Short Form Order

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

COPY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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JOSEPH ARNOUX, MARLENE ARNOUX and JOSIE VIXAMAR,

Plaintiffs,

-against-

MARY L. DOWD,

Defendant.

----------X

INDEX NO.: 11436/2006
CALENDAR NO.: 07-01660-MV
MOTION DATE: 1/28/2008
MOTION NO.: 001 MD
002 XMD

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DEFENDANT'S ATTORNEY:
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Upon the following papers numbered 1 to 59 read on this motion and cross-motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1-24 ; Notice of Cross Motion and supporting papers 25-31 ; Answering Affidavits and supporting papers 32-34; 35-41 ; Replying Affidavits and supporting papers 42-56; 57-59 ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by defendant for summary judgment dismissing the first and second causes of action in the complaint on the basis that plaintiffs Joseph Arnoux and Marlene Arnoux did not sustain a "serious injury" as defined in Insurance Law § 5102 (d), is denied; and it is further

ORDERED that the cross motion by the plaintiff on the counter claim, Joseph Arnoux, for summary judgment dismissing the second and third causes of action in the complaint on the basis that plaintiffs Marlene Arnoux and Josie Vixamar did not sustain a "serious injury" as defined in Insurance Law § 5102 (d), and for partial summary judgment dismissing the counterclaim on the basis that defendant bears sole liability for the accident, is determined as set forth below.

This is an action to recover damages for serious personal injuries allegedly sustained by plaintiffs as a result of a motor vehicle accident which occurred at the intersection of Park Avenue and Pulaski Road, Town of Huntington, New York on December 31, 2005. The accident allegedly happened when the vehicle owned and operated by defendant made a left-hand turn in front of the vehicle that was being operated by plaintiff Joseph Arnoux, and in which plaintiffs Marlene Arnoux and Josie Vixamar were riding as passengers. Defendant now moves for summary judgment dismissing the first and second causes of action in the complaint on the basis that plaintiffs Joseph Arnoux and Marlene Arnoux did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). Plaintiff on the counterclaim, Joseph Arnoux, cross moves for summary judgment dismissing the second and third causes of action in the complaint on the basis

that plaintiffs Marlene Arnoux and Josie Vixamar did not sustain a "serious injury" as defined in Insurance Law § 5102 (d), and for summary judgment dismissing the counterclaim on the basis that defendant bears sole liability for the accident.

Turning to the threshold issues, Insurance Law § 5102 (d) defines "serious injury" as "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]).

It is for the court to determine in the first instance whether a prima facie showing of "serious injury" has been made out (*Tipping-Cestari v Kilhenny*, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). The initial burden is on the defendant "to present evidence, in competent form, showing that the plaintiff has no cause of action" (*Rodriguez v Goldstein,* 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once defendant has met the burden, plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (*Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]). Such proof, in order to be in a competent or admissible form, shall consist of affidavits or affirmations (*Pagano v Kingsbury,* 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the nonmoving party, here, the plaintiffs (*Cammarere v Villanova,* 166 AD2d 760, 562 NYS2d 808 [3d Dept 1990]).

In support of this motion and with respect to plaintiff Joseph Arnoux, defendant submits the pleadings; the plaintiffs' bill of particulars; the affirmed report of defendant's examining radiologist, Melissa Sapan Cohn, M.D.; the affirmed report of defendant's examining orthopedist, Joseph P. Stubel, M.D.; and the affirmed report of defendant's examining neurologist, Richard A. Pearl, M.D. Plaintiffs claim, in their bill of particulars, that Mr. Arnoux sustained tears of the superior labrum, biceps tendon and infraspinatus of the right shoulder; cervical and lumbar disc herniations; and cervical and lumbar radiculopathy. Plaintiffs also claim that Mr. Arnoux is partially disabled as a result of his injuries. Additionally, plaintiffs claim that Mr. Arnoux sustained a serious injury in the categories of a permanent loss of use, a permanent consequential limitation, a significant limitation and a non-permanent injury.

In her affirmed report dated April 2, 2007, Dr. Cohn states that she reviewed the MRI studies of plaintiff's cervical spine, lumbosacral spine and right shoulder dated February 17, 2006. Dr. Cohn's findings with respect to the MRI studies of plaintiff's cervical spine include circumferential disc bulging with mild flattening of the ventral aspect of the thecal sac; disc herniations; disc desiccation; and a normal marrow signal. She opined that these studies showed cervical disc bulges and herniations which were associated with underlying degenerative changes which were chronic and unrelated to trauma. Dr. Cohn's findings with respect to the MRI studies of plaintiff's lumbosacral spine include circumferential disc bulging at L5-S1 and disc dessication. She opined that these studies showed no evidence of an acute trauma-related injury. Dr. Cohn's findings with respect to the MRI studies of plaintiff's right shoulder include supraspinatus tendinosis with a partial tear at the insertion into the greater tuberosity; partial tearing of the infraspinatus tendon; partial tearing of the infraspinatus tendon; partial tearing of the long head of the biceps tendon; a superior labral tear; and acromioclavicular joint hypertrophy. Dr. Cohn opined that these studies showed chronic degeneration of the rotator cuff and supraspinatus tendon, but that the exact time of the labral tear could not be completely ascertained even though these findings were associated with chronic shoulder disease.

In his report dated April 18, 2007, Dr. Stubel states that he performed an independent orthopedic examination of plaintiff on that date, and his findings include upper and lower body reflexes that were bilaterally symmetrical and "2+"; a normal motor exam; and a negative straight leg raising test. He also observed that plaintiff's cervical extension, flexion, bilateral rotation and bilateral lateral flexion were to 45, 45, 80 and 45, with the normal ranges being 45, 45, 80 and 45 degrees. Additionally, he recorded that plaintiff's lumbar forward bending, bilateral lateral flexion, and lateral rotation were 90, 30 and 60, with the normal ranges being 90, 30 and 60 degrees. Moreover, he noted that plaintiff's right shoulder "forward bending," internal rotation, external rotation, abduction and extension were to 150, 80, 80, 150 and 30 degrees, with the normal ranges being 150, 80, 80, 150 and 30 degrees. Dr. Stubel opined that plaintiff had sustained causally-related sprains of the neck, back and right shoulder as a result of the accident, but that there were no objective signs of disability.

In his report dated April 25, 2007, Dr. Pearl states that he performed an independent neurological examination of plaintiff the prior day, and his findings include a motor exam that was "5/5" in all extremities with normal tone; DTR's that were "2+" and symmetrical; and a normal gait. He also recorded that plaintiff's cervical flexion, extension, and lateral rotation were to 60, 0 to 75 and 80 degrees, with the normal ranges being 60, 0 to 75 and 80 degrees. Additionally, he observed that plaintiff's lumbar flexion, extension and lateral bending were to 80, 25 and 30 degrees, with the normal ranges being 80, 25, and 30 degrees. Moreover, he recorded that plaintiff complained of pain upon palpation of the paraspinal muscles in the lumbar region. Dr. Pearl opined that plaintiff sustained a sprain of the lumbosacral spine but that there were no objective findings to indicate a neurological injury.

Defendant failed to make a prima facie showing that Mr. Arnoux did not sustain a serious injury in the categories of a permanent consequential limitation and a significant limitation as the reports of doctors Stubel and Pearl fail to rule out the existence of limitations in plaintiff's cervical spine range of motion (*see*, *Sanon v Moskowitz*, 44 AD3d 926, 843 NYS2d 510 [2d Dept 2007]). Whereas Dr. Stubel considered 45 degrees to be the normal range of cervical extension, flexion and bilateral rotation, Dr. Pearl considered 0 to 75 and 60 degrees to be the normal range,

thus raising triable issues of fact. Further, whereas Dr. Cohn concluded that Mr. Arnoux's MRI studies showed chronic degeneration of the rotator cuff and supraspinatus tendon, her equivocal statement that she could not determine the exact time of the labral tear in plaintiff's right shoulder, combined with Dr. Stubel's acknowledgment of a causally related right shoulder injury, raises an additional issue of fact (*c.f.*, *Nix v Xiang*, 19 AD3d 227, 798 NYS2d 5 [1st Dept 2005]). Accordingly, as defendant failed to meet her burden as to Mr. Arnoux, the Court is not required to consider the sufficiency of the plaintiffs' opposing papers (*see*, *Zamaniyan v Vrabeck*, 41 AD3d 472, 835 NYS2d 903 [2d Dept 2007). Moreover, since the Court has found the existence of triable issues of fact with respect to one category of serious injury, it need not consider whether the proof submitted by defendant establishes a prima facie showing with respect to the other statutory categories (*see*, *Cesar v Felix*, 181 AD2d 852, 581 NYS2d 411 [2d Dept 1992]).

In support of this motion and with respect to plaintiff Marlene Arnoux, defendant submits the pleadings; the affirmed report of defendant's examining radiologist, Melissa Sapan Cohn, M.D.; the affirmed report of defendant's examining orthopedist, Joseph P. Stubel, M.D.; and the affirmed report of defendant's examining neurologist, Richard A. Pearl, M.D. Plaintiffs claim, in their bill of particulars, that Mrs. Arnoux sustained chondromalacia of the patella of the left knee; a lumbar disc bulge; and radiculopathy of the cervical and lumbar spine. Plaintiffs also claim that Mrs. Arnoux is partially disabled as a result of her injuries. Additionally, plaintiffs claim that Mrs. Arnoux sustained a serious injury in the categories of a permanent loss of use, a permanent consequential limitation, a significant limitation and a non-permanent injury.

In her report dated April 2, 2007, Dr. Cohn states that she performed an independent radiological review of the MRI studies of plaintiff's lumbosacral spine dated February 10, 2006 and left knee dated February 17, 2006. Dr. Cohn's findings with respect to plaintiff's MRI of the lumbosacral spine include normal disc spaces; disc dessication; and mild disc bulging at L3-4. Dr. Cohn opined that these studies showed mild degenerative changes at the L3-4 level and no evidence of disc herniation or trauma-related injury. Dr. Cohn's findings with respect to the MRI studies of plaintiff's left knee include mild chondromalacia of the patella; mild synovitis with cystic changes along the anterior aspect of the joint; and no joint effusion. Dr. Cohn opined that these studies showed mild degenerative changes of the left knee, but that there was no evidence of acute trauma-related injuries.

In his report dated April 18, 2007, Dr. Stubel states that he performed an independent orthopedic examination of plaintiff on that date, and his findings include upper and lower body reflexes that were bilaterally symmetrical and "2+"; a normal motor exam; and a normal straight leg raising test. He also observed that plaintiff's cervical extension, flexion, bilateral rotation and bilateral lateral flexion were to 45, 45, 80 and 45 degrees, with the normal ranges being 45, 45, 80, and 45 degrees. Additionally, he recorded that plaintiff's lumbar forward bending, bilateral lateral flexion and bilateral lateral rotation were to 90, 30 and 60 degrees, with the normal ranges being 90, 30 and 60 degrees. Dr. Stubel found that plaintiff had a full extension and flexion of the left knee to 150 degrees, with normal being 150. Moreover, Dr. Stubel noted that plaintiff missed about two and one-half months of work from her factory job as a data entry supervisor at the time of the accident. Dr. Stubel opined that plaintiff sustained causally-related sprains of the neck, back and left knee, but that there were no objective signs of disability with respect to the accident.

In his report dated April 25, 2007, Dr. Pearl states that he performed an independent neurological examination of plaintiff the prior day, and his findings include DTR's that were "2+" and symmetrical; a motor exam that was "5/5" in all extremities with normal tone; a negative straight leg raising test; and a normal gait. He also observed that plaintiff's cervical flexion, extension and lateral rotation were to 60, 0 to 75 and 80 degrees, with the normal ranges being 60, 0 to 75 and 80 degrees. Additionally, he recorded that plaintiff's lumbar flexion, extension and lateral bending were to 80, 25 and 30 degrees, with the normal ranges being 80, 25 and 30 degrees. Dr. Pearl opined that plaintiff sustained a lumbosacral sprain and that she had a pre-existing history of a degenerative condition of the spine.

