SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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MARIANN ROCHE, AS ADMINISTRATRIX OF THE ESTATE OF ROBERT ROCHE,

Plaintiff,

-against-

JOY WERTEL,

Defendant.

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SCAN

MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 11
Index No.: 7349/09
Motion Seq. No.: 01

DECISION AND ORDER

Papers Read on this Motion:

Defendant's Notice of Motion	01
Plaintiff's Opposition	xx
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Defendant, Joy Wertel ("Wertel") moves, pursuant to CPLR §3212, for an Order of this Court, granting her summary judgment dismissal of the complaint of plaintiff, Mariann Roche, as Administratrix of the Estate of Robert Roche's complaint.

This action arises out of a rear end motor vehicle accident that took place in the right eastbound lane of the Northern State Parkway ("NSP") near exit 46 on July 2, 2008 at approximately 3:50 p.m. As best as can be determined from the papers submitted herein, the facts are as follows:

At the time of the accident, the defendant, Joy Wertel, was operating her 2002 Honda Accord, traveling approximately 55 to 60 miles per hour in the left east bound lane of the NSP when she observed a motorcycle, being operated by the plaintiff's decedent, Robert Roche, rapidly approaching from her rearview mirror. As a result, Wertel signaled with her right indicator and moved into the right lane to permit Robert Roche to pass. Robert, who was operating a 1998 Suzuki motorcycle moved into

the right lane behind defendant's vehicle and struck the defendant's vehicle in the rear. Robert was declared dead at the scene of the accident.

Robert's mother, Mariann Roche, as Administratrix of the Estate of Robert Roche, brings this action for negligence and wrongful death against the defendant. At her sworn examination before trial, Mariann testified that as far as she knew, Robert, 19 years old at the time of the accident, was on his way to his friend's house in Suffolk County. Mariann also stated Robert had owned his motor cycle for about a month and a half before the accident but that to her knowledge, he had never operated a motorcycle before he bought the motorcycle involved in the accident.

Upon the instant motion, defendant Wertel seeks summary judgment dismissal of the plaintiff's complaint. The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v Journal-News*, 211 AD2d 626 [2nd Dept 1995]).

The burden on the party moving for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]). If this initial burden has not been met, the motion must be denied without regard to the sufficiency of opposing papers (*Id.*; *Alvarez v Prospect Hosp.*, supra). However, once this initial burden has been met by movant, the burden shifts to the party opposing the motion to submit evidentiary proof in admissible form sufficient to create material issues of fact requiring a trial to resolve (*Id*). Mere conclusions and unsubstantiated allegations

or assertions are insufficient (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]) even if alleged by an expert (*Alvarez v Prospect Hospital*, supra; *Aghabi v. Sebro*, 256 AD2d 287 [2nd Dept 1998]).

In support of her instant motion for summary judgment, defendant Wertel submits, *inter alia*, the deposition transcripts of several non-party witnesses to the accident, including Carol Ryan, Barbara Fratello, Alexis Cancel, and Daniel Luizzi. In pertinent part, Carol Ryan testified that she was traveling in the right eastbound lane of the NSP when she observed what appeared to be a motorcycle losing control and flying into the air in the vicinity of Exit 46. She was traveling approximately 70 mph in the right lane when a motorcycle passed her vehicle in the left lane. She stated that she heard the motorcycle before she first observed it traveling one car length in front of her in the right lane. She stated that the motorcycle maintained its speed and was traveling approximately four car lengths in front of her when it began to move to the left and then to the right (without changing lanes), looking "confused." She then observed the motorcyclist "lose control" and move to the right, bouncing a few times, before he fell off of his motorcycle in mid-air and hit the exit sign.

Barbara Fratello, a nurse who assisted in administering CPR to the plaintiff's decedent at the scene of the accident, testified at her sworn deposition that she was traveling in the left eastbound lane of the NSP at approximately 65 mph on the date of the accident when she observed a motorcyclist traveling approximately 10 feet behind her from her rearview mirror. She stated that the motorcycle was traveling faster than she was and passed her in the right lane a few seconds after she first observed it. She stated that she maintained her speed of approximately 65 mph when the motorcycle passed her. She observed the motorcycle change lanes at least five more times after it passed her traveling at a speed of at least 80 mph. She never observed brake lights on the motorcycle and that approximately one to one half minutes later, traffic came to a stop. She observed a woman kneeling over the motorcyclist,

and she also pulled her vehicle over and assisted the other woman in administering CPR to the motorcyclist.

Alexis Cancel testified at her sworn deposition that she was also traveling at approximately 60 mph in the left eastbound lane of the NSP when she observed a motorcycle pass her to her right. She stated that the motorcyclist was traveling much faster than any of the other vehicles in her line of sight and the motorcycle began to "bob and weave." She observed him perform this maneuver twice, and he passed two vehicles. She quickly lost sight of the motorcycle, and approximately 15-20 seconds later, the vehicle in front of her abruptly pulled over to the grassy median.

Finally, Daniel Luizzi testified at his sworn deposition that he was traveling at approximately 65 mph in the left eastbound lane of the NSP when he looked into his rearview mirror and observed a motorcycle traveling approximately twenty car lengths behind him at a high rate of speed in what appeared to be the left lane. He intended to move into the right lane to permit the motorcycle to pass, but before he could do so, the motorcycle passed him in the right lane. The motorcycle then moved back into the left lane and, in the same manner, passed another vehicle that was traveling in the left lane by passing that vehicle on the right. He lost sight of the motorcycle and approximately five to ten minutes later, traffic came to a stop.

"To establish a *prima facie* case of negligence, a plaintiff must demonstrate the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and that the breach was a proximate cause of the plaintiff's injury" (*Dabnis v West Islip Public Library*, 45 AD3d 802, 803 [2nd Dept 2007]; *see also*, *Pulka v Edelman*, 40 NY2d 781, 782-783 [1976]; *In re New York City Asbestos Litigation*, 5 NY3d 486, 493-494 [2005]; *Kimmell v Schaefer*, 89 NY2d 257, 263-264 [1996]).

"To succeed on a cause of action to recover damages for wrongful death, the decedent's personal representative must establish, *inter alia*, that the defendant's wrongful act, neglect or default

caused the decedent's death" (*Eberts v Makarczuk*, 52 AD3d 772, 772-773 [2nd Dept 2008]). Although a plaintiff's burden of proof in a wrongful death case is reduced because the decedent is unable to describe the events in question (*Noseworthy v City of New York*, 298 NY 76, 80 [1948]), the plaintiff is still obligated to provide some proof from which negligence can reasonably be inferred (*Marsch v Catanzaro*, 40 AD3d 941, 942 [2nd Dept 2007]; *Dubi v Jericho Fire Dist.*, 22 AD3d 631 [2nd Dept 2005]).

Based upon the papers submitted herein, this Court finds that the defendant has made her *prima facie* showing of entitlement to judgment as a matter of law. There is no evidence on this record that the defendant was negligent in the happening of this accident or that she proximately caused the accident. Further, as the operator of a vehicle that is struck in the rear by plaintiff's vehicle, defendant is subject to the presumption that the plaintiff was negligent in failing to keep a safe distance between the vehicles (*Abramov v Campbell*, 303 AD2d 697 [2nd Dept 2003]; *Karakostas v Avis Rent A Car Sys.*, 301 AD2d 632 [2nd Dept 2003]; *Reed v New York City Tr. Auth.*, 299 AD2d 330 [2nd Dept 2002]). Although such a presumption is rebuttable, in the absence of any evidence in this case that the defendant, as the lead vehicle, was negligent, summary dismissal of the negligence cause of action is appropriate herein (*Abramov v Campbell*, supra; *Davis v Quinones*, 295 AD2d 394 [2nd Dept 2002]).

Defendant has also established her entitlement to judgment as a matter of law on plaintiff's wrongful death cause of action. "While. . . a deceased or unconscious plaintiff is held to a lesser standard of proof, that does not relieve the plaintiff of the obligation to provide some proof from which negligence could reasonably be inferred" (*Byrd v New York City Tr. Auth.*, 228 AD2d 537 [2nd Dept 1996]; *Noseworthy v City of New York*, supra at 80; *Horne v Metropolitan Tr. Auth.*, 82 AD2d 909, 910 [2nd Dept 1981]). Here, as the plaintiff has failed to proffer any support for the negligence claim, *supra*, the plaintiff is not entitled to a lower burden of proof under the *Noseworthy* doctrine.

In light of Wertel's showing of entitlement to judgment as a matter of law, the burden shifts to the plaintiff as the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial (*Alvarez v Prospect Hosp.*, supra).

In opposition, plaintiff has failed to raise a triable issue of fact as to the negligence of the defendant. Plaintiff submits that as the defendant testified that she was traveling up to 60 mph in a 55 mph speed limit on the NSP, i.e., in excess of the posted speed limit on the NSP, she admitted to violation of the VTL §1180 which provides for the basic rule in regard to the maximum speed limits. Plaintiff also proffers, without any support for her allegations, that a question of fact is raised as to whether the defendant changed lanes when it was not reasonably safe to do so. Finally, plaintiff maintains that in light of this negligence, the plaintiff ought to be afforded the benefit of the *Noseworthy* doctrine so as to preclude dismissal of her wrongful death claim. These arguments are all unsupported, unavailing and entirely meritless.

Even affording the nonmovant plaintiff the benefit of every favorable inference that reasonably can be drawn from the evidence herein (*Szczerbiak v Pilat*, 90 NY2d 553 [1997]; *Napolitano v Dhingra*, 249 AD2d 523 [2nd Dept 1998]), and assuming that the defendant, in fact, violated New York Vehicle and Traffic Law by traveling 60 mph, plaintiff nevertheless has failed to establish via admissible proof that the defendant's alleged violation of the law was the proximate cause of this accident. The fact remains that the plaintiff motorcyclist struck the rear of the defendant's vehicle. In the absence of any non-negligent explanation for the striking of defendant's vehicle (*Leal v Wolff*, 224 AD2d 392 [2nd Dept 1996]) any allegation that the defendant may have cut in front of the plaintiff motorcyclist is not supported by the evidence, including the deposition testimony of the non party witnesses. Mere conclusions and unsubstantiated allegations or assertions are insufficient to present a triable issue of fact (*Zuckerman v City of New York*, supra at 562).

Finally, inasmuch as the plaintiff has failed to provide any evidence so as to infer any negligence on behalf of the defendant, the *Noseworthy* doctrine is inapplicable to the facts at hand. Therefore, it is

ORDERED, that defendant Wertel's motion for summary judgment dismissal of plaintiff's complaint is ***granted*** and the complaint is ***dismissed***.

This shall constitute the decision and order of this Court.

DATED: January 26, 2011
Mineola, N.Y. 11501

ENTER: _____
HON. MICHELE M. WOODARD
J.S.C.
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