Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: Honorable **LAWRENCE V. CULLEN** IAS PART 6
Justice

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SAFRINA McLEAN, Index No.:24639/05

Plaintiff, Motion Date: 8/28/07

-against- Motion Cal. No.: 27

AMERICAN SAND & GRAVEL INC., STEVEN L. CIANCIOTTA, CLIFFORD A. MALONE, ALL ISLAND TRUCK LEASING CORP., SPEEDWAY TRUCKING, INC., EDVIN GUERRA and GEORVANTH MARTINEZ, Motion Sequence No.: 6

Defendants.

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The following papers numbered 1 to 12 read on this motion by the defendants for summary judgment dismissing the plaintiff's complaint.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits.....	1
Notice of Cross Motion-Affirmation-Exhibits.....	2
Notice of Cross Motion-Affirmation-Exhibits.....	3
Affirmation(s) in Opposition-Exhibits.....	4-7
Reply Affirmation(s)-Exhibits.....	8-12

Upon the foregoing papers, the motion and cross-motions are determined as follows:

This is an action to recover damages for personal injuries allegedly sustained as a result of a four vehicle accident. The accident occurred on July 29, 2005 while plaintiff was operating her vehicle in the right east bound lane on Hillside Avenue. It is undisputed that plaintiff's vehicle crossed in front of a tractor trailer which was traveling in the left east bound lane. Said tractor trailer left the scene of the accident.

As a result of police investigation subsequent to said accident, the defendant, AMERICAN SAND & GRAVEL, INC. was identified as the alleged owner of the tractor trailer, and defendant, STEVEN L. CIANCIOTTA, was identified as the alleged operator of the tractor trailer. (Hereinafter

referred to as "AMERICAN & CIANCIOTTA"). Defendants, AMERICAN and CIANCIOTTA, argue that they were not involved in said accident, and, therefore, should be granted summary judgment dismissing the plaintiff's complaint against them. In the alternative, defendants, AMERICAN and CIANCIOTTA, argue that even if they are the fleeing tractor trailer, that summary judgment should be granted inasmuch as it was plaintiff who struck the tractor trailer. Defendants rely on their own interpretation of a surveillance video obtained from a local business located on Hillside Avenue at the scene of the accident.[1] Plaintiff, on the other hand, alleges that the tractor trailer hit her vehicle in the rear, causing her vehicle to lose control and cross over the yellow lines.

It is undisputed that after plaintiff's vehicle made contact with the fleeing tractor trailer, the plaintiff's vehicle crossed over the yellow lines into the westbound lane of traffic and was struck by a Mack truck, which is owned by defendant, ALL ISLAND TRUCK LEASING CORP., and operated by defendant, CLIFFORD A. MALONE. (Hereinafter referred to as "ALL ISLAND" and "MALONE"). Moreover, the parties acknowledge that defendant, MALONE, in an attempt to avoid striking plaintiff's vehicle, hit the brakes and swerved to the right, hitting a Honda, owned by defendant, GEORVANTH MARTINEZ, and operated by defendant, EDVIN GUERRA. (Hereinafter referred to as "GUERRA" and "MARTINEZ").

Defendants, AMERICAN and CIANCIOTTA, moved for summary judgment dismissing the plaintiff's complaint and all claims and cross claims against them. Defendants present two arguments in support of said motion.

First, defendants, AMERICAN and CIANCIOTTA, argue that the plaintiff cannot provide any proof that their vehicle was involved in this accident. In support, they annex the deposition transcript of defendant, CIANCIOTTA, in which he states that he was not involved in any motor vehicle accident on July 29, 2005. In further support, annexed was the transcript of Louis DeRosa, the sole officer of defendant company, AMERICAN, wherein he testified that he had no knowledge of his employee, CIANCIOTTA, or his vehicle being involved in a motor vehicle accident on July 29, 2005.

The deposition testimony submitted by defendants, AMERICAN and CIANCIOTTA, establish a prima facie entitlement to summary judgment based upon the fact that they were not involved in an motor vehicle accident on July 29, 2005. As defendants have met their burden, the plaintiff must raise a triable issue of fact with respect to defendants' involvement in said accident.

