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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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LESLIE LUONGO ,

Plaintiff,

-against-

HOWARD R. WOLKIN and VELSEN GROUP, INC.,

Defendants.

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MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 12
Index No.: 006356-09
Motion Seq. Nos.: 01 & 02

DECISION AND ORDER

Papers Read on this Motion:

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Defendants' Notice of Motion	02
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In motion sequence number one, the plaintiff moves for summary judgment on the issue of liability.

In motion sequence number two, defendants Howard R. Wolkin ("Wolkin") and Velsen Group, Inc. ("Velsen") move for summary judgment on the issue of serious injury.

Plaintiff commenced this action for monetary damages due to injuries allegedly suffered in an automobile collision that occurred on December 11, 2007 at approximately 4:10 p.m. at the intersection of Sunrise Highway and Carol Drive, Massapequa Park, New York. It is not disputed that plaintiff was traveling southbound on Carol Drive, and the traffic signal controlling her travel was green. She alleges Wolkin, operating a vehicle owned by Velsen, ran a red light on Sunrise Highway in the westbound lane and struck her vehicle.

As to liability, Wolkin and Velsen contend that although plaintiff testified that she did not see

anything prior to the collision, plaintiff had a duty to enter the intersection and look left and right to see Wolkin's vehicle entering the intersection.

Wolkin did not recall if he was facing a red, yellow or green traffic signal (see Exhibit E, pg. 27 annexed to plaintiff's motion). Wolkin did recall seeing a car coming at him, and he, Wolkin, accelerated his vehicle to swerve around the vehicle to avoid the collision (p. 27).

Plaintiff testified she had a green traffic signal (see Exhibit D, pgs. 9, 20 annexed to plaintiff's motion).

Plaintiff testified that prior to impact she did not see any vehicles coming toward her (see Exhibit D, pg. 17 annexed to plaintiff's motion).

First, the court must address the timeliness of defendant's summary judgment motion on the issue of serious injury.

Plaintiff contends the Certification Order (see Exhibit A annexed to plaintiff's affirmation in opposition) indicates that all summary judgment motions must be made sixty (60) days from the filing of the Note of Issue or April 9, 2010. Here, the defendants' motion is dated June 18, 2010. Defendants contend the Preliminary Conference Order dated July 27, 2009 (see Exhibit A annexed to defendants' motion) is controlling in that it gives defendants ninety (90) days to make their summary judgment motion. Plaintiff argues the Certification Order dated January 22, 2010 (see plaintiff's affirmation in opposition, pg. 2, ¶ 1) giving 60 days after the Note of Issue is filed is controlling and the defendants should have made their motion by June 8, 2010. The court must agree.

The "good cause" requirement requiring a summary judgment motion to be made no later than 120 days or less after the filing of the Note of Issue except with leave of the court on good cause shown requires a showing of good cause for the delay in making the motion, i.e., a satisfactory explanation for

the untimeliness, rather than simply permitting meritorious, non-prejudicial filings, however tardy; no excuse at all, or a perfunctory excuse, cannot be "good cause." *(Brill v City of New York*, 2 NY3d 648 [2004]; *Polhamus v Foulke*, 20 AD3d 888 [4th Dept 2005]).

Of course, a court may set a date after which no summary judgment motion may be made that is less than 120 days as long as the date is at least thirty (30) days after the Note of Issue is filed (*Rossi v Arnot Ogden Med. Ctr.*, 252 AD2d 778 [3d Dept 1998]). Here, the parties were given a sixty (60) day limitation to file their motions after the Note of Issue was filed (see Exhibit A annexed to plaintiff's affirmation in opposition). The "good cause" requirement still applies. As noted, defendants contend the ninety-day limitation for filing a summary judgment motion as set forth in the Preliminary Conference Stipulation and Order (see Exhibit A annexed to defendants' motion) is controlling and should be utilized to determine the timeliness of their summary judgment motion.

The court must disagree. Here, the Preliminary Conference Stipulation is dated July 27, 2009, is not "so ordered" and is "preliminary," a rough schedule to get the ball rolling with a little "preliminary" direction. The Certification Order is dated almost six months later, January 22, 2010, and indicates the matter is certified for trial. It is also signed by the court. Thus, this later, more specific directive of sixty (60) days is controlling. It tells the parties the herein matter is ready to go to the trier of fact, and if they wish to seek a summary determination per CPLR §3212, they have sixty (60) days from the filing of the Note of Issue to do so.

A defendant's untimely motion for summary judgment could not be considered in a personal injury action, even if it appeared to be meritorious, given that the defendant offered no explanation for the delay in filing, but rather merely argued the late motion should be considered due to the obvious lack of merit in the plaintiff's case (*Rivera v Toruno*, 19 AD3d 473 [2d Dept 2005]).

The excuse offered by defendant's counsel herein ("law office failure") is not "good cause" as set forth by the Court of Appeals. Of course, all parties had signed the Certification Order. They were all aware of the sixty (60) day window once the Note of Issue was filed.

Thus, defendants' incorrect reliance on the wrong time limitation (90 days versus 60 days) is not sufficient to overcome the CPLR §3212(a) issue herein in the post-*Brill v City of New York, supra*, era.

Defendants' summary judgment motion is **denied** as untimely.

Thus, the court will consider the issue of liability.

A driver is negligent in driving through a red light and failing to yield the right-of-way to another vehicle (*Sheehan v Marshall*, 9 AD3d 403 [2d Dept 2004]).

A driver of a vehicle traveling in a lane who has the right-of-way was entitled to anticipate that another driver would obey the traffic laws which required him to yield (*see Jacino v Sugerman*, 10 AD3d 593 [2d Dept 2004])

Since the plaintiff's vehicle had the right-of-way, she was entitled to anticipate that Wolkin would obey the traffic laws which required Wolkin's vehicle to stop at a red (for westbound traffic) traffic signal *(see Jacino v Sugerman, supra)*.

Here, the Wolkin vehicle was bound to see the approaching plaintiff's vehicle. A driver is bound to see what, by the proper use of his senses, he, should have seen. (*Almonte v Tobias*, 36 AD3d 636 [2d Dept 2007]).

A party fails to raise a triable issue of fact when the party merely alleges, unsupported by any evidence that another party could have taken some unspecified action to avoid the collision or the party somehow contributed to its cause *(White v Gooding,* 21 AD3d 485 [2 Dept 2005]).

Here, there are only conclusory and speculative assertions as to plaintiff's possible negligence

that were not supported by competent evidence (*Pitt v Alpert*, 51 AD3d 650 [2d Dept 2008]).

A party must offer more than mere speculation as to the fault of another driver involved in a collision; such speculation is insufficient to defeat a motion for summary judgment (*Coumbes v Taylor*, 298 AD2d 350 [2d Dept 2007]).

Defendants' contention that the Luongo vehicle should have taken evasive action or seen defendants' vehicle running the red traffic signal is pure speculation (*see Le Claire v Pratt*, 270 AD2d 612 [3d Dept 2000]).

A defendant/driver's negligence was the sole proximate cause of a motor vehicle collision where the defendant's vehicle failed to stop at a red traffic light and proceed into the intersection directly into another driver's lane, and there was no viable evidence offered that the other driver was at fault or could have done anything to avoid the collision (*Pitt v Alpert, supra; Lestingi v Holland*, 297 AD2d 627 [2d Dept 2002]).

Where a driver proceeds through an intersection against a red traffic signal without stopping, it is usually the sole proximate cause of the collision where the opponent failed to raise a triable issue of fact as to whether the other driver was at fault or whether the other driver could have done anything to avoid the impact (*Ramos v Triboro Coach Corp.*, 31 AD3d 625 [2d Dept 2006]). This is the situation here.

Here, the collision was a result of the negligence of Wolkin who ran a red traffic signal and entered the intersection without yielding the right-of-way to plaintiff's lawfully proceeding (*see Shuman v Maller*, 45 AD3d 566 [2d Dept 2007]).

As such, the plaintiff's application for summary judgment on the issue of liability is **granted**.

Of course, while the issue of liability is resolved, the issue of whether or not the plaintiff

sustained a "serious injury" must be determined. If there is no serious injury, the liability issue becomes academic (*see Srebnick v Quinn*, 75 AD3d 637 [2d Dept 2010]). It is hereby

ORDERED, that the parties are directed to appear in DCM on October 21, 2010 at 9:30 a.m. for a trial on damages.

This constitutes the Decision and Order of the Court.

DATED: October 15, 2010
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.

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