In support of the branch of the cross motion for summary judgment dismissing the second cause of action, plaintiff on the counterclaim submits, among other things, the affirmation of counsel which adopts the factual and legal arguments set forth in the affirmation of counsel in support of the main motion. Counsel argues that plaintiff on the counterclaim should be granted summary judgment dismissing the second cause of action on the basis that plaintiff Marlene Arnoux did not sustain a serious injury as defined in Insurance Law § 5102.

Defendant and plaintiff on the counterclaim failed to make a prima facie showing that Ms. Arnoux did not sustain a serious injury in the categories of a permanent consequential limitation and a significant limitation as the reports of doctors Stubel and Pearl fail to rule out the existence of limitations in plaintiff's cervical spine range of motion (*see*, *Sanon v Moskowitz*, *supra*). Whereas doctors Stubel considered 45 degrees to be the normal range of cervical extension, flexion and bilateral rotation, Dr. Pearl considered 0 to 75 and 60 degrees to be the normal range, thus raising triable issues of fact. Accordingly, as defendant and plaintiff on the counterclaim failed to meet their burden as to Ms. Arnoux, the Court is not required to consider the sufficiency of the plaintiffs' opposing papers (*see*, *Morales v Theagene*, 2007 N.Y. App. Div. LEXIS 11054, 848 NYS2d 325 [2d Dept 2007]). Moreover, since the Court has found the existence of triable issues of fact with respect to one category of serious injury, it need not consider whether the proof submitted by defendant and plaintiff on the counterclaim establishes a prima facie showing with respect to the other statutory categories (*see*, *Cesar v Felix*, *supra*).

In support of the branch of the cross motion for summary judgment dismissing the third cause of action on behalf of plaintiff Josie Vixamar, plaintiff on the counterclaim submits, inter alia, plaintiffs' bill of particulars; the affirmed report of defendant's examining orthopedist, Joseph P. Stubel, M.D.; and the affirmed report of defendant's examining neurologist, Richard A. Pearl, M.D. Plaintiffs claim, in their bill of particulars, that Ms. Vixamar sustained a cervical disc bulge and radiculopathy of the cervical and lumbar spine. Plaintiffs also claim that Ms. Vixamar is partially disabled as a result of her injuries. Additionally, plaintiffs claim that Ms. Vixamar sustained a serious injury in the categories of a permanent loss of use, a permanent consequential limitation, a significant limitation and a non-permanent injury.

In his report dated April 27, 2007, Dr. Stubel states that he performed an independent orthopedic examination of plaintiff on that date, and his findings include reflexes that were "2+" and bilaterally symmetrical; normal motor strength; a negative Tinel's sign at both carpal tunnels; and a negative straight leg raising test. He also observed that plaintiff's cervical extension, flexion, bilateral rotation and bilateral lateral flexion were to 45, 45, 80 and 45 degrees, with the

normal ranges being 45, 45, 80 and 45 degrees. Additionally, he recorded that plaintiff's lumbar forward bending, bilateral lateral flexion and lateral rotation were to 90, 30 and 60 degrees, with normal being 90, 30 and 60 degrees. He further noted that plaintiff reported to him that she had missed three months of work after the accident. Dr. Stubel opined that plaintiff sustained, inter alia, sprains of the neck and back, but that her injuries had resolved without permanency. He also concluded that plaintiff was not disabled and that she was capable of performing the activities of her daily living and usual work.

In his affirmed report dated April 25, 2007, Dr. Pearl states that he performed an independent neurological examination of plaintiff the prior day, and his findings include a motor examination that was "5/5 " in all extremities with normal tone; DTR's that were "2+" and symmetrical; and an intact sensory system. He also observed that plaintiff's cervical flexion, extension and lateral rotation were 60, 0 to 75 and 80 degrees, with normal being 60, 0 to 75 and 80 degrees. Additionally, he recorded that plaintiff's lumbar flexion, extension and lateral bending were to 80, 25 and 30 degrees, with normal being 80, 25 and 30 degrees. Furthermore, he noted that plaintiff reported pain upon palpation of the paraspinal muscles in the cervical and lumbosacral region. Dr. Pearl opined that plaintiff sustained a cervical and lumbosacral sprain, but that there were no objective findings to indicate a neurological disability.

Plaintiff on the counterclaim failed to make a prima facie showing that Ms. Vixamar did not sustain a serious injury in the categories of a permanent consequential limitation and a significant limitation as the reports of doctors Stubel and Pearl fail to rule out the existence of limitations in plaintiff's cervical spine range of motion (*see*, *Ayotte v Gervasio*, 81 NY2d 1062, 601 NYS2d 463 [1993]; *Sanon v Moskowitz*, *supra*). Whereas doctors Stubel considered 45 degrees to be the normal range of cervical extension, flexion and bilateral rotation, Dr. Pearl considered 0 to 75 and 60 degrees to be the normal, thus raising triable issues of fact. On this finding alone, plaintiff on the counterclaim failed to meet his prima facie burden. Moreover, the cross moving papers do not adequately address Ms. Vixamar's claim, clearly set forth in her bill of particulars, that she sustained a medically determined injury or impairment of a non-permanent nature within the meaning of the Insurance Law § 5012 (d) (*see*, *DeVille v Barry*, 41 AD3d 763, 839 NYS2d 216 [2d Dept 2007]). Doctors Stubel and Pearl, who conducted their examinations of the plaintiff more than fifteen months after the accident occurred, did not relate any of their findings to this category of serious injury for the period of time immediately following the accident (*see*, *Thai v Butt*, 34 AD3d 447, 824 NYS2d 131 [2d Dept 2006]). In any event, Dr. Stubel recorded plaintiff's claim that she had lost three months from work subsequent to the accident (*see*, *Nembhard v Delatorre*, 16 AD3d 390, 791 NYS2d 144 [2d Dept 2005]). Since plaintiff on the counterclaim failed to meet his initial burden of establishing a prima facie case with respect to the above noted categories of serious injury alleged by Ms. Vixamar, it is unnecessary to consider whether he met his burden as to the other statutory categories (*see*, *Cesar v Felix*, *supra*), or whether plaintiffs' papers in opposition to the motion are sufficient to raise a triable issue of fact (*see*, *Avrashkova v Paul*, 44 AD3d 976, 844 NYS2d 445 [2d Dept 2007]).

Turning to the issue of liability, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The party opposing the motion must produce

evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Rebecchi v Whitmore,* 172 AD2d 600, 568 NYS2d 423 [1991]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.,* 168 AD2d 610, 610, 563 NYS2d 449 [1990]). However, mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue of fact (*Gilbert Frank Corp. v Federal Ins. Corp.*, 70 NY2d 966, 525 NYS2d 793 [1988]; *Rebecchi v Whitmore, supra*).

Vehicle and Traffic Law § 1110 provides that the driver of a vehicle shall obey the instructions of any official traffic control device, and Vehicle and Traffic Law § 1111 (d) (1) provides, in part, that all vehicles must stop when faced with a steady circular traffic signal before entering an intersection, and remain standing until an indication to proceed is shown. Vehicle and Traffic Law § 1111 (a) (1) provides that vehicles faced with a steady circular green signal may proceed straight through or turn right or left at an intersection, unless a sign provides otherwise. Also, Vehicle and Traffic Law § 1140 (a) provides that the driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection from a different highway. Additionally, Vehicle and Traffic Law § 1140 (b) provides that, when two vehicles enter an intersection from different highways at approximately the same time, the driver of the vehicle on the left shall yield the right of way to the vehicle on the right. Further, Vehicle and Traffic Law § 1141 provides, in relevant part, that the driver of a vehicle intending to turn 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. Moreover, it is well-settled that a driver with the right of way is entitled to anticipate that another driver will obey the traffic laws that require him to yield the right of way (*Bongiovi v Hoffman*, 18 AD3d 686, 687, 795 NYS2d 354 [2d Dept 2005]).

Mr. Arnoux testified that he was proceeding northbound on Park Avenue at Pulaski Road at the time of the accident. After stopping for a red light, he proceeded when the circular light turned green. When he was about halfway through the intersection, defendant, who was proceeding southbound and who was only a few feet away, turned in front of him without stopping. Although Mr. Arnoux steered to the right and applied his brakes he was unable to avoid the collision. The front of the defendant's vehicle impacted the front of his vehicle. Upon impact, the air bags in his car deployed and his vehicle was pushed to the right and then into another vehicle which was stopped. Mr. Arnoux further testified that the repair costs to his vehicle totaled about $13,000.

Ms. Arnoux testified that the vehicle that her husband was driving was impacted by defendant's vehicle. Defendant's vehicle did not stop after it entered the turning lane. Approximately one second passed from the time that she saw defendant's vehicle until the time of impact. Ms. Arnoux further testified that the front of the defendant's vehicle hit the front of her husband's vehicle.

Defendant testified that she was proceeding south on Park Avenue at the time of the accident and that she had an unobstructed view. When she first saw plaintiff's vehicle it was about 20 feet away. She stopped for a red light at the intersection of Park Avenue and Pulaski Road, and then rolled forward with her wheels turned to the left upon seeing a circular green light.

When the impact occurred, the front of her vehicle had already crossed the double yellow lines and she was in the northbound lane of traffic. While defendant testified that she was not sure what lane of traffic or direction of travel that she was in at the time of the impact, she subsequently admitted that no portion of plaintiffs' vehicle came into her lane of traffic prior to the accident, and that the accident happened entirely in the northbound lanes. Defendant also admitted that she did not see plaintiffs' vehicle move into any other lane of traffic prior to the impact. She was issued tickets at the scene but did not remember the details of same. Defendant further testified, however, that she was arrested at the scene after refusing a blood alcohol test and that she was eventually convicted of a "D.U.I."

Plaintiff on the counterclaim is entitled to partial judgment on the issue of liability as a matter of law as the record shows that defendant's failure to stop and her sudden entry into plaintiff's lane of traffic was the sole proximate cause of the accident and that he legally proceeded with the right of way (*see, Aristizibal v Oswaldo*, 37 AD3d 503, 829 NYS2d 701, *lv denied*, 9 NY3d 808, 844 NYS2d 784 [2007]; *Loweth v Cusak*, 273 AD2d 283, 708 NYS2d 720 [2d Dept 2000]). Defendant, who negligently entered the intersection by rolling forward with her wheels turned, "had a duty to see that which under the facts and circumstances [s]he should have seen by the proper use of her senses" (*see, Lester v Jolicofur*, 120 AD2d 574, 574, 502 NYS2d 61 [2d Dept 1986]). In opposition to this branch of the cross motion, defendant has failed to raise a triable issue of fact whether plaintiff was in any way at fault in the happening of the accident or whether he could have done anything to avoid the collision (*see, Shapiro v Munoz*, 28 AD3d 638, 813 NYS2d 755 [2d Dept 2006]; *Loweth v Cusak, supra*). Since plaintiff had the right of way, he was entitled to anticipate that defendant would obey the traffic laws which required her to yield (*see, Berner v Koegel*, 31 AD3d 591, 819 NYS2d 89 [2d Dept 2006]). Further, plaintiff was not required to anticipate that defendant would suddenly cross over into his lane of travel (*see, Jones v Fraser*, 265 AD2d 773, 698 NYS2d 57 [3d Dept 1999]). Additionally, defendant was convicted of a "D.U.I" in connection with the accident (*see, O'Neill v Hamill*, 22 AD3d 691, 253 NYS2d 289 [2d Dept 1985]; *see also, Cordero v City of New York*, 112 AD2d 914, 492 NYS2d 430 [2d Dept 1964]). Accordingly, the counterclaim asserted against Joseph Arnoux and sounding in contributory negligence is dismissed. Upon searching the record, plaintiffs are granted reverse partial summary judgment against defendant on the basis that she bears sole responsibility for the accident and the case is to proceed to a determination of damages (*see*, CPLR 3212 [b], [c]).

Plaintiffs are directed to serve a copy of this order with notice of its entry upon the Calendar Clerk of this Court. Upon such service, the Calendar Clerk is directed to place this matter on the Calendar Control Part Calendar for the next available trial date.

Dated: 7/2/08

HON. PAUL J. BAISLEY, JR.
J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**