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[1] While defendants annexed a video tape to their moving papers, there was no testimony proffered that said video depicted a true and accurate representation of the conditions at the time of the accident. Therefore, inasmuch as said video does not constitute competent evidence, the Court did not view the same. See, Lustenring v. 98-100 Realty, LLC., 1AD3d 574; Saks v. Yeshiva of Spring Valley, Inc., 257 AD2d 615; Davis v. County of Nassau, 166 AD2d 498.

The second argument put forth by defendants, AMERICAN and CIANCIOTTA, is that even if it was their vehicle involved in said accident, they could not be held negligent in that it was plaintiff that struck defendants' vehicle. This position was put forth by defendants' attorney after reviewing the video tape obtained from the police. However, as hereinafter discussed, this argument is unavailing.

In opposition to the motion, plaintiff submitted the deposition transcript of Detective Kenneth Meringolo who proffered testimony regarding his investigation of the aforesaid accident. Det. Meringolo testified that his subsequent investigation enabled him to conclude that it was defendant's, AMERICAN's, tractor trailer that was involved in the accident, which was operated by defendant, CIANCIOTTA. This resulted in Det. Meringolo issuing an amended police accident report listing AMERICAN and CIANCIOTTA as owner and operator.

Moreover, plaintiff submitted an affidavit of a professional engineer who stated that after reviewing the videotape, the investigative file, photographs, the accident scene, and deposition transcripts, and according to the damage pattern and vehicle rotation of the plaintiff's vehicle, said factors were consistent with a hit in the rear collision, rather than a side-swipe collision. Said engineer further concluded that it was the tractor trailer that collided with the rear left side of the plaintiff's vehicle.

The standard of summary judgment requires the proponent to make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case, and such showing must be made by producing evidentiary proof in admissible form. (Santanastasio v. Doe, 301 AD2d 511, 753 NYS2d 122 [2nd Dept. 2003]). Further, when reviewing a defendant's motion for summary judgment we are required to accept as true the allegations of the complaint. (Guggenheimer v. Ginzburg, 43 NY2d 268 [NY 1977]). The burden then shifts to the plaintiff to present facts, in admissible form, demonstrating that genuine, triable issues exist precluding the grant of summary judgment. (Zuckerman v. City of New York, 49 NY2d 557 [NY 1980]).

In viewing the plaintiff's evidence in the most favorable light, the plaintiff's opposition has raised an issue of fact defeating defendants, AMERICAN and CIANCIOTTA's motion. Therefore, the motion for summary judgment submitted by defendants, AMERICAN SAND & GRAVEL, INC., and STEVEN L. CIANCIOTTA, is hereby denied.

Next, this Court turns to defendants, ALL ISLAND and MALONEs', cross motion seeking summary judgment arguing that the plaintiff cannot prove that any act of said defendants was the proximate cause of injury. Defendant, MALONE, testified at his deposition that he was traveling west bound on Hillside Avenue at 25 - 30 miles per hour on the day of said accident. Defendant, MALONE, attested that he observed the plaintiff's vehicle make contact with the tractor trailer, causing plaintiff to lose control of the vehicle and cross over the yellow lines in front of his vehicle. Defendant, MALONE, further stated that when he saw the plaintiff and tractor trailer make contact, he hit his brakes and slowed down to 5 – 10 mile per hour, which was his speed at the time of

impact of his vehicle and plaintiff's vehicle. Defendant, MALONE, further testified that from the time of plaintiff's impact with the tractor trailer, to the time of the impact of plaintiff's vehicle and his vehicle, approximately 2-3 seconds elapsed.

In opposition, plaintiff submitted an Attorneys Affirmation arguing that a jury could decide not to believe defendant, MALONE's version of the accident, and conclude that he had a reasonable opportunity to avoid the collision, that is a "last clear chance".

Contrary to plaintiff's assertions, a driver is not required to anticipate that an automobile traveling in the opposite direction will cross over into oncoming traffic. (Koch v. Levenson, 225 AD2d 592). Further, it is well settled that a driver confronted with such a sudden emergency situation is under no obligation to use his best judgment, and any error in his judgment is generally insufficient to constitute negligence. (Williams v. Econ, 221 AD2d 429).

Moreover, in cases involving a vehicle crossing over into oncoming traffic, it is clear that such an event constitutes a classic emergency situation, thus implicating the "emergency doctrine". (Lyons v. Rumpler, 254 AD2d 261 [1998]). In Gajjar v. Shah, 31 AD3d 377 [2006], the plaintiff's vehicle crossed over three lanes of traffic, including a double yellow line, into oncoming traffic and collided with defendant's vehicle. The *Gajjar* Court found that the defendant's reaction of slamming on his brakes was reasonable as a matter of law under the circumstances, which were not of his own making. Thus the burden shifted to the plaintiff therein to raise a triable issue of fact. Plaintiff, Gajjar, submitted an attorneys affirmation arguing that the defendant therein had enough time to avoid the accident. The *Gajjar* Court further held that an affirmation was insufficient to raise a triable issue of fact, and also that the emergency doctrine applied. Accordingly, the lower court properly granted defendant summary judgment.

Furthermore, with respect to a driver's attempt to avoid a collision, it has been held that the passing of two seconds, between the moment the driver first saw the other vehicle and the collision, constitutes such a brief period of time to react and is, generally, insufficient to raise a triable issue of fact. (Lupowitz v. Fogarty, 295 AD2d 576 [2002]). (See also, McClelland v. Seery, 261 AD2d 451).

Defendant, MALONE, was presented with an emergency situation when plaintiff's vehicle crossed over the double yellow lines in front of his vehicle, thereby invoking the "emergency doctrine". Defendant, MALONE's testimony regarding his efforts to avoid the collision, as well as his statement that two to three seconds elapsed from the time of the plaintiff's impact with the tractor trailer to the time of plaintiff's impact with his vehicle, was reasonable as a matter of law under these circumstances. Therefore, defendants ALL ISLAND and MALONE have met their burden to entitle them to summary judgment herein.

Plaintiff submitted an Attorney Affirmation alleging that whether or not defendant, MALONE, could have avoided the collision was sufficient to defeat defendants motion for summary judgment. Inasmuch as this Court finds that the emergency doctrine applies herein, defendant,

MALONE, was under no obligation to use his best judgment, and any error in his judgment is generally insufficient to constitute negligence (See, Williams v. Econ, supra). Accordingly, plaintiff has failed to raise a triable issue of fact to defeat defendants, ALL ISLAND and MALONE's motion for summary judgment. Therefore, defendants, ALL ISLAND TRUCK LEASING CORP. and CLIFFORD A. MALONE 's motion for summary judgment is granted, and the plaintiff's complaint, as well as any and all cross-claims as and against defendants ALL ISLAND TRUCK LEASING CORP. and CLIFFORD A. MALONE, are hereby dismissed.

Lastly, this brings the court to defendants, EDVIN GUERRA and GEORVANTH MARTINEZs' cross-motion for summary judgment. Inasmuch as plaintiff stated that she does not oppose said cross-motion; defendants, ALL ISLAND and MALONE, stated they support said cross motion; and defendants, AMERICAN and CIANCIOTTA, did not submit any opposition to said cross motion, the same is granted, without opposition.

Accordingly, based upon the foregoing, it is

ORDERED that defendants, AMERICAN SAND & GRAVEL, INC. and STEVEN L. CIANCIOTTA, motion for summary judgment is hereby denied; and it is further

ORDERED that defendants, ALL ISLAND TRUCK LEASING CORP. and CLIFFORD A. MALONE, cross motion for summary judgment is hereby granted, and the complaint of the plaintiff, SAFRINA MCLEAN is dismissed as against the said defendants, ALL ISLAND TRUCK LEASING CORP. and CLIFFORD A. MALONE; and it is further

ORDERED that defendants, EDVIN GUERRA and GEORVANTH MARTINEZ, cross motion for summary judgment is hereby granted, without opposition, and the complaint of the plaintiff, SAFRINA MCLEAN is dismissed as against the said defendants, EDVIN GUERRA and GEORVANTH MARTINEZ; and it is further

ORDERED that the Clerk of the Court is authorized to enter judgment in accordance with the foregoing.

Dated: December 17, 2007

LAWRENCE V. CULLEN, J.S.C.

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