Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:
WILLIAM B. REBOLINI
Justice

William R. Voight and Darlene Voight,	Motion Sequence No.: 001; MG
	Motion Date: 12/20/17
Plaintiffs,	Submitted: 12/20/17
-against-	Index No.: 601970/2017**E**
Linda S. Chan,	Attorney for Plaintiffs:
Defendant.	Rappaport, Glass, Levine & Zullo, LLP 1355 Motor Parkway Islandia, NY 11749
	Attorney for Defendant:
	Russo & Tambasco 115 Broadhollow Road, Suite 300 Melville, NY 11747
	Clerk of the Court

Upon the **E-file document list** numbered 8 to 19 on this application by plaintiff for summary judgment on the issue of liability pursuant to CPLR 3212, it is

ORDERED that plaintiffs' motion is granted for the reasons set forth herein.

By the filing of a summons and complaint on February 1, 2017, plaintiffs commenced this action seeking damages for personal injuries allegedly sustained as a result of a motor vehicle accident on December 2, 2016, which occurred when defendant's vehicle made an unsafe lane change colliding into plaintiff William Voight's vehicle. Issue was joined on February 17, 2017 by the filing and service of an answer. A preliminary conference was held on April 17, 2017 and thereafter discovery proceeded pursuant to the preliminary conference order.

Plaintiffs now move for summary judgment on liability and in support of their motion submit a copy of the pleadings and verified bill of particulars, a certified copy of the police accident report, a copy of defendant's signed MV-104, a copy of plaintiff William Voight's examination before trial, and photographs of plaintiff William Voight's motor vehicle after the accident.

Plaintiff William Voight testified at his examination before trial that the motor vehicle accident occurred on December 2, 2016 at approximately 8:12 p.m. at or near the Northern State Parkway eastbound Route 110 exit ramp. Plaintiff testified that on the date of the accident, he was traveling eastbound in the right-hand lane of Northern State Parkway where the Route 110 exit intersects the Northern State Parkway. Plaintiff further testified that defendant Linda Chan also was driving eastbound on the Northern State Parkway in the left-hand lane. Plaintiff avers that as the two vehicles approached the exit for Route 110, the vehicles were side by side, when defendant suddenly and without warning, attempted to exit the Northern State Parkway at the Route 110 exit ramp from the left-hand lane of the Northern State Parkway. Plaintiff alleges that defendant made an unsafe lane change from the left lane directly into plaintiff's vehicle in the right lane. Plaintiff testified that when his vehicle was struck by defendant's vehicle, his vehicle was sent spinning into the center concrete barrier. Plaintiff alleges that defendant continued onto the Route 110 exit and returned to the scene of the accident after the police and ambulance had arrived. In opposition, defendant provides only her attorney's affirmation. No affidavit of defendant was submitted to refute the facts as alleged by plaintiff.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact *(see **Rotuba Extruders, Inc. v Ceppos***, 46 NY2d 223, 413 NYS2d 141 [1978]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assoc., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797,799 [2d Dept 1988]). Once a prima facie showing has been made, the burden shifts to the party opposing the summary judgment motion to produce evidence in admissible form sufficient to establish the existence of a material issue of fact (*see **Alvarez v Prospect Hosp.***, 68 NY2d at 324, 508 NYS2d 923, citing ***Zuckerman v City of New York***, 49 NY2d at 562, 427 NYS2d 595). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.***, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]). When a party fails to oppose matters advanced on a motion, the facts alleged in the moving papers may be deemed admitted by the Court (***Kuehne & Nagel, Inc. V Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]; ***Madeline D'Anthony Enter., Inc.***

V. Sokolowsky, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]; ***Argent Mtge. Co, LLC v Mentesana***, 79 AD3d 1079, 915 NYS2d 591 [2nd Dept 2010]).

Vehicle and Traffic Law Section 1128 provides in pertinent part that:

> [w]henever any roadway has been divided into two or more clearly marked lanes fro traffic the following rules in addition to all others consistent herewith shall apply:
> (a) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

VTL §1128.

Vehicle and Traffic Law Section 1122 (a) provides, in pertinent part, that "the driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left at a safe distance and shall not again drive to the right side of the roadway until safely clear of the overtaken vehicle."

It is well-established that a violation of the Vehicle and Traffic Law constitutes negligence as a matter of law (*see* ***Vainer v. DiSalvo***, 79 AD3d 1023 [2d Dept. 2010]; *see also* ***Elliott v. City of New York***, 95 NY2d 730, 724 NYS2d 397 [2001]). It is further well-settled that a driver with the right-of-way is entitled to anticipate that other drivers will obey traffic laws (*see* ***Kahn v. Maggies Paratransit Corp.***, 63 AD3d 792 [2d Dept. 2009]) and that a driver is negligent in failing to see that which under the facts and circumstances he should have seen by the proper use of his senses (*see* ***Barbieri v. Vokoun***, 72 AD3d 853, 900 NYS2d 315 [2d Dept.2010]; ***Domanova v. State of New York***, 41 AD3d 633, 838 NYS2d 644 [2d Dept. 2007]; ***Lester v Jolicofur et al.,*** 120 AD2d 574; 502 NYS2d 61 [2d Dept 1986]).

Based upon the adduced evidence, plaintiff William Voight established his *prima facie* entitlement to judgment as a matter of law on liability by demonstrating that he was traveling lawfully in the eastbound right lane of the Northern State Parkway when defendant's vehicle entered into his lane of travel and collided with his vehicle (*see* Vehicle and Traffic Law §§1122 (a) and 1128 (a); ***Reyes-Diaz v. Quest Diagnostics, Inc.***, 123 AD3d 790, 999 NYS2d 98 [2d Dept. 2014]; ***Davidoff v. Mullokandov***, 74 AD3d 862, 903 NYS2d 107 [2d Dept. 2010]; ***Rivera v. Corbett***, 69 AD3d 916, 892 NYS2d 790 [2d Dept. 2010]). The plaintiff, having the right of way, was entitled to anticipate that defendant would obey the traffic laws and not change lanes when it was unsafe to do so (*see* Vehicle and Traffic Law §§ 1122 (a) and 1128 (a); ***Walker v. Patrix Trucking NY Corp.***, 115 AD3d 943, 982 NYS2d 552 [2d Dept. 2014]). In addition, a driver is negligent, when, as here, an accident occurs because he or she failed to see that which through the proper use of his or her senses he or she ought to have seen (*see* ***Laino v. Lucchese***, 35 AD3d 672, 827 NYS2d 249 [2d Dept. 2006]; ***Bongiovi v. Hoffman***, 18 AD3d 686, 795 NYS2d 354 [2d Dept. 2005]).

Being that plaintiff William Voight met his initial burden, defendant was required to present evidence in admissible form sufficient to establish a question of fact. Defendant's assertions that the collision may have been caused by the speed of plaintiff's vehicle or by some evasive actions plaintiff took in order to avoid the accident, which are based only upon defendant attorney's affirmation, are unsupported by any probative evidence in admissible form and amount to sheer conjecture and speculation (*see* ***Clark v. Amboy Bus Co.,*** 117 AD3d 892, 985 NYS2d 901 [2d Dept. 2014]; ***Constantino v. Webel***, 57 AD3d 472, 869 NYS2d 179 [2d Dept. 2008]; ***Trzepacz v. Jara***, 11 AD3d 531, 782 NYS2d 852 [2d Dept. 2004]). Moreover, a violation of a statute constituting negligence *per se* places a duty on a party to provide a reasonable excuse for its failure to comply with the statutorily imposed standard of care (***Dalas v. City of New York***, 262 AD2d 596, 692 NYS2d 468 [2d Dept. 1999]). Here, nothing has been offered in that regard by defendant. The court further notes that the defendant's signed MV-104, which she does not contest herein, states that she did not see the defendant's vehicle until after the impact and that the accident happened when she was making a lane change. Thus, defendant's own uncontroverted statements establish her negligence as a matter of law (*see* Vehicle and Traffic Law §§ 1122 (a) and 1128 (a)).

Thus, the testimony and evidence presented on plaintiffs' motion establishes that the defendant was not operating her vehicle with due care and caution, as required of a prudent person under similar circumstances and conditions (***Fillippazzo v. Santiago,*** 277 AD2d 419, 716 NYS2d 710 [2000]); ***Stewart v State of New York***, 29 Misc2d 525, 208 NYS2d 402 [Ct of Claims 1960]). Therefore, the defendant's negligence was the proximate cause of the accident.

Accordingly, the plaintiff's motion for summary judgment in his favor on the issue of liability is granted.

Dated: 3/20/2018

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

_____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION