SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

MIAELA SEUNG and HOUNG C. KIM,

Plaintiffs,

- against -

CHOI WAN LAU and KIT POON,

Defendants.

- x

Index No.: 13790/2012

Motion Date: 11/30/12

Motion No.: 135

Motion Seq.: 1

The following papers numbered 1 to 12 were read on this motion by plaintiffs, MIAELA SEUNG and HOUNG C. KIM, for an order pursuant to CPLR 3212(b) granting plaintiffs partial summary judgment on the issue of liability and setting the matter down for trial on damages only:

Papers Numbered

Notice of Motion-Affidavits-Exhibits.....1 - 6
Affirmation in Opposition-Affidavits-Exhibits.....7 - 10
Reply Affirmation.....11 - 12

This is a personal injury action in which Plaintiff, Miaela Seung, seeks to recover damages for injuries she sustained as a result of a motor vehicle accident that occurred on January 12, 2012, at approximately 7:00 p.m., on 42nd Avenue at the intersection of 214th Place, Queens County, New York.

Plaintiff claims that at the time of the accident, the defendant was making an illegal and unsafe U-Turn on 42nd Avenue when defendants' vehicle struck the plaintiffs' vehicle. Plaintiff Miaela Seung contends that as a result of the accident she sustained physical injuries including a rotator cuff injury of the right shoulder requiring arthroscopic surgery, as well as herniated/bulging discs at C5-C6 and C6-C7 levels.

Steven Louros, Esq., counsel for plaintiffs, now moves for an order pursuant to CPLR 3212(b), granting partial summary judgment in favor of plaintiffs on the issue of liability and setting the matter down for a trial on damages. In support of the motion, the plaintiffs submit an affirmation from counsel; a copy of the pleadings; a copy of plaintiffs' verified bill of particulars; a copy of the police accident report (MV-104AN); a photograph depicting the street where the accident occurred; and an affidavit of facts from the plaintiff.

In the accident description section of the police report, the police officer, who did not witness the accident, describes the accident, based upon the statements of the two drivers as follows:

At t/p/o driver of Vehicle #1 (defendant) states she was driving E/B on 42nd Avenue when she made a U-turn colliding with driver of vehicle #2(plaintiff). Driver of Vehicle #2 (plaintiff) states she was driving W/B on 42nd Avenue when driver of Vehicle #1 hit her vehicle causing property damage. P.O. did not witness accident."

In her affidavit dated October 8, 2012, plaintiff, Miaela Seung states:

"On January 12, 2012, I was the operator of a certain 2002 Nissan motor vehicle. I was traveling westbound on 42nd Avenue in the County of Queens, City and State of New York. At the accident location, 42nd Avenue is a two way street with one lane of traffic in each direction. Defendant, Choi Wan Lau, was traveling eastbound on 42nd Avenue and made a sudden U-turn in the middle of the block, striking my vehicle."

Plaintiff's counsel, argues in support of the motion for summary judgment, that the plaintiff's affidavit indicates that plaintiff was traveling lawfully in her westbound lane of 42nd Avenue and that she was not negligent as a matter of law. Counsel contends that defendant Lau's negligent actions in suddenly striking plaintiff's vehicle in the course of making a U-turn without warning, without signaling, and without first ascertaining that it was safe to do so was the sole proximate cause of the accident. Plaintiff's counsel argues that the defendant admitted liability to the police officer at the scene by stating to the officer that she was making a U-turn at the time the accident occurred. Counsel claims that the defendant was negligent as a matter of law in that she violated VTL § 1162 which state that "no person shall move a vehicle which is stopped, standing or parked unless and until such movement can be

made with reasonable safety." Counsel also alleges that the defendant violated VTL § 1128(a) which requires drivers to drive as nearly as practicable entirely within a single lane and shall not move from that lane until the driver has first ascertained that such movement can be made with safety. Counsel also cites NYCRR Title 34 Chapter 4 section 5(b) which forbids a U-turn in the opposite direction upon any street in a business district and that a vehicle shall not make a U-turn upon any street outside a business district unless such turn is made without interfering with the right of way of any vehicle or pedestrian. Counsel asserts that based upon the photograph he submitted from a Google website that the area where the defendant made her U-turn was a business district.

In opposition to the motion, defendant's counsel, Jacqueline Cabrera, Esq. submits her own affirmation as well as the affidavit of the defendant, Choi W. Lau, dated October 26, 2012. Ms. Lau states that at the time of the accident on January 12, 2012, she was driving a 2006 Porsche which was leased to her husband, Kit Poon. She was traveling eastbound on 42nd Avenue near the intersection with 214th Place. There were no traffic control devices governing her movement or turn in her direction of travel. She states that there were no posted signs prohibiting vehicles to turn or make a U-turn on 42nd Avenue near the intersection with 214th Place. Defendant states:

"Prior to the accident as I was traveling in the eastbound direction of 42nd Avenue, I stopped my vehicle at about a distance of 20 feet from 214th Place in order to turn onto the westbound lane of 42nd Place to go park my vehicle at an available parking spot on the opposite side of 42nd Avenue. Before I proceeded to make the U-turn I looked straight ahead onto the westbound lane of 42nd Avenue and I also looked behind me through my rear view mirror to make sure that there were no vehicles approaching from either direction. I observed no vehicles so I began to move at about two miles per hour. As my vehicle was almost through the turn, I felt an impact to the front left side of my vehicle. I realized that my vehicle had come into contact with the left front side of the plaintiff's vehicle." She states that she never observed the plaintiff's vehicle at any time prior to the accident.

Defendant's counsel contends that plaintiff's affidavit is insufficient to establish her prima facie entitlement to summary judgment on the issue of liability as a matter of law. Firstly, counsel argues that the plaintiff failed to show that there were any signs posted at the subject location which prohibited a U-turn at the location and no proof submitted to show that the defendant failed to make the U-turn without first ascertaining

that it was safe to do so. Secondly, counsel contends that the plaintiff's statement that the defendant made a sudden U-turn striking her vehicle is insufficient, per se, to prove the plaintiff's negligence and is insufficient to establish that the plaintiff took any action to avoid the collision and that her actions did not contribute to the accident. Counsel contends that the plaintiff's affidavit, although stating that her car was struck by defendant's vehicle, failed to demonstrate that she exercised due care and failed to establish that she was free from comparative fault. In addition, counsel contends that the affirmation of the defendant raises questions of fact precluding summary judgment including defendant's statement that she looked all around to make sure no vehicles were approaching from any direction before proceeding to make the U-turn.

Upon review of the plaintiffs' motion, the defendants' opposition and the plaintiffs' reply thereto, this court finds as follows:

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. The failure to make that showing requires the denial of the motion regardless of the sufficiency of the opposing papers (see Mastrangelo v Manning, 17 AD3d 326 [2nd Dept 2005]). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position (see Zuckerman v. City of New York, 49 NY2d 557[1980]).

Based upon a review of the respective affidavits of the parties this Court finds that there are material issues of fact which preclude the granting of summary judgment to the plaintiff on the issue of liability. Although the plaintiff states that the defendant made a sudden U-turn into her lane of traffic striking her vehicle in violation of Vehicle and Traffic Law §§ 1128, 1163(a)(b), 1160(e) and 1162, the plaintiff failed to provide any statement regarding her own actions at the time the defendant made the U-turn. In that regard, the Appellate Division has stated that "there can be more than one proximate cause of an accident and, thus, the proponent of a summary judgment motion has the burden of establishing freedom from comparative negligence as a matter of law" (Winner v Star Cruiser Transp., Inc., 95 AD3d 1109 [2d Dept. 2012] citing Pollack v Margolin, 84 AD3d 1341 [2d Dept. 2011]; Villa v Leandrou, 94 AD3d 980 [2d Dept 2012]; Calcano v Rodriguez, 91 AD3d 468 [1st Dept. 2012]). Although the plaintiff driver had the right-of-way, was proceeding lawfully on 42nd Avenue, and was entitled to

anticipate that the plaintiff would obey the traffic laws (see Martin v Ali, 78 AD3d 1135, 1136 [2010]; Yelder v Walters, 64 AD3d 762 [2009]), the plaintiff driver also has a duty to exercise reasonable care to avoid a collision with another vehicle that allegedly failed to yield the right-of-way. Here, the plaintiff's affidavit fails to specify if and when she saw the defendant's vehicle prior to the impact and what actions, if any, she took in order to avoid the collision. Thus, the plaintiff's evidentiary submissions did not prove her freedom from negligence as a matter of law, and as such, were insufficient to establish, prima facie, that the defendant's actions were the sole proximate cause of the accident or to eliminate all issues regarding the facts surrounding the accident and whether either or both parties were negligent (see Allen v Echols, 88 AD3d 926[2d Dept. 2011]; Pollack v Margolin, 84 AD3d 1341 [2d Dept. 2011]; Myles v Blain, 81 AD3d 798 [2d Dept. 2011]; Sayed v Aviles, 72 AD3d 1061 [2d Dept. 2010]).

Moreover, the affidavit of the defendant driver states that there were no signs prohibiting U-turns in that area, that she looked straight ahead as well as in her rearview mirror prior to making the U-turn and that she did not observe any other vehicles including the defendants' vehicle. The photograph submitted by the plaintiff is inconclusive as to the location and whether a business district is depicted. Thus, the defendant's affidavit raises a question of fact as to whether the U-turn was illegal per se, whether prior to making the U-turn she yielded to oncoming traffic and whether she sufficiently ascertained prior to making the U-turn that it was safe to do so (see VTL § 1128).

Therefore, viewing the evidence in the light most favorable to the non-moving party (Stukas v Streiter, 83 AD3d 18 [2nd Dept. 2011]; Judice v DeAngelo, 272 AD2d 583, [2nd Dept. 2000] this court finds that there are factual issues concerning whether the plaintiff and defendant each met their respective duty to observe what should have been observed and the duty to exercise reasonable care under the circumstances (see Wilson v Rosedom, 82 AD3d 970 [2d Dept. 2011]; Cox v Weil, 66 AD3d 634 [2d Dept. 2009]; Borukhow v Cuff, 48 AD3d 726 [2d Dept. 2008]).

Accordingly, as triable questions exist as to whether both drivers exercised due care and, if not, whether such lack of care was a proximate cause of the accident (see Gorham v Methun, 57 AD3d 480 [2d Dept. 2008]), it is hereby

ORDERED, the motion by plaintiff for partial summary judgment on the issue liability is denied.

Dated: January 28, 2013
Long Island City, N.Y.

ROBERT J. MCDONALD, J.S.C.

J.S.C.