Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:
WILLIAM B. REBOLINI
Justice

Dominic Drwal,

Plaintiff,

- against -

Howard B. Sugarman, Hannah F. Sugarman and Bryan J. Campbell,

Defendants.

Index No.: 70161/2014**E**

Motion Sequence No.: 001; MG
Motion Date: 9/28/16
Submitted: 9/28/16

Motion Sequence No.: 002; XMOT.D
Motion Date: 9/28/16
Submitted: 9/28/16

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Clerk of the Court

Upon the following papers numbered 1 to 27 read upon this motion and cross motion for summary judgment: Notice of Motion and supporting papers, 1 - 12; Notice of Cross Motion and supporting papers, 17 - 20; Answering Affidavits and supporting papers, 13 - 16; Replying Affidavits and supporting papers, 21 - 22; 23 - 24; Other, Supplemental Affirmation, 25 - 27; it is

ORDERED that the motion by the defendant Bryan J. Campbell for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against him is granted; and it is further

ORDERED that the cross motion by the plaintiff for an order pursuant to CPLR 3212 granting summary judgment in his favor as to the defendants' liability is granted to the extent that he is granted summary judgment on his first cause of action against the defendants Howard B. Sugarman and Hannah F. Sugarman, and is otherwise denied.

The plaintiff commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred on July 20, 2016 at the intersection of County Road 104 and Old Country Road in the Hamlet of Quogue, County of Suffolk, New York. The accident allegedly happened when the defendant Hannah F. Sugarman (Sugarman) failed to stop at the stop sign which controlled traffic in her direction of travel. It is undisputed that the defendant Bryan J. Campbell (Campbell) was operating the other vehicle involved in this accident, that the plaintiff was a passenger in Campbell's vehicle, that the vehicle operated by Sugarman was owned by the defendant Howard B. Sugarman, and that Sugarman was operating said vehicle with the owner's permission.

Campbell moves for summary judgment on the ground that Sugarman was the sole proximate cause of this accident. In support of his motion, Campbell submits the complaint and his answer, a letter requesting a copy of Sugarman's answer, the transcripts of the depositions of the parties, and an unauthenticated copy of the police accident report regarding this incident, Form MV-104A. The police accident report record relied on by the plaintiff is plainly inadmissible and has not been considered by the Court in making this determination (*see* CPLR 4518 [c]; ***Cover v Cohen***, 61 NY2d 261, 473 NYS2d 378 [1984]; ***Cheul Soo Kang v Violante***, 60 AD3d 991, 877 NYS2d 354 [2d Dept 2009]). Counsel for the plaintiff contends that Campbell's motion is defective as his attempt to submit Sugarman's answer is made by service of "an impermissible Sur Reply." It is noted that all the pleadings are now before the undersigned, and that the plaintiff's cross motion does not include a copy of any of the pleadings. CPLR 2001 permits a court, at any stage of an action, to "disregard a party's mistake, omission, defect, or irregularity if a substantial right of a party is not prejudiced." The undersigned can discern no prejudice to the parties and, in the interest of judicial economy and fairness to both movants, it is determined that Campbell's sur-reply containing Sugarman's answer will be considered herein

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proff in admissible form sufficient to require a trail of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the part opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

At his deposition, Campbell testified that he was operating his motor vehicle southbound on County Road 104 on the day of this accident, that the plaintiff was a passenger in the seat behind him, and that Sugarman's vehicle was traveling westbound on Old Country Road at the time of this accident. He stated that there are no traffic control devices for traffic on Old Country Road at the subject intersection, that a stop sign controls traffic for westbound traffic on County Road 104 at the subject intersection, and that he first saw Sugarman's vehicle when it was approximately one-half car length from the stop sign. He indicated that he was approximately 15 to 20 feet from the intersection when he first saw Sugarman's vehicle, that he was traveling at approximately 45 miles per hour at that time, and that he observed Sugarman's vehicle pass said stop sign without stopping. Campbell further testified that he "slammed on his brakes," and turned his steering wheel to the right in an effort to avoid colliding with the Sugarman vehicle, but that her vehicle struck his vehicle on his front driver side.

