SHORT FORM ORDER

INDEX No. 07-34983

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 1-13-10
Mot. Seq. # 001 - MG; CASEDISP

NANCY C. HADLEY and KENNETH B. HADLEY, Plaintiffs, - against - TOWN OF SOUTHAMPTON and MICHAEL S. LORENZ, Defendants.	JAKUBOWSKI, ROBERTSON, MAFFEI, GOLDSMITH & TARTAGLIA, LLP Attorneys for Plaintiffs 969 Jericho Turnpike St. James, New York 11780 DEVITT SPELLMAN BARRETT, LLP Attorneys for Defendants 50 Route 111 Smithtown, New York 11787

Upon the following papers numbered 1 to 33 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 12 - 23 ; Replying Affidavits and supporting papers 24 - 25 ; Other plaintiff's sur-reply 26 -31; defendants's opposition to plaintiff's sur-reply 32 - 33; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED this motion by defendants Town of Southampton and Michael Lorenz seeking summary judgment dismissing plaintiffs' complaint is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff Nancy Hadley as a result of a motor vehicle accident that occurred on August 21, 2006. The accident allegedly occurred when the vehicle owned by defendant Town of Southampton ("Southampton") and operated by defendant Michael Lorenz struck the vehicle operated by plaintiff as she attempted to make a left turn into a parking lot on State Route 24 ("Flanders Road") in Hampton Bays, New York. Plaintiff Kenneth Hadley also commenced an action for loss of services as a result of the injuries allegedly sustained by his wife, plaintiff Nancy Hadley.

Defendants now move for summary judgment on the basis that Nancy Hadley's failure to yield the right of way, in violation of Vehicle and Traffic Law §1141, was the sole proximate cause of the subject accident. Defendants, in support of the motion, submit a copy of the pleadings, copies of the

parties' deposition transcripts, a copy of the police motor vehicle accident report, and the affidavit of non-party witness Denise Renda. Plaintiffs oppose the instant motion on the ground that there are material issues of fact as to defendants' comparative negligence. Plaintiffs also assert that there can be more than one proximate cause of an injury, and that defendant Lorenz was negligent in failing to see Nancy Hadley's vehicle prior to the happening of the accident. Plaintiffs, in opposition to the motion, submit a copy of the pleadings, a copy of the parties' deposition transcript, and pictures of their damaged vehicle.

On a motion for summary judgment the court's function is to determine whether issues of fact exist not to resolve issues of fact or to determine matters of credibility; (*see* ***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]; ***Tunison v D.J. Stapleton, Inc.***, 43 AD3d 910, 841 NYS2d 615 [2007]; ***Kolivas v Kirchoff***, 14 AD3d 493, 787 NYS2d 392 [2005]; ***Scott v Long Is. Power Auth.***, 294 AD2d 348, 741 NYS2d 708 [2002]). A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v New York***, 49 NYS2d 557, 427 NYS2d 595 [1980]). In considering the motion, the evidence must be construed in the light most favorable to the non-moving party (*see* ***Doize v Holiday Inn Ronkonkoma***, 6 AD3d 573, 774 NYS2d 792 [2004]; ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2001]; ***Mosheyev v Pilevsky***, 283 AD2d 469, 725 NYS2d 206 [2001]). The motion should not be granted where the facts are in dispute, where different inferences may be drawn from the evidence, or where the credibility of parties or witnesses is in question (***Szczerbiak v Pilat***, 90 NY2d 553, 556, 664 NYS2d 252 [1997]; *see* ***Forrest v Jewish Guild for the Blind***, 3 NY3d 295, 786 NYS2d 382 [2004]; ***Dykeman v Heht***, 52 AD3d 767, 861 NYS2d 732 [2008]; ***Cameron v City of Long Beach***, 297 AD2d 773, 748 NYS2d 26 [2002]). The failure of the moving party to make such a prima facie showing requires denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Sheppard- Mobley v King***, 10 AD3d 70, 778 NYS2d 98 [2004]; ***Celardo v Bell***, 222 AD2d 547, 635 NYS2d 85 [1995]). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Zuckerman v New York***, *supra*). However, mere allegations, unsubstantiated conclusions, expressions of hope or assertions are insufficient to defeat a motion for summary judgment (*see* ***Zuckerman v City of New York***, *supra*; ***Blake v Guardino***, 35 AD2d 1022, 315 NYS2d 973 [1970]).

