SHORT FORM ORDER

INDEX No. 09-45392
CAL. No. 11-00765MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 8-30-11
ADJ. DATE 10-19-11
Mot. Seq. # 001 - MG

CLAUDE BURNETT	:	MICHAEL S. LANGELLA, ESQ.
	:	Attorney for Plaintiff
Plaintiff,	:	2459 Ocean Avenue
	:	Ronkonkoma, New York 117779
- against -	:	
	:	LEWIS JOHS AVALLONE & AVILES
	:	Attorney for Defendant
WILLIAM REISENAUER,	:	21 East Second Street
	:	Riverhead, New York 11901
Defendants.	:	

Upon the following papers numbered 1 to 16 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 12 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 13-14 ; Replying Affidavits and supporting papers 15-16 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by the plaintiff, Claude Burnett, pursuant to CPLR 3212 for an order granting summary judgment against the defendant on the issue of liability is granted; and it is further

ORDERED that the plaintiff is directed to serve a copy of this order with notice of entry upon the defendant and the clerk of the calendar department, Supreme Court, Riverhead, within thirty days of the date of this order, and the clerk is directed to set this matter down forthwith for a hearing on damages.

This is an action premised upon the alleged negligence of the defendant, William Reisenauer. The plaintiff, Claude Burnett, seeks to recover damages for personal injuries he allegedly sustained on October 13, 2009, as a pedestrian at or near Route 25A about one tenth of a mile east of Church Street in Kings Park, New York, when he was struck by a vehicle operated by the defendant as it was exiting a parking lot.

The plaintiff now seeks summary judgment in his favor on the issue of liability.

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 (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]; ***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 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 [2d Dept 1981]).

In support of motion (001), the plaintiff has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, defendant's answer, plaintiff's bill of particulars, supplemental verified bill of particulars, and second supplemental verified bill of particulars; plaintiff's affidavit dated July 29, 2011; an uncertified copy of the police MVA 104 accident report; an unsigned, certified copy of the transcript of the examination before trial of William Reisenauer dated November 12, 2010; and the unsigned copy of the transcript of the examination before trial of Claude Burnett dated August 4, 2010.

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]). While the deposition transcript of William Reisenauer is unsigned, but certified, it is considered by this court as not challenged as inaccurate by the defendant (*see*, ***Zalat v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]). While plaintiff's deposition transcript is unsigned and uncertified, it is adopted as accurate by the plaintiff as movant (***Ashif v Won Ok Lee,*** 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]).

Claude Burnett testified to the effect that he resides in SOCR Suffolk County Community Residence, an outpatient residence for patients who are mentally ill and disabled, and was discharged from Kings Park Hospital on approval of the psychiatrist and treatment team. He had been in the United States Air Force for six years and trained as an aircraft electrician. He received an honorable discharge. Thereafter, he suffered mood swings, and had several prolonged hospital admissions during which time he received treatment. He became involved in vocational rehabilitation doing woodworking, furniture refinishing and restoring antiques. He continued that on October 13, 2009, he was involved in an accident across the street from the Kings Park Volunteer Fire Department on Route 25A at about 5:00 p.m. He described the day as clear, sunny and cool, and stated it was almost sunset when the accident occurred. He had been to the Babylon Federation and took a Suffolk County bus to Kings Park. He was dropped off next to the Bagel Boss where he bought some scratch off tickets and a twelve ounce bottle of beer, which he stated he slugged down outside. Bagel Boss is located about one hundred yards from where the accident occurred.

Burnett continued that he left Bagel Boss, walked eastbound past the bank, located on the same side as the library and the church, to cross over Indian Head Road or Church Street. He stated that there was no traffic coming in his direction and that he reached the sidewalk on the other side of the street, still on the same side of 25A. He stated that he continued walking on the sidewalk along 25A, but he did not cross over 25A. He continued to walk eastbound about fifty yards on the three foot wide sidewalk. To his left was the Kings Park Library and hedges. There was a ramp or driveway, about one car width wide, which went across the sidewalk for cars to exit and enter the parking lot. He continued that there was a flashing light at the driveway exit with a sign suspended from the traffic signal wires that indicated "no turn on red". He did not know what color the light was at the time.

Burnett further testified that he was looking straight ahead as he continued walking on the sidewalk. When he came to the driveway, but was still on the sidewalk, he looked to his left to see if there were any cars exiting the parking lot. The plaintiff stated that he passed the hedge and was halfway across the driveway ramp when he first saw the defendant about two feet away, coming toward him. Burnett stated that when he first saw the vehicle, it was moving slowly, about ten to fifteen miles per hour, crossing the sidewalk to exit the parking lot onto 25A. Burnett testified that when he was on the sidewalk, just before he reached the driveway, the defendant's car had not crossed the sidewalk, but was moving forward out of the parking lot. The defendant's car then blocked the driveway as it moved forward, so he had to go around it. He thought the defendant was going to stop his car when he saw the car on the ramp, but the driver was looking in the other direction. A split second passed from when he first saw the vehicle on the sidewalk until he was struck by the defendant's vehicle. As the defendant's vehicle came toward him, he put his hands up toward the hood trying to get the driver's attention, gesturing him to stop the car. The next thing he knew, he was on the ground. He did not see the driver prior to the impact, heard no screeching brakes or the sound of a horn. The defendant's vehicle made contact with his hands, pushed him to the left and into the roadway on 25A. He had walked this route on a daily basis and was familiar with the location of the accident.

Burnett's averments set forth in his affidavit are consistent with his testimony about the occurrence.

William Reisenauer testified to the extent that he was involved in a motor vehicle accident on October 13, 2009 with a pedestrian while he was alone in his vehicle at about 5:00 p.m. It was still sunny and light out, the skies were clear, and the roads were dry. He was exiting a municipal parking lot to enter onto Main Street, traveling in a southbound direction, intending to make a right turn to travel westbound. He usually parked his car in that parking lot, as it is close to his place of employment. He was wearing sunglasses, as the sun was to his right. He used his cell phone for two minutes to call his friend while his vehicle was still stopped in the parking lot. One minute lapsed from the time he began driving until the accident occurred. When he started driving, he drove forward halfway down the middle aisle of the parking lot, then went through the other unoccupied parking fields. There were no vehicles in front of him or passing from the opposite direction. With reference to Main Street, there were two entrance ramps, one forward ramp, located to the west, and the second, more to the east. There was only one exit from the parking lot which was located with the second entrance ramp which permitted both ingress and egress. There was a stop line at the exit, and a traffic control light, across from the Fire House, that he knew had a red and yellow light, but he did not know if it had a green light. There was no turning arrow, or a no-turn-on-red sign, on the light.

Reisenauer continued that as he was traveling about fifteen miles per hour and began to turn right to head towards the exit, the area was open with no parked cars. He was aware of the sun glare, and as he turned right, looking directly towards the sun was difficult. As he continued towards the exit, he did not stop. He was aware there was a stop line and a sidewalk as he looked straight ahead. He observed that the traffic light was flashing red, which, he stated, required a stop, then go. The light did not change color prior to the accident. He could see part of the sidewalk, and part of it was blocked by hedges which were about four and a half to five feet high. He brought his car to a stop at the stop line, with the front of his vehicle even with the line, remained stopped for ten seconds, and looked to his left and his right, and did not see any pedestrians on the sidewalk. He thought he had to squint from the sun glare when he looked to his right. When he looked to his right, he could see about five to ten feet onto the sidewalk. When he looked to his left, he could see about twenty to thirty feet onto the sidewalk. He continued that generally, there were not a lot of people who walked the sidewalk in that location, although he was aware that Kings Park Hospital was located in the area, but he did not know who was a patient and who was not, and would have to guess based upon his own feelings.

Reisenauer continued that he could not see the street traffic from the stop line, so he moved his vehicle forward so that the front of his vehicle was facing straight, protruding into the street, and the body of his car was over the sidewalk. His vehicle remained in a stopped position for about thirty seconds as he looked to his left and waited for traffic to pass. He did not look to his right during that thirty seconds that his vehicle was stopped. When he saw a clearing in traffic, he looked forward and took his foot off the brake. His vehicle moved forward about five feet, traveling about five miles per hour, when he heard a sound, a thud, to the right front of his vehicle. He put his foot back on the brake, looked up, and saw the plaintiff flying back, with his hands in front of him. The plaintiff fell backwards, about four feet into the street, facing north. He did not see the plaintiff prior to his impact with his vehicle. The impact was to the area of the right front headlight. The front portion of his vehicle was on the road, the body of his car covered the sidewalk, and his rear tires were on the blacktop of the parking lot.

In the statement of the accident annexed to the MV104, the defendant stated he was "making a right turn out of the parking lot across from the Kings Park Fire Department on Main Street. At the same time, a pedestrian walked in front of the car. I did not see him due to the angle of the sun."

In order to set forth a prima facie case of negligence, the plaintiff's evidence must establish (1) the existence of a duty on defendant's part as to plaintiff; (2) a breach of this duty; and (3) that such breach was a substantial cause of the resulting injury (***Merino v New York City Transit Authority***, 218 AD2d 451, 639 NYS2d 784 [1st Dept 1996]). A duty of reasonable care owed by a tortfeasor to an injured party is elemental to any recovery in negligence, and the scope and existence of an alleged tortfeasor's duty is a legal declaration reserved for judges to make prior to submitting anything to fact-finding (***Palka v Servicemaster Management Services Corporation***, 83 NY2d 579, 611 NYS2d 818 [1994]). Here, it is determined as a matter of law that the defendant owed a duty of reasonable care to the plaintiff pedestrian.

The driver of a vehicle within a business or residence district emerging from an alley, driveway, or building shall stop such vehicle immediately prior to driving onto a side walk or onto the sidewalk area extending across any alleyway or driveway, and shall yield the right of way to any pedestrian as may be necessary to avoid collision, and upon entering the roadway shall yield the right of way to all vehicles approaching on said roadway (***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; *see,* Vehicle and Traffic Law § 1173).

A defendant driver is bound to see what, with proper use of his senses, he should have seen (***Avila v Mellen***, 131 AD2d 408, 515 NYS2d 856 [2d Dept 1987]). The defendant testified that he did not see the plaintiff before his vehicle struck him and only became aware of the accident when he felt the thud to the right front headlight area of his vehicle. Reisenauer could not see the street traffic from the stop line, so he moved his vehicle forward so that the front of his vehicle was facing straight, protruding into the street, and the body of his car was over the sidewalk. His vehicle remained in a stopped position for about thirty seconds as he looked to his left and waited for traffic to pass. He did not look to his right during that thirty seconds that his vehicle was stopped. When he saw a clearing in traffic, he looked forward, and took his foot off the brake. His vehicle moved forward about five feet, traveling about five miles per hour, when he heard the thud. Thus, Reisenauer has established by his own testimony that he never looked again to his right to see if there were any pedestrians on the sidewalk, thus establishing that he did not keep a proper lookout. In his statement, he claims that he did not see the plaintiff due to the angle of the sun. The sun was to his west, as was the plaintiff. Because Reisenauer did not look to his right, as per his testimony, it is determined as a matter of law that the proximate cause of the accident was not due to the glare of the sun, but due to the defendant's failure to look right and to keep a proper lookout and observe the plaintiff who was there to be seen (*see,* ***Sulaiman v Thomas***, 54 AD3d

751, 863 NYS2d 723 [2d Dept 2008] wherein the defendant driver testified he did not see the plaintiff due to another car turning left while he was making a right turn); ***Finkel v Benoit***, 211 AD2d 749, 622 NYS2d 295 [2d Dept 1995]). It is determined that the plaintiff has established prima facie entitlement to summary judgment on the issue of liability in that the defendant did not yield the right of way to the plaintiff as a pedestrian and that the defendant failed to see him prior to striking him.

In opposing this motion, the defendant has submitted solely an a attorney's affirmation wherein counsel asserts that there are factual issues which preclude summary judgment, including, but not limited to the exact location of the accident. However, the arguments proffered by counsel are merely speculative with regard to liability in that the defendant testified that he did not see the plaintiff prior to striking him and did not look to his right prior to pulling out to turn, and that the plaintiff testified that he looked to see if any vehicles were approaching from the driveway and saw the defendant's vehicle (*see,* ***Kurz v New York City Transportation Authority***, 2011 NY Slip Op 7203 [2d Dept 2011]; ***Martinez v Kreychmar***, 83 AD3d 1037, 923 NYS2d 648 [2d Dept 2011]; ***Abramov v Miral Corp***., 24 AD3d 397, 805 NYS2d 119 [2d Dept 2005]).

New York Vehicle and Traffic Law § 1146 requires every driver to exercise due care to avoid colliding with any pedestrian upon any roadway. Thus, whether the plaintiff was on the sidewalk or just off the sidewalk to continue walking ahead, the defendant had an obligation to obey both Vehicle and Traffic Laws §§ 1146 and 1173. While the term "due care" is not defined in the statute, the cases connote a standard of reasonableness under the circumstances. Due care is that care which is exercised by reasonably prudent drivers. It is not that degree of care which guarantees that a driver will avoid any accident no matter what the circumstances might be (*see,* ***Russell v Adduci,*** 140 AD2d 844, 528 NYS2d 232 [3d Dept 1988]). Here, although there was sun glare, the defendant testified that he did not look to his right for the thirty seconds his vehicle was stopped, then, when there was a break in traffic, looked ahead and pulled out, striking the plaintiff whom he did not see (*see,* ***Russell v Adduci***, supra), thus establishing that he was inattentive, did not use due care, and failed to see the plaintiff who was there to be seen. The failure of the defendant to look to his right before pulling out into traffic and to observe the plaintiff, was the proximate cause of the accident as it was a substantial factor in bringing about the accident, and had such an effect in producing the accident, that reasonable men or women would regard it as a cause of the accident (***Rubin v Pecoraro***, 141 AD2d 525, 529 NYS2d 142 [2d Dept 1988]).

Accordingly, motion (001) for an order granting summary judgment against the defendant on the issue of liability is granted. The plaintiff is directed to serve a copy of this order with notice of entry upon the defendant and the clerk of the calendar department, Supreme Court, Riverhead, within thirty days of the date of this order. The calendar clerk is directed to set this matter down forthwith for a hearing on damages.

Dated: NOV 28 2011

J.S.C.
HON. JEFFREY ARLEN SPINNER

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION