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Dismissed

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20 X

JULIO ROSARIO,

Plaintiff,

-against-

YAKOV AMINO,

Defendants.

X

Index No: **300697/2016**

DECISION AND ORDER

Present:
HON. KENNETH L. THOMPSON, JR.

The following papers numbered 1 to **2** read on this **motion for summary judgment**

No On Calendar of **June 16, 2017**	PAPERS NUMBER
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed	**1**
Answering Affidavit and Exhibits	**2**
Replying Affidavit and Exhibits	
Affidavit	
Pleadings -- Exhibit	
Memorandum of Law	
Stipulation -- Referee's Report --Minutes	
Filed papers	

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendant moves pursuant to CPLR 3212 for summary judgment dismissing the complaint. This action arose as a result of personal injuries sustained by plaintiff, when a vehicle plaintiff was operating was struck by a vehicle operated by defendant, as plaintiff's vehicle pulled into the lane of traffic in which defendant's vehicle was traveling.

Plaintiff testified that he was stopped in his lane of traffic, and that the defendant's vehicle was one and a half to two car lengths behind where plaintiff's vehicle was stopped. "The plaintiff made a prima facie showing of negligence on the part of the appellant, Robert Dishotsky, based on Dishotsky's deposition testimony that the motor vehicle accident at issue occurred when he pulled out of a parking spot and into a lane of moving traffic (*see,* Vehicle and Traffic Law § 1128 [a]). *Calandra v. Dishotsky*, 244 A.D.2d 376, 376–77]2nd Dept 1997]).

Whether there was construction in plaintiff's lane of travel or not does not cast any negligence upon defendant for failing to avoid a collision with a vehicle entering his lane from a dead stop, one and a half to two car lengths ahead of defendant's vehicle. There is no evidence that defendant was speeding. Defendant testified he was traveling at 20 mph.

Accordingly, defendant's motion for summary judgment is granted, and the complaint is hereby dismissed.

The foregoing constitutes the decision and order of the Court.

Dated: 7/19/2017

KENNETH L. THOMPSON JR. J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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JULIO ROSARIO,

Plaintiff(s)

- against -

Index No. 300697/2016

YAKOV AMINO,

Defendant(s)

----------x

MEMORANDUM OF LAW
OF THE DEFENDANT
YAKOV AMINO

Law Office of Dennis C. Bartling
ATTORNEYS FOR DEFENDANT(S)
Yakov Amino
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Westbury, NY 11590
516-229-4429

THE DEFENDANT, YAKOV AMINO, WAS NOT NEGLIGENT AS A MATTER OF LAW AND SUMMARY JUDGMENT SHOULD BE GRANTED.

The CPLR provides that a summary judgment "motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party" (CPLR 3212 [b]). A Court may grant summary judgment in a proceeding when it has been established that no triable issue of fact exists. Summary judgment is designed to expedite all civil cases by eliminating from the trial calendar claims which can be properly resolved as a matter of law (*Andre v Pomeroy*, 35 NY2d 361 [1974]).

THE DEFENDANTS DID NOT BREACH ANY DUTY OWED TO THE PLAINTIFF.

It is well-established law in New York State, that there are three elements which must be present for a plaintiff to recover from a defendant in tort. These elements are: (1) the existence of a legal duty from the defendant to the plaintiff; (2) a breach of that duty; and (3) an injury which was proximately caused by the breach of the duty (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297 [2010]; *Akins v Glens Falls City School Dist.*, 53 NY2d 325 [1981]; *Pulka v Edelman*, 40 NY2d 781 [1976]).

If one of these elements is not present, there can be no recovery by the plaintiff against the defendant (*Stukas v Streiter*, 83 AD3d 18 [2d Dept 2011]; *Green v State*, 222 AD2d 553, [2d Dept 1995]; *Gaeta v City*, 213 AD2d 509 [2d Dept 1995]).

