| **Donato v Pasciuta** |
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| 2020 NY Slip Op 34749(U) |
| January 8, 2020 |
| Supreme Court, Suffolk County |
| Docket Number: Index No. 625551/2018E |
| Judge: William B. Rebolini |
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Short Form Order

**SUPREME COURT - STATE OF NEW YORK**

**I.A.S. PART 7 - SUFFOLK COUNTY**

**PRESENT:**
**WILLIAM B. REBOLINI**
**Justice**

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| Billy J. Donato,<br><br>Plaintiff,<br><br>-against-<br><br>Amadeo S. Pasciuta, Phyllis R. Pasciuta and V.F. Severino,<br><br>Defendants. | Index No.: 625551/2018E<br><br>Motion Sequence No.: 002; MG<br>Motion Date: 9/25/19<br>Submitted: 10/23/19<br><br>Motion Sequence No.: 003; MD<br>Motion Date: 9/25/19<br>Submitted: 10/23/19 |
| Vincent Severino, Jr.,<br><br>Plaintiff,<br><br>-against-<br><br>Amadeo S. Pasciuta, Phyllis R. Pasciuta,<br><br>Defendants. | [Index No.: 620671/2018E]<br><br>Attorneys [See Rider Annexed] |

Upon the **E-file document list** numbered 25 to 54 read on the application by plaintiff for an order pursuant to CPLR 3212 granting him partial summary judgment as against defendants Amadeo S. Pasciuta, Phyllis R. Pasciuta, and V.F. Severino, on the issue of liability, and on the application of defendant V.F. Severino for summary judgment pursuant to CPLR 3212 dismissing the complaint and all cross-claims as against him; it is

***ORDERED*** that the motions (Motion Sequence 002 and Motion Sequence 003) are consolidated for purposes of a determination herein; and it is further

***ORDERED*** the plaintiff's motion for summary judgment on the issue of liability as against all defendants is granted; and it is further

***ORDERED*** that the cross-motion for summary judgment on the issue of liability by defendant V.F. Severino is denied.

This action seeking damages for personal injuries allegedly sustained by plaintiff was commenced by the filing of a summons and complaint on December 31, 2018. The complaint alleges that defendants Amadeo S. Pasciuta ("A. Pasciuta"), Phyllis R. Pasciuta ("P. Pasciuta") (collectively the "Pasciuta defendants"), and V.F. Severino ("Severino") were negligent in causing a motor vehicle accident on February 21, 2017 at approximately 11:00 a.m. at the intersection of 12th Avenue and 13th Street, in West Babylon, Suffolk County, New York. Plaintiff alleges that he was an innocent passenger in the Severino vehicle when it became involved in a collision with the Pasciuta vehicle, which resulted from the Pasciuta vehicle failing to stop at a stop sign located on 12th Avenue. Issue was joined by all defendants and the depositions of the parties have been held. Plaintiff now moves for summary judgment against defendants on the issue of liability. Defendant Severino cross-moves for summary judgment dismissing the complaint and cross-claims asserted against him. The Pasciuta defendants oppose the motions. Defendant Severino replies.

It is well settled that a party moving for summary judgment 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 Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Friends of Animals v. Associated Fur Mfrs.***, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). The failure of the moving party to make a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v. New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). However, once the movant has made the requisite showing, the burden then shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to require a trial on any material issue of fact (***Zuckerman v. City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]. To defeat a motion for summary judgment, a party opposing such motion must lay bare his proof in evidentiary form; conclusory allegations are insufficient to raise a triable issue of fact (*see* ***Friends of Animals, Inc. v. Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790; ***Burns v. City of Poughkeepsie***, 293 AD2d 435, 739 NYS2d 458 [2d Dept 2002]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (***Nomura***, *supra*; *see also* ***Ortiz v. Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157 [2011]). A motion for summary judgment should be denied where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*see* ***Chimbo v. Bolivar***, 142 AD3d 944, 37 NYS3d 339 [2d Dept 2016]; ***Benetatos v. Comerford***, 78 AD3d 730, 911 NYS2d 155 [2d Dept. 2010]).

"A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries" (***Tsyganash v. Auto Mall Fleet Mgmt., Inc.,*** 163 AD3d 1033, 83 NYS3d 74 [2d Dept. 2018]). A violation of a standard of care imposed by the Vehicle and Traffic Law constitutes negligence *per se* (***Lebron v. Mensah,*** 161 AD3d 972, 76 NYS3d 219 [2d Dept. 2018]; ***Barbaruolo v. Difede,*** 73 AD3d 957, 900 NYS2d 671 [2d Dept. 2010]***; Ciatto v. Lieberman,*** 266 AD2d 494, 698 NYS2d 54 [2d Dept. 1999]; *see also*

***Barbieri v. Vokoun***, 72 AD3d 853, 856, 900 NYS2d 315 [2d Dept. 2010]; ***Smith v. State of New York,*** 121 AD3d 1358, 1358-59, 955 NYS2d 329 [3d Dept. 2014]. Further, a driver with the right of way is entitled to anticipate that other motorists will obey traffic laws that require them to yield the right of way (*see* ***Lebron v. Mensah,*** 161 AD3d 972, 76 NYS3d 219 [2d Dept. 2018]; ***Bullock v. Calabretta***, 119 AD3d 884 [2d Dept 2014]; ***Kucar v. Town of Huntington***, 81 AD3d 784, 917 NYS2d 646 [2d Dept 2011]; ***Todd v Godek***, 71 AD3d 872 [2d Dept 2010] ***Kann v. Maggies Paratransit Corp.***, 63 AD3d 792, 882 NYS2d 129 [2d Dept 2009]; ***Berner v. Koegel***, 31 AD3d 591, 819 NYS2d 89 [2d Dept 2006]; ***Gabler v. Marly Bldg. Supply Corp.***, 27 AD3d 519, 813 NYS2d 120 [2d Dept 2006]). In addition, a driver is negligent when an accident occurs because the driver failed to see that which through proper use of the driver's senses he or she should have seen (*see* ***Laino v. Lucchese***, 35 AD3d 672, 827 NYS2D 249 [2d Dept 2006]; ***Berner v. Koegel***, 31 AD3d 591, 819 NYS2d 89 [2d Dept 2006]; ***Bongiovi v. Hoffman***, 18 AD3d 686, 795 NYS2d 354 [2d Dept 2005]). However, "a driver who has the right-of-way has a duty to exercise reasonable care to avoid a collision with another vehicle" (***Gause v. Martinez,*** 91 AD3d 595, 936 NYS2d 272 [2d Dept. 2012] *quoting* ***Todd v. Godek,*** 71 AD3d 872, 895 NYS2d 861 [2d Dept. 2010]; ***Bonilla v. Calabria***, 80 AD3d 720 [2d Dept 2011]; ***Gardner v. Smith***, 63 AD3d 783 [2d Dept 2009]; ***Cox v Nunez***, 23 AD3d 427 [2d Dept 2005]). The question of whether the defendant driver stopped at the stop sign is not dispositive, where it is established that the defendant driver failed to yield the right of way (***Fuentes v. City of New York,*** 146 AD3d 936, 45 NYS3d 562 [2d Dept. 2017]).

There can be more than one proximate cause of an accident and the issue of comparative negligence is generally a question of fact for the jury to decide (*see* ***Bullock v. Calabretta***, 119 AD3d 884, 989 NYS2d 862 [2d Dept. 2014]; ***Bonilla v. Calabria***, 80 AD3d 720 [2d Dept 2011]; ***Todd v. Godek,*** 71 AD3d 872, 895 NYS2d 861 [2d Dept. 2010]). The fact that a party violated the Vehicle and Traffic Law would not preclude a finding that comparative negligence by another party contributed to the accident (*see* ***Gardner v. Smith***, 63 AD3d 783 [2d Dept 2009; ***Cox v. Nunez***, 23 AD3d 427 [2d Dept 2005]). Notwithstanding, a plaintiff need not prove that he or she was free from comparative fault in order to establish his or her prima facie entitlement to summary judgment (*see* ***Rodriguez v. City of New York***, 31 NY3d 312, 76 NYS3d 898 [2018]; ***Edgerton v. City of New York***, 160 AD3d 809, 74 NYS3d 617 [2d Dept 2018]). A plaintiff's right as an innocent passenger to summary judgment on the issue of liability is not barred or restricted by any potential issue of comparative fault as between the owners and operators of the two vehicles involved in the accident (*see* ***Phillip v. D & D Carting Co., Inc.,*** 136 AD3d 18, 22 NYS3d 75 [2d Dept. 2015]; ***Rodriguez v. Farrell,*** 115 AD3d 929, 983 NYS2d 68 [2d Dept. 2014]; ***Medina v. Rodriguez,*** 92 AD3d 850, 939 NYS2d 514 [2d Dept. 2012]).

