

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2
Justice

ANTONIA KELLY and BRIAN KELLY

Plaintiffs

-against-

ALAN SOBEL, ANTONIO C. FERNANDEZ,
MICHELE GIANAKOS and WILLIAM M. GIANAKOS

Defendant

Index No: 6792/06

Motion Date: 10/17/07

Motion Cal. No.:16

Motion Seq. No.: 4

The following papers numbered 1 to 30 read on this motion by defendants, MICHELE and WILLIAM M. GIANAKOS, and cross-motion defendant, FERNANDEZ, for summary judgment as to liability dismissing the complaint and all cross-claims asserted against the respective movants; and papers numbered 31 to 36 read on the cross-motion by defendants, Michele and William M. Gianakos for an Order directing plaintiff to submit to a neuropsychological physical examination, to provide HIPAA compliant authorizations and to appear for a further deposition.

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affidavits-Exhibits	1 - 4
Notice of Cross-Motion-Affidavits-Exhibits	5 - 8
Answering Affidavits-Exhibits.....	9 - 11
Answering Affidavits-Exhibits.....	12 - 14
Answering Affidavits-Exhibits.....	15 - 17
Answering Affidavits-Exhibits.....	18 - 19
Answering Affidavits-Exhibits.....	20 - 22
Answering Affidavits-Exhibits.....	23 - 25
Answering Affidavits-Exhibits.....	26 - 28
Replying Affidavits.....	29 - 30
Notice of Cross-Motion-Affidavits-Exhibits.....	31 - 34
Replying Affidavits.....	35 - 36

Upon the foregoing papers it is ordered that this motion and cross-motions are determined as follows.

It appears that Michele and William M. Gianakos' cross-motion seeking various items of discovery was mistakenly attached to the instant summary judgment motions, rather than to the discovery motion of the defendant, Sobel, which sought the identical relief. The Sobel motion was submitted on October 3, 2007 and decided by Order dated October 9, 2007. Inasmuch as the Gianakos' cross-motion seeks the identical relief as that sought by Sobel, the instant cross-motion is determined in accordance with the Order, dated October 9, 2007.

The defendants' Gianakos' motion, and the defendant's Fernandez', cross-motion for summary judgment dismissing the complaint and all counter-claims and cross-claims asserted against these movants are dismissed. The remainder of the action is severed. It is noted that, in addition to the above captioned action, there are three other related actions and that the four actions have been combined for joint trial and all parties in the four actions were given notice of the motion and cross-motion for summary judgment.

The instant action arises out of an automobile accident which occurred on December 7, 2005 at the intersection of 57th Street and 39th Ave. The vehicle, owned by William M. Gianakos and driven by the defendant, Michelle Gianakos, was traveling east on 39th Ave. when it was struck on the right rear passenger side by the vehicle owned and operated by the defendant, Sobel who was traveling north on 57th St. Upon being hit, the Gianakos vehicle spun around and spun into the westbound lane of 39th Ave. where it was struck on the driver's side by the vehicle owned and operated by the defendant, Fernandez, traveling in the westbound lane of 39th Ave. At this intersection, 57th St. is controlled by a stop sign.

Defendants, Gianakos and Fernandez move for summary judgment in their favor on the ground that the defendant, Sobel was negligent in failing to stop at the stop sign and to yield the right of way to the Gianakos vehicle. Fernandez also asserts that Sobel's negligence was the sole proximate cause of the accident on the ground that when the Gianakos vehicle crossed over into his lane of traffic, Fernandez was faced with an emergency, not of his creation and he acted reasonably under the circumstances. In support and opposition to the motions, the movants and opponents submitted the deposition testimony of the drivers of the three vehicles involved in the accident.

The defendants, Gianakos established, prima facie, their entitlement to summary judgment on the issue of liability, by demonstrating that Sobel, either failed to stop at the stop sign, or upon stopping failed to yield the right of way to the Gianakos vehicle in violation of Vehicle and Traffic Law § 1142(a) (see

Odumbo v. Perera, 27 AD3d 709 [2006]; Breslin v. Rudden, 291 AD2d 471 [2002], lv denied 98 NY2d 605 [2002]). A driver is negligent where an accident occurs because he has failed to see that which through the proper use of his senses he should have seen (Bolta v. Lohan, 242 AD2d 356 [1997]; Stiles v. County of Dutchess, 278 AD2d 304 [2000].) The opponents of the motion, failed to raise a question of fact as to Gianakos' alleged comparative negligence in failing to avoid the accident (see, Gillinder v. Hemmes, 298 AD2d 493 [2002]; Bolta v. Lohan, 242 AD2d 356 [1997]; Wilke v. Price, 221 AD2d 846 [1995]; Cassidy v. Valenti, 211 AD2d 876 [1995]). Gianakos, who had the right-of-way, was entitled to assume that Sobel would obey the traffic laws requiring him to stop and yield the right of way (see Vehicle and Traffic Law § 1142[a]; Gillinder v. Hemmes, 298 AD2d 493 [2002]; Lupowitz v. Fogarty, 295 AD2d 576 [2002]; Stiles v. County of Dutchess, 278 AD2d 304 [2000]; Cenovski v. Lee, 266 AD2d 424 [1999]).

The defendant, Fernandez, has also established, prima facie entitlement to summary judgment on the issue of liability by demonstrating that he was faced with an emergency not of his making and he acted reasonably under the circumstances.

It is well settled that a driver is not required to anticipate that an automobile traveling in the opposite direction will cross over into oncoming traffic (see Boos v. Bedrock Materials, Inc., 16 AD3d 447 [2005]; Dormena v. Wallace, 282 AD2d 425 [2001]; Koch v. Levenson, 225 AD2d 592, 592-593 [1996]). Such an occurrence presents an emergency situation, and the actions of the driver faced with such a situation is not obligated to exercise her best judgment (see Koch v. Levenson, supra) and any error in judgment is not sufficient to constitute negligence (see, Greifer v. Schneider, 215 AD2d 354 [1995] Moller v. Lieber, 156 AD2d 434, 435 [1989]).

In opposition, to Fernandez' prima facie showing, none of the parties submitted any evidence to raise a triable issue of fact regarding Fernandez' possible comparative negligence. The opponents' claim that because Fernandez testified at his EBT that he had a clear vision of the Gianakos vehicle, the Sobel vehicle and the intersection, before the accident, he should have anticipated that a collision would occur which would propel Gianakos into his lane of traffic and, thus, Fernandez should have taken some unspecified evasive action to avoid hitting Gianakos' vehicle. Such a claim is speculative and unrealistic (see, Johnson v. Davis, 20 AD3d 395, [2005]; Zuckerman v. City of New York, 49 NY2d 557 [1980]).

Dated: October 22, 2007
D# 32

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J.S.C.