SHORT FORM ORDER

INDEX No. 06-25828

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 1-10-08
ADJ. DATE 1-16-08
Mot. Seq. # 001 - MG
002 - XMD

DANIEL D. KLIMKOWSKI, as Administrator of the Estate of KRISTEN M. KLIMKOWSKI and DANIEL D. KLIMKOWSKI, individually,	STOCK & CARR Attorneys for Plaintiff 88 Second Street Mineola, New York 11501
Plaintiff,	SOBEL & SEIDELL, LLP Attorneys for Defendants Manzella & Cisario 811 West Jericho Turnpike, Suite 105W Smithtown, New York 11787
- against -	
NANCY A. MANZELLA, LOUIS A. CISARIO, DAWN SCOLLO and 1058 REST., INC. d/b/a CRAZY DONKEY BAR & GRILL,	BREEN & CLANCY Attorneys for Defendant Scollo 1355 Motor Parkway, Suite 2 Hauppauge, New York 11749
Defendants.	RUBIN, FIORELLA & FRIEDMAN, LLP Attorneys for Defendant 1058 Rest., Inc. 292 Madison Avenue, 11th Floor New York, New York 10017

Upon the following papers numbered 1 to 20 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 -3; Notice of Cross Motion and supporting papers 4 - 6;Answering Affidavits and supporting papers 7 - 8; 9 - 10; 11 - 12; 13 - 14; Replying Affidavits and supporting papers 15 - 16; 17 - 18; 19 - 20; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (#001) by defendants Manzella and Cisario for summary judgment dismissing all claims interposed against them in this action that arises from a motor vehicle accident is considered under CPLR 3212 and the relevant provisions of the Vehicle and Traffic Law and is granted; and it is further

ORDERED that the cross motion (#002) by the plaintiff for partial summary judgment on the issue of the liability of defendants Manzella, Cisario and Scollo for the occurrence of the motor vehicle accident that is the subject of this action is considered under CPLR 3212 and the relevant provisions of the Vehicle and Traffic Law and is denied.

The plaintiff commenced this action in his representative and individual capacities to recover damages for the wrongful death and conscious pain and suffering of his daughter, Kristen M. Klimkowski, and those attributable to the loss of her services. The plaintiff also demands damages from corporate defendant 1058 Rest, Inc., by reason of its purported violations of the Dram Shop Act (General Obligations Law §11-101 *et. seq.*). Underlying these claims is the occurrence of a two car motor vehicle accident in which the plaintiff's decedent was killed while riding as a passenger in a vehicle titled in the name of the plaintiff and operated by defendant Scollo and the conduct of defendant Scollo and employees of defendant 1058 Rest, Inc., in the hours preceding the accident.

The subject accident occurred at approximately 12:40 a.m. on April 29, 2006 in Lindenhurst, New York at the intersection of Route 109 and Wellwood Avenue. Prior to the collision, the vehicle operated by Scollo had purportedly stopped for a red traffic signal in the eastbound, lefthand turn lane of Route 109 at its intersection with Wellwood Avenue. The Scollo vehicle was the only vehicle in that lefthand turn lane. At that time, defendant Cisario was operating a vehicle owned by defendant Manzella in the left, westbound travel lane of Route 109. As defendant Cisario approached the intersection of Route 109 and Wellwood Avenue, he saw from a distance of approximately 100 feet, that the traffic light controlling his lane of travel at said intersection was red. Defendant Cisario responded by reducing the speed of his vehicle from 45 miles per hour to 30-35 miles per hour. Immediately thereafter, the traffic light changed to green and defendant Cisario resumed his speed of 45 miles an hour. After entering the intersection, defendant Cisario's vehicle struck the passenger side of the Scollo vehicle.

As a result of the impact, the plaintiff's decedent was killed and the driver of her automobile, defendant Scollo, was taken to a nearby hospital. She was subsequently charged with vehicular manslaughter and driving while intoxicated, to which charges, defendant Scollo later entered a guilty plea.

Defendant Scollo has no recollection of the circumstances surrounding the occurrence of the accident other than that she had pulled the vehicle she was operating into the eastbound, lefthand turn lane of Route 109 and stopped there for a red traffic signal. She testified that there were no cars ahead, behind or to the side of the one she was operating. She also testified that the weather conditions were clear, the roads were dry and that traffic was empty or slow.

