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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

LYNN PICKERING as Administrator of the Goods Chattels and Credits of JOSEPH A. VINCUILLO, Jr., deceased, and LYNN PICKERING, individually,

Plaintiff,

- against -

RAYMOND C. WOOLLEY, PLANETARY PROJECTS CORP., MATTHEW PERNA and VERONICA REYES,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.:020281/07
Motion Seq. Nos.: 01, 02
Motion Dates: 08/31/09
10/02/09

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion for Summary Judgment by Defendant Veronica Reyes, Affirmation and Exhibits	1
Notice of Motion for Summary Judgment by Defendant Matthew Perna, Affidavit and Exhibits	2
Affirmation in Opposition and Exhibits	3
Affirmation in Opposition and Exhibits	4
Reply Affirmation	5
Reply Affidavit	6
Reply Affidavit	7

Upon the foregoing papers, it is ordered that the motions are decided as follows:

In a personal injury action stemming from an automobile accident occurring on February 7, 2007 at approximately 5:20 p.m., defendant Veronica Reyes ("Reyes") moves for summary judgment dismissing plaintiff's complaint upon the grounds that defendant Reyes is absolved of any liability in this action pursuant to the emergency doctrine. (Motion Sequence Number 01) The motion is opposed by plaintiff. Defendant Matthew Perna ("Perna") also moves for

summary judgment dismissing all claims and cross-claims against him on the issue of liability, or in the alternative, finding that plaintiff failed to establish a *prima facie* case on any claim of conscious pain and suffering. Plaintiff opposes the motion as do defendants Raymond C. Woolley and Planetary Project Corp.

It is well settled that the proponent of motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.,* 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra.*

The present action was brought by plaintiff, Lynn Pickering, as Administrator of the goods and chattels and credits of Joseph A. Vincuillo, Jr. ("Vincuillo"), for damages for personal injuries sustained as the result of a motor vehicle accident occurring on February 6, 2007, at approximately 5:20 p.m., on the Southern State Parkway, east of exit 42, Town of Islip, Suffolk County, New York. Plaintiff claims that the defendants caused her son, Joseph A. Vincuillo Jr.'s, serious injuries resulting in his death. Motor Vehicle 1 ("MV1") was a 1999 Mazda owned and operated by Vincuillo. Motor Vehicle 2 ("MV2") was a 2006 Chevrolet owned by defendant Planetary Projects Corp. ("Planetary") and operated by defendant Raymond C. Woolley ("Woolley'). Motor Vehicle 3 ("MV3") was a 2005 Hyundai owned and operated by defendant Perna. Motor Vehicle 4 ("MV4") was a 1999 Nissan owned and operated by

defendant Reyes. According to the affirmations, affidavits and exhibits offered in support of the motions for summary judgment, at the time of the motor vehicle accident, MV1 and MV2 were both driving eastbound on the Southern State Parkway. According to defendant Woolley, MV1 was driving erratically and weaving in and out of traffic at a high rate of speed. Defendant Woolley then contends that MV1 cut off MV2 causing defendant Woolley to have to brake at which time MV1 hit the left rear of MV2. MV1 then apparently lost control and crossed over the grass median separating the eastbound and westbound lanes of traffic on the Southern State Parkway. After crossing over the grass median, MV1 entered into the westbound lanes of traffic. MV3 was driving in the center lane of the three lane westbound parkway. MV4 was driving in the right lane of the three lane westbound parkway. Defendant Perna states that MV1 came out of nowhere and hit MV3 in a "T" shape. Defendant Reyes states that MV1 crossed the median and came directly towards her with its wheels off the ground. MV1 hit the rear wheel of MV4 causing defendant Reyes to lose control of MV4 and hit a light post on the right side of the westbound parkway lanes.

Defendant Reyes moves for summary judgment dismissing plaintiff's complaint upon the grounds that defendant Reyes is absolved of any liability in this action pursuant to the emergency doctrine. Defendant Perna also moves for summary judgment dismissing all claims and cross-claims against him on the issue of liability, or in the alternative, finding that plaintiff failed to establish a *prima facie* case on any claim of conscious pain and suffering. Defendant Perna also invokes the emergency doctrine to absolve him of any and all liability.

The "emergency doctrine" holds that when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context. *See Alamo v. McDaniel*, 44 A.D.3d 149, 841 N.Y.S.2d 477 (1st Dept. 2007). A driver is not obligated to anticipate that a vehicle traveling in the opposite direction will cross over into oncoming traffic; such an event constitutes a classic emergency situation, thus implicating the "emergency doctrine." *Minor v. C & J Energy Savers, Inc.*, 65 A.D.3d 532, 883 N.Y.S.2d 587 (2d Dept.

2009); *Gajjar v. Shah*, 31 A.D.3d 377, 817 N.Y.S.2d 653 (2d Dept. 2006); *Snemyr v. W.A. Morales-Aparicio*, 47 A.D.3d 702, 850 N.Y.S.2d 489 (2d Dept. 2008); *Eichenwald v. Chaudhry*, 17 A.D.3d 403, 794 N.Y.S.2d 391 (2d Dept. 2005).

The Court notes that it is undisputed in the present case that, on the date of the subject accident, MV1 crossed over the grass median separating the east and west bound lanes of traffic on the Southern State Parkway, entered into the oncoming traffic where the collisions with MV3 and MV4 occurred. This scenario clearly falls under the emergency doctrine. Defendants Perna and Reyes were not obligated to anticipate that MV1, which had been traveling in the opposite direction on the other side of a grass median, would cross over said median and enter into the oncoming traffic in which they were driving.

With respect to defendant Reyes, she testified in her examination before trial that the accident happened "so quickly." She testified that " I was just looking towards the front of the car and the car was coming, kind of just flying so I just hit the gas." When asked what she did when she saw MV1 coming, defendant Reyes testified, "[p]ut gas in order to pass it because if not I knew it was going to hit me." When asked where MV1 was coming from, defendant Reyes testified "[c]rossing the street. It was coming the opposite way. That's the only thing that was coming." From her testimony, it is evident that defendant Reyes, faced with an emergency situation, acted as a reasonably prudent person would act in the same emergency. Plaintiff's arguments that defendant Reyes did not act in an reasonable manner in the face of an emergency and that she was not confronted by a sudden and unforeseen occurrence so the emergency doctrine is inapplicable are without merit. How can one argue that a motor vehicle, allegedly traveling at a high rate of speed, in what appeared to be a cloud of dirt and smoke, crossing over a grass median into oncoming traffic was not a sudden and unforseen occurrence? This is not an event that a reasonable driver should be prepared for when going about his or her everyday driving. Said argument falls under the weight of its own absurdity. Plaintiff has failed to demonstrate an issue of fact which precludes summary judgment. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). Defendant Reyes was faced with a sudden and unexpected circumstance that left her with virtually no time for reflection as to how to avoid a collision. *See Alamo v. McDaniel*, 44 A.D.3d 149, 841 N.Y.S.2d 477 (1st Dept. 2007); *Levine v. Li-Heng Chang*, 56 A.D.3d 530, 867 N.Y.S.2d 513 (2d Dept. 2008); *Palma v. Garcia*, 52 A.D.3d 795, 861 N.Y.S.2d 113 (2d Dept. 2008). Therefore, as defendant Reyes was faced with

an emergency situation, not of her own making, the Court finds that the emergency doctrine applies and relieves defendant Reyes from liability for the injuries allegedly sustained by Vincuillo, owner and operator of MV1. Consequently, the Court hereby grants the relief requested in defendant Reyes's motion (Motion Sequence Number 1) for summary judgment dismissing plaintiff's complaint.

With respect to defendant Perna, when asked during his examination before trial if he observed MV1 at any point before the accident, defendant Perna testified "no." He further testified that the front of his vehicle hit the passenger side/right-hand side of MV1 and that MV1 was traveling right in front of him. Defendant Perna testified that MV1 must have been traveling in a north bound direction when the collision between MV1 and MV3 occurred because the crash was "like a T." Defendant Perna testified that he did not know how fast MV1 was traveling as he did not see from where MV1 came. Defendant Perna testified that he did not apply his brakes within ten seconds of impact as he did not see MV1 coming.

Plaintiff submitted the same argument in opposition to defendant Perna's position on the applicability of the emergency doctrine that she did to defendant Reyes' application. As previously noted, for reasons set forth above, the Court finds no merit to said argument made by plaintiff. Co-defendants Woolley and Planetary also submitted papers in opposition to defendant Perna's motion for summary judgment on the grounds of the applicability of the emergency doctrine. They claim that the evidence indicates that Vincuillo died as a result of the injuries that he sustained in the impact with defendant Perna's vehicle. They further argue that defendant Perna failed to keep a proper lookout and be aware of what was in his view and that he failed to observe that which was there to be seen. They argue that Perna should have seen MV1 traveling in the dust cloud across the grass median before MV1 entered the oncoming westbound lanes of traffic. Defendant Perna replies that co-defendants Woolley and Planetary fail to offer evidence in admissible form that establishes, or even tends to establish, defendant Perna's actions were unreasonable and imprudent in light of encountering MV1 traveling at an alleged high rate of speed crossing over the Southern State Parkway median. Defendant Perna further contends that co-defendants Woolley and Planetary's speculative assertions that he might have been able to take a different course of evasive action is immaterial.

The Court finds that the emergency doctrine does indeed apply to defendant Perna. Defendant Perna testified that he did not see MV1 until the point of impact and, as previously

stated, a driver is not obligated to anticipate that a vehicle traveling in the opposite direction will cross over into oncoming traffic. Speculation that defendant Perna should have seen MV1 entering into the oncoming traffic, especially speculation based upon the actions of other drivers who were not in the same location or position as defendant Perna, is not sufficient to overcome the applicability of the emergency doctrine. Speculation that the driver in an opposing lane of traffic could have done something to avoid a vehicle crossing over into oncoming traffic is insufficient to defeat a motion for summary judgment. *See Scott v. Kass*, 48 A.D.3d 785, 851 N.Y.S.2d 649 (2d Dept. 2008); *Eichenwald v. Chaudhry*, 17 A.D.3d 403, 794 N.Y.S.2d 391 (2d Dept. 2005); *Gadon v. Oliva*, 294 A.D.2d 397, 742 N.Y.S.2d 122 (2d Dept. 2002). Furthermore, taking the evidence presented as a whole, the Court does not find any evidence presented by plaintiff or co-defendants Woolley and Planetary that sufficient time existed for defendant Perna to take evasive action. *See Lupowitz v. Fogarty*, 295 A.D.2d 576, 744 N.Y.S.2d 480 (2d Dept. 2002); *Le Claire v. Pratt*, 270 A.D.2d 612, 704 N.Y.S.2d 354 (3d Dept. 2000).

Therefore, as defendant Perna was faced with an emergency situation, not of his own making, the Court finds that the emergency doctrine applies and relieves defendant Perna from liability for the injuries allegedly sustained by Vincuillo, owner and operator of MV1. Consequently, the Court hereby grants the relief requested in defendant Perna's motion (Motion Sequence Number 2) for summary judgment dismissing plaintiff's complaint.

Defendant Perna's argument concerning the results of Vincuillo's toxicology report prepared by the Division of Medical–Legal Investigation and Forensic Sciences of Suffolk County in which Vincuillo's urine tested positive for cocaine and his blood and urine tested positive for benzoylecgonine, a metabolite of cocaine that is only present after cocaine use, will not be addressed by this Court as the complaint has been dismissed for the reasons stated above. Additionally, defendant Perna's argument that Vincuillo did not experience any conscious pain or suffering from the moment he contacted defendant Perna's vehicle until the time of his demise will also not be addressed by this Court for the same reasons.

Accordingly, it is hereby

ORDERED, that Motion Sequence Number 01 by defendant Reyes pursuant to CPLR § 3212 granting summary judgment to defendant Reyes and dismissing plaintiff's complaint on the grounds that there is no liability attributable to this defendant due to the emergency doctrine is hereby **GRANTED**.

ORDERED, that Motion Sequence Number 02 by defendant Perna pursuant to CPLR § 3212 granting summary judgment to defendant Reyes and dismissing plaintiff's complaint on the grounds that there is no liability attributable to this defendant due to the emergency doctrine is hereby **GRANTED**.

This constitutes the decision and order of this Court.

ENTER:

DENISE L. SHER
A.J.S.C.

Dated: Mineola, New York
February 18, 2010