SHORT FORM ORDER

INDEX No. 03-12742
CAL. No. 07-00288-MV

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 5-23-07 (007)
7-25-07 (008 & 009)
ADJ. DATE 8-22-07
Mot. Seq. #007 - MG
008 - MD
009 - MG

ROBERTA BISCARDI,	JOHN L. JULIANO, P.C.
	Attorney for Plaintiff
	39 Doyle Court
Plaintiff,	East Northport, New York 11731
- against -	O'CONNOR, O'CONNOR, HINTZ, et al.
	Attorneys for Defendant Theresa Yoel
BARBARA RIVERA, as Administratrix of the Estate of CARLOS A. RIVERA, BARBARA RIVERA, individually, GARY YOEL, THERESA L. YOEL and ROBERT CHEVROLET,	One Huntington Quadrangle, Suite 3C01
	Melville, New York 11747
	McCABE, COLLINS, McGEOUGH, et al.
	Attys for Deft Barbara Rivera, as Administratrix of the Estate of Carlos A. Rivera
Defendants.	346 Westbury Avenue
	Carle Place, New York 11514

Upon the following papers numbered 1 to 114 read on this motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-25; 26-32; 33-51; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 52-96; Replying Affidavits and supporting papers 97-114; Other___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that for the purposes of this determination the motion by defendant Robert Chevrolet, Inc. (# 007) for summary judgment dismissing the complaint, the motion by defendant Barbara Rivera, individually (# 008) for summary judgment dismissing the complaint, and the motion by defendant Theresa Yoel (# 009) for summary judgment dismissing the complaint are consolidated; and it is further

ORDERED that the motion by defendant Robert Chevrolet, Inc. (# 007) for summary judgment dismissing the complaint and all cross claims against it and defendant Theresa Yoel is granted; and it is further

ORDERED that the motion by defendant Barbara Rivera, individually (# 008) for summary judgment dismissing the complaint and all cross claims against her is denied; and it is further

ORDERED that the motion by defendant Theresa Yoel (# 009) for summary judgment dismissing the complaint and all cross claims against her is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, Roberta Biscardi, as a result of a motor vehicle accident at approximately 11:45 p.m. on February 11, 2003. At the time of the accident, plaintiff was a passenger in a vehicle owned by defendant Barbara Rivera, the administratrix of the decedent's estate, and operated by the decedent.

It is undisputed that the accident occurred on Scholar Lane in Commack, New York. Scholar Lane is a two-way street with one lane in each direction, separated by a double yellow line and running east and west. On the day of the accident, defendant Theresa Yoel, who was traveling westbound on Scholar Lane, was in the process of making a left turn into the driveway of her home. The decedent, who was also traveling westbound on Scholar Lane, attempted to pass the Yoel vehicle by traveling from the westbound into the eastbound lane of Scholar Lane, struck the Yoel vehicle, skidded across the road and struck a tree off the side of the road.

Defendant Robert Chevrolet, Inc. now moves for summary judgment dismissing the complaint and all cross claims against it and defendant Theresa Yoel, asserting that they bear no liability for the accident. In support, defendant Robert Chevrolet, Inc. submits, *inter alia*, the pleadings and the transcripts of the deposition testimony given by plaintiff, defendant Theresa Yoel and defendant Gary Yoel [1]

Defendant Theresa Yoel moves for summary judgment dismissing the complaint and all cross claims against her, asserting that she bears no liability for the accident. In support, defendant Theresa Yoel submits, *inter alia*, the pleadings and the transcripts of the deposition testimony given by plaintiff, defendant Theresa Yoel and defendant Gary Yoel.

At her examination before trial, plaintiff testified to the effect that she is a college student. On the day of the accident, the decedent was her boyfriend, and she "drove to [the decedent's] house from school." Although plaintiff remembered that she and the decedent were going to rent a movie, she did not remember whether she left the house with the decedent and whether the accident happened while going to rent a movie or coming back to the house. She did not remember "anything whatsoever about the accident itself." The first thing that she remembered after the accident was that "[she] was in the hospital." Plaintiff also testified that the decedent was driving a Honda Civic which he owned in the subject accident.

At her deposition, defendant Theresa Yoel testified to the effect that she had been traveling westbound on Scholar Lane and slowly approached her home because "the roads were slippery" and

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[1] The action has been discontinued, with prejudice, insofar as asserted against Gary Yoel only by stipulation of both parties, dated December 1, 2006.

"slick." At this point on Scholar Lane, there was no left turn lane or traffic control device. She checked her mirrors–both side-view and rear-view mirrors–to "make sure that there are no cars coming from behind [her] and nothing obviously is coming towards [her]." After having found that "there were no oncoming cars," she "was about to proceed to turn into [her] driveway" and heard a noise, like a "whoosh" sound. At that time, she did not feel any contact with her vehicle. Thereafter, she heard a "loud bang." Prior to making a left turn into her driveway, she activated her left turn signal but did not stop. Rather, her vehicle was "rolling ever so slowly." She testified that she and her husband, Gary Yoel, did not know what happened until she pulled her vehicle into the driveway. After they got out of the vehicle, she found that "the bumper cover of the front of the vehicle *** had been peeled away," and her husband "went over to the other vehicle and realized that [the decedent and plaintiff] needed help, and [she] *** called 911."

At his deposition, defendant Gary Yoel testified to the effect that he is the general sales manager of defendant Robert Chevrolet, Inc., an automobile dealership, and that he gets paid on a commission basis and gets some fringe benefits including the use of a company vehicle. On the day of the accident, he used a company vehicle and let his wife, defendant Theresa Yoel, drive on the way back home. He was seated in the front passenger seat, and his daughter was in the rear. They had been traveling westbound on Scholar Lane which is a "straight road, downward incline." Their house is at the "bottom of that incline." Defendant Gary Yoel observed his wife turn "her [left] signal on to turn into the driveway." He testified that defendant Theresa Yoel slowly approached their home and "came to a [full] stop" prior to making the left turn. When he heard that "whooshing" sound, his wife was making the left turn. It all happened in a split second. At that time, he did not feel any contact with his vehicle. At any time prior to the "whooshing" sound, he neither saw any headlights nor heard any sound coming from a vehicle headed in a westbound direction. In addition, the weather was cold and clear, and the roadway was "slick."

Here, defendants Robert Chevrolet, Inc. and Theresa Yoel established their entitlement to judgment as a matter of law by submitting evidence showing that the decedent violated Vehicle and Traffic Law § 1126 (a) by crossing over a double yellow line, and thereby caused the accident. It is well settled that a driver who crosses over a double yellow line into opposing traffic, unless justified by an emergency situation not of the driver's own making, violates the Vehicle and Traffic Law and is guilty of negligence as a matter of law (*see*, Vehicle and Traffic Law § 1126 [a]; ***Sena v Negron***, 38 AD3d 516, 832 NYS2d 236 [2007]; ***Gadon v Oliva***, 294 AD2d 397, 742 NYS2d 122 [2002]). The evidence indicates that the accident occurred when the decedent drove his vehicle across a double yellow line and then proceeded west in the eastbound lane of Scholar Lane in an attempt to pass the Yoel vehicle (*see*, ***O'Connor v Lopane***, 24 AD3d 426, 805 NYS2d 125 [2005]). At the time, defendant Theresa Yoel had slowly approached her home and was making a left turn into the driveway of her home, activating her left signal.

In opposition, plaintiff failed to produce any evidence to raise a triable issue of fact as to the emergency doctrine and defendant Theresa Yoel's comparative negligence. Plaintiff submits, *inter alia*, the affidavit of an engineering expert who merely alleged, unsupported by any evidence, that defendant Theresa Yoel made an abrupt left turn without turning on the signal or somehow contributed to its cause. The affidavit was insufficient to defeat the motion for summary judgment because the expert's opinion

was speculative, conclusory and unsubstantiated (*see*, ***Reddy v 369 Lexington Ave. Co.***, 31 AD3d 732, 819 NYS2d 776 [2006]; ***Winsche v Town of North Hempstead***, 304 AD2d 756, 757 NYS2d 774 [2003]). Thus, the motion by defendant Robert Chevrolet, Inc. (# 007) and the motion by defendant Theresa Yoel (# 009) for summary judgment dismissing the complaint against them are granted. The action is severed and shall continue against the remaining defendants.

Defendant Barbara Rivera, individually, moves for summary judgment dismissing the complaint and all cross claims against her, asserting that she bears no liability for the decedent's accident because she did not give the decedent permission to use the subject vehicle. In support, defendant Barbara Rivera submits, *inter alia*, the pleadings and her deposition testimony.

At her examination before trial, defendant Barbara Rivera testified to the effect that she was the decedent's mother and owned a 1993 Honda Civic. On the day of the accident, when she said good night to her son and went to bed at around 10:30 p.m., he was downstairs watching TV with plaintiff. At approximately 1:00 p.m., she received a phone call from a hospital nurse stating that her son was involved in an accident and discovered that the vehicle was gone with him. Defendant Barbara Rivera testified that, prior to the accident, her son had used the vehicle approximately 10 times, and, during those 10 occasions, he had her permission to drive the vehicle. She also testified that "[her son] was always told [that] he could not use the car without [her] permission. That was just a standard." Immediately prior to the accident, she told her son that he could not drive the vehicle because he had a suspended license and did not have permission to use the vehicle. The decedent's license had been suspended due to a previous DWI for six months since September 2002. In addition, defendant Barbara Rivera testified that she did not give anyone else permission to drive the vehicle and that the decedent knew that the keys for the vehicle were kept in the kitchen cabinet.

Vehicle and Traffic Law § 388 (1) imputes to the owner of a motor vehicle the negligence of one who uses or operates it with his or her permission. This section gives rise to a "very strong" presumption that the vehicle is being operated with the owner's consent, but the presumption may be rebutted by substantial evidence to the contrary (*see*, ***Britt v Pharmacologic Pet Serv.***, 36 AD3d 1039, 828 NYS2d 630 [2007]; ***Matter of New York Cent. Mut. Fire. Ins. Co. v Dukes***, 14 AD3d 704, 789 NYS2d 267 [2005]; ***Headley v Tessler***, 267 AD2d 428, 700 NYS2d 849 [1999]). Although the issue of whether someone had permission to use or operate a motor vehicle is generally an issue of fact (*see*, ***Padilla v Felson***, 28 AD3d 530, 813 NYS2d 744 [2006]; ***Chambers v City of New York***, 309 AD2d 81, 764 NYS2d 708 [2003]; ***Lewis v Caldwell***, 236 AD2d 896, 653 NYS2d 745 [1997]), the presumption of the consent may be rebutted as a matter of law by demonstrating that there is uncontradicted evidence that the driver did not have express permission to operate the motor vehicle involved in the accident, and there was no competent evidence from which permission or authority could be inferred (*see*, ***Burke v Elmendorf***, 30 AD3d 553, 817 NYS2d 149 [2006]; ***Headley v Tessler***, *supra*).

Here, defendant Barbara Rivera testified that, immediately prior to the accident, she told her son not to drive the vehicle. Nevertheless, the fact that defendant Barbara Rivera's testimony was not contradicted does not, by itself, overcome the presumption that the vehicle was being operated by the decedent with permission (*see*, ***Matter of Gen. Acc. Ins. Co. v Bonefont***, 277 AD2d 379, 716 NYS2d 596 [2000]). Moreover, the evidence indicates that the decedent had previously used the subject vehicle

approximately 10 times and he knew where the keys were kept. Under the circumstances, there is an issue of fact whether the decedent had permission to use the subject vehicle (*see*, ***Lewis v Caldwell***, *supra*). Thus, the motion by defendant Barbara Rivera, individually (# 008) for summary judgment dismissing the complaint is denied.

Accordingly, the motion by defendant Robert Chevrolet, Inc. (# 007) and the motion by defendant Theresa Yoel (# 009) are granted, and the motion by defendant Barbara Rivera, individually (# 008) is denied.

Dated: OCT 16 2007

J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**

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