Defendant Cisario testified that he saw only one other vehicle as he approached the subject intersection, namely, a small red car which was also heading west on Route 109. However, this car was stopped in the westbound, lefthand turn lane of Route 109 at the traffic signal controlling its lane of travel. Defendant Cisario entered the intersection under the green light that was controlling his left,

westbound lane of travel and he forcefully applied his brakes when the Scollo vehicle suddenly appeared cutting north across his westbound travel lane. Defendant Cisario further testified that he did not see the vehicle operated by defendant Scollo until its sudden movement across his left, westbound lane of travel during his traverse through the subject intersection.

By their motion-in-chief, defendants Manzella and Cisario seek an order awarding them summary judgment dismissing all claims interposed in this action. These moving defendants claim that the competent and admissible evidence in the record establishes that, as a matter of law, defendant Cisario engaged in no unreasonable conduct while operating the Manzella vehicle on the morning of the subject accident and that the cause of the subject accident is attributable to negligence on the part of defendant Scollo and/or others. With these contentions the court agrees and thus awards defendants Manzella and Cisario the summary judgment demanded by them.

The conduct of motorists at an intersection controlled by traffic signals is subject to the provisions of VTL § 1111 and not the more general provisions of the Vehicle and Traffic Law such as those set forth in §§ 1140 or 1141 which govern the conduct of drivers at intersections that are not controlled by traffic lights (*see*, ***Dicke v Anci,*** 31 AD2d 696, 821 NYS2d 93 [2006]; ***Saggio v Ladone***, 21 AD3d 407, 799 NYS2d 586 [2005]; ***Rudolph v Kahn***, 4 AD3d 408, 771 NYS2d 370 [2004]; ***Le Clarie v Pratt***, 270 AD2d 612, 704 NYS2d 354 [2000]). Section 1111 of the Vehicle and Traffic Law permits motorists approaching an intersection with a green traffic signal to proceed through the intersection provided they yield to vehicles lawfully within the intersection and exercise reasonable care under the circumstances (*see,* ***Shea v Judson,*** 283 NYS2d 393 28 NE2d 885 [1940]). A motorist facing a green traffic signal thus has the right to assume that the light is red for cross traffic and that such traffic will obey the law by stopping for the red light and remaining stationary until the light has changed to green (*see,* ***Baughman v Libasci,*** 30 AD2d 696, 292 NYS2d 588 [1968]). Although a motorist proceeding under a green light is not authorized to blindly and wantonly enter the intersection without keeping a proper lookout or employing a reasonable speed (*see,* ***Nuziale v Paper Transport of Green Bay Incorporated***, 39 AD3d 833, 835 NYS2d 316 [2007]), there is no requirement that said motorist reduce his or her speed at every intersection as a reduction in speed is required only where warranted by prevailing conditions (*see,* VTL §1180(a) (e); ***Wallace v Kuhn,*** 23 AD3d 1042, 804 NYS2d 187 [2005]; ***Mosch v Hansen***, 295 AD2d 717, 744 NYS2d 222 [2002]; ***Barile v Carroll***, 280 AD2d 988, 720 NYS2d 674 [2001]; ***Wilke v Price***, 221 AD2d 846, 633 NYS2d 686 [1995]).

Here, moving defendants Manzella and Cisario submitted sufficient proof in admissible form to establish that all lanes of the roadway of Route 109 at its intersection with Wellwood Avenue werre controlled by traffic signals on the date of the accident and that defendant Cisario lawfully entered the subject intersection under a green light that controlled his westbound lane of travel. The record further established that prior to impact, the Scollo vehicle was stopped at a red traffic signal that controlled the eastbound, lefthand turn lane of the subject roadway. Defendant Cisario was thus entitled to proceed through the intersection confident that defendant Scollo's vehicle would comport itself with the obligations imposed on its driver by VTL §1111 and without having to anticipate any sudden movement

across his lane of travel by defendant Scollo or others (*see, **Perez v Brus Cab Copr.,*** 251 Ad2d 157, 674 NYS2d 343 [1998]; ***McGraw v Ranieri***, 202 AD2d 725, 608 NYS2d 577 [1994]). The record also established that as defendant Cisario entered the subject intersection, the vehicle operated by defendant Scollo suddenly pulled out of its stopped position at the front of the eastbound, left-hand turn lane and crossed the path of defendant Cisario's oncoming, westbound vehicle. The evidence adduced was thus sufficient to establish, prima facie, the moving defendants' entitlement to summary judgment on the issue of their non-liability for the occurrence of the accident (*see, **Dubi v Jericho Fire District***, 22 AD3d 631, 803 NYS2d 103 [2005]).

