SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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NATASHIA A. MALCOLM,

Plaintiff,

-against-

ANNIE M. FONG-SAM and VAILLANT FONG-SAM,

Defendants..

MICHELE M. WOODARD, J.S.C.
TRIAL/IAS Part 16
Index No.: 13873/07
Motion Seq. No.: 03

DECISION AND ORDER

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Paper Read on this Motion:

Defendants' Notice of Motion for Leave to Reargue	03
Plaintiff's Affirmation in Opposition	xx
Defendants' Reply Affirmation	xx

Defendants move by Notice of Motion for leave to reargue the determination of the court in granting a prior motion by Plaintiff on the issue of liability.

Plaintiff commenced this action for personal injuries allegedly sustained in an automobile collision that occurred on March 30, 2007 at or about 3:00 p.m. at the intersection of Surprise Street and Dougherty Avenue, Elmont, N.Y. Plaintiff contends the Defendants' vehicle, operated by Annie M. Fong-Sam and owned by co-Defendant Vaillant Fong-Sam, ran a stop sign. Defendants allege the Plaintiff, operating the vehicle, was speeding at the time of the collision. Defendants contend there is significant discovery still outstanding in that the Plaintiff has not yet been deposed (nor allegedly has she had an independent medical examination by Defendants' physicians). Defendants argue that discovery must be completed before the issue of speeding and potential comparative negligence by Plaintiff can be fully explored. Plaintiff argues the Defendants' vehicle had the stop sign, and the Defendants' vehicle had to stop and yield to Plaintiff's vehicle.

Of course, a driver that has the right of way is entitled to assume the other driver would

obey the traffic laws requiring the other driver to yield (*Platt v Wolman*, 29 AD3d 663 [2d Dept 2006]).

VTL § 1180(a), 1180(e) does not mandate that a driver reduce his or her speed at every intersection, but only when warranted by the conditions presented (*Wilke v Price*, 221 AD2d 846 [3d Dept 1995]).

Plaintiff in her affidavit in support (see Exhibit A annexed to Defendants' motion) merely states she was driving her vehicle eastbound on Surprise Street and while traveling straight, she, was struck by the Fong-Sam vehicle when the Fong-Sam vehicle "ran" the stop sign. There is no indication of the speed of Plaintiff's vehicle nor a more detailed picture of what happened, from Plaintiff's perspective.

A person operating a vehicle on a street governed by a stop sign is required to bring the vehicle to a stop, and once having done so, to yield to vehicles on the intersecting thoroughfare operating with the right of way; a failure to yield constitutes negligence as a matter of law; the vehicle faced with a stop sign is required to stop and remain stationery until it was clear to proceed across the intersection (*Marcel v Chief Energy Corp.*, 38 AD3d 502 [2d Dept 2007]; *see Friedberg v Citiwide Auto Leasing, Inc.*, 22 AD3d 522 [2d Dept 2005]).

The driver of the vehicle with the stop sign is required to see the oncoming traffic through the proper use of his or her senses (*Bongiovi v Hoffman*, 18 AD3d 686[2d Dept 2005]).

Under the law of comparative negligence, a driver who lawfully enters an intersection may still be found partially at fault for an accident if he or she fails to use reasonable care to avoid a collision with another vehicle in the intersection (*Romano v 202 Corp.*, 305 AD2d 576 [2d Dept 2003]) since a driver with the right of way has a corresponding duty to use reasonable care to

avoid a collision (*Mateiasevici v Daccordo,* 34 AD3d 651 [2d Dept 2006]).

Speeding by the driver with a right of way (here, the Plaintiff had the right of way) raises issues as to the "clear" right of way. A speeding vehicle on the right of way route negates and/or distorts to some degree the "correct" view of oncoming traffic by proper use of the senses of the driver of the yielding vehicle (here, Ms. Fong-Sam), i.e., the driver of the yielding vehicle which has a more difficult time of judging when it is safe to proceed.

Deposition testimony can assist in determining the speed of the various vehicles involved (*see Barile v Carroll*, 280 AD2d 988 [4d Dept 2001]; *Vogel v Gilbo*, 276 AD2d 977 [3d Dept 2000]).

As noted in a very recent case by the Appellate Division, Second Department, *Rotondi v Rao*, 49 AD3d 520 (2d Dept 2008), discusses a similar scenario as the one faced herein. An accident occurred at an intersection wherein the Defendant Rao's vehicle was faced with a stop sign at the intersection. There was no traffic control device (traffic signal, stop sign, etc.) for the other Defendant's vehicle, operated by one Curatolo. Plaintiff was a passenger in the Rao vehicle. The Appellate Division, Second Department, found the Curatolo vehicle, which had the right of way, had the duty to use reasonable care to avoid a collision. The court also found the deposition testimony of Curatolo did not eliminate all issues of fact as to whether Curatolo was operating his vehicle in excess of the speed limit, and, if so, whether such conduct contributed to a collision since the Court found there can be more than one proximate cause of the collision.

In the matter before this Court, a potential scenario is much the same. Driver Annie Fong-Sam had the traffic sign. Plaintiff had the right of way. Ms. Fong-Sam stated she stopped for the stop sign. Ms. Fong-Sam stated Plaintiff's vehicle was speeding after Plaintiff's vehicle moved

around a school bus (see Exhibit B, ¶ ¶ 2 and 3 annexed to Defendants' motion).

A determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence (*Ruttura & Sons Construction Co. v J. Petrocelli Construction, Inc.*, 257 AD2d 614 [2d Dept 1999]).

Thus, the denial of summary judgment because discovery remains outstanding requires a showing that the request for additional discovery is calculated to yield facts that would warrant the denial of summary judgment (*Town of Brookhaven v Mascia*, 38 AD3d 758 [2d Dept 2007]). The Defendants have made such a showing. The issue of the speed of Ms. Malcolm's vehicle is important to the issue of any possible comparative negligence.

Also, the credibility of witnesses, the reconciliation of conflicting statements, a determination of which statements should be accepted and which rejected, the truthfulness and accuracy of the testimony, whether contradictory or not, are issues for the trier of the facts (*Lelekakis v Kamamis*, 41 AD3d 662 [2d Dept 2007]; *Pedone v B & B Equipment Co., Inc.*, 239 AD2d 397 [2d Dept 1997]). Currently, the record reflects a "she said, she said" scenario. The deposition of the Plaintiff could fill in the gaps in the facts herein so that a full assessment of the Defendants' "speeding" theory could be examined.

A motion to reargue is addressed to the sound discretion of the court which decided the prior motion and said motion may be granted upon a showing that the court overlooked or misapprehended the facts or the law or for some other reason mistakenly arrived at its earlier decision (*Long v Long*, 251 AD2d 631 [251 AD 2d 631]).

Having reviewed its prior determination and the papers submitted herein, this Court

concludes that discovery should be completed before the issue of liability is resolved herein.

It is hereby **ORDERED**, that the parties shall appear on June 30, 2008 at 9"30 a.m. to resolve any outstanding discovery issues (deposition of Plaintiff, affidavits of any witnesses, IMEs, etc.).

This constitutes the **DECISION** and **ORDER** of the Court.

DATED: June 19, 2008
Mineola, N.Y.

ENTER:

HON. MICHELE M. WOODARD
J.S.C.

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