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SHORT FORM ORDER

INDEX No. 07-34366
CAL. No. 09-02095-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 6-7-10
ADJ. DATE
MNEMONIC: # 002 - MG

LEISA S. HAMILTON,

Plaintiff,

- against -

LANCE D. VERDEROSA and JOY A. VERDEROSA,

Defendants.

PORTNOY & PORTNOY
Attorneys for Plaintiff
315 Walt Whitman Road
Huntington Station, New York 11746

RICHARD T. LAU & ASSOCIATES
Attorneys for Defendants
P.O. Box 9040
Jericho, New York 11753-9040

Upon the following papers numbered 1 to 29 read on this motion RRRR; Notice of Motion/ Order to Show Cause and supporting papers (002) 1 - 23 ; Notice of Cross-Motion and supporting papers ; Answering Affidavits and supporting papers 27-29 ; Replying Affidavits and supporting papers 24-26 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (002) by the defendants, Lance D. Verderosa and Joy A. Verderosa, pursuant to CPLR §2221(d) granting leave to reargue that part of motion (001) pursuant to CPLR §3212 on the issue of liability is granted, and upon reargument, summary judgment dismissing the complaint on the issue of liability is denied.

In motion (001), the Court overlooked that part of the application by the defendants for summary judgment dismissing the complaint on the issue of liability and limits reargument solely to that issue.

This is a personal injury action to recover damages allegedly sustained by Leisa S. Hamilton now Leisa Edwards (hereinafter plaintiff), when she was involved in a motor vehicle accident on November 26, 2004, on Route 231 (also known as Deer Park Avenue) at or near its intersection Nicolls Road, Town of Babylon, County of Suffolk, State of New York, with the defendants' motor vehicle operated by Lance D. Verderosa (hereinafter Verderosa) and owned by Joy A. Verderosa.

The defendants seek summary judgment dismissing the complaint on the basis that the defendants bear no liability for the occurrence of the accident.

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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 produced, 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 application the defendants submit a copy of the prior motion and opposing papers including, but not limited to, an attorney's affirmation; a copy of the pleadings and verified bill of particulars; copies of the transcripts of the examinations before trial (hereinafter EBT) of the plaintiff, dated December 19, 2008, and Verderosa, dated May 15, 2009; and a copy of the MV 104 Police Accident Report.

In opposing this motion, the plaintiff has submitted, inter alia, an attorney's affirmation; a copy of the MV 104 Police Accident Report; a copy of the deposition of the non-party witness, William Fitzgerald, dated July 23, 2009.

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]).

At her EBT, the plaintiff testified that she was involved in a motor vehicle accident on November 26, 2004 while operating a Nissan Sentra owned by her cousin, Sandra McFarlane. She had driven that vehicle on prior occasions and was alone in the vehicle at the time of the accident which occurred on Deer Park Avenue at its intersection with Nicolls Road. Her vehicle was traveling on Nicolls Road less than thirty miles per hour when she came to a traffic light at the intersection of Nicolls Road and Deer Park Avenue. The light was green when she saw it from two blocks back. As her vehicle approached the light, it turned yellow, then red. She slowed down her vehicle while the light was turning and came to a stop on Nicolls Road. To her left was a left turn lane. There was one lane for vehicles to go straight or to turn right. It was her intention

to make a right turn from Nicolls Road onto Deer Park Avenue if there were no cars coming. She described Deer Park Avenue as having two southbound travel lanes with a shoulder to the right for cars turning from Deer Park Avenue into the gas station or other stores on the right. She looked to her left and saw one vehicle coming and waited. As there were no other cars coming from her left, she was able to make the right turn. There were no vehicles turning in front of her from Deer Park Avenue as she turned into the right travel lane. She was already onto Deer Park Avenue and her entire vehicle had traveled past the first entrance of the gas station when the impact occurred to the front of her vehicle on the driver's side. She did not see the defendants' vehicle turning from the other side of the road prior to the impact.

At his EBT, Verderosa testified that he was driving his mother's vehicle, a blue 2004 Honda Accord when he was involved in an automobile accident. He was either going to a gas station or to the Waldbaum's shopping center located on Deer Park Avenue about 200 feet south of the intersection with Nicolls Road. His vehicle was traveling northbound on Deer Park Avenue, described as two lanes in his direction with a left turn lane. He stated there was a traffic signal at the intersection of Deer Park Avenue and Nicolls Road. He had braked his vehicle to a stop for about one minute at the traffic light which controlled the northbound turning lane traffic. He stated that there was a green light for the east and west traffic so he had to wait for the turn light to turn green before he could turn his vehicle. Upon his traffic light turning green, he made a U-turn from northbound Deer Park Avenue from the left turn lane into the right southbound lane of Deer Park Avenue. While he was stopped at the intersection, he did not see the other vehicle involved in the accident. There were no vehicles in front of his car while he was in the left turn lane. He looked to the right to make sure traffic stopped crossing the road, and made sure no one was heading southbound, and glanced to his left and then made his U-turn. He did not see any vehicles coming from his left before he made the U-turn into the right southbound travel lane. Upon impact, he stated that his vehicle was in the right southbound travel lane of Deer Park Avenue for about three seconds. The impact occurred to his passenger side front fender and bumper and the driver's side front fender bumper of the other vehicle. He never saw the other vehicle before impact.

At his EBT, William Fitzgerald testified that he was a witness to an automobile accident which occurred on November 26, 2004 about midday at the intersection of Route 231 and Nicolls Road, Deer Park, involving two vehicles. He was operating a vehicle in a northbound direction on Route 231, described as two lanes northbound and a left turn lane in the northbound direction. At its intersection with Nicolls Road, there was a traffic light which had a left turn arrow for traffic on Route 231. He was in the left turn lane on Route 231, stopped for the red traffic light behind the vehicle being driven by his friend, the defendant Verderosa. It was their intention to turn into the gas station on the west side of Route 231. He stated the vehicle operated by Verderosa stopped for the red light in that left turn lane, but the light for traffic traveling straight ahead in the northbound direction was green. He saw the other vehicle on Nicolls Road at the traffic light facing eastbound for about thirty seconds, stopped. When the light turned green for the left turn traffic, the light for the northbound traffic turned red. Verderosa began to make his vehicle's left turn into a U-turn, when the other vehicle, which had its right directional on, made a turn at the

same time. The accident occurred about five seconds after the Verderosa vehicle went into motion at the green light. He stated that there were no signs prohibiting a U-turn. Verderosa made a U-turn from the northbound turn lane of Route 231 into the far right southbound lane of Route 231, which is where the accident occurred. The Verderosa vehicle had traveled about twenty feet from when it went into motion and the other vehicle had traveled about ten or fifteen feet from the time it went into motion. The front right fender of the Verderosa vehicle and the left front of the bumper of the other vehicle made contact.

"A defendant making a "U" turn is required to use a higher degree of care than is necessary in the case of a vehicle going directly along a highway. In other words, the degree of care required must be commensurate with the increased danger resulting from the operation of his vehicle in this manner.... While a plaintiff driving along a roadway has the right of way, this does not give him an absolute right to continue to proceed along once he becomes aware, or under the exercise of due care should have become aware, of the presence of the defendant's vehicle making a "U" turn on the roadway" (***Condon v Epstein***, 8 Misc2d 574, 168 NYS2d 189 [City Court of the City of New York, Trial Term, New York County 1957]. In ***Condon v Epstein***, supra, the Court opined that the accident was caused mainly by the negligence of the defendant who made a U-turn without the due care required in the circumstances and obviously without granting the right of way to the plaintiff. The Court further stated that the plaintiff was not wholly blameless as he failed to see the defendant's vehicle making the U-turn and that the plaintiff's failure to observe the entire roadway contributed to this accident. Here there are factual issues concerning whether Verderosa safely made a U-turn into the right southbound travel lane of Deer Park Avenue and whether or not his actions proximately caused the accident, thus precluding summary judgment.

Verderosa testified that he had a green light in his favor. The plaintiff testified that she had a red light and stopped and then proceeded to turn right when the intersection was clear. The fact that a motorist may have a green light or a "go" signal in his or her favor does not give him or her an absolute right to proceed without regard to others who are in the intersection, whether they be motorists or pedestrians. Traffic control signals at intersection should not excuse the use of reasonable care and caution on the part of motorists. The conduct of both drivers approaching an intersection controlled by a traffic light must be consistent with reasonable care under the circumstances by exercising forbearance and caution regardless of the light (***Costalas et al v City of New York et al,*** 143 AD2d 573, 532 NYS2d 868 [1st Dept 1988]). Here there are factual issues concerning whether the defendant used reasonable care and caution at the intersection precluding summary judgment in his favor.

Drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident (***Fillippazzo v Santiago,*** 277 AD2d 419, 716 NYS2d 710 [2nd Dept 2000]). In the instant action, the plaintiff and the defendant Verderosa both testified that neither saw the other's vehicle turning prior to the impact. Verderosa testified that the impact occurred in the right southbound travel lane after his vehicle crossed over the left southbound travel lane of Deer Park Avenue. The plaintiff testified she was already traveling in the right southbound travel lane of Deer Park Avenue and her entire vehicle had driven past the first entrance to the gas station when the impact occurred between her vehicle and the defendants' vehicle. Accordingly, there are factual issues concerning whether the plaintiff and defendant each

breached his/her duty to observe what should have been observed and the duty to exercise reasonable care under the circumstances, thus precluding summary judgment on liability.

William Fitzgerald was a long-time friend of Verderosa and it is argued that his testimony raises credibility issues. The Court is not to determine credibility, but is to determine whether arguably there exists a genuine factual issue, (CPLR §3212(b); ***Washington v Delossantos et al,*** 44 AD3d 748, 843 NYS2d 186 [2nd Dept 2007]). In that there are genuine issues of fact raised concerning which lane or lanes the respective parties were in at the time of impact, and whether or not the defendant Verderosa safely made a U-turn and whether the plaintiff safely made a right turn on red, the defendants' application for summary judgment is precluded.

Accordingly, the defendants' application for summary judgment dismissing the complaint on the issue of liability is denied.

Dated: June 22, 2010

J.S.C.

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