SHORT FORM ORDER

INDEX No. 04-1218
CAL. No. 06-02476-MV

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 2-22-07
ADJ. DATE 4-23-07
Mot. Seq. # 004 - MD
005 - MG

ELIZABETH JAYNES,	:	BLOOM & NOLL, LLP
	:	Attorneys for Plaintiff
Plaintiff,	:	170 Old Country Road, Suite 316
	:	Mineola, New York 11501
	:	
- against -	:	DEEGAN & DEEGAN, LLP
	:	Attorneys for Defendants Wilkins
JUSTINE M. WILKINS, STEVEN P. WILKINS,	:	200 Old Country Road, Suite 300
JOSEPH B. McPARTLAND, MICHAEL E.	:	Mineola, New York 11501-4240
McPARTLAND and CHASE MANHATTAN	:	
AUTOMOBILE FINANCE CORPORATION,	:	RUSSO & APOZNANSKI
	:	Attys for Defts McPartland & Chase Auto
	:	875 Merrick Avenue
Defendants.	:	Westbury, New York 11590

Upon the following papers numbered 1 to 49 read on this motion for summary judgment; court ordered discovery; to amend pleadings : Notice of Motion/ Order to Show Cause and supporting papers 1 - 19 ; Notice of Cross Motion and supporting papers 20 - 27 ; Answering Affidavits and supporting papers 28 - 43 ; Replying Affidavits and supporting papers 44 - 49 : Other ; ~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the branch of motion (#004)for partial summary judgment on the issue of liability is denied ,while that portion seeking court ordered discovery is granted.

ORDERED that the cross-motion (#005) to amend the complaint is granted.

This is an action to recover damages for injuries sustained by plaintiff Elizabeth Jaynes on August 9, 2003 at about midnight at or near the intersection of Station Road and Hampton Avenue in Bellport, New York.

Plaintiff was crossing Station Road when she was struck by a vehicle operated by Justine M. Wilkens and owned by Steven P. Wilkens which was proceeding northbound on Station Road. Plaintiff

was thrown into the southbound lane and while she was lying in the roadway, was struck by a vehicle driven by Joseph B. McPartland which was leased by his father Michael E. McPartland from Chase Manhattan Automobile Finance Corporation ("Chase").

Plaintiff Elizabeth Jaynes has moved for summary judgment on the issue of liability against all defendants. She also moves to compel defendants Joseph and Michael McPartland and Chase to comply with court-ordered discovery or, in the alternative, to have defendants' answer stricken. Defendants McPartland and Chase oppose the entire motion while Wilkens opposes the motion with respect to liability. Wilkens also seeks to serve an amended verified answer pursuant to CPLR 3025 (b).

On a motion for summary judgment the moving party bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (***Winegrad v NYU Medical Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). The burden will then shift to the nonmoving party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2004]; ***Rebecchi v Whitmore,*** 172 AD2d 600, 568 NYS2d 423 [1991]). The court's function is to determine whether issues of fact exist not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the nonmoving party and all inferences that may be drawn are to be accepted as true (*see*, ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2001]; ***Rennie v Barbarosa Transport, Ltd.***, 151 AD2d 379, 543 NYS2d 429 [1989], ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [1987]).

Plaintiff Elizabeth Jaynes testified at her examination before trial that the accident occurred on August 9, 2003 at approximately 11:30 p.m. at the intersection of Station Road and Hampton Avenue in Bellport, New York. She was walking with a friend named Lovely Wood to pick up her children on Hoffman Avenue, about a ten minute walk from the accident location. During the five hours prior to the accident, she had consumed three rum and cokes and two cans of beer. During this time, she also ate one hot dog and several hamburgers. Prior to the accident, she was standing on the corner. There were no traffic control signals on Station Road or Hampton Avenue, however there was a stop sign for traffic on Hampton Avenue. As she approached the corner she did not see any traffic. She has no recollection of the accident.

According to the sworn affidavit of Lovely Wood, she and plaintiff were standing on the corner of Station Road and Hampton Avenue with the intention of crossing to the opposite side of Station Road. Wood looked both ways and did not observe any vehicles approaching. She then looked down to light a cigarette while plaintiff started to walk across the street. When she looked up she saw defendant Justine Wilkens's vehicle approaching at a high rate of speed. The car never slowed down or sounded its horn before striking plaintiff in the northbound lane of travel. She saw plaintiff's body thrown into the opposite lane of travel where it lay for several minutes before being run over by the pick-up truck operated by Joseph McPartland.

Defendant Justine Wilkens testified she was a licensed driver for about one month prior to the accident. She had driven along that same stretch of roadway on at least ten prior occasions. She testified she was driving on Station Road for approximately three miles before reaching the accident

location. The weather was misting, however, the road was dry. She testified she did not need her windshield wipers and her headlights were on. According to Wilkens, the lighting conditions were poor at the accident site.

Wilkens testified she saw plaintiff before the accident as she was stepping off the sidewalk at the corner of Hampton Avenue and Station Road. She testified she was traveling at a speed of thirty miles per hour (the speed limit on Station Road), however, in her sworn statement given a the scene she estimates her speed at about 35 to 40 m.p.h. Defendant observed plaintiff walking with another woman when plaintiff suddenly crossed into her path while the other woman remained off the traveled portion of the roadway. Defendant hit her brakes but did not swerve or sound her horn. Plaintiff's body hit the hood and front windshield of defendant's car then flew into the southbound lane of travel. Defendant then pulled her car over to the right side of Station Road and tried to call 911, however, the cell phone failed. Defendant's friend Robert McGuiniss was traveling behind defendant in his mother's Ford Explorer. As defendant was conversing with McGuinnis on the side of the road she heard him exclaim that plaintiff had been struck again. At this point defendant observed a blue pick- up truck traveling southbound on Station Road with no vehicles in front of it.

Non-party witness Robert McGuinnis testified he became aware of the accident when he saw Wilkens apply her brakes and pull over to the side of the road. It looked to him as if Wilkens had hit a bag of garbage that flew up over her car. He testified he did not observe Wilkens apply her brakes until after the intersection of Hampton Avenue. McGinnis testified that he noticed that a group of onlookers had begun to gather. After speaking with Wilkens, McGinnis proceeded into the roadway towards plaintiff when a blue pick-up truck came toward them. McGinnis testified he had to jump back to avoid being hit. Other than the pick-up truck, no other vehicles had passed through the intersection. McGinnis testified the pick-up hit plaintiff with the driver's side of the vehicle and applied its brakes as it skidded over her.

Defendant Joseph McPartland testified that at the time of the accident, he was seventeen years old and driving a 2001 Dodge Dakota pick-up truck owned by his father. Defendant testified he was traveling southbound at the time of the accident. He was familiar with the area. Defendant stated his radio was on and he had a cell phone which he was not using at the time. McPartland claims there was a small car traveling in front of his, southbound, the entire way along Station Road. Defendant testified that during the last one-half mile before the accident, the small car was traveling at the same rate of speed as his truck, about three car lengths in front. Defendant testified he was able to see the roadway in front of his truck behind the small car, but he could not see the roadway in front of the small car. McPartland did not see the initial impact between Wilkins and plaintiff. He testified he was driving about three car lengths behind the small car when he saw its brake lights activate. Defendant testified he also applied his brakes at this time, however, he did not slow as much as the small car. He saw the small car swerve to the left but never stop. Defendant testified he followed the path of the small car which passed over the double yellow line, however, defendant did not swerve as far to the left as the small car. Defendant did not see the small car run over anything. Defendant explained his vehicle was straddling the double yellow line when he felt a bump under his tires. Defendant testified at his deposition that the was traveling approximately forty miles per hour while in his sworn statement to police at the scene, he indicated his speed was fifty miles per hour. Defendant maintains he never noticed plaintiff or the crowd of about twenty onlookers until after the accident.

In opposition to plaintiff's motion for summary judgment, defendant Wilkens argues there are issues of fact as to whether plaintiff failed to exercise due care to avoid an accident by failing to cross at the intersection and entering the roadway when it was impractical for a vehicle to stop. Additionally, Wilkens points to plaintiff's certified medical records from Stony Brook University Hospital which indicate that plaintiff, when admitted, was "ETOH intoxicated". Defendant Wilkens also asks the Court to consider plaintiff's prior medical history which includes alcoholism for which she has received rehabilitation.

Defendants McPartland and Chrysler also oppose plaintiff's motion for summary judgment. In support, McPartland offers, *inter alia*, the sworn statement of non-party witness Megan Kelly given to the police. This witness was traveling northbound behind Robert McGuinnis, who in turn, was following behind defendant Wilkens. Kelly stated that she pulled over on the shoulder of Station Road after observing Wilkens car pulled over to the side of the road. She also observed "something" in the southbound lane of traffic and people gathered by the side of the road. She then saw a vehicle run over the object in the road. When people began screaming, she realized the object was a woman. That vehicle, according to Kelly, was "...not driving fast. Maybe 35 mph. It was difficult to see the woman in the road". Kelly noted the woman was in the middle of the southbound lane.

Chase Manhattan Automobile Finance Corporation ("Chase") who leased the vehicle to defendant McPartland, argues that although plaintiff had already been struck once prior to being hit by McPartland, her level of intoxication and failure to exercise due care cannot be ruled out as a contributing cause to the accident with McPartland. Further, there is conflicting testimony from the non-party witnesses with respect to McPartland's speed.

In the present case, the existence of material issues of fact require the court to deny the plaintiff's motion for partial summary judgment on the issue of liability with respect to defendants Justine and Steven Wilkens, Joseph B. McPartland and Michael E. McPartland, and Chase Manhattan Automobile Finance Corporation. First, it is unclear from the evidence submitted whether the plaintiff was exercising vigilance and due care while crossing the street (*see,* Vehicle and Traffic Law § 1151[b])[1], whether she had consumed alcohol to such an extent that it was a contributing factor to the accident(s), and whether being struck by both automobiles were foreseeable consequences of plaintiff's actions. Further, there are questions of fact as to whether defendants Justine Wilkens and Joseph McPartland, as operators of the motor vehicles, breached their duty to see that which they should have seen, which, in the case of Wilkens, included the plaintiff crossing the street (***Bolta v Lohan***, 242 AD2d 356, 661 NYS2d 286 [1997]; ***Safran v Amato***, 155 AD2d 653, 548 NYS2d 244 [1989]; *see also,* Vehicle and Traffic Law §110). Issues of fact have also been raised with respect to exactly where plaintiff attempted to cross the road, the lighting conditions at that the location, and the speed at which defendants Wilkens and McPartland were traveling.

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[1]Section 1151(b) of the Vehicle and Traffic Law provides, "No pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impractical for the driver to yield.

Plaintiff also moves to compel the McPartland defendants to produce certain court-ordered records, to wit, Cingular Wireless cell phone records. According to plaintiff, defendants have failed to comply with two previous court orders dated February 16, 2006, and July27, 2006, specifically mandating that defendants produce an authorization for release of the cell phone records within thirty days of the order. As evidenced by plaintiff's Exhibit 8, authorizations were completed by the McPartlands, however, Cingular has refused to produce the records on the grounds the authorizations are defective. Cingular sent rejection letters to defense counsel for McPartland. Accordingly, the McPartland defendants are directed to provide plaintiff with the requested documentation within thirty (30) days of service of this order with notice of entry. Both parties are directed to cooperate in completion of any outstanding discovery request.

The Court has also considered the Wilkens defendants' cross motion for leave to serve an amended answer on the grounds the original answer served by predecessor counsel was defective. The firm originally retained by defendants filed an answer pleading, *inter alia*, that plaintiff did not sustain a serious injury and that her injuries were increased or caused by her failure to wear a seat belt. By Order dated July 21, 2005, the Hon. Paul J. Baisley, Jr. disqualified that firm. Upon present counsel's receipt of the case, they discovered the inappropriate answer that had been previously filed and notified plaintiff's counsel and that counsel would be defending this action on the grounds of comparative negligence.

CPLR 3025(b) provides that leave to serve an amended pleading should be freely given upon such terms as are just. Leave to amend will generally be granted as long as the opponent is not surprised or prejudiced by the proposed amendment, and the proposed amendment appears to be meritorious (*see*, ***Holchendler v We Transp., Inc.,*** 292 AD2d 568, 739 NYS2d 621 [2002]; ***Leszczynski v Kelly & McGlynn,*** 281 AD2d 519, 722 NYS2d 254 [2001]; ***Charleson v City of Long Beach***, 297 AD2d 777, 747 NYS2d 802 [2002]). That is the case here. Accordingly, the motion is granted, the proposed answer submitted by counsel has been deemed served, and has been considered in opposition to plaintiff's motion for summary judgment.

Dated: JUN 07 2007

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION