SHORT FORM ORDER

INDEX No. 04-13591
CAL. No. 09-00296-MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 5-22-09
MNEMONIC: # 003 - MG

CATHERINE FRETTA-PAEZ and MICHAEL PAEZ, Plaintiffs, - against - BENJAMIN L. SIMPSON and ELISABETH SIMPSON, Defendants.	CERTILMAN BALIN ADLER & HYMAN, LLP Attorneys for Plaintiffs 90 Merrick Avenue, 9th Floor East Meadow, NY 11554 RICHARD T. LAU & ASSOCIATES Attorneys for Defendants P.O. Box 9040 Jericho, NY 11753-9040

Upon the following papers numbered 1 to 15 read on this motion for summary judgment and to strike the 2nd affirm. defense; Notice of Motion/ Order to Show Cause and supporting papers (003) 1 - 10 ; Notice of Cross-Motion and supporting papers ; Answering Affidavits and supporting papers 11-13 ; Replying Affidavits and supporting papers 14-15 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (003) by the plaintiffs, Catherine Fretta-Paez and Michael Paez, pursuant to CPLR §3212 for an order granting summary judgment on the issue of liability in this action is granted in plaintiffs' favor; and for a further order striking the defendants' second affirmative defense asserted in their answer is granted and the second affirmative defense is dismissed with prejudice; and the plaintiff is directed to serve a copy of this order with Notice of Entry upon all parties and upon the Clerk of the Calendar Department who is directed to place this action on the ready trial calendar for a trial on damages.

This is a negligence action wherein the plaintiffs seek damages personally and derivatively for personal injuries allegedly sustained in a motor vehicle accident by Catherine Fretta-Paez (hereinafter plaintiff) which occurred at or near the intersection of School Street and Main Street in the hamlet of Bridgehampton, Town of Southampton, County of Suffolk, State of New York (hereinafter Main Street, Bridgehampton) on June 10, 2001 when the vehicle owned by Michael Paez and operated by the plaintiff was struck in the rear by the vehicle operated by Benjamin Simpson (hereinafter defendant) and owned by Elisabeth Simpson.

The plaintiffs now seek summary judgment on the issue of liability and dismissal of the second affirmative defense asserted by the defendants in their answer.

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. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form sufficient to require a trial of any issue of fact (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [1979]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]).

In support of this motion the plaintiffs have submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, answer, third-party summons and complaint, third-party answer, verified bill of particulars and supplemental verified bill of particulars with plaintiff's medical records annexed thereto; an uncertified copy of a police MV 104 accident report; and copies of the transcripts of the examinations before trial (hereinafter EBT) of the plaintiff and Michael Paez, both dated November 11, 2005, and Benjamin Simpson, dated September 6, 2005.

In opposing this motion, the defendants have submitted an attorney's affirmation and a copy of the EBT of the defendant, dated September 6, 2005.

Initially, the Court notes that the unsworn MV-104 police accident report constitutes hearsay and is inadmissible (*see*, ***Lacagnino v Gonzalez***, 306 AD2d 250, 760 NYS2d 533 [2d Dept 2003]; ***Hegy v Coller***, 262 AD2d 606, 692 NYS2d 463 [2d Dept 1999]) and therefore fails to raise a triable issue of fact.

At her EBT the plaintiff testified that she was involved in a motor vehicle accident on June 10, 2001 about 11:30 pm, a clear dry evening. She was operating a Saab convertible (hereinafter vehicle), which also was occupied by a front seat passenger, in a westbound direction on Main Street (Montauk Highway) in Bridgehampton, a two lane road. Because there was a chill in the air she decided to raise the top on her vehicle. After she drove her vehicle through the intersection, she signaled and pulled the vehicle into a parking spot to her right in front of a church. She brought her vehicle to a full stop after parallel parking it, and applied the emergency brake. The top of the vehicle began to rise, and after about twenty seconds, it had risen half way when her vehicle was struck in the rear by the defendant's

vehicle with a heavy impact, pushing her vehicle forward about one car length. The rear of her vehicle at its trunk was damaged, and the front of the defendant's vehicle was damaged and leaking.

At his EBT the defendant testified that he was involved in an accident on June 10, 2001 around midnight outside of Bobby Van's Restaurant on Main Street, Bridgehampton while driving the co-defendant Elisabeth Simpson's vehicle. At the time he was traveling westbound on Main Street, Bridgehampton, a two-lane road with double yellow lines separating the travel lanes, with parking on either side. He stated the area was relatively well-lit at the time of the accident as it was in the middle of town. He described traffic as medium. He stated he couldn't be certain if his highest rate of speed on Montauk Highway was more than forty miles per hour. He did not recall if there were vehicles in front of him or behind him as he drove. He testified that he did not see the other vehicle involved in the accident until after the accident occurred. He stated that "someone actually put their bright beams on as if to flash or to signal me that my bright beams were on or some sort of retaliatory thing. And it momentarily blinded me." He couldn't say if he was blinded for more or less than five seconds. He stated he started to brake and was in an accident before he "could even have any other cognitive thoughts." He stated he couldn't recall if his right foot was on the brake pedal. He then testified that before the accident he was traveling about thirty miles per hour and when he saw the bright beams he put his foot on the brake pedal, shifted his head around to "search my visual field" and did not recall turning his steering wheel, and stated that the accident occurred within "a split second" of his applying his vehicle's brakes. The front right portion of his vehicle came into contact with the other vehicle with a "medium" impact. After the accident, the front of his vehicle was in the shoulder area of the road and he did not know where the back right of his vehicle was. He stated the other vehicle was on the shoulder after the accident.

When a driver of a motor vehicle approaches another automobile from the rear, he or she is bound to maintain a safe rate of speed and has the duty to keep control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (***Chepel v Meyers,*** 306 AD2d 235, 762 NYS2d 95 [2nd Dept 2003]; ***Power v Hupart,*** 260 AD2d 458, 688 NYS2d 194 [2nd Dept 1999]; *see also,* Vehicle and Traffic Law § 1129[a]). Moreover, a rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability regarding the operator of the moving vehicle and imposes a duty of explanation on the operator of the moving vehicle to excuse the collision by providing a non-negligent explanation, such as a mechanical failure, a sudden stop of the vehicle ahead, and unavoidable skidding on a wet pavement or some other reasonable excuse (*see,* ***Rainford v Han,*** 18 AD3d 638; 795 NYS2d 645 [2nd Dept 2005]*;* ***Thoman v Rivera***, 16 AD3d 667, 792 NYS2d 558 2nd Dept [2005]; ***Power v Hupart,*** *supra*).

It is only in rare cases that a trial court is justified in holding that the acts of parties are negligent per se. The questions of negligence and contributory negligence are usually questions of fact to be determined as such (***Kellegher v Forty-second Street, Manhattanville and St. Nicholas Avenue Railroad Company,*** 171 NY 309 [1902]). "The standard to be applied in deciding a motion for judgment as a matter of law was whether the

trial court could find that by no rational process could the trier of fact base a finding in favor of the party opposing the motion" (***Burns v Mastroianni, etc,*** 173 AD2d 754, 570 NYS2d 629 [2nd Dept 1991]). A driver is negligent in failing to see that which under the facts and circumstances he should have seen by the proper use of his senses (***Burns v Mastroianni, etc***, supra; ***Lesster v Jolicofur et al,*** 120 AD2d 574, 502 NYS2d 61 [2nd Dept 1986]).

In this action the plaintiff has demonstrated prima facie entitlement to summary judgment as her vehicle was stopped and parked in a parking space while its convertible roof was being raised when the defendant's vehicle struck her vehicle from the rear. The burden then shifted to the defendant to establish any issues of fact so as to preclude the granting of summary judgment to the plaintiff (***Zuckerman v City of New York,*** supra), and to come forward with a non-negligent explanation concerning the cause of the action. Here the defendant has failed to raise a triable issue of fact and has failed to present a non-negligent explanation for the accident.

Although the defendant claims that basically he was confronted with an emergency situation because an oncoming vehicle driver flashed its headlights at him, this is a situation of the defendant's own making and the defendant's position is unsupported by any evidence (*see*, ***Johnson v Phillips,*** 261 AD2d 268, 690 NYS2d 545 91st Dept 1999]). The defendant had been aware for the three to four weeks he was using his co-defendant Elisabeth Simpson's vehicle that people were flashing their vehicle's headlights at his vehicle or "brighting" it a lot. However, the defendant did not tell his co-defendant Elisabeth Simpson about the vehicle's headlights before the accident and did nothing to ascertain the condition of the headlights of the vehicle that he was operating on a regular basis. Additionally, he failed at any time to observe the plaintiff's vehicle parked on the side of the road in a parking space in a relatively well-lit area prior to the occurrence of the accident. Because the accident occurred almost immediately when the oncoming vehicle's headlights were flashed at him, he had failed to observe what was there to be seen, i.e. that the plaintiff's vehicle was parked in a parking spot ahead to the right of the defendant's vehicle. Therefore, as a matter of law, the Court finds that the defendants have failed to present a non-negligent explanation for the accident and the striking of the plaintiff's parked vehicle (*see, generally,* ***Soto-Maroquin v Mellet et al,*** 2009 Slip Op 4357. 2009 NY App Div Lexis 4146 [Supreme Court of New York, Appellate Division, 1st Dept]), and that the defendant's conduct was the sole proximate cause of the accident (*see,* ***Pandley v Parikh, et al,*** 57 AD3d 634, 870 NYS2d 367 [2nd Dept 2008]).

Accordingly, motion (003) by the plaintiffs for summary judgment on the issue of liability in their favor is granted.

The plaintiffs also seek to strike the second affirmative defense raised in the defendants' answer based upon the plaintiff's alleged culpable conduct, negligence and assumption of the risk. The defendants have not proffered any evidence or demonstrated that the plaintiff was negligent in parking her vehicle in a designated parking space along the

shoulder of the road or that the plaintiff contributed in any way to the occurrence of the accident, or that the plaintiff assumed the risk that the defendant would drive his motor vehicle off the road, striking the plaintiff's vehicle in the rear.

Accordingly, the second affirmative defense asserted by the defendants in their answer is dismissed with prejudice.

Dated: July 1, 2009

J.S.C.

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