Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DAVID ELLIOT** IAS PART 14
Justice

FANNY ASAYAG AND SHAI ASAYAG,	Index No. 12140/07
Plaintiffs, -against-	Motion Date November 20, 2007
JAISON THOMPAN AND ELSAMMA THOMPAN,	Motion Cal. No. 2
Defendants.	Motion Seq. No. 2

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Notice of Motion-Affid-Exhib....	1-4
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Plaintiffs commenced this action to recover damages for personal injuries alleged to have been sustained on September 29, 2006 due to a motor vehicle accident at the intersection of 75th Avenue and 186th Street in the county of Queens, City and State of New York.

Plaintiffs move for an order pursuant to CPLR 3212 granting summary judgment in their favor on the issue of liability and setting this matter down for an inquest on the issue of damages.

Plaintiff Fanny Asayag submits her affidavit wherein she states that she was driving her car eastbound on 75th Avenue. As she proceeded into the intersection of 186th Street, defendant Jason Thompan's car suddenly came into the intersection from her left at an extremely high rate of speed. The front of the defendant's car struck plaintiff's driver's side passenger door and left rear quarter panel. Her car spun around and careened into a parked vehicle. 186th Street is a one-way street for vehicles to travel northbound. Plaintiffs also submit an uncertified police report and defendant's MV-104.

In opposition to the motion, defendants assert that it is premature as discovery is incomplete since examinations before trial have not been conducted. Defendants have just received authorizations and have not yet received copies of plaintiff's medical records to assess her injuries vis-a-vis whether she sustained a serious injury. Defendants assert that plaintiff's affidavit is insufficient as it is silent as to which direction she was traveling at the time of the occurrence; where she was in the intersection when she first saw the defendant's car; and what evasive action she took to avoid the accident. Further, plaintiff's affidavit is contradictory to defendant Jaison Thompan's affidavit which states that he was traveling on northbound 186th Street when he went through the intersection at 75th Avenue, he realized that he needed to make a right turn onto 75th Avenue. He tried to make a u-turn at the intersection. He had almost completed his turn when plaintiff's car, traveling eastbound on 75th Avenue, impacted with the right front of his car.

Defendant also states that there is a grassy median separating eastbound from westbound traffic on 75th Avenue. There is nothing to obstruct the view of someone traveling eastbound on 75th Avenue at the 186th Street intersection from visualizing cars traveling in either direction on 186th Street or making a u-turn at the intersection. Questions arise as to plaintiff's perception of defendant's direction of travel and as to his rate of speed.

In reply, plaintiffs argue that defendant's affidavit confirms his reckless negligence as he admits to making a u-turn on a one-way street so that he was traveling in the wrong direction when he plowed into her car. Depositions are not necessary as defendant's negligence is established as a matter of law. Both affidavits establish that defendant was traveling southbound on a northbound road. Further, defendant states that he had passed the intersection, turned around to go back to it thereby placing him the wrong way on the one-way street.

Decision of the Court

The motion by plaintiffs is denied.

It is well settled that: "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering

sufficient evidence to eliminate any material issues of fact from the case (see, Zuckerman v City of New York, 49 NY2d 557, 562, 427 NYS2d 595, 404, NE2d 718; Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404, 165 NYS2d 498, 144 NE2d 387). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Matter of Redemption Church of Christ v Williams, 84 AD2d 648, 649, 444 NYS2d 305; Greenberg v Manlon Realty, 43 AD2d 968, 969, 352 NYS2d 494)." (Winegrad v New York University Medical Center, 64 NY2d 851 at 853).

In the instant case, the plaintiffs have failed to sustain their initial burden of establishing their entitlement to judgment as a matter of law.

As noted by the court in Burghardt v. Cmaylo, 40 AD3d 568 at 569: "The defendant admits that he violated the Vehicle & Traffic Law by turning left from the center lane (see VTL § 1160). This violation constitutes negligence per se (Jones v. Radeker, 32 AD3d 494, 820 NYS2d 321) but does not necessarily lead to the conclusion that his action was a proximate cause of the accident (see Baldwin v. Degenhardt, 82 NY2d 867, 609 NYS2d 563, 631 NE2d 569; Koziol v. Wright, 26 AD3d 793, 794, 809 NYS2d 350). Additionally, there may be more than one proximate cause of an accident. Since the defendant may be totally at fault, not at all at fault, or partially at fault, the plaintiff failed to meet his initial burden of establishing his entitlement to judgment on the issue of liability as a matter of law, and the motion should have been denied (see Scibelli v. Hopchick, 27 AD3d 720, 810 NYS2d 924; see generally Alvarez v. Prospect Hosp., 68 NY2d 320, 324, 5008 NYS2d 923, 501 NE2d 572)."

Even if evidence is submitted to show that defendant Jaison Thompan was traveling the wrong way on a one-way street in violation of VTL § 1127, such evidence does not preclude a finding that negligent conduct by the plaintiff driver contributed to the accident. Cox v. Nunez, 23 AD3d 427. Here, plaintiff's affidavit does not establish that she was free from comparative negligence. Scibelli v. Hopchick, 27 AD3d 720. No information is given as to her rate of speed at the time that she approached and entered the intersection or as to what, if anything, she observed just prior to the accident. On the papers submitted by plaintiffs, this court cannot conclude as a matter of law that no condition existed requiring the plaintiff driver to reduce her speed or keep a more careful lookout upon entering the intersection. She was not authorized to

"blindly and wantonly" enter the intersection. Nuziale v. Paper Transport of Green Bay, Inc., 39 AD3d 833. No evidence has been submitted to show the plaintiff driver's freedom from comparative negligence.

Accordingly, the motion by plaintiffs is denied.

Dated:February 22,2008

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HON. DAVID ELLIOT