The plaintiff was deposed on September 17, 2015 and testified that he was sitting behind Campbell at the time of this accident, that he first saw Sugarman's vehicle coming from his left "right before she hit us," and that he was not paying attention to the roadway until Campbell shouted an expletive just before the accident. He stated that he did not know the speed at which the Campbell vehicle was traveling at the time Campbell shouted, that he did not know the speed of the Sugarman vehicle, and that Campbell attempted to avoid the collision by turning his steering wheel "to the right in an evasive maneuver."

At her deposition, Sugarman testified that she was unfamiliar with the area where this accident occurred, that she was following "GPS directions" in order to go to lunch at a local restaurant, and that she believes that she was traveling on County Road 104. She stated that she did not know the compass direction that she was traveling at the time of this accident, that she had stopped at the subject stop sign, and that she did not see any vehicles to her left or right, and that she never saw Campbell's vehicle before this accident. She indicated that she first knew she was in an accident when the collision occurred, that she did not know the speed of the other vehicle involved, and that the accident happened "at an intersection." Sugarman further testified that that the police responded to this accident, that she spoke with the police, and that she recalls telling the police that she did not see the stop sign and failed to stop.

Vehicle and Traffic Law § 1142 (a) requires a driver of a motor vehicle approaching a stop sign to stop and yield the right of way to any vehicle that has entered the intersection or is approaching so closely as to constitute an immediate hazard (*see also* ***Barbato v Maloney***, 94 AD3d 1028, 943 NYS2d 204 [2d Dept 2012], and the failure to do so constitutes negligence as a matter of law (***Colpan v Allied Cent. Ambulette, Inc.***, 97 AD3d 776, 949 NYS2d 124 [2d Dept 2012]; ***Vainer v DiSalvo***, 79 AD3d 1023, 914 NYS2d 236 [2d Dept 2010]). Vehicle and Traffic Law § 1172 (a) requires an operator of any vehicle approaching a stop sign to stop at a clearly-marked stop line or before entering the crosswalk so that the driver has a clear view of oncoming traffic before entering the intersection, and "the right to proceed shall be subject to the provisions of section eleven hundred forty-two" (*see also* ***Natoli v Peabody***, 27 NY2d 981, 318 NYS2d 741 [1970]; ***Ahr v Karolewski***, 32 AD3d 805, 821 NYS2d 236 [2d Dept 2006]).

Here, the adduced evidence demonstrates that, regardless of whether she stopped at the subject stop sign, Sugarman violated Vehicle and Traffic Law § 1142 (a) by proceeding into the intersection without yielding the right of way to the Campbell vehicle when it was so close as to constitute an immediate hazard. A driver is charged with the common-law duty of seeing that which he or she should have seen, under the circumstances, through the proper use of his or her senses (*see* ***Guzman v Bowen***, 38 AD3d 837, 833 NYS2d 548 [2d Dept 2007]; ***Domanova v State,*** 41 AD3d 633, 838 NYS2d 644 [2d Dept 2007]). "[A] driver is negligent where an accident occurs because [he or she] has failed to see that which through the proper use of [his or her] senses [he or she] should have seen" (*see* ***Breslin v Rudden***, 291 AD2d 471, 738 NYS2d 471 [2d Dept 2002]; *see also* ***Wilson v Rosedom***, 82 AD3d 970, 919 NYS2d 59 [2d Dept 2011]).