It is well settled that the driver of a vehicle intending to turn left within an intersection or driveway shall yield the right of way to any vehicle approaching from the opposite direction that is within the intersection or so close as to constitute an immediate hazard (*see* Vehicle and Traffic Law § 1141; *see also* ***Cohens v Hess***, 92 NY2d 511, 683 NYS2d 161 [1998]; ***Berner v Koegel***, 31 AD3d 591, 819 NYS2d 89 [2006]). However, the operator of a motor vehicle does have a right to assume that all drivers will obey the rules of the road and is not under a duty to anticipate that one will disobey the laws of vehicular operation (*see* ***Spivak v Erikson***, 40 AD3d 962, 86 NYS2d 676 [2007]; ***Jacino v Sugarman***, 10 AD3d 593, 781 NYS2d 663 [2004]; ***Schmall v Ryder***, 262 AD2d 476, 692 NYS2d 168 [1999]). Additionally, the law is well settled that the operator of a motor vehicle is under a duty to operate his vehicle with reasonable care, to be aware of any potential road hazards, and to see that which

under the circumstances he should have seen with the proper use of his senses (*see* ***Spatola v Gelco***, 5 AD3d 469, 773 NYS2d 101 [2004]; ***Stiles v County of Dutchess,*** 278 AD2d 304, 717 NYS2d 325 [2000]; ***Marsella v Sound Distrib. Corp.***, 248 AD2d 638, 670 NYS2d 559 [1998]).

Plaintiff Nancy Hadley testified at an examination before trial that on the day of the accident she was heading to the Port Jefferson office of her employer, Maryhaven Center of Hope, for their monthly quality assurance department meeting. Plaintiff testified that she was traveling northbound on Flanders Road when she was unable to switch lanes and missed her exit onto Sunrise Highway. Plaintiff testified that she continued to travel further north on Flanders Road "intending to go into a turnaround, stop, wait for traffic to clear, and then head back to the [Sunrise Highway] exit." She testified that she had traveled approximately two to three miles north when she spotted a parking lot on the southbound side of Flanders Road. She testified that there was a steady flow of traffic on Flanders Road the morning of the accident, but that she intended to make a left turn across the southbound traffic and into the parking lot. She testified that she was not sure if she came to a complete stop or merely slowed down in the northbound lane before she began executing her left turn across the southbound lane of traffic. Plaintiff testified that she turned her left directional signal on approximately 50 to 70 feet before making the left turn. Plaintiff testified that she positioned her vehicle in the "cut" of the road, and once there was a clearing in the traffic she began to turn left. Plaintiff testified that prior to executing her turn she saw a "white spec of dot of a vehicle in the distance" approximately two football fields away. However, she testified that she did not remember if she continued to see the "white spec of dot of a vehicle" as she began to make the left turn. She testified that the impact occurred immediately upon her execution of the left turn, and that she did not hear any horns or tires screeching prior to the impact. She testified that defendants' vehicle struck the right passenger side of her vehicle causing her airbags to deploy. Plaintiff further testified that as a result of the accident she sustained breaks to her collarbone, right humerus, pelvis, right and left ankles, and her second toe on her left foot.

Plaintiff Kenneth Hadley testified at an examination before trial that he is married to plaintiff Nancy Hadley and that he was not present when his wife had her accident. Plaintiff testified that he only became aware of the accident's occurrence when a police officer came to his home and informed him that his wife had been in an accident, and that she had been airlifted to Stony Brook University Hospital. He testified that he is unaware of any witnesses to the accident, and that he discovered that the accident had occurred with a Southampton Animal Control van when he went to the tow shop to check on his wife's vehicle and retrieve her eyeglasses. Plaintiff further testified that he was informed by the tow truck driver, an employee of Village Auto Body, that defendant Lorenz said "he was speeding and just did not see [her] before the accident."

Defendant Michael Lorenz testified at an examination before trial on behalf of defendants. Mr. Lorenz testified that he has been employed by Southampton as an animal control officer since 1987, and that he enforces local and state animal laws, as well as picking up stray animals and assisting with injured animals. Mr. Lorenz testified that he utilizes a vehicle as a regular part of his duties and that the vehicle, which is a van, is taken home with him every night. He testified that on the morning of the accident he was operating one of the vans and that he was heading to the Southampton Jackson Avenue office. He testified that the accident occurred in front of the old state trooper's barracks on Flanders Road and that traffic was light on the southbound side of Flanders Road. He testified that the speed limit

on Flanders Road at the site of the accident is 55 miles per hour and that he was traveling within the requisite speed limit. Mr. Lorenz testified that there were no vehicles traveling in front of him, but that there were vehicles traveling on the northbound side of Flanders Road. Mr. Lorenz testified that he saw plaintiff's vehicle a second before the accident happened and that plaintiff's vehicle was coming from "his left to his right, directly in front of him" when he first saw her vehicle. Mr. Lorenz testified that at the time of the accident approximately one-third of plaintiff's vehicle was in his lane of travel and that he did not see any directional signals on her vehicle. He testified that his view was not obstructed and that he was approximately 5 to10 feet away from plaintiff's vehicle when he first observed it. He testified that the front of his vehicle struck the right fender and door of plaintiff's vehicle. He testified that prior to the impact he did not hear any horn or tires screeching. Mr. Lorenz further testified that after the accident a woman handed him her business card with her name and number on it, and stated to him that she saw what happened, and that he passed the information to the police.

