SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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xxxxxxxxxxxxxx,

Plaintiff,

-against-

xxxxxxxxxxxxxx
xxxxxxxxxxxx CO., INC. and DONLEN TRUST,

Defendants.

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NOTICE OF MOTION

Index Number: 8573/12

IAS Judge:
Hon. Darrell L. Gavrin

Return date: Dec. 27, 2012

S I R S :

PLEASE TAKE NOTICE that upon the annexed Affirmation of DANIEL FLANZIG, ESQ., dated November 30, 2012, and upon all of the pleadings and proceedings heretofore had herein, the undersigned will move this Court at the Centralized Motion Part, Room 25, thereof, at the Queens County, Supreme Court, located at 89-02 Sutphin Blvd, Jamaica, New York, on the 27th day of December, 2012 at 9:30 o'clock in the forenoon or as soon thereafter as counsel can be heard, for an Order pursuant to CPLR §3212 granting Plaintiff summary judgment on the issue of liability, and setting this matter down for a trial on the issue of damages only, together with such other and further relief as this Honorable Court deems just and proper.

PLEASE TAKE FURTHER NOTICE, that pursuant to CPLR 2214(b), answering papers, if any, must be served at least seven (7) days prior to the return date of this motion.

Dated: Mineola, New York
November 30, 2012

_____

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File No: 12-PO-295TJN

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

----------X

xxxxxxxxxxxxxxxxxx,

Index No.: 8573/12

Plaintiff,

AFFIRMATION

-against-

xxxxxxxxxxxxxxxxx
AND POWER CO., INC. and DONLEN TRUST,

Defendants.

----------X

DANIEL FLANZIG, ESQ., duly affirms under the penalty of perjury as follows:

1. I am an attorney and partner of the law firm of FLANZIG and FLANZIG, LLP, attorneys of record for the Plaintiff herein, and as such am fully familiar with the facts and circumstances heretofore had herein, based upon a review of the file maintained by this office.

2. That I submit this affirmation in support of plaintiff's motion for summary judgment on this issue of liability based upon the defendants admission that he violated Vehicle and Traffic Law Sec. 1214 when he opened his van door into moving traffic and into the path of Plaintiff's bicycle and that said violation was and is the sole proximate of the accident.

PROCEDURAL HISTORY

3. The within action arises out of a bicycle verse motor vehicle accident that occurred on March 17, 2012 on Bell Blvd. in Bayside, Queens, NY when the plaintiff was lawfully riding his bicycle. As Plaintiff was passing the defendant's parked vehicle he was "doored" when without warning the Defendant's van door was opened into his path of travel. A copy of the police accident report is annexed hereto as Plaintiff's **Exhibit "A".** The action was commenced by the service of a Summons and Complaint on or about April 24th 2012. Issue was joined by the service of an Answer by the Defendant on or about June 1, 2012. Annexed hereto

as Plaintiff's **Exhibit "B"** are copies of Plaintiff's Summons and Complaint and Defendants' Answer. A review of the Summons and Complaint and Defendant's Answer indicates that at the time of the accident the Defendant, DONLEN TRUST was the owners of the vehicle being operated by an employee of PETROLEUM HEAT AND POWER CO., INC., and that its employee, xxxxxxxxx operated the vehicle with the consent and permission of its owner and in furtherance of his employment. As a result of the accident plaintiff sustained a severely fractured clavicle requiring surgery and the placement of hardware and screws. A copy of plaintiff Bill of Particulars is annexed hereto as **Exhibit "C".** Depositions of the Plaintiff and Defendant operator were taken on October 18, 2012. As all necessary discovery is now complete Plaintiff timely moves for summary judgment.

STATEMENT OF FACTS

4. The accident occurred March 17, 2012 at approximately 2:30 p.m. on a clear and sunny day while the Plaintiff xxxxxxxxxxxxxxxxxxwas riding his bicycle on Bell Boulevard at its intersection with 50th Avenue in Bayside, New York. At the time of the accident Mr. xxx, an employee of Defendant, PETROLEUM HEAT AND POWER CO., INC. had just completed a service call and was exiting his parked van in front of his customer's home where he sat while completing his bill. While exiting his vehicle to return to the home he opened his door into the immediate path of the Plaintiff causing the Plaintiff to strike the door, also known as a "dooring".

5. The Plaintiff seeks summary judgment based upon the following theories:

a) The Defendant violated Vehicle and Traffic Law §1214 which prohibits the opening of vehicle doors into the path of moving traffic;

b) The Plaintiff is free of any comparative or culpable conduct in causing the crash;

c) and the actions of the Defendant and the statutory violation were

the sole proximate cause of the accident.

POINT I

PLAINTIFF'S TESTIMONY

6. In support of Plaintiff's motion and as proof in admissible form the Plaintiff relies upon the deposition transcripts of both the Plaintiff and Defendant. A copy of Plaintiff's deposition transcript is annexed hereto as Plaintiff's **Exhibit "D"**. A copy of the defendant's transcript is annexed hereto as plaintiff's **Exhibit "E",** together with the transmittal letter in conformity with CPLR 3116(a).

7. Plaintiff testified at the time of the accident he was riding a bicycle ("C" at 8). He has been a bicyclist for almost 25 years and rides for recreational as well as athletic purposes to keep in shape. ("D" at 9) Plaintiff was riding towards St. John's Mile which is the bike path that runs along the Cross Island Expressway. ("D" at 12-13) Prior to the accident he had been riding for only about 15 to 20 minutes. ("D" at 13) He was wearing a helmet as well as a bright orange T-shirt. ("D" at 13) His bike was in good mechanical condition on the day of the accident and the tires were new. ("D" at 11-12).

8. The accident occurred on Bell Boulevard in Bayside around 50th Street. ("D" at 14) Plaintiff had been cycling on Bell Boulevard for approximately 2 blocks prior to the accident occurring. Bell Boulevard in the area where the accident occurred is a residential, two-way street separated by a grassy island. ("D" at 15) In the direction the Plaintiff was traveling the road was relatively narrow, straight and level, with only one lane in his direction and no marked lanes for parking. ("D" at 16) In the two blocks that the Plaintiff traveled prior to the crash he did not pass any other parked cars and only reached a maximum speed of approximately 11 to 12 miles per hour. ("D" at 17)

9. As the plaintiff rode the two block distance on Bell Boulevard he rode to the right side of the roadway to give room for vehicles to pass. ("D" at 19) It was then that he observed the van that was the subject of the accident. ("D" at 19) As he approached the vehicle he never saw anybody get in or out of it. ("D" at 22) At approximately three car lengths behind it he began to move a little bit to the left to get around the parked vehicle ("D" at 22-23) and maintained his same speed. As he passed the rear of the parked van his bicycle he continued along the driver's side of the van and maintained that same distance up until the time that the crash occurred. ("D" at 23-24).

10. All of a sudden and without warning the driver's door of the van swung open into the path of the plaintiff and plaintiff collided with the door. ("D" at 24-25)The time between the opening of the door and the contact was almost immediate as the door was still in the process of being opened when the crash occurred. ("D" at 25). Plaintiff had no time to brake or change the course of his bike as his front tire struck the outside edge of the door as it was still opening. ("D" at 25) After hitting the door the Plaintiff lost consciousness came to rest he was in the middle of the street on his back. ("D" at 27) By the time he regained consciousness somebody had picked up his bike and called the police. Plaintiff was removed by ambulance and taken to New York Hospital in Queens. ("D" at 41-42)

11. The Plaintiff identified four photographs of the scene of the accident. ("D" at 33) Copies of the photographs are annexed hereto as Plaintiff's **Exhibit "F**". The photographs depict the cars parked in a similar position as the Defendants van. The Plaintiff was traveling from the background of the photograph (marked as Defendant's exhibit "D") and proceeding towards the foreground. ("D" at 32)

POINT II

DEFENDANT'S TESTIMONY

12. On that same day the deposition of xxxxxxxx was taken. A copy of Mr. xxx's deposition is annexed hereto as Exhibit "E". The deposition has been exchanged with the defendants in conformity with CPLR 3116(a) and plaintiff relies upon same in support of this motion.

13. On the day of the accident Mr. xxx was working for PETRO (PETROLEUM HEAT AND POWER CO.). ("E" at 6) To perform his heating services at customer's homes he was provided with a van. ("E" at 7) Mr. FAY was in that location on the day of the accident doing a service call. The accident occurred on Bell Boulevard. ("E" at 7) The accident involved his vehicle and a bicycle. ("E" at 10)

14. The house that he was working at is depicted in the photograph marked as Exhibit "D", "the one with the steps". ("E" at 8) Prior to the accident the Defendant had been inside his customer's home for approximately an hour and then returned to the vehicle to complete a printed ticket to have the customer sign. He prepared the ticket while sitting in the vehicle. ("E" at 10) As he sat in the van the ignition as well as the interior lights of the vehicle were all off and his driver door was closed. ("E" at 12) The van lacked rear windows and side windows, making the only windows in the van the driver's door, passenger's door and windshield. ("E" at 11).

15. After he finished the ticket it was his intention to return to the customer's home. In order to return to the house the Defendant opened the driver's side door. It was while in the process of still opening the door that the crash occurred ("E" at 15). The door had only opened approximately ten to twelve inches before the impact. ("E" at 12-13, 15) **At no time before the accident occurred did the Defendant ever see the bicyclist.** This is because as the Defendant

opened his door he was looking straight ahead ("E" at 14-15). The front wheel of the bicycle came into contact with the inside edge of the door. ("E" at 14) After the impact the cyclist fell to the ground and came to rest on the ground in front of the van approximately five feet to six feet forward of the hood of the van but his bike remained by the door. ("E" at 16)

16. Defendant described the accident location as the east side of Bell Boulevard. He described Bell Boulevard out and near the place where the accident occurred as heavily traveled. ("E" at 18-19) After the accident occurred there were multiple vehicles stopped behind the Plaintiff and the traffic was all backed up. ("E" at 19) He is not aware of any witnesses to the accident. ("E" at 19) At some point the police and an ambulance arrived. The police asked him what happened and he said "I went to open my door and the bicycle struck the door." The Plaintiff then left the scene by ambulance. ("E" at 20)

POINT III

PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY AS AGAINST ALL DEFENDANTS.

17. Plaintiff moves for summary judgment on the issue of liability based upon Defendants violation of Vehicle Traffic Law §1214. Plaintiff seeks summary judgment as against all defendants. The defendant xxx concedes that he was acting in the course of his employment for Defendant PETROLEUM HEAT AND POWER CO. at the time of the crash. Further, under VTL 388 and the applicable case law, the owner of a vehicle is vicariously liable for the acts of an individual who opens a door into the path of a bicyclist. As the Appellate Division held in Kohn v. Nationwide Mutual Insurance Co. 286 A.D.2d 699, 730 N.Y.S.2d 152, "The passengers act of opening the taxi cab door in order to exit the vehicle constitutes "use in operation" of a vehicle pursuant to Vehicle and Traffic Law 388. See also, Argentina v. Emory World Wide

Delivery Corp., 93 N.Y.2d 554, 693 N.Y.S.493. holding that an owner is vicariously responsible for the acts of a violation of VTL 1214. Accordingly, Defendant DONLEN TRUST is liable for the crash as well.

POINT IV

THE VIOLATION OF VTL 1214 WAS THE SOLE PROXIMATE CAUSE OF THE ACCIDENT.

18. **§1214 of the Vehicle and Traffic Law states "Opening and closing vehicle doors – no person shall open the door of a motor vehicle on the side available to moving traffic and until it is reasonably safe to do so and can be done without interfering with the movement of other traffic nor shall a person leave a door open on the side of a vehicle available to moving traffic for a period of time longer than necessary to load or unload passengers**. (a copy of the statute is annexed hereto as exhibit "F" and remains current as of 2012)

19. A bicycle is considered a "vehicle" with the same rights and protections as motorized vehicles. (See, Vehicle and Traffic Law §1146, §1231) Here, Plaintiff was confronted with a driver's door being opened into the path of his bicycle, less than one foot in front of him, giving him no time to react, stop or brake. In fact, the Plaintiff was in such close proximity to the opening door that the Defendant was actually still in the process of opening the door when the incident occurred. Further, Plaintiff had no warning that the Defendant xxxx was even inside the parked van as the ignition was off and no lights illuminated in the interior or exterior of the van. The van also lacked rear or side windows to allow Plaintiff to see Defendant xxx sitting in the van.

20. It has been held that the party has established a prima facie case of negligence when a car door is opened into adjacent moving traffic when it is not reasonably safe to do so.

Montesinos v. Cote, 46 A.D.3d 774, 848 N.Y.S.2d 329, (2nd Dept. 2007). In Montesinos a Plaintiff attempted to exit her vehicle when her driver's door came into contact with a trailer portion of a tractor trailer owned by the Defendants. The defendant moved to dismiss on the basis that the plaintiff's opening of the car door was the sole proximate cause of her accident. The Court granted summary judgment to the Defendant and held that the Plaintiff violated Vehicle and Traffic Law §1214 by opening her door into a moving traffic lane and being negligent in failing to see what by the reasonable use of her senses she should have seen. The violation of the Vehicle and Traffic Law §1214 required dismissal as a matter of law. See also, Abbas v. Salavel, 73 A.D.3d 1100 (2nd Dept. 2010).

21. In Williams v. Persaud, 10 A.D.3d 686, 798 N.Y.S.2d 495 the Appellate Division held that a motorist was not liable for injuries that occurred when the driver of a parked vehicle opened the driver's side door and struck a motorist's passing vehicle. "On these facts alone the driver established prima facie entitlement to judgment as a matter of law." In opposition the Plaintiff failed to raise a triable issue of fact ….. there is nothing in the record to demonstrate that the Defendant breached any duty owed to the Plaintiff or even assuming such a breach, that any conduct on the part of the Defendant was the proximate cause of the accident." See also, Williams v. The City of New York, 240 A.D.2d 734, 659, N.Y.S.2d 302. To the contrary, the evidence established that the Plaintiff violated Vehicle and Traffic Law §1214 by opening her door on the side adjacent to moving traffic when it was not reasonably safe to do so and was negligent in failing to see what by reasonable use of her senses she should have seen. Williams, supra. Thus, the Court found that dismissal of Plaintiff's complaint was required as the sole cause of the accident was Plaintiff's violation of Vehicle and Traffic Law §1214.

22. Here the plaintiff, xxxxxxxxxxx was clearly there to be seen by the defendant had

he looked. The Plaintiff was wearing a bright orange shirt, it was a clear and sunny day and Belle Boulevard was a straight, flat road. There was no reason Defendant could not see Plaintiff had he looked or looked properly.

23. Further, Vehicle and Traffic Law §1146 requires "every driver shall exercise due care to avoid colliding with a bicyclist . . . . upon any roadway." Based upon the facts of the case, applicable statutes and case law in this Department, Plaintiff, xxxxxxxxx should be granted summary judgment on the issue of liability.

POINT V

THE VIOLATION OF A STATUTE CONSTITUTES THE DEFENDANT'S NEGLIGENCE AS MATTER OF LAW

24. It is well established that a violation of a statute makes a Defendant liable as a matter of law, See PJI 2:25. "When there is evidence that a party violated the statute and that the violation was a contributing cause of the occurrence the jury should be instructed that a violation of the statute would constitute negligence. Cordero v. New York, 112A.D.2d 914, 492 N.Y.S.2d 430, Goode v. Meyn, 165 A.D.2d 436, 568 N.Y.S.2d 472. It is also well established that a violation of the Vehicle and Traffic Law constitutes negligence Per Se. See, PJI 2:26, also Martin v. Herszog, 228 N.Y. 164. The unexcused failure to abide by the statute is negligence per se only if the statute is designed to protect a particular class of harm and plaintiff is a member of that protected class. Dance v. Southampton, 95 AD2d 442, 467 N.Y.S.2d 203. Here, it is clear that the intent of the statute (Vehicle and Traffic Law §1214) is to protect those similar to plaintiff from being injured by the unlawful opening of a car door into traffic. The violation of this statute constitutes negligence as a matter of law.

POINT VI

PLAINTIFF HAS ESTABLISHED AS A MATTER OF LAW THAT HE IS FREE OF ANY NEGLIGENCE IN CAUSING AND CONTRIBUTING TO HIS OWN ACCIDENT.

25. Plaintiff assumes the Defendant's will argue, as it is the only possible way to avoid summary judgment, that the acts or omissions of the Plaintiff somehow create issues as the Plaintiff's comparative negligence in causing the accident. However, the record before this Court demonstrates that the Plaintiff was confronted with an emergency situation and should be entitled to a standard of care under this doctrine. This is a clearly a case where the facts establish that the Plaintiff cannot be held comparatively negligent because he was faced with a "sudden and unexpected circumstance that was not of his own making." Bella vs. Transit Authority of New York City, 12 A.D.3d 58 (2nd Dept. 2004). A mistake in judgment, wrong choice or action or speculation concerning possible accident avoiding measures do not render the emergency doctrine applicable. Barber v. Young, 238 A.D.2d 822 and the doctrine can be applied by the Courts as a matter of law. Vitale v. Levine, 44 A.D.3d 935, (2nd Dept. 2007). The Plaintiff who was operating his bicycle lawfully, at a reasonable rate of speed, and with proper placement on the roadway in accordance with RCNY § 4-12(p) which states "Bicyclists may ride on either side of one-way roadways that are at least 40 feet wide".[1] The Defendant, by his own admission was still in the process of opening the door and had only opened the door approximately 12 to 14 inches when the Plaintiff contacted the outer edge of the door. Plaintiff had no warning or knowledge that the defendant was even inside his vehicle so he could have no warning that a door could possibly open into his path. The Defendant's vehicle was not running and no interior lights were on. The van had no windows to even allow the plaintiff to observer the defendant sitting in the van prior to the crash. There was absolutely no warning or possible way for the

[1] Vehicle and Traffic Law §1234(a) is superseded by the New York City Code pursuant to Vehicle and Traffic Law §1642.

plaintiff to avoid the crash. Plaintiff was continuously riding to his the right side of the roadway to give room to passing vehicles on his left. Based upon his speed, position on the roadway and the immediacy of the door opening into his path, there is nothing to establish plaintiff's contributory or comparative negligence. Further, the condition of the plaintiff's bike, experience or lack of experience, fail to create any issues of negligence on the part of the plaintiff.

26. The Second Department has infrequently denied Summary Judgment based upon a claim of a violation of Vehicle and Traffic Law §1214 and only has when certain facts were present. However, none of those facts exist here. For instance, in Ferguson v. Gassman 229 A.D.2d 464, 645 N.Y.S.2d 331 (2 Dept 1996) the Court found the fact that a car door was that opened for 2-3 seconds prior to a crash and the fact that the driver who struck it was moving at the slow speed of 5-10 M.P.H. broke the causal connection between the violation of VTL 1214 and the accident as under those circumstances the driver could have avoided the door. Here this is not the case. The door was still in the process of being opened and began opening less than a second prior to the impact and Plaintiff's speed in no way caused or contributed to this crash.

27. Likewise in Villa v. Leandrou, 942 N.Y.S.2d 371, 94 A.D.3d 980 (2012) the court refused to grant the plaintiff, a cyclist, summary judgment in a "dooring" crash case. Although the lower court found that the defendant violated VTL 1214 by opening her car door into traffic, it still left open questions of fact as to whether the cyclist's actions caused or contributed to the accident requiring denial of summary judgment to the plaintiff on the issue of liability. The facts in Villa were not addressed in the Appellate Division decision, however, they were thoroughly addressed by the lower Court's decision, a copy of which is annexed hereto as Plaintiff's **Exhibit "G".** In striking contrast to this case the Plaintiff cyclist actually observed two people sitting in

the parked car prior to the crash. He was also able to change the path of his bike in order to avoid a "dooring" when the crash occurred. The Plaintiff in Villa stated the door "was wide open" when the crash occurred which again is not the case here. The Lower Court found that:

> "The deposition testimony of the Plaintiff raised questions of fact as to his comparative negligence. In his deposition he stated that he observed the Plaintiff's [Defendant] vehicle from five feet away and was able to see two people in the vehicle. He testified that although he was going slowly, upon seeing the individuals in the car he moved his bicycle slightly to the left "because I didn't know what they were about." Thus, the Court finds that there is an issue of fact as to whether the Plaintiff, **after** seeing persons in the vehicle and not being sure what they would do, **and** having sufficient time to react to the situation", used reasonable care to avoid being hit."

Here, none of these factors are present. Plaintiff had no notice of any occupants in the vehicle, the door was not "wide open" and Plaintiff had not time to react. As none of these factors exist there are no issues of fact that plaintiff's actions or in actions somehow caused or contributed to the happening of this accident.

WHEREFORE, your deponent respectfully requests that this Honorable Court grant Plaintiff's Motion for summary judgment on the issue of liability, and enter judgment against the Defendant, on the issue of liability and set this matter down for trial on the issue of damages only, together with such other and further relief as this Honorable Court deems just and proper.

Dated: Mineola, New York
November 30, 2012

_____
DANEIL FLANZIG, ESQ.