Knudsen plaintiffs cross-move for summary judgment against the defendants Jutting on the same ground. The Knudsen plaintiffs also assert that General Municipal Law § 205-e imposes strict liability where there is a reasonable connection between the injury sustained and the statutory violation. In opposition, the plaintiffs and Carl Jutting both oppose the defendant Smith's motion on the ground that there are questions are fact regarding whether defendant Smith was negligent in the operation of his motor vehicle on the night of the subject accident. The parties, both in support and opposition to the motions, rely primarily upon the pleadings, a copy of the police motor vehicle accident report, and copies of the deposition transcripts of the parties, Officer Knudsen, and non-party witness Johnny Rivera.

On a motion for summary judgment, the movant bears the initial burden of establishing his cause of action or defense sufficiently to warrant the court to direct judgment in his favor as a matter of law. Once the movant meets this burden, the burden shifts to the opposing party to show by tender of sufficient facts in admissible form that triable issues of fact remain which preclude summary judgment in the movant's favor (*see* ***Altieri v Golub Corp.***, 292 AD2d 734, 741 NYS2d 126 [2002]). However, in opposing a summary judgment motion, mere conclusions, unsubstantiated allegations or assertions are insufficient to raise triable issues of fact (*see* ***Zuckerman v New York***, 497 NYS2d 557, 427 NYS2d 595 [1980]). In determining a motion for summary judgment, the court's function is not to resolve issues of fact or to determine matters of credibility but rather to determine whether issues of fact exist precluding summary judgment (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [1987]).

It is well settled that, even with a green light, a driver must exercise reasonable care to avoid collision with another vehicle in an intersection (*see* Vehicle and Traffic Law § 1111). A driver approaching an intersection also is not entitled to blindly or wantonly enter an intersection (*see* Vehicle and Traffic Law § 1180; ***Greco v Boyce***, 262 AD2d 734, 691 NYS2d 599 [1999]; ***McGraw v Ranieri***, 202 AD2d 725, 608 NYS2d 577 [1994]), however, the operator of a motor vehicle does have a right to assume that all drivers will obey the rules of the road and is not under a duty to anticipate that one will disobey the laws of vehicular operation (*see* ***Schmall v Ryder***, 262 AD2d 476, 692 NYS2d 168 [1999]; ***Walter v State***, 187 Misc 1034, 65 NYS2d 378 [1946]). Additionally, the law is well settled that the operator of a motor vehicle is under a duty to operate his vehicle with reasonable care, to be aware of any potential road hazards and to see that which under the circumstances he should have seen with the proper use of his senses (*see* ***Spatola v Gelco***, 5 AD3d 469, 773 NYS2d 101 [2004]; ***Stiles v County of Dutchess***, 278 AD2d 304, 717 NYS2d 325 [2000]; ***Marsella v Sound Distrib. Corp.***, 248 AD2d 638, 670 NYS2d 559 [1998]).

Based upon the adduced evidence, the defendant Smith has established his prima facie entitlement to judgment as a matter of law (*see* ***Zuckerman v New York***, *supra*; ***Carpio v Leahy Mech. Corp.***, 30 AD3d 554, 816 NYS2d 762 [2006]; ***Daliendo v Johnson***, 147 AD2d 312, 543 NYS2d 987 [1989]). The defendant Smith has demonstrated that the defendant Jutting's negligence was the sole proximate cause of the subject accident, as the defendant Jutting's vehicle proceeded through the intersection of Express Drive North and Motor Parkway against a red light, in violation of Vehicle and Traffic Law §1111 (*see* Vehicle and Traffic Law §1111 (d) (1); ***Casanova v New York City Tr. Auth.***, 279 AD2d 495, 719 NYS2d 125 [2001]; *cf.* ***Munter v Hubert***, 34 AD3d 544, 825 NYS2d 490 [2006]). Both the defendant Smith and the non-party witness, Mr. Rivera, testified that the traffic light controlling the flow of traffic at the subject intersection was green for traffic traveling westbound on Express Drive North and red for traffic traveling on Motor Parkway. Mr. Rivera also testified that the traffic light controlling his flow of traffic did not turn green until after the accident's occurrence. He testified that the traffic light on Express Drive North turns red first and then a couple of seconds later, the traffic light on Motor Parkway turns green. Mr. Rivera further testified that the defendant Smith's vehicle was already in the intersection when the collision occurred. Thus, the defendant Smith, as the driver with the right-of-way, was entitled to anticipate that the defendant Jutting would obey the traffic laws and yield the right-of-way to him (*see* ***Perex v Brux Cab Corp.***, 251 AD2d 157, 674 NYS2d 343 [1998]; ***Namisnak v Martin***, 244 AD2d 258, 664 NYS2d 435 [1997]; ***Anastasio v Scheer***, 239 AD2d 823, 658 NYS2d 467 [1997]).

In opposition, the plaintiffs and the Jutting defendants have failed to raise a triable issue of fact as to whether the defendant Smith was at fault for the happening of the subject accident or whether he could have done anything to avoid the collision (*see* ***Puccio v Caputo***, 272 AD2d 387, 707 NYS2d 478 [2000]; ***Packer v Mirasola***, 256 AD2d 394, 681 NYS2d 559 [1998]; ***Namisnak v Martin***, *supra*). The infant-plaintiffs and the defendant Carl Jutting each testified at their respective examinations before trial that they were unaware of how the accident occurred. The infant-plaintiffs both testified that they were asleep at the time of the accident's occurrence, and that they only became aware of the fact that they were involved in an accident when they woke up and discovered they were in an embankment off the roadway. The defendant Carl Jutting testified that he has no recollection of the accident's happening and that the last thing he remembers is leaving Shea Stadium after the Mets game to take Ms. Milana home.

Thus, the plaintiffs and the Jutting defendants have not submitted any evidence to establish any comparative negligence on behalf of the defendant Smith (*see* ***Diasparra v Smith***, 253 AD2d 840, 678 NYS2d 373 [1998]; ***Fuller v Blackbird***, 211 AD2d 886, 621 NYS2d 708 [1995]). Moreover, the defendant Carl Jutting, as the operator of a motor vehicle, was under a duty to see that which he should have seen through the proper use of his senses (*see* ***Bolta v Lohan*** 242 AD2d 356, 661 NYS2d 286 [1997]; ***Safran v Amato***, 155 AD2d 653, 548 NYS2d 244 [1989]; ***Olsen v Baker***, 112 AD2d 510, 490 NYS2d 916 [1985]). Additionally, the plaintiffs and the Jutting defendants have failed to demonstrate that the defendant Smith had any chance to avoid the accident, which according to the deposition testimonies of the defendant Smith and Mr. Rivera, occurred within a "split second"of time (*see* ***Casanova v New York City Tr. Auth.***, *supra*; ***Packer v Mirasola***, *supra*; ***Miesing v Whinnery***, 233 AD2d 551, 649 NYS2d 246 [1996]; ***Wilke v Price***, 221 AD2d 846, 633 NYS2d 686 [1995]). Accordingly, the defendant Smith's motion for summary judgment is granted.

Finally, the Knudsen plaintiffs' cross-motion for summary judgment is denied. The Knudsen plaintiffs are not parties to the instant action and, therefore, lack standing to make a motion for relief within this action (*see* ***Grella v Mid-America Realty Investors Ltd. Partnership***, 199 AD2d 18, 605 NYS2d 857 [1993]; ***Tischler v Fahnestock & Co., Inc.***, 2009 NY Slip Op 29003, 871 NYS2d 887 [2009]; *cf.* ***Van Slyke v Pargas, Inc.***, 69 AD2d 927, 415 NYS2d 307 [1979]).

Dated: 3/30/09

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION