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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x **TRIAL TERM PART: 45**

JULIET R. TUDOR,

INDEX NO.: 17439/08

Plaintiff,

MOTION DATE:12-4-09
SUBMIT DATE:1-6-10
SEQ. NUMBER - 001

-against-

PAUL YETMAN,

Defendant.

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The following papers have been read on this motion:

Notice of Motion, dated 10-21-09.....1
Affirmation in Opposition, dated 12-15-09.....2
Reply Affirmation, dated 12-21-09.....3

The motion by the plaintiff for summary judgment pursuant to CPLR 3212 on the issue of liability is denied.

This is an action for personal injuries arising as a result of an automobile accident that occurred on May 13, 2008, at the intersection of May Street and Grand Avenue in Nassau County. Plaintiff was exiting from a gas station on Grand intending to go south on Grand when, after traveling about 100 feet and into the intersection of May, she was struck on the front driver's side by defendant's vehicle which was stopped in the left northbound lane of Grand intending to turn left into May which required him to cross over plaintiff's southbound

lane of travel. In their examinations before trial, which are attached to plaintiff's moving papers, the plaintiff testified that as she waited to exit the gas station, she saw defendant's vehicle waiting to turn left, and the defendant testified that prior to turning, he was watching the southbound lane and did not see plaintiff's vehicle until while into his turn, he was about to strike her.

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957); *Bhatti v. Roche*, 140 AD2d 660 (2d Dept. 1988). It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v. Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82 AD2d 168 (3d Dept. 1981). Even where there are some issues in dispute in the case which have not been resolved, the existence of such issues will not defeat a summary judgment motion if, when the facts are construed in the nonmoving party's favor, the moving party would still be entitled to relief, *Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept.1993).

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines,* 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v. Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993). If a party defends a motion by resort to CPLR 3212(f), that is, the party has a defense sufficient to defeat the motion but that the facts cannot yet be stated, that party must be able to make some showing that such facts do in fact exist; mere hope that discovery may reveal those facts is insufficient. *Companion Life Ins. Co. v All State Abstract Co.*, 35 AD3d 519 (2d Dept. 2006). Nor can mere speculation serve to defeat the motion. *Pluhar v Town of Southhampton,* 29 AD3d 975 (2d Dept. 2006); *Ciccone v Bedford Cent. School Dist.*, 21 AD3d 437 (2d Dept. 2005).

However, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but

simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett*, 187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James v. Albank*, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries,* Inc., 198 AD2d 330 (2d Dept. 1993).

The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. *See Village Bank v Wild Oaks Holding, Inc.*, 196 AD2d 812 (2d Dept. 1993); *Barclays Bank of N.Y. v Sokol,* 128 AD2d 492 (2d Dept. 1987), such as when the affidavit in opposition clearly contradicts earlier deposition testimony. *Central Irrigation Supply v Putnam Country Club Assocs., LLC,* 27 AD3d 684 (2d Dept. 2006).

When a movant's submission in support of the motion establishes entitlement to summary judgment, the burden is shifted to the opposing party to rebut the case by submitting proof in evidentiary form showing the existence of triable issues of fact. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Friends of Animals v. Associated Fur Manufacturers, Inc.*, 46 NY2d 1065 (1979). In this instance, plaintiff has failed to make a *prima facie* showing of entitlement to relief, however, even if such a showing can be said to have been attained, defendant has demonstrated that there are issues of fact.

As there was no traffic control devices governing his movement, defendant was required to comply with VTL § 1141:

> The driver of a vehicle intending to turn left 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.

Defendant, as the driver of the turning vehicle, was obligated to yield the right of way to approaching opposite traffic and a vehicle so approaching is entitled to rely on compliance by the turning vehicle. *Gabler v. Marly Bldg. Supply Corp.*, 27 AD3d 519 (2d Dept. 2006). While defendant was, under the statute, required to use caution, plaintiff was also obligated to use reasonable care not to hit the turning car if such could be avoided. *Bogorad v. Fitzpatrick*, 38 AD2d 923 (1st Dept. 1972) *aff'd* 31 NY2D 984 (1973).

As to plaintiff, her movements were governed by VTL §1143 which states:

> The driver of a vehicle about to enter or cross a roadway from any place other than another roadway, shall yield the right of way to all vehicles approaching on the roadway to be entered or crossed.

A driver exiting a driveway and entering into traffic without yielding, violates the foregoing statute and is negligent. A driver is negligent when an accident occurs because he or she has failed to see that which, through the proper use of her senses he or she should have seen. *Ferrara v. Castro*, 283 AD2d 392, 393 (2d Dept. 2001); *Palumbo v. Holtzer*, 235 AD2d 409 (2d Dept. 1997). Under the circumstances of this case, the defendant was entitled to anticipate that the plaintiff would obey the traffic laws that required her to yield. *Lallemand v. Cook*, 23 AD3d 533 (2d Dept. 2005).

Here, the parties' deposition testimony raise issues of fact as to whose actions were negligent. (*Disla v Murillo*, 117 Misc3d 114[A] [Supreme Court Queens Co. 2007]). These issues include whether defendant was negligent in making a left turn despite the approach of plaintiff's vehicle and whether plaintiff was negligent in failing to use appropriate caution in the operation of her vehicle, and the allocation of fault, if any, on the part of each driver (*Bogorad v Fitzpatrick, supra*; *Young v Mauch,* 268 AD2d 583; *cf Spivak v Erickson*, 40

AD3d 962 [2nd Dept. 2007]).

Based on the foregoing, there are discrepancies and gaps in the accounts of the parties which preclude the grant of summary judgment. *Nuziale v. Paper Transport of Green Bay Inc.*, 39 AD3d 833 (2d Dept. 2007) and *Munter v. Hubert*, 34 AD3d 544 (2d Dept. 2006).

Thus plaintiff has not established a *prima facie* entitlement to judgment as a matter of law. *Cf Casanova v. New York City Transit*, 279 AD2d 495 (2d Dept. 2001); *Diasparra v. Smith,* 253 AD2d 840 (2nd Dept. 1998).

Plaintiff testified that as she was exiting the gas station, she was observing the defendant's vehicle that was about 100 feet to her right, she exited and the accident happened in the middle of the intersection. Defendant testified that he was northbound intending to turn left at the intersection, looked in the opposite direction but didn't see plaintiff's vehicle until he was about to hit her. This testimony raises issues of fact as to whether both or only one driver was at fault and if both, the degrees thereof.

Plaintiff has submitted the police accident report. CPLR §4518(a) allows records made in the regular course of any business to be introduced into evidence when it was in the regular course of such business to make them. However, the Court of Appeals in *Johnson v. Lutz*, 253 NY 124 (1930) read into this rule a requirement that the person making the police report be the witness or that the person supplying the information to the entrant be under a business duty to do so (p. 128). In effect, each participant in the chain producing the record must be acting within the course of regular business conduct. *See St. Lawrence County Dept. of Social Services v. Leon RR*, 48 NY2d 117 (1979).

Here, the accident not having been witnessed by the police officer and there being no business duty for either plaintiff or defendant to report to the police officer, *see Cover v. Cohen*, 61 NY2d 274 (1984), the accident report as a whole is not admissible as a business record. In the alternative, the statements of the parties in a police report are admissible as admissions of a party and may be considered. *Chemical Leaman Tank Lines, Inc. v. Stevens*, 21 AD2d 556 (3rd Dept. 1964); *Kelly v. Wasserman*, 5 NY2d 425 (1959); *Toll v. State*, 32 AD2d 47 (3rd Dept. 1969). Here, there are no statements contained in the police report, hence it is not competent evidence of its contents.

The motion is denied.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: January 6, 2010

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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