SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Justice Supreme Court **TRIAL TERM PART: 20**

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DEBORAH GIANNONE,
Plaintiff,

-against-

FEDERAL EXPRESS CORP. and CURTIS J. THOMAS,
Defendants.

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INDEX NO.: 601631/12

SEQ. NUMBER - 001

MOTION DATE: 3-25-15
SUBMIT DATE:5-6-15

The following papers have been read on this motion:

Notice of Motion, dated 3-4-15.....1
Memorandum of Law in Support, dated 3-4-15.....2
Affirmation in Opposition, dated 4-17-15.....3
Memorandum of Law in Opposition.....4
Reply Memorandum of Law with Affidavit, dated 5-5-15.....5

This motion by defendants Federal Express Corp. and Curtis J. Thomas for an Order of this Court, pursuant to CPLR §3212, dismissing the complaint of the plaintiff, Deborah Giannone, is granted.

The instant motion arises from a personal injury action in which the plaintiff allegedly sustained injury in an automobile accident. The plaintiff commenced the action by filing a summons and complaint in this Court in August 2012.

Plaintiff is claiming serious injury under Insurance Law §5102, and she is alleging that the defendants were negligent in that they were operating their vehicle, in a careless, reckless, dangerous, improper, imprudent, and unskillful manner. The plaintiff also alleged, inter alia, that the defendant driver was operating the vehicle at an excessive rate of speed, failed to keep a proper lookout and

yield the right of way for and to the plaintiff's vehicle. On this motion the defendants move for judgment as a matter of law based upon their contention that defendant Curtis J. Thomas was not negligent in the operation of defendants' truck. This motion should be granted.

On June 1, 2012 at the intersection of Sunrise Highway and North Long Beach Road in Rockville Centre, Nassau County, New York, at about 8:10 a.m., the plaintiff was operating her vehicle when it made contact with the vehicle operated by defendant Thomas. Thomas was operating a vehicle, owned by his employer, defendant Federal Express Corp., and he was in the course of his employment at the time of this accident.

According to the plaintiff, she was traveling on North Long Beach Road, where she stopped at the red light at the intersection. She proceeded to make a lawful right turn onto westbound Sunrise Highway, when she saw a "truck bearing down on her".[1] According to the plaintiff, the defendant's 18-wheeler Federal Express issued truck collided with her vehicle. The plaintiff is claiming that the defendant violated VTL§1129(a)(b), and VTL §1128(a), in its failure to make sure the roadway was clear of other vehicles before approaching, and failure to yield the right of way.

The defendant driver counters that he was lawfully traveling on Sunrise Highway and the green light was in its favor, and that plaintiff violated VTL §1111(d)(2) in her attempt to make a right turn at a red signal. She made contact with the trailer of his truck, and the cab already had passed through

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[1]It is noted that the plaintiff is cited as testifying that she saw a truck bearing down on her from the middle lane, yet the cited reference sets forth that she observed the defendant's truck out of the "corner of [her] left eye".

the intersection before impact.

The defendants argue that the plaintiff did not demonstrate negligence on their part as a matter of law. Further, the defendants had the right of way. The plaintiff, in opposition, resorts to setting forth "boilerplate" arguments thereby failing to offer sufficient evidence to raise a triable issue in fact.

The plaintiff contends that the granting of summary judgment on the issue of negligence is not only rare, but inappropriate where the parties have different versions of the facts. The defendants' conduct was culpable in that the driver failed to observe the plaintiff's vehicle, and he changed lanes before ascertaining whether it was safe to do so.

A Court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is; therefore, entitled to summary judgment as a matter of law. *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986). Thus, when faced with a summary judgment motion, *a* court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial. *Miller v. Journal-News*, 211 AD2d 626 (2nd Dept. 1995).

The burden on the party moving for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of material issue of fact. *Ayotte v. Gervasio*, 81 NY2d 1062 (1993). Although summary judgment is a drastic remedy and there is considerable reluctance to grant it in negligence actions, the motion should be granted when there is no genuine issue to be resolved at trial. See *McGraw v.*

Ranieri, 202 AD2d 725 (3rd Dept 1999).

VTL § 1111(d)(1) and (2) provide in relevant part as follows:

> (d) Red indications:
>
> 1. Traffic,..., facing a steady circular red signal,..., shall stop at a clearly marked stop line, but if none, then shall stop before entering the crosswalk on the near side of the intersection, or in the event there is no crosswalk, at the point nearest the intersecting roadway *where the driver has a view of the approaching traffic on the intersecting roadway before entering the intersection and shall remain standing until an indication to proceed is shown except as provided in paragraph two of this subdivision.*
> 2. Except in a city having a population of one million or more, unless a sign is in place prohibiting such turn:
>
> a. Traffic facing a steady circular red signal may cautiously enter the intersection to make a right turn after stopping as required by paragraph one of this subdivision,.... Such traffic shall yield the right-of-way to ...other traffic *lawfully* using the intersection..."
> (Emphasis supplied.)

VTL §1128(a), provides that; "[a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

VTL §1129 (a)(b), also provides that:

> "... [t]he driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway.... The driver of any motor truck or motor vehicle drawing another vehicle when traveling upon a roadway outside of a business or residence district and which is following another motor truck or motor vehicle drawing another vehicle shall,..., leave sufficient space so that an overtaking vehicle may enter and occupy such space without danger, except that this shall not prevent a motor truck or motor vehicle drawing another vehicle from overtaking and passing any like vehicle or other vehicle...".

The operator of a vehicle with the right-of-way is entitled to assume that the opposing driver will obey the traffic laws requiring him or her to yield. However, "[a] driver who has the right-of-way has a duty to exercise reasonable care to avoid a collision with another vehicle already in the intersection". See *Todd v. Godek*, 71 AD3d 872 (2nd Dept 2010). There can be more than one proximate cause of an accident. As a result, the proponent of a summary judgment motion has the burden of establishing freedom from comparative negligence as a matter of law. See *Colpan v. Allied Cent. Ambulette, Inc.*, 97 AD3d 776 949 (2nd Dept 2012).

The defendants, in support of their motion for summary judgment, submitted the deposition transcripts of both, the defendant, Thomas, and the plaintiff, which contained some conflicting testimony as to the facts surrounding the accident. The main point of contention is which lane the defendants' vehicle was traveling before impact. It is undisputed that the plaintiff was traveling subject to a steady red light, and the defendants' vehicle was traveling subject to a green traffic signal.

However, the evidence did not establish, *prima facie*, that the defendant violated VTL§1129(a)(b), and VTL §1128(a), or even if he did, that such violation was a proximate cause of the accident. Further, the defendants' evidence established that the plaintiff's entrance into the intersection in violation of Vehicle and Traffic Law § 1111(d)(2)(a) constituted negligence per se and was a proximate cause of the accident. See *Jones v. Radeker*, 32 AD3d 494 (2nd Dept 2006).

Notably, the defendant testified that he was traveling within the speed limit at about 40 mph in the right lane of west bound Sunrise Highway and that he was traveling in the right lane for about three traffic lights before he arrived at the subject intersection. The cab of his truck was "already through the intersection", and the impact was made "on the back of the truck".

The deposition testimony references pictorial evidence which indicates that there was damage to "rear tandem of the trailer", and that there was an "abrasion on [its] tire" (see Notice of Motion, Exhibit F, Tr. Thomas, p. 50, ln. 7-18). Further, there was no damage to driver's side of the truck. As to the plