SHORT FORM ORDER

INDEX No. 07-24226
CAL. No. 10-00294-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 3-26-10
ADJ. DATE 5 -12-10
Mot. Seq. # 003 - MG
#004 - XMG

NANCY HARTMANN and FRANCIS HERMUS, Plaintiffs, - against - ALICE M. HAUGE, JASON L.H. BLAKE and RUTHANNE M. HARTMANN, Defendants.	SIBEN & SIBEN, LLP Attorneys for Plaintiffs 90 East Main Street Bay Shore, New York 11706 ABAMONT & ASSOCIATES Attorneys for Defendants Hauge & Blake 200 Garden City Plaza, Suite 400 Garden City, New York 11530 DAVID J. SOBEL, P.C. Attorney for Defendant Hartmann 811 West Jericho Turnpike, Suite 105W Smithtown, New York 11787

Upon the following papers numbered 1 to 25 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13 ; Notice of Cross-Motion and supporting papers 14 - 19 ; Answering Affidavits and supporting papers 20 - 21; 22 -23 ; Replying Affidavits and supporting papers 24-25 ; Other ____; (~~and after hearing counsel in support and opposed to the motion~~); it is

ORDERED that this motion (003) by the defendant, Ruthanne M. Hartmann, pursuant to CPLR §3212 for summary judgment because said defendant bears no liability for the occurrence of the accident of August 26, 2006 is granted and the complaint and all cross-claims against her are dismissed with prejudice; and it is further

ORDERED that this cross-motion (004) by Nancy Hartmann and Francis Hermus (hereinafter plaintiffs), pursuant to CPLR §3212, for an order granting summary judgment on liability in favor of the plaintiffs is granted because, as a matter of law, the defendant Jason L.H. Blake (hereinafter Blake) was the sole proximate cause of the accident of August 26, 2006, and it is further

ORDERED that the plaintiffs are directed to serve a copy of this order with notice of entry upon all parties and on the Clerk of the Calendar Department, Supreme Court, Riverhead, New York within thirty days of the date of this order, and the Clerk is directed to place this matter on the ready trial calendar for a trial on damages.

The plaintiffs seek damages for injuries allegedly sustained by them arising out of an automobile accident which occurred at 10 p.m. on August 26, 2006 on County Road 101 at its intersection with Dunton Avenue, East Patchogue, Town of Brookhaven, County of Suffolk, State of New York. The plaintiffs were passengers in the vehicle owned and operated by Ruthanne M. Hartmann (hereinafter R. Hartmann) when it was involved in a collision with the vehicle operated by Blake and owned by Alice M. Hauge (hereinafter Hauge). R. Hartmann has asserted a cross-claim against Hauge and Blake, who have also asserted a cross-claim against R. Hartmann.

R. Hartmann seeks summary judgment dismissing the complaint because she bears no liability for the accident. R. Hartmann argues that her vehicle was traveling northbound on County Road 101 when Blake, whose vehicle was traveling southbound on County Road 101, made a left turn in front of her vehicle and failed to yield the right of way, thus causing the accident to occur.

The plaintiffs seek an order granting them summary judgment on the issue of liability as they were passengers in the vehicle operated by R. Hartmann and bear no liability in the occurrence of the accident.

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...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [1979]) and must assemble, lay bare and reveal her proof in order to establish that the matters set forth in her 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 motion (003), R. Hartmann has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, answer and bill of particulars; an uncertified copy of an MV 104 Police Accident report; copies of the transcripts of the examinations before trial (hereinafter EBT) of R. Hartmann, Blake and the plaintiffs.

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]).

The co-defendants Hauge and Blake oppose these motions with an attorney's affirmation.

At his examination before trial (hereinafter EBT) Blake testified that he was operating a 2003 Acura owned by Hauge, his grandmother, with her permission, when his vehicle was involved in the accident on August 26, 2006 at the intersection of County Road 101 and Dunton Avenue, East Patchogue. He described County Road 101 as a four-lane roadway with two northbound lanes and two southbound lanes, separated by a grassy median. Dunton Avenue intersected as a T-intersection with County Road 101. His vehicle was traveling southbound on County Road 101. Traffic conditions were light and he thought it might have been drizzling rain that evening. At some point he moved his vehicle from the right southbound lane into the left southbound lane and entered his vehicle into a dedicated left turn lane to turn left onto Dunton Avenue. He did not remember if there were any vehicles ahead of him in that turning lane and he did not remember if he brought his vehicle to a stop before he began to make his left turn. He had turned on his vehicle's directional signal and it was traveling about fifteen miles per hour and was already turning left to cross over the northbound travel lanes of County Road 101 when he saw R. Hartmann's vehicle thirty car lengths down the road with its headlights on. He did not know the length of R. Hartmann's vehicle and stated he did not know the speed his vehicle was traveling when he saw R. Hartmann's vehicle. He did not know how fast R. Hartmann's vehicle was traveling or whether it was in the right or left northbound travel lane when he saw it. He did not know if it was more or less than five seconds or more or less than two seconds until the accident occurred. He stated that it was a short time. He also stated, "I feel like I was in the intersection. Like I feel I was making the turn, like I had time." He did not know in which lane the impact occurred, but thought it might have been the right northbound lane. The front and back of his vehicle on the passenger side sustained damage in the accident. He thought his vehicle was struck by R. Hartmann's vehicle in its right bumper by the trunk. The front of R. Hartmann's vehicle was damaged. He did not apply his vehicle's brakes prior to the impact, and did not remember if he heard the screech of tires on pavement or a horn, or if he sounded his vehicle's horn.

At her EBT R. Hartmann testified that she was operating a 2006 Acura which she owned. Her mother, plaintiff Nancy Hartman, was in the rear passenger seat and plaintiff Francis Hermus was in the front passenger seat. The weather conditions were clear and dry. She said her vehicle was traveling northbound on County Road 101 for less than a mile in the right lane about forty five miles per hour, the speed limit. There were no vehicles in the right lane traveling ahead of her vehicle, and three vehicles had passed her in the left lane traveling northbound when her vehicle was about fifty feet from the intersection with Dunton Avenue. She was looking straight ahead as she was driving and did not see the vehicle operated by Blake until just prior to the impact when she saw the Blake vehicle's headlights just five feet or less from her vehicle shining into it as the Blake vehicle was crossing over the left northbound travel lane of County Road 101. No portion of the Blake vehicle

was in the right northbound lane when she saw it. She blew her horn. She stated the driver's front quarter panel "broad side" of her vehicle was struck by the front of the Blake vehicle, causing her vehicle to veer to the right. Her headlights were turned on and operational at the time of the accident. She knew Blake as he was a friend of her first cousin, Joseph Provenzano.

At her EBT Nancy Hartmann testified that the accident occurred at about 10:00 p.m. on a Saturday night and it was a beautiful evening. She was a rear seat passenger in her daughter's vehicle. Her daughter was driving on County Road 101 in the right travel lane. Traffic conditions were light. The accident occurred at the intersection with North Dunton Avenue. She heard her daughter blow the vehicle's horn, she felt the vehicle's brakes and then the impact. She does not remember seeing anything and couldn't say if she saw the headlights of the car that struck them.

Francis Hermus testified to the effect that he was a passenger in the front seat of R. Hartmann's car on the evening of August 26, 2006 when it was involved in an accident on County Road 101 at Dunton Avenue which made a T-intersection with 101. The weather was clear and dry. Traffic conditions were light. They were in the right northbound travel lane of County Road 101 which was flat and straight for about an eighth of a mile prior to the intersection and there were no obstructions blocking his view. He was looking out the passenger window when he heard R. Hartmann sound the vehicle's horn and he felt the vehicle's brakes. He turned his head, saw the headlights coming towards his left, and a second later the impact occurred to the left front fender of their vehicle with the right front of the Blake vehicle. He did not remember if any portion of their vehicle crossed through the intersection of Dunton and 101 when he saw the headlights.

As a matter of law, R. Hartmann has established prima facie entitlement to summary judgment dismissing the complaint and cross-claims asserted against her. It has been established that Blake violated Vehicle & Traffic Law §1141 when he made a left turn from southbound County Road 101 into the path of her vehicle as it legally proceeded with the right of way and that R. Hartmann was entitled to anticipate that Blake would obey the traffic laws which required him to yield to her vehicle (see, ***Gabler v Marly Building Supply Corp., et al,*** 27 AD3d 519, 813 NYS2d [2nd Dept 2006]). The Vehicle & Traffic Law §1141 provides that the driver of a vehicle intending to turn to the 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 (***Kiernan v Edwards, et al,*** 97 AD2d 750, 468 NYS2d 381 [2nd Dept 1083]; ***Mass et al v Leinker et al,*** 46 AD2d 383, 362 NYS2d 552 [2nd Dept 1975]; ***Bogorad et al v Fitzpatrick,*** 38 AD2d 923, 329 NYS2d 874 [1st Dept 1972]). Failure to yield the right of way in such circumstances is negligence (***Hamby v Bonventre et al,*** 36 AD2d 648, 318 NYS2d 178 [3rd Dept 1971]). There is unrefuted evidence that the R. Hartmann vehicle was operated with its headlights on. Although Blake saw the R. Hartmann vehicle approaching the intersection from the opposite direction, he proceeded to make the left turn to cross over the northbound travel lanes of County Road 101, Blake's actions were the sole proximate cause of the accident (see, ***Joyce v Stockwell,*** 32 AD2d 698, 299 NYS2d 1011 [3rd Dept 1969]) as he attempted to cross in front of the Hartmann vehicle when it was hazardous to do so (***Smalley v McCarthy et al,*** 254 AD2d 478, 679 NYS2d 406 [2nd Dept 1998]; ***Hernandez v Joseph et al,*** 143 AD2d 632, 533 NYS2d 13 [2nd Dept 1988]). The defendants Hauge and Blake, have failed to raise a triable issue of fact to preclude summary judgment.

Accordingly, motion (003) by R. Hartmann for summary judgment dismissing the complaint and all cross-claims is granted and the complaint and all cross-claims are dismissed with prejudice; and the cross-motion (004) for summary judgment in favor of the plaintiffs against Hauge and Blake is granted.

Dated: June 8, 2010

J.S.C.

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION