

Simone v McFarlane
2011 NY Slip Op 32261(U)
August 4, 2011
Sup Ct, Nassau County
Docket Number: 11874/10
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

ROSE SIMONE and PIETRO SIMONE,

Plaintiffs,

- against -

LORRAINE McFARLANE and KIRK McFARLANE,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 11874/10
Motion Seq. No.: 01
Motion Date: 05/27/11

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	<u>1</u>
Affirmation in Opposition	<u>2</u>

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiffs move, pursuant to CPLR § 3212, for an order granting partial summary against defendants on the issue of liability. Defendants oppose the motion.

This action arises from a motor vehicle accident which occurred on April 17, 2010, at approximately 12:37 p.m., on West John Street, near Alpha Plaza and Cantiague Park, Hicksville, Town of Oyster Bay, Nassau County, New York. The accident involved a 2003 Honda operated by defendant Lorraine McFarlane and owned by defendant Kirk McFarlane and a 2002 Toyota owned and operated by plaintiff Rose Simone. Plaintiffs commenced the action by the filing and service of a Summons and Verified Complaint on or about June 21, 2010. Issue was joined on or about July 8, 2010.

Briefly, it is plaintiff Rose Simone's contention that, on the date and time in which the accident occurred, her vehicle was traveling in an westbound direction on West John Street. Defendant Lorraine McFarlane was also traveling on West John Street in an eastbound direction. According to plaintiff Rose Simone's testimony at her Examination Before Trial ("EBT"), while she was traveling westbound on West John Street, she was stopped for a red traffic light at its intersection with Cantiague Park. According to plaintiff Rose Simone, when the light turned green she proceeded to drive straight ahead. At that same time, defendant Lorraine McFarlane suddenly and unexpectedly made a left turn from the eastbound side of West John Street towards the entrance of Cantiague Park. Plaintiff Rose Simone testified that she applied the brakes and tried to swerve to the right, but defendants' vehicle struck plaintiff Rose Simone's vehicle, pushing plaintiff Rose Simone's vehicle into a vehicle that was stopped waiting to exit Cantiague Park. Plaintiffs further submit that defendant Lorraine McFarlane testified at her EBT that she did not see plaintiff Rose Simone's vehicle at any point until the actual impact itself occurred. In support of their arguments, plaintiffs provided an affidavit of Francesca Simone, daughter of plaintiffs, who was a front seat passenger in the vehicle operated by plaintiff Rose Simone. With respect to the subject accident, Francesca Simone states, amongst other things, "[w]e were stopped for approximately 15 seconds until the light turned green. I observed a car stopped for the same red light facing eastbound on West John Street. When the light turned green my mother proceeded approximately 1 to 2 car lengths into the intersection when suddenly and without warning the other vehicle made a left turn towards the entrance of Cantiague Park. My mother slammed on the brakes and tried to swerve to the right to avoid the other vehicle. However, the front left of the other vehicle struck the driver side of

our vehicle and pushed our vehicle into a third vehicle that was stopped waiting to exit Cantiague Park.”

Plaintiff also submitted an affidavit from Robert Rothstein, who was an independent witness to the subject accident. Mr. Rothstein states, “ I was traveling in the left lane of West John Street next to Cantiague Park. In front of my vehicle was a 2003 Honda. There was a 2002 Toyota traveling westbound on West John Street as well. The 2002 Toyota proceeded to drive straight in the westbound direction on West John Street. At the same time, the 2003 Honda which was in front of me turned left heading into the driveway for Cantiague Park. All of the vehicles had green lights. The 2003 Honda failed to yield the right of way to the 2002 Toyota which was traveling straight in the opposite direction of West John Street. The 2003 Honda and the 2002 Toyota collided pushing the 2002 Toyota into a third vehicle which was fully stopped and waiting at the light to exit the Cantiague Park driveway.”

Plaintiffs submit that defendant Lorraine McFarlane violated New York State Vehicle and Traffic Law (“VTL”) § 1141 by making a left turn directly into plaintiff Rose Simone’s vehicle and thereby failed to yield the right of way of plaintiff Rose Simone.

Plaintiffs argue that defendant Lorraine McFarlane was negligent in failing to see that which through the proper use of her senses should have been seen.

In opposition to the instant motion, defendants argue that plaintiffs have failed to eliminate an issue of fact as to whether plaintiff Rose Simone failed to act reasonably under the circumstances and failed to see that which she should have seen through the proper use of her senses. Defendants submit that plaintiff Rose Simone admitted that she only observed defendants’ vehicle a split second before the accident happened even though plaintiff Rose

Simone testified that she was stopped at a red light just before the accident happened. *See* Plaintiffs' Affirmation in Support Exhibit F. Defendants add that plaintiffs' daughter, Francesca Simone, stated in her affidavit that she observed defendants' vehicle stopped facing the opposite direction at the same traffic light where her mother was stopped and that non-party witness, Robert Rothstein, stated in his affidavit that both defendants' and plaintiff Rose Simone's vehicles entered the intersection at the same time. Furthermore, the points of impact to each of the vehicles was the front driver's side. Defendants therefore argue that, "[i]t is incredible that the plaintiff, Rose Simone, did not observe the McFarlane vehicle enter the intersection under these circumstances and that there was nothing she could have done to avoid the subject accident. For example, if the plaintiff, Rose Simone, had actually observed the McFarlane vehicle and not accelerated as soon as the light turned green, this accident may have been avoided." Defendants claim that the failure of plaintiff Rose Simone to observe the defendants' vehicle more than a "split second" before the accident raises an issue of the plaintiff Rose Simone's own negligence.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v.*

Associated Fur Mfrs., Inc., 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. See CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. See *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. See *Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. See *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. See *Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989). It is the existence of an issue, not its relative strength that is the critical and controlling consideration. See *Barrett v. Jacobs*, 255 N.Y. 520 (1931); *Cross v. Cross*, 112 A.D.2d 62, 491 N.Y.S.2d 353 (1st Dept. 1985). The evidence should be construed in a light most favorable to the party moved against. See *Weiss v. Garfield*, 21 A.D.2d 156, 249 N.Y.S.2d 458 (3d Dept. 1964).

Plaintiffs, in their motion, have demonstrated *prima facie* entitlement to partial summary judgment as a matter of law on the issue of liability against defendants by establishing that

defendant Lorraine McFarlane violated VTL § 1141 in making a left turn when it was not reasonably safe to do so, directly into the path of plaintiff Rose Simone's oncoming vehicle which was lawfully present in the intersection. Since plaintiff Rose Simone had the right of way, she was entitled to assume that defendant Lorraine McFarlane would obey the traffic laws requiring her to yield to plaintiff Rose Simone's vehicle. *See Ahern v. Lanaia*, 85 A.D.3d 696, 924 N.Y.S.2d 802 (2d Dept. 2001); *Palomo v. Pozzi*, 57 A.D.3d 498, 869 N.Y.S.2d 153 (2d Dept. 2008); *Berner v. Koegel*, 31 A.D.3d 591, 818 N.Y.S.2d 89 (2d Dept. 2006). Furthermore, based upon the facts presented before it, the Court finds that defendant Lorraine McFarlane was negligent with respect to the subject accident because she failed to see that which, through proper use of her own senses, she should have seen; to wit, plaintiff Rose Simone's vehicle in the intersection. *See Todd v. Godek*, 71 A.D.3d 872, 895 N.Y.S.2d 861 (2d Dept. 2010); *Berner v. Koegel*, *supra*.

Since plaintiffs have demonstrated *prima facie* entitlement to partial summary judgment, the burden shifts to defendants to demonstrate an issue of fact which precludes summary judgment. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

The Court finds that defendants have failed to raise a triable issue of fact since the evidence in the record does not support defendants' speculative assertions of comparative fault on the part of plaintiff Rose Simone. *See Ahern v. Lanaia*, 85 A.D.3d 696, 924 N.Y.S.2d 802 (2d Dept. 2011). Based upon the record, the Court concludes that, when defendant Lorraine McFarlane began her left turn, plaintiff was either in the intersection or so close to it that she was not comparatively negligent in the happening of subject accident, thus precluding the imposition of liability on plaintiff Rose Simone. Defendant Lorraine McFarlane testified at her EBT that she never saw plaintiff Rose Simone's vehicle before the collision occurred, but it is

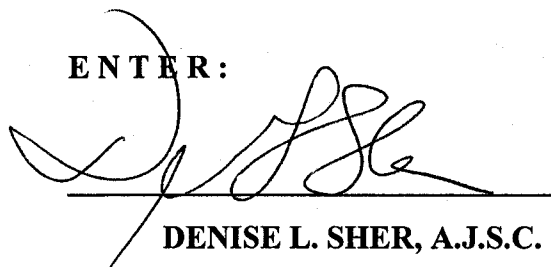
evident that plaintiff's vehicle was already in the intersection at the time of the collision and had the right of way.

Therefore, based upon the foregoing, plaintiffs' motion, pursuant to CPLR § 3212, for an order granting partial summary judgment as to the liability against defendants is hereby **GRANTED**. This matter shall proceed with the issue of damages only.

All parties shall appear for Trial in Nassau County Supreme Court, Differentiated Case Management Part (DCM), at 100 Supreme Court Drive, Mineola, New York, on August 25, 2011, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
August 4, 2011

ENTERED
AUG 08 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE