Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

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LISA LIAO and DANNIE CHO,

Plaintiffs,

-against-

PAUL V. ALVARENEA, JENNIFER ALVARENEA, ABDUL HAKIM M. ISMAIL and PREMIUM TAXI CORP.,

Defendants.

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Index No: 17340/05
Motion Date: 3/7/07
Motion Cal. No: 28

The following papers numbered 1 to 10 read on this motion by defendants Abdul Hakim M. Ismail and Premium Taxi Corp., for an order, pursuant to CPLR § 3212, granting summary judgment in their favor and dismissing the complaint as to them on the ground that there are no triable issues of fact with respect to whether they were negligent.

	PAPERS NUMBERED
Notice of Motion-Memorandum of Law-Affidavits-Exhibits.....	1 - 5
Affirmation in Opposition-Exhibit.....	6 - 8
Reply.....	9 - 10

Upon the foregoing papers, it is ordered that the motion is disposed of as follows:

This is an action to recover for personal injuries allegedly sustained by plaintiffs, passengers in the taxi operated by defendant Abdul Hakim M. Ismail and owned by defendant Premium Taxi Corp., that was involved in a motor vehicle accident with a vehicle operated by defendant Paul V. Alvarenea and owned by defendant Jennifer Alvarenea, on July 2, 2005, at the intersection of Canal Street and Hudson Street, in New York County, New York.[1] The accident allegedly occurred as the Alvarenea vehicle was making a left turn. Defendants Abdul Hakim M. Ismail and Premium Taxi Corp.("defendants") move for summary judgment on the ground that because the accident occurred as a result of defendant Paul V. Alvarenea's violation of the Vehicle and Traffic Law, there are no triable issues of fact to be determined.

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[1]A default judgment was granted by this Court (Satterfield, J.) in favor of plaintiffs and against the Alvarenea defendants on January 3, 2006.

It is well established that summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980); Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231(1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (1985). The proponent of a motion for summary judgment "'must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers' (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986] [citations omitted]." JMD Holding Corp. v. Congress Financial Corp., 4 N.Y.3d 373 (2005). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

Section 1141 of the Vehicle and Traffic Law provides that "[t]he driver of a vehicle intending to turn to the left within an intersection . . . shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard." Failure to yield the right of way constitutes negligence as a matter of law See, McNamara v. Fishkowitz, 18 A.D.3d 721 (2d Dept. 2005); Ishak v. Guzman, 12 A.D.3d 409 (2d Dept. 2004); Rossani v. Rana, 8 A.D.3d 548 (2d Dept. 2004); Spatola v. Gelco Corp., 5 A.D.3d 469 (2d Dept. 2004). A driver thus is required to bring his or her vehicle to a stop and remain stationary until it is clear to proceed across an intersection [(see Breslin v. Rudden, 291 A.D.2d 471 (2d Dept. 2002); Bolta v. Lohan, 242 A.D.2d 356 (2d Dept. 1997)], and is obligated to see oncoming traffic through the proper use of her senses [(see, Bongiovi v. Hoffman, 18 A.D.3d 686 (2d Dept. 2005)]. As a corollary to these principles of law, a driver with the right of way is entitled to anticipate that an opposing driver controlled by a stop sign will obey the traffic laws requiring her to yield. Id., Gabler v. Marly Building Supply Corp., 27 A.D.3d 519 (2006).

Defendants, who, inter alia, submitted on this motion their deposition testimony and that of plaintiffs, demonstrated their prima facie entitlement to judgment as a matter of law by establishing with that evidence that defendant Paul V. Alvarenea violated "Vehicle and Traffic Law § 1141 when he made a left turn directly into the path of defendants' vehicle as it legally proceeded with the right of way [(see, Moreback v. Mesquita, 17 A.D.3d 420, 793 N.Y.S.2d 148 (2005); Torro v. Schiller, 8 A.D.3d 364, 777 N.Y.S.2d 915 (2d Dept. 2004); Casaregola v. Farkouh, 1 A.D.3d 306, 767 N.Y.S.2d 57; Rieman v. Smith, 302 A.D.2d 510, 755 N.Y.S.2d 256; Russo v. Scibetti, 298 A.D.2d 514, 748 N.Y.S.2d 871 (2d Dept. 2003); Agin v. Rehfeldt, 284 A.D.2d 352, 726 N.Y.S.2d 131 (2d Dept 2001); Stiles v. County of Dutchess, 278 A.D.2d 304, 717 N.Y.S.2d 325 (2d Dept.2000)]." Gabler v. Marly Bldg. Supply Corp., supra. See, also, Berner v. Koegel, 31 A.D.3d 591 (2d Dept.2006)["The plaintiff demonstrated her prima facie entitlement to judgment as a matter of law by establishing that the defendant violated Vehicle and Traffic Law § 1141 when she made a left turn directly into the path of the plaintiff's vehicle as the plaintiff's vehicle was legally proceeding into the intersection with the right-of-way."] Moreover, defendant Ismail had the right to anticipate that

defendant Paul Alvarenea would obey the traffic laws which required him to yield to defendants' vehicle. Bongiovi v. Hoffman, supra.

The burden then shifted to plaintiffs to produce evidentiary proof in admissible form sufficient to raise a triable issue of fact. See Zuckerman v City of New York, supra. In opposition, plaintiffs submit their deposition testimony, in which each testified that defendant Ismail was driving between 40 and 45 miles per hour and was driving erratically prior to the accident by quickly accelerating and decelerating. They argue that the speed defendant Ismail was operating his vehicle was in violation of the Rules of the City of New York, Title 34 §4-06(a), which provides that "[n]o person shall drive a vehicle at a speed greater than thirty miles per hour except where official signs indicate a difference in maximum speed." They also argue that defendant Ismail violated the speed limitations set forth in Vehicle and Traffic Law §1180. Plaintiffs thus contend that there is a question of fact as to whether the moving defendants also are at fault for this motor vehicle accident. This Court agrees.

Defendant Paul V. Alvarenea was negligent in failing to see that which, under the circumstances, should have been seen, and in making a left turn that crossed in front of defendant Ishmail's vehicle when it was apparently hazardous to do so. See, Sirico v. Beukelaer, 14 A.D.3d 549 (2005); Pryor v. Reichert, 265 A.D.2d 470 (2d Dept.1999); Canceleno v. Johnston, 264 A.D.2d 405 (1999). Notwithstanding that defendant Ismail, as the operator of the vehicle who had the right-of-way, was entitled to anticipate that plaintiff would obey the traffic laws which required him to yield [(see, Cenovski v. Lee, 266 A.D.2d 424 (2d Dept. 1999); Namisnak v. Martin, 244 A.D.2d 258 (2d Dept. 1997)], he nonetheless was required to exercise care in his handling of the accident. As the record here raises an issue of fact as to whether defendant Ismail was negligent in the operation of his vehicle, the motion for summary judgment must be denied.

Dated: April 27, 2007

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J.S.C.