It was thus incumbent upon defendant Scollo and others opposing the motion to establish, by due proof in admissible form, that questions of fact exist regarding defendant Cisario's engagement in negligent acts that may have caused or contributed to the accident. However, the court's review of the record adduced on the instant motion reveals that no such questions of fact were raised.

Defendant Scollo has no recollection of the accident as she remembers nothing after stopping her vehicle in the front of the eastbound, left hand turn lane on Route 109 at its intersection with Wellwood Avenue at the red traffic signal controlling her lane of travel. Defendant Cisario's account of the facts surrounding the collision is thus uncontroverted. Although counsel for the plaintiffs and counsel for defendant Scollo argue that defendant Cisario had a concomitant duty under VTL §1111(a) to yield to vehicles which were lawfully within the intersection, there is no evidence that defendant Scollo lawfully entered the subject intersection or that defendant Cisario violated VTL §1111(a) and that any such violation was a proximate cause of the accident. Nor is there evidence that defendant Cisario violated VTL §1180 by reason of the speed of his vehicle. As indicated above, a motorist approaching an intersection is duty bound to keep a proper lookout and to reduce his or her speed where prevailing conditions warrant. There is, however, no duty to reduce one's speed at every intersection as a reduction in speed is required only where warranted by prevailing conditions (*see*, VTL §1180(a); (e); ***Wallace v Kuhn,*** 23 AD3d 1042, 804 NYS2d 187 [2005], *supra*; ***Mosch v Hansen***, 295 AD2d 717, 744 NYS2d 222 [2002], *supra;* ***Barile v Carroll***, 280 AD2d 988, 720 NYS2d 674 [2001], *supra*; ***Wilke v Price***, 221 AD2d 846, 633 NYS2d 686 [1995], *supra*). Here, there was no evidence that the speed of defendant Cisario's vehicle was over the limit or otherwise unreasonable under the circumstances or that defendant Cisraio failed to keep a proper lookout.

The further claims of opposing counsel regarding defendant Cisario's purported violation of VTL §1140 are without merit as the duties imposed by that statute are applicable only to drivers at intersections which are not controlled by traffic lights, stop signs or other traffic control devices (*see, **Le Claire v Pratt***, 270 AD2d612, 704 NYS2d 354 [2002], *supra*). In any event, there is no evidence in the record regarding culpable conduct on the part of defendant Cisario. The fact that defendant Cisario testified that he did not see defendant Scollo's vehicle until it was right before him is similarly insufficient to raise a question of fact on the issue of defendant Cisario's engagement in acts of comparative negligence (*see, **Maxwell v Land Saunders***, 233 AD2d 303, 649 NYS2d 809 [1996]; *see also, **Mosch v Hansen***, 295 AD2d 717, 744 NYS2d 222 [2002], *supra*; ***Lupowitz v Fogarty***, 295 AD2d

576, 744 NYS2d 480 [2002]; ***Gravina v Wakschal,*** 255 AD2d 291, 679 NYS2d 420 [1998]; ***Toscano v New York City Transportation Authority***, 209 AD2d 403, 618 NYS2d 733 [1994]). Accordingly, the motion (#001) by defendants Manzella and Cisario for summary judgment dismissing all claims interposed in this action against them is granted.

Left for consideration is the cross motion (#002) by the plaintiff for partial summary judgment on the issue of the liability of defendants, Manzella, Cisario and Scollo. The motion is singularly premised upon allegations that the plaintiff's decedent was an innocent passenger in the vehicle operated by defendant Scollo. The plaintiff argues that liability for the occurrence of the subject accident thus rests with the defendants and that issues of comparative negligence among said defendants should not preclude an award of summary judgment in favor of the plaintiff on the issue of the defendants' liability (*see, e.g.,* ***Silberman v Surrey Cadillac Limousine Service***, 109 AD2d 833, 486 NYS2d 357 [1985]). The court notes, however, that those portions of the plaintiff's cross motion wherein he seeks partial summary judgment on the issue of the liability of defendants Manzella, and Cisario have been rendered academic by the award of summary judgment in favor of said defendants. Accordingly, the plaintiff's demands for an award of partial summary judgment on the issue of the liability of defendants Manzella and Cisario are denied.

The remaining portions of the plaintiff's cross motion wherein he demands partial summary judgment on the issue of defendant Scollo's liability for the occurrence of the accident is denied. It is well established that the existence of fact issues regarding a plaintiff's engagement in acts of comparative negligence precludes an award of summary judgment in favor of said plaintiff on the issue of liability (*see*, ***Munter v Hubert***, 34 AD3d 544, 825 NYS2d 490 [2006]; ***Valore v McIntosh***, 8 AD2d 662, 779 NYS2d 782 [2004]). It is equally well established that the existence of issues of comparative negligence on the part of purported joint tortfeasor defendants precludes the granting of a motion for partial summary judgment by the injured party on the issue of said tortfeasors' liability (*see,* ***Perla v Wilson,*** 287 AD2d 606, 732 NYS2d 35 [2001]; ***Young v Mauch***, 268 AD2d 583, 702 NYS2d 848 [2000]). This rule is applicable even where the injured party's freedom from engagement in any acts of comparative negligence is clear from the record *(see,* ***Morrison v Montzouotsos***, 40 AD3d 717, 835 NYS2d 713 [2007]; ***Martinez v Mendon Leasing Corp***, 295 AD2d 408, 744 NYS2d 44 [2002]; ***Mundo v City of Yonkers***, 249 AD2d 522, 672 NYS2d 128 [1998]; ***Rios v Nicoletta***, 119 AD2d 562, 500 NYS2d 730 [1986]; *Cf.,* ***Silberman v Surrey Cadillac Limousine Service***, 109 AD2d 833, 486 NYS2d 357 [1985], *supra*).

Here, the moving papers failed to establish that, as a matter of law, the conduct of the plaintiff's decedent on the night of the accident, including the several hours prior to its occurrence, was not negligent. A passenger in a motor vehicle is under a common law duty to take reasonable precautions for his or her own safety *(see,* ***Nelson v Nygen***, 259 NY 71, 181 NE 52 [1932]). A passenger who is aware that their driver is intoxicated and thus deprived of reasonable control of the subject vehicle may be found comparatively negligent provided there is evidence, in addition to the fact that the parties drank together, from which impairment of driving ability can be reasonably inferred (*see,* ***Regan v Ancoma,***

Inc., 11 AD3d 1016, 782 NYS2d 480 [2004]; ***Lanza v Wells***, 99 AD2d 506, 470 NYS2d 676 [1984]; ***Eisenberg v Green***, 33AD3d 756, 305 NYS2d 769 [1969]). Here, there is evidence in the record that, in addition to drinking with defendant Scollo for several hours prior to the accident, the plaintiff's decedent was aware or should have been aware of the intoxicated condition of defendant Scollo to whom the plaintiff's decedent passed the keys to her car thereby enabling defendant Scollo's operation of said car. Such evidence gives rise to questions of fact regarding whether the plaintiff's decedent violated her common law duty as a passenger and/or otherwise contributed to the occurrence of the accident. In addition, questions of fact regarding the relative culpability of defendant Scollo and the corporate defendant 1058 Rest, Inc., who is charged herein with serving alcohol to defendant Scollo in violation of GOL §11-101 *et. seq.*, were not eliminated by the proof submitted on the instant cross motion. The existence of these questions of fact precludes the granting of partial summary judgment on the issue of defendant Scollo's liability for the occurrence of the subject accident.

In view of the foregoing, the motion (#001) by defendants Manzella and Cisario for summary judgment dismissing all claims interposed in this action against them is granted, while the cross motion by the plaintiff for partial summary judgment on the issue of the liability of defendants Manzella, Cisario and Scollo is denied. Pursuant to CPLR 3212(e), the claims upon which summary judgment have been awarded are severed from those unaffected by such award and moving defendants Manzella and Cisario may settle a judgment, upon a copy of this order, reflecting the severance herein directed and the award of summary judgment in their favor. All other claims are continued herein

Dated: MAR 31 2008

JEFFREY ARLEN SPINNER J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**