Here, there is no dispute that plaintiff is an innocent passenger who submitted sufficient evidence that the accident occurred as the result of the negligence of defendants without any negligence on his part contributing thereto (*see* ***Johnson v. Braun,*** 120 AD3d 765, 991 NYS2d 351 [2d Dept. 2014]; ***Mughal v. Rajput,*** 106 AD3d 886, 965 NYS2d 545 [2d Dept. 2013]).

The burden then shifted to the Pasciuta defendants who have not raised a triable issue of fact through the submission of their attorney's affirmation (*see* ***Acheson v. Shepherd***, 27 AD3d 596, 811

NYS2d 781 [2d Dept. 2006]); ***Levitt v. County of Suffolk***, 145 AD2d 414, 525 NYS2d 618 [2d Dept. 1988]). Thus, the Court concludes that based upon the admissible evidence of plaintiff, which has not been refuted by any admissible evidence from defendants, the negligence of the defendants was the proximate cause of the accident. With regard to the cross-motion of defendant Severino, no evidence was presented therein that plaintiff, as an innocent passenger, was negligent in any respect.

The cross-motion of defendant Severino addresses liability as between the Pasciuta defendants and defendant Severino. Plaintiff testified that he did not see the Pasciuta vehicle prior to the accident as he was busy looking at his cellphone. Defendant Severino alleges that there was no stop sign on 13th Street at the location where his vehicle was struck, that the Pasciuta vehicle proceeded through the intersection without stopping at the traffic control device, and that the Pasciuta vehicle otherwise did not yield to the Severino vehicle, which had the right-of-way.

"Negligence cases by their very nature do not usually lend themselves to summary judgment, since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination" (***Ugarriza v. Schmieder,*** 46 NY2d 471, 474, 414 NYS2d 304 [1979]; ***Davis v. Commack Hotel, LLC,*** —AD3d— , —NYS3d—, 2019 WL 2844549 [2d Dept. 2019]; *see also* ***Harris v. Manhattan & Bronx Surface Tr. Operating Auth.,*** 138 AD2d 56, 57, 529 NYS2d 290 [1st Dept. 1988]). Notwithstanding, a violation of a standard of care imposed by the Vehicle and Traffic Law constitutes negligence per se (***Lebron v. Mensah,*** 161 AD3d 972, 76 NYS3d 219 [2d Dept. 2018]; ***Barbaruolo v. Difede,*** 73 AD3d 957, 900 NYS2d 671 [2d Dept. 2010]***; Ciatto v. Lieberman,*** 266 AD2d 494, 698 NYS2d 54 [2d Dept. 1999]; *see also* ***Barbieri v. Vokoun***, 72 AD3d 853, 856, 900 NYS2d 315 [2d Dept. 2010]; ***Smith v. State of New York,*** 121 AD3d 1358, 1358-59, 955 NYS2d 329 [3d Dept. 2014]. Vehicle and Traffic Law §1172 (a) provides, in relevant part, that an operator of any vehicle approaching a stop sign shall stop "at the point nearest the intersecting roadway where the driver has a view of the approaching traffic on the intersecting roadway," and that the driver must comply with Vehicle and Traffic Law § 1142 before proceeding into the intersection. Further, 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* ***Willis v Finks***, 7 AD3d 519, 775 NYS2d 587 [2d Dept. 2004]; ***Szczotka v Adler***, 291 AD2d 444, 737 NYS2d 121 [2d Dept. 2002]). A driver who fails to yield the right of way in violation of Vehicle and Traffic Law § 1142 (a) is negligent as a matter of law (*see* (***Czarnecki v. Corso,*** 81 AD3d 774, 775, 916 NYS2d 828 [2d Dept. 2011], *quoting* ***Thompson v. Schmitt,*** 74 AD3d 789, 789, 902 NYS2d 606)***; Goemans v. County of Suffolk***, 57 AD3d 478, 868 NYS2d 753 [2d Dept. 2008]; ***Maliza v. Puerto-Rican Transp. Corp.***, 50 AD3d 650, 854 NYS2d 763 [2d Dept. 2008]; ***Exime v. Williams***, 45 AD3d 633, 845 NYS2d 450 [2d Dept. 2007]). Moreover, "a driver is required to see what is there to be seen . . . and a driver who has the right of way is entitled to anticipate that the other motorist will obey the traffic law requiring him or her to yield" (***Duran v. Simon,*** 83 AD3d 654, 919 NYS2d 895 [2d Dept. 2011], *citing* ***Laino v. Lucchese,*** 35 AD3d 672, 827 NYS2d 249 [2d Dept. 2006]).

Although a police report generally is admissible as a business record, statements contained in the report concerning the cause of an accident constitute inadmissible hearsay unless the reporting officer witnessed the accident, the reporting officer is qualified as an expert, or the statements meet some other exception to the hearsay rule (*see* ***Memenza v. Cole,*** 131 AD3d 1020, 16 NYS3d 287 [2d Dept. 2015]; ***Sanchez v. Steenson,*** 101 AD3d 982, 957 NYS2d 239 [2d Dept. 2012]; ***Cheul Soo Kang v. Violante,*** 60 AD3d 991, 877 NYS2d 354 [2d Dept. 2009]; ***Roman v. Cabrera,*** 113 AD3d 541, 979 NYS2d 310 [2d Dept. 2014]; ***Shaw v. Rosha Enters., Inc.,*** 129 AD3d 1574, 1575, 12 NYS3d 441 [4th Dept. 2015]; ***Brady v. Casilio,*** 93 AD3d 1190, 1191, 940 NYS2d 396 [4th Dept. 2012]). It is undisputed that the reporting officer did not observe the accident. Thus the conclusions made by the police officer as to the cause of the accident are inadmissible hearsay.

Nevertheless, defendant Severino established prima facie his entitlement to summary judgment on the issue of liability, through evidence he presented that the Pasciuta vehicle, which had a stop sign, negligently drove into the intersection without yielding the right of way to defendant Severino and proceeded into the intersection without observing Severino's vehicle, thereby striking it (*see* ***Fuertes v. City of New York,*** 146 AD3d 936, 45 NYS3d 562 [2d Dept. 2017]; ***Hatton v. Lara,*** 142 AD3d 1047, 37 NYS3d 604 [2d Dept. 2016]; ***Briggs v. Russo,*** 98 AD3d 547, 949 NYS2d 719 [2d Dept. 2012]; ***Batts v Page,*** 51 AD3d 833, 858 NYS2d 748 [2d Dept. 2008]; ***Exime v. Williams***, 45 AD3d 633, 845 NYS2d 450 [2d Dept. 2007]; ***Hull v. Spagnoli***, 44 AD3d 1007, 844 NYS2d 416 [2d Dept. 2007]; ***McCain v. Larosa***, 41 AD3d 792, 838 NYS2d 663 [2d Dept. 2007]; ***Morgan v. Hachmann,*** 9 AD3d 400, 780 NYS2d 33 [2d Dept. 2004]; ***McKeaveney v. Reiffert***, 268 AD2d 411, 702 NYS2d 318 [2d Dept. 2000]).

Having made the requisite prima facie showing of entitlement to summary judgment on liability, the burden shifted to the Pasciuta defendants to raise a triable issue of fact (*see* ***Kerolle v. Nicholson,*** 172 AD3d 1187, 101 NYS3d 387 [2d Dept. 2019]; ***Yu Mei Liu v. Weihong Liu,*** 163 AD3d 611, 81 NYS3d 75 [2d Dept. 2018]; *see also* ***Bene v. Dalessio,*** 135 AD3d 679, 22 NYS3d 237 [2d Dept. 2016]; ***Cortes v. Whelan***, 83 AD3d 763, 922 NYS2d 419 [2d Dept. 2011]; ***Balducci v. Velasquez***, 92 AD3d 626, 938 NYS2d 178 [2d Dept. 2012]). Here, defendant A. Pasciuta testified during his deposition that he was halfway through the intersection when the back passenger side of his vehicle was struck by the Severino vehicle, causing the Pasciuta vehicle to flip over. This testimony, together with the evidence regarding the point of impact to the vehicles, including the police report which is admissible for this purpose, and the differing versions of how the accident occurred, create questions of fact as to which vehicle was in the intersection first, what caused the accident, and the fault of the respective drivers (***Piazza v. Cline,*** 161 AD3d 1113, 76 NYS3d 633 [2d Dept. 2018]; ***Wilson v. Rosedom,*** 82 AD3d 970, 919 NYS2d 59 [2d Dept. 2011]; ***Todd v. Godek,*** 71 AD3d 872, 895 NYS2d 861 [2d Dept. 2010]. Indeed, a driver who has the right of way is still obligated to see that which is there to be seen and take due care to avoid an accident with a vehicle already in the intersection (*see* ***Jeong Sook Lee-Son v. Doe,*** 170 AD3d 973, 96 NYS3d 302 [2d Dept. 2019]; ***Todd v. Godek,*** 71 AD3d 872, 895 NYS2d 861 [2d Dept. 2010]). These issues of fact raised by the Pasciuta defendants, coupled with inherent issues of credibility, warrant a denial of defendant Severino's motion for summary judgment on liability (*see* ***Piazza v. Cline,*** 161 AD3d 1113, 76 NYS3d 633 [2d Dept. 2018]; ***Goulet v. Anastasio***, 148 AD3d 783, 48 NYS3d 731 [2d

Dept. 2017]; ***Wesolowski v. St. Francis Hosp.,*** 108 AD3d 525, 526, 968 NYS2d 181 [2d Dept. 2013]; ***Bond v. DeMasco,*** 84 AD3d 1292, 1293, 923 NYS2d 902 [2d Dept. 2011]; ***Gardner v. Cason, Inc.,*** 82 AD3d 930, 931, 918 NYS2d 769 [2d Dept. 2011]; ***Nuziale v. Paper Transport of Green Bay Inc.***, 39 AD3d 833, 835 NYS2d 316 [2d Dept. 2007]; ***Munter v. Hubert***, 34 AD3d 544, 825 NYS2d 490 [2d Dept. 2006]; ***Nicklas v. Tedlen Realty Corp.,***305 AD2d 385, 759 NYS2d 171 [2d Dept. 2003]; *see also* ***Myers v. FIR Cab Corp.,*** 64 NY2d 806, 486 NYS2d 922 [1985]; ***Lowhar-Lewis v. Metropolitan Transit Auth.,*** 97 AD3d 728, 948 NYS2d 667 [2d Dept. 2012]).

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

Dated: 1/8/2020

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

_____ **FINAL DISPOSITION** ____X___ **NON-FINAL DISPOSITION**

**RIDER**

Attorney for Plaintiff:
(Action #1)

Joseph Farlado, Esq.
125-10 Queens Boulevard, Suite 12
Kew Gardens, NY 11415

Attorney for Defendants
Amadeo S. Pasciuta and Phyllis R. Pasciuta:
(Action #1 and Action #2)

Russo & Tambasco
115 Broad Hollow Road, Suite 300
Melville, NY 11747

Attorney for Defendant V.F. Severino:
(Action #1)

Picciano & Scahill, P.C.
1065 Stewart Avenue, Suite 210
Bethpage, NY 11714

Attorney for Defendant Vincent Severino:
(Action #2)

Law Offices of Matthew A. Sosnik, Esq.
125-10 Queens Boulevard, Suite 15
Kew Gardens, NY 11415

Clerk of the Court