The scope of one party's duty owed to another is a question of law to be determined by the Court (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136 [2002]; *Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579 [1994]; *Eaves Brooks Costume Co. v Y.B.H. Realty Corp.*, 76 NY2d 220 [1990]).

While questions of proximate cause can be factual jury questions, the Court of Appeals has held that the plaintiff must establish prima facie that the alleged negligence was a substantial cause of the events that resulted in his injuries (*Derdiarian v Felix Contracting Corp.*, 51 NY2d 308 [1980]). Where the defendant's vehicle merely furnishes the occasion for the accident, any negligence that could be attributed to the defendant is not a proximate cause of the plaintiff's injuries (*Ely v Pierce*, 302 AD2d 489 [2d Dept 2003]).

Drivers are under a duty to maintain a reasonable speed, control and care of their cars to avoid an accident (*Oberman v. Alexanders Rent-A-Car, et al.*, 56 AD2d 814 [1st Dept 1977]).

The PLAINTIFF, JULIO ROSARIO, was negligent per se because he violated Vehicle and Traffic Law § 1128 (a). Violation of a state statute is negligence per se. The unexcused failure to observe the statutory standard of care is negligence (*Martin v Herzog*, 228 NY 164 [1920]; *Dalal v City of New York*, 262 AD2d 596 [2d Dept 1999]; *Miller v Hine*, 281 AD 387 [3d Dept 1953]).

Vehicle and Traffic Law § 1128 (a) provides:

> "Driving on roadways laned for traffic. Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply:

> (A) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety."

A party's failure to act reasonably under the circumstances and failure to see that which she should have seen through the proper use of her senses also constitutes negligence (*Wilson v Rosedom*, 82 AD3d 970 [2d Dept 2011]; *Laino v Lucchese*, 35 AD3d 672 [2d Dept 2006]; *Berner v Koegel*, 31 AD3d 591 [2d Dept 2006]; *Bongiovi v Hoffman*, 18 AD3d 686 [2d Dept 2005]; *Bolta v Lohan*, 242 AD2d 356 [2d Dept 1997]; *Mohammed v. Frische*, 233 AD2d 628 [1st Dept 1996]).

The operator of a motor vehicle who has the right of way, is entitled to anticipate that other vehicles will obey the traffic laws which require them to yield to the vehicle with the right of way (*Gabler v Marly Bldg. Supply Corp.*, 27 AD3d 519 [2d Dept 2006] [internal citations omitted]).

Pattern Jury Instructions 2:77.1 states,

> A driver is charged with the duty to see that which under the facts and circumstances he should have seen by the proper use of his senses, and if you find that defendant did not observe that which was there to be seen you may find that he was negligent in failing to look or in not looking carefully.

It is well-established law that the unexcused failure to observe the standards imposed by statute is negligence. Martin v. Herzog, 228 N.Y.164, 126 N.E. 814 (1920); Goode v Meyn, 165 A.D.2d 436, 568 N.Y.S.2d 472 (3rd Dept. 1991).

Motorist's testimony that motor vehicle accident occurred when he moved into a lane of moving traffic in apparent violation of VTL § 1128(a) was prima facie evidence of negligence. Calandra v. Dishotsky, 244 A.D.2d 376, 664 N.Y.S.2d 95 (2nd Dept. 1997).

CONCLUSION

Applying the law to the facts of this case, the plaintiff JULIO ROSARIO was negligent per se because he made a unsafe lane change into the lane in which defendant, YAKOV AMINO was traveling.

All of the evidence supports the conclusion that the defendant, YAKOV AMINO, was not the proximate cause of the accident or for the injuries allegedly sustained by the plaintiff. The other parties cannot refute this nor offer any evidence of culpable conduct and the action must therefore be dismissed in its entirety as to defendant, YAKOV AMINO.

It is respectfully requested that this Court dismiss the complaint and any and all cross-complaints against the defendant and for any other relief that this Court deems just and proper.

Dated: Westbury, New York
May 11, 2017

Theresa Mariano, Esq.