

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON
Justice

**SCOTT RESNIK and CINDY NADELBACH,
as Co-Administrators of the Estate
of ELAYANE SINGER, Deceased and
CINDY NADELBACH and SCOTT RESNIK
Individually,**

Plaintiff(s),

- against -

JULIO ORTIZ JR. and IRVING SINGER,

Defendant(s).

TRIAL/IAS PART 8

INDEX NO. 9470/06

**MOTION SEQUENCE
NO. 2**

**MOTION SUBMISSION
DATE: November 24, 2008**

The following papers read on this motion:

Notice of Motion	X
Affirmation in Opposition	XX
Affirmation in Reply	X

Upon the foregoing papers, the motion by the defendant Julio Ortiz, Jr. for an Order granting summary judgment pursuant to New York Civil Practice Law and Rules, Rule 3212 dismissing the complaint against Co-defendant Julio Ortiz, Jr, on the grounds that Co-defendant, Irving Singer was the sole proximate cause of the incident by violating Vehicle & Traffic Law §1141 in failing to yield the right of way to defendant's vehicle approaching from the opposite direction, or in the alternative on the grounds that co-defendant Julio Ortiz, Jr. should be relinquished from all liability stemming from the incident in question based upon the common law emergency doctrine given that Julio Ortiz, Jr. was faced with an emergency situation brought about solely by Co-defendant Irving Singer's violation of Vehicle & Traffic Law §1141, is determined as hereinafter provided:

This personal injury action and wrongful death action arises out of two car motor vehicle accident that occurred on July 31, 2004 at approximately 11:00 am at the intersection of Sunrise Highway and Hewlett Avenue, Town of Hempstead, New York.

At the time of the incident in issue, the defendant Julio Ortiz was traveling westbound on Sunrise Highway and the vehicle driven by Irving Singer which had been proceeding east bound was attempting to turn left across the westbound lanes of Sunrise Highway into Hewlett Avenue heading north. The respective

vehicles were in collision in the intersection and as a result, the plaintiff Elayane Singer, the wife of Irving Singer and a passenger in the vehicle, was killed. Prior to a deposition of the defendant Irving Singer, Mr. Singer died.

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in **Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc., 207 AD2d 880, 616 NYS2d 650, 651 (Second Dept., 1994):**

"It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Zuckerman v. City of New York*, *supra*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718)."

A review of the respective submissions and in particular the deposition transcript of the defendant Jules Ortiz, Jr. at pgs 39-47 and the respective non-parties create an issue of fact as to the events in issue in the accident of July 31, 2004 and in particular the effect of the speed of the defendant Julio Ortiz in relation to the accident. As such, the defendant Julio Ortiz's application for an Order granting summary judgment pursuant to New York Civil Practice Law and Rules, Rule 3212 dismissing the complaint against Co-defendant Julio Ortiz, Jr, on the grounds that Co-defendant, Irving Singer was the sole proximate cause of the incident by violating Vehicle & Traffic Law §1141 in failing to yield the right of way to defendant's vehicle approaching from the opposite direction, or in the alternative on the grounds that co-defendant Julio Ortiz, Jr. should be relinquished from all liability stemming from the incident in question based upon the common law emergency doctrine given that Julio Ortiz, Jr. was faced with an emergency situation brought about solely by Co-defendant Irving Singer's violation of Vehicle & Traffic Law §1141, is denied.

SO ORDERED.

DATED: 2/9/2009

.....*Ray S. Mallon*.....
J.S.C.

ENTERED
FEB 13 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE