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SHORT FORM ORDER

INDEX No. 15305-05

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 1/25/07
ADJ. DATES 1/26/07
Mot. Seq. # 002 - MG

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ELLEN McKENNA,

Plaintiff,

-against-

COSTADENOS LADEAS, A CAB SERVICE, INC., ROBERT J. McKENNA and JENNIFER McKENNA,

Defendants.

COSTADENOS LADEAS and A CAB SERVICE, INC.,

Third-Party Plaintiffs,

-against-

ROBERT J. McKENNA and JENNIFER McKENNA,

Third-Party Defendants

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Upon the following papers numbered 1 to 7 read on this motion for summary judgment ; Notice of Motion/Order to Show Cause and supporting papers 1 - 3 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 4-5 ; Replying Affidavits and supporting papers 6-7 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion by defendants/third-party defendants, Robert J. McKenna and Jennifer McKenna, seeking an Order pursuant to CPLR 3212, granting them summary judgment and dismissing both the plaintiff's complaint and the third-party complaint as against them, is granted; and it is further

ORDERED that plaintiff's action and third-party plaintiff's action, as against defendants, Robert J. McKenna and Jennifer McKenna, is severed and shall continue against the remaining defendants (*see* ***Holt v Holt,*** 262 AD2d 530, 692 NYS2d 451 [2d Dept 1999]); and it is further

ORDERED that the caption is amended to reflect the deletion of defendants/third-party defendants, Robert J. McKenna and Jennifer McKenna, and all future documentation and correspondence shall reflect the discontinuance of the action as against the moving parties; and it is further

ORDERED that movant shall serve a copy of this Order upon respective counsel with Notice of Entry within twenty (20) days of the date herein pursuant to CPLR 2103(b)(1), (2) or (3) and thereafter file the affidavit(s) of service with the Clerk of the Court; and it is further

ORDERED that movant is directed to serve a copy of this Order with upon the Calendar Clerk of this Court IAS Part 33 within twenty (20) days of the date hereof; and it is further

ORDERED that a conference is scheduled for **May 8, 2007,** at 9:30 a.m., in Part 33, at the courthouse located at 1 Court Street, Riverhead, New York.

This personal injury action arose from an accident which occurred on July 30, 2004 between the vehicle driven by defendant/third-party plaintiff, Costadenos Ladeas, and owned by the defendant/third-party defendant, A Cab Service, Inc. (hereinafter collectively "Ladeas"), and the vehicle driven by defendant/third-party defendant, Jennifer McKenna, and owned by the defendant/third-party defendant, Robert J. McKenna (hereinafter collectively "McKenna"). The plaintiff, Ellen McKenna, was a passenger in the McKenna vehicle.

McKenna now moves for summary judgment to dismiss the plaintiff's complaint and the third-party complaint on the grounds that Ladeas, who was driving in front of McKenna, turned into a side road and made a u-turn from the side road, hitting the McKenna vehicle in the passenger side. In support of the motion, McKenna submits a copies of the pleadings, plaintiff's verified bill of particulars, an uncertified copy of the accident report by the Suffolk County Police Department and selected excerpts from plaintiff's examination before trial and that of Ladeas.[1] McKenna is in compliance with CPLR 3212(b) *(see* ***Woods v Zik Realty Corp.***, 172 AD2d 606, 568 NYS2d 146 [2d Dept 1991]; ***Waterford v Jack LaLanne Long Island, Inc.***, 151 AD2d 742, 542 NYS2d 765 [2d Dept 1989]). The motion is opposed by Ladeas, who submits his attorney's affirmation.

Plaintiff testified that she was a passenger in the McKenna vehicle; that the Ladeas vehicle was in front of the McKenna vehicle when it made a right turn into a side street and then made a u-turn into the roadway; and that upon re-entering the roadway, without stopping, the Ladeas vehicle hit the McKenna vehicle in the passenger side where she was sitting (*see* EBT Ellen McKenna, 2/7/06).

Ladeas testified the he made a quick right turn into the side street; that he attempted to make a three point turn in the middle of the intersection; that when he made the u-turn, he did not put his car in reverse during this period; that when he completed the u-turn, he hit the vehicle in which plaintiff was a passenger; and that the reason he made the u-turn was that he received a call from his dispatcher to pick up a fare in the opposite direction in which he was traveling (*see* EBT Costadenos Ladeas, 2/7/06).

It is established law that a driver is required to "exercise reasonable care and to observe that which was there to be seen" (***Aprea v Franco***, 292 AD2d 478, 739 NYS2d 727 [2d Dept 2002]) and is negligent

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[1] Copies of select excerpted pages of the plaintiff's and Ladeas transcrpt's are submitted in support of the motion and are unsigned and uncertified. However, none of the parties claim them to be inaccurate. Assuming that the original transcripts were properly submitted for signature or that, in fact, the signatures were affixed, copies itranscripts of depositions attached as exhibits to an attorney's affirmation may be used in support of or to defeat a summary judgment motion (*see* CPLR 3116; ***Thomas v Hampton Express, Inc.,*** 208 AD2d 824, 617 NYS2d 831 [2d Dept 1994]; *app. den.* 85 NY2d 803, 624 NYS2d 373 [1995]; ***Olan v Farrell Lines,*** 64 NY2d 1092, 489 NYS2d 884 [1985]).

when he fails to see that which he should have seen by the use of his senses (*see* ***Zambrano v Seok***, 277 AD2d 312, 715 NYS2d 750 [2d Dept 2001]). A driver also has "a duty to see what should have been seen and to exercise reasonable care under the circumstances to avoid an accident" (***Filippazo v Sanhago***, 277 AD2d 419, 716 NYS2d 710 [2d Dept 2000], *citations omitted*). A driver cannot make a u-turn and proceed to cross over a roadway in the face of oncoming traffic in order to proeed in a northbound direction (*see e.g.* ***William v Econ***, 221 AD2d 429, 633 NYS2d 392 [2d Dept 1995]), without exercising a degree of care commensurate with the circumstances (*see* ***Oakes v Mannigan***, 107 Misc2d 926, 436 NYS2d 165 [Sup Ct, Jefferson County, 1981]; *see also* ***Hoehn v Federico***, 24 Misc2d 51, 202 NYS2d 564, [Sup Ct New York County, 1960]; *accord* ***Rodriguez v Schwartz***, 257 AD2d 655, 684 NYS2d 579 [1999]) and thereby creating an emergency situation.

As the undisputed evidence has established, the McKenna vehicle was confronted with an emergency situation not of her own making and there is no evidence which is suggestive that her actions were unreasonable (*see* ***Strobe v Norton***, 278 AD2d 484, 718 NYS2d 642 [2d Dept 2000]; ***Flanagan v Kuehn***, 270 AD2d 452, 705 NYS2d 74 [2d Dept 2000]). By her submissions, McKenna has demonstrated that she was not negligent in causing any injuries sustained by plaintiff (*see* ***Baker v Staria***, 6 AD3d 639, 775 NYS2d 182 [2d Dept 2004]; ***Hudson v Goodwin***, 272 AD2d 296, 707 NYS2d 889 [2d Dept 2000]). By tendering sufficient evidence of the absence of any material issue of fact, McKenna has demonstrated her prima facie entitlement to summary judgment as a matter of law (*see* ***Ayotte v Gervasio***, 81 NY2d 1062, 601 NYS2d 463 [1963]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

The burden then shifted to Ladeas to produce, in admissible form, sufficient evidence to establish material issues of fact to require a trial (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, *supra*). When deciding a motion for summary judgment, the Court must view the evidence in a light most favorable to the non-moving party and give the non-moving party the benefit of all reasonable inferences which can be drawn from the evidence (*see* ***Louniakov v M.R.O.D. Realty Corp.,*** 282 AD2d 657, 724 NYS2d 70 [2d Dept 2001]; ***Thomas by Thomas v Drake,*** 145 AD2d 687, 535 NYS2d 229 [3d Dept 1988]; ***Negri v Stop & Shop, Inc.,*** 65 NY2d 625, 491 NYS2d 151 [1985]). However, the party opposing the motion must set forth more than mere conclusions of law or fact which are sufficient to defeat the motion for summary judgement (*see* ***Banco Popular No. America v Victory Taxi Mgt., Inc.,*** 1 NY3d 381, 774 NYS2d 480 [2004]). In opposing the motion, Ladeas has failed, as a matter of law, to overcome McKenna's prima facie entitlement to summary judgment (*see* ***Winegrad v New York Univ. Med. Ctr.,*** 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York***, 49 NY2d 557, *supra*).

The affirmation of counsel for Ladeas, submitted in opposition, lacks probative weight and cannot raise a triable issue of fact to sustain Ladeas' burden as said counsel does not have personal knowledge of the facts and circumstances of the accident (*see* ***Zuckerman v City of New York***, 49 NY2d 557, *supra*; *see also* ***Warrington v Ryder Truck Rental, Inc.***, 35 AD3d 455, 826 NYS2d 152 [2d Dept 2006]; ***Batista v Santiago,*** 25 AD3d 326, 807 NYS2d 340 [1st Dept 2006]; ***Bates v Yasin,*** 13 AD3d 474, 788 NYS2d 397 [2d Dept 2004]; ***Stahl v Stralberg,*** 287 AD2d 613, 731 NYS2d 749 [2d Dept 2001]; ***Riverhead Bldg. Supply Corp. v Regine Starr, Inc.,*** 249 AD2d 532, 672 NYS2d 117 [2d Dept 1998]; *see also e.g.* ***Olan v Farrell Lines, Inc.,*** 105 AD2d 653, 481 NYS2d 370 [1st Dept 1984] *affd* 64 NY2d 1092, 489 NYS2d 884 [1985]).

Accordingly, the motion is granted as herein indicated. This constitutes the Order and decision of the Court.

DATED: 4/10/07

THOMAS F. WHELAN, J.S.C.