

SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. PETER B. SKELOS,
Justice.

MARGARET T. KEHRBAUM,
Plaintiff,

-against-

CAROL J. KAPLAN and JOSHUA KAPLAN,
Defendants.

TRIAL/IAS PART 26
NASSAU COUNTY

MOTION # 01
INDEX #11473/00
MOTION SUBMITTED:
AUGUST 8, 2001

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....1
Answering Affidavits.....2
Reply Affidavits.....3

Plaintiff moves for partial summary judgment on the issue of liability. While summary judgement is a drastic remedy in that it deprives a party of his day in court and the court should deny the motion if there is any material issue of fact, the courts should “not strain to find feigned issues of fact where they are not genuinely present” (*Opalek v. Oshrain*, 33 A.D.2d 521, 522 [3rd Dept. 1966]). Plaintiff’s motion for partial summary judgment in this case is well-founded and is granted.

This action arises out of an automobile accident which occurred at approximately 12:30

a.m. on October 11, 1998. At that time plaintiff was a passenger wearing a seat belt in a 1993 Saturn motor vehicle operated by defendant Joshua J. Kaplan with the permission of the owner, his mother, the defendant Carol Kaplan.

Joshua Kaplan was a licensed driver who had operated his mother's vehicle many times before the accident. He was familiar with the roadway, Southern State Parkway westbound between Hempstead Avenue and Franklin Avenue. He described the road conditions as being "terrible" due to several days of rain. However, at the time of the occurrence of the accident the rain was "pretty light." He was operating the motor vehicle at 45-50 mph in terrible road conditions with poor visibility when, he claims, the vehicle hydroplaned, he lost control of the steering wheel and the car struck the concrete divider.

Under these circumstances, as established by the testimony of the defendant at his examination before trial, the plaintiff has made out a *prima facie* case of negligence (*see, Pfaffenbach v. White Plains Exp. Corp.*, 17 N.Y.2d 132, 133). It was incumbent upon the defendant to offer proof that there was an excuse for the happening of the accident (*see, Carter v. Castle Electric Construction Company*, 26 A.D.2d 83, [2nd Dept. 1966]). Defendant fails to offer any proof that the road conditions changed immediately before the happening of the accident. There was no proof that Joshua Kaplan lost control of the vehicle because he was either faced with or reacting to a sudden or unforeseen circumstance which would support a charge under the emergency doctrine (*see, Muye v. Liben*, ___ A.D.2d ___, 723 N.Y.S. 2d 510

[2nd Dept. 2001]). Upon the defendant's own testimony there can be but one conclusion, he lost control of the vehicle because he was traveling too fast under the circumstances with which he was faced at the time of the happening of the accident. Perhaps, alternatively, if the road conditions were as terrible as defendant claims they were, then he was negligent for undertaking to drive under those conditions for the purpose of traveling to New York City to have dinner in the middle of the night.

When the evidence of the cause of an accident is undisputed, the question of whether the defendant's act or omission was a proximate cause of the accident is one for the court and not the jury (*see, Rodriguez v. Gutierrez*, 217 A.D.2d 692, [2nd Dept. 1995]). The proximate cause of this accident was solely Kaplan's loss of control of his automobile as he testified (*see, Donaghy v. Bilotti*, 159 A.D.2d 478 [2nd Dept. 1990]).

Judgment on the issue of liability is granted in favor of the plaintiff against the defendant Joshua Kaplan for the reasons stated herein and against the defendant Carol Kaplan pursuant to VTL §388(1).

Counsel shall appear for a status conference on September 5, 2001 for the purpose of discussing settlement. Counsel shall appear with authority to bind their respective clients.

This constitutes the decision and order of the court.

Dated: August 13, 2001


PETER B. SKELOS, J.S.C.

ENTERED

AUG 16 2001

**NASSAU COUNTY
COUNTY CLERKS OFFICE**