In addition, Campbell was entitled to assume that Sugarman as an operator of a motor vehicle upon a public highway would obey the rules of the road and yield the right of way to him (*see* ***Dominguez v CCM Computers, Inc.***, 74 AD3d 728, 902 NYS2d 163 [2d Dept 2010]; ***Yelder v Walters***, 64 AD3d 762, 883 NYS2d 290 [2d Dept 2009]). Sugarman's negligence and failure to see that which she should have seen through the proper uses of her senses was the sole proximate cause of the collision (***Grossman v Spector***, 48 AD3d 750, 853 NYS2d 154 [2d Dept 2008]). There is no evidence in the record supporting the conclusory assertions by Sugarman, the defendant Howard B. Sugarman, and the plaintiff that a triable issue exists as to whether Campbell was speeding prior to this accident, or that Campbell could have avoided the collision (*see* ***DeLuca v Cerda***, 60 AD3d 721, 875 NYS2d 520 [2d Dept 2009]; ***Rieman v Smith***, 302 AD2d 510, 755 NYS2d 256 [2d Dept 2003]).

Vehicle and Traffic Law § 388 provides that the owner of a vehicle is vicariously liable to third parties for injuries resulting from the "use and operation" of such vehicle by any person using it with permission. The statute creates a strong presumption of permissive use which can be rebutted only with substantial evidence showing that the driver of the vehicle was not operating it with the owner's express or implied permission (*see* ***Murdza v Zimmerman***, 99 NY2d 375, 756 NYS2d 505 [2003]; ***Amex Assur. Co. v Kulka***, 67 AD3d 614, 888 NYS2d 577 [2d Dept 2009]; ***Talat v Thompson***, 47 AD3d 705, 850 NYS2d 486 [2d Dept 2008]). The presumption can be rebutted by evidence that the driver exceeded restrictions placed on his or her use of the vehicle by the owner (***Murdza v Zimmerman***, *supra*; ***Walls v Zuvic***, 113 AD2d 936, 493 NYS2d 628 [2d Dept 1985]; ***Aetna Casualty & Surety Co. v Brice***, 72 AD2d 927, 422 NYS2d 203 [4th Dept 1979], *affd* 50 NY2d 958, 431 NYS2d 528 [1980]), thereby exonerating the owner from vicarious liability under the statute. Here, neither Sugarman nor the defendant Howard B. Sugarman dispute that Sugarman was operating her vehicle with the permission of its owner. Accordingly, Campbell's motion for summary judgment is granted.

The plaintiff cross-moves for partial summary judgment against the defendants on the ground that there can be no issues of fact requiring a trial of this action as to their liability in causing this accident. In support of his motion, the plaintiff submits the transcript of his deposition testimony, and the affirmation of his attorney. As mentioned above, the contention by counsel for the plaintiff that there is an issue of fact regarding Campbell's liability herein is without merit. The conclusory statement that Campbell has failed to establish that he took adequate measures to avoid this accident

is not reflected in the adduced evidence. Mere conclusions and unsubstantiated allegations are insufficient to raise any triable issue of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]; ***Rebecchi v Whitmore***, *supra*). For the reasons set forth above, it is determined that the plaintiff's motion for partial summary judgment as to Campbell is denied.

However, as discussed above, the adduced evidence has established a prima facie case that Sugarman's violation of Vehicle and Traffic Law § 1142 (a) was the sole proximate cause of the subject accident (*see* ***Colpan v Allied Cent. Ambulette, Inc.***, *supra*; ***Vainer v DiSalvo***, *supra*). Furthermore, the evidence submitted by plaintiff demonstrates that he was merely riding as a passenger in the Campbell vehicle at the time of the accident and, thus, was not capable of any culpable conduct in causing said accident (*see* ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]; ***Briceno v Milbry***, 16 AD3d 448, 791 NYS2d 622 [2d Dept 2005]). Sugarman and the defendant Howard B. Sugarman do not oppose the plaintiff's motion. Accordingly, the plaintiff's cross motion is granted to the extent that he is granted summary judgment on his first cause of action against the defendants Howard B. Sugarman and Hannah F. Sugarman, and is otherwise denied.

The Court directs that the causes of action as to which summary judgment was granted are hereby severed and that the remaining causes of action shall continue (*see* CPLR 3212 [e] [1]).

Dated: 4/6/2017

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

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