Nonparty witness Denise Renda states in her affidavit that on the day of the accident she was traveling southbound on Flanders Road directly behind defendants' vehicle. Ms. Renda states that she had been traveling behind defendants' vehicle for a few miles before the accident occurred, and that they were both traveling within the posted speed limit. Ms. Renda states that she observed a vehicle approaching from the opposite direction. She states that the vehicle then made a sudden and abrupt left turn directly into the path of defendants' vehicle, which resulted in a collision between the two vehicles. She states that the approaching vehicle did not yield the right of way to defendants' vehicle, and that the vehicle did not slow down or stop prior to making its sudden left turn across the southbound lane of Flanders Road.

Based upon the forgoing, defendants have demonstrated their prima facie entitlement to judgment as a matter of law by showing that plaintiff failed to yield the right of way in violation of Vehicle and Traffic Law §1141, and making a left turn directly into defendant Lorenzo's path of travel when it was unsafe to do so (*see* Vehicle and Traffic Law §1141, ***Aristizabal v Aristizabal***, 37 AD3d 503, 829 NYS2d 701 [2008]; ***Carabella v Saad***, 29 AD3d 618, 815 NYS2d 199 [2006]; ***Moreback v Mesquita***, 17 AD3d 420, 793 NYS2d 148 [2005]; ***Torro v Schiller***, 8 AD3d 364, 777 NYS2d 915 [2004]). Defendants have demonstrated that plaintiff was negligent, as a matter of law, when she failed to yield the right-of-way to the vehicle operated by defendant Lorenz (*see* ***Spivak v Erickson***, *supra;* ***Torro v Schiller***, *supra*; ***Agin v Rehfeldt***, 284 AD2d 352, 726 NYS2d 131 [2001]). Inasmuch as defendant Lorenz had the right-of-way, he was entitled to anticipate that plaintiff would obey the traffic laws requiring her to yield and allow his vehicle to pass prior to attempting to execute her left turn into the parking lot on the southbound side of Flanders Road (*see* ***Palomo v Pozzi***, 57 AD3d 498, 869 NYS2d 153 [2008]; ***Torro v Schiller***, *supra*; ***Casaregola v Farkouh***, 1 AD3d 306, 767 NYS2d 915 [2003]; ***Stiles v County of Dutchess***, *supra*).

Therefore the burden shifted to plaintiffs to come forward with evidence in admissible form to refute defendants' prima facie showing (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Zuckerman v New York***, *supra*). In opposition, plaintiffs failed to submit sufficient evidence in admissible form to raise a triable issue of fact (*see* ***Reiman v Smith***, 302 AD2d 510, 755 NYS2d 256 [2003]; ***Szczotka v Adler***, 291 AD2d 444, 737 NYS2d 121 [2002]). Plaintiffs have also failed to establish the existence of a triable issue of fact as to whether defendant Lorenz was

comparatively negligent in allegedly failing to brake, see that which he should have seen, or otherwise attempt to avoid the collision (*see* ***Berner v Koegel***, *supra*; ***Venuto v RCS Elec. Corp.***, 5 AD3d 672, 774 NYS2d 729 [2004]; ***Meretskaya v Logozzo***, 2 AD3d 599, 769 NYS2d 580 [2003]; ***Agin v Rehfeldt***, *supra*). Furthermore, contrary to plaintiffs' contention, the hearsay statement concerning the accident allegedly made to Mr. Hadley by the Village Auto Body tow truck driver, even if it were considered by the court, as to whether defendant Lorenz was speeding at the time of the accident, is speculative, and as such, is insufficient to defeat defendant's motion for summary judgment (*see* ***Carabella v Saad***, *supra*; ***Ithier v Harnden***, 13 AD3d 1204, 787 NYS2d 806 [2004]; ***Reiman v Smith***, *supra*; ***Szczotka v Adler***, *supra*). Accordingly, defendants' motion for summary judgment is granted.

Dated: 30 June 2010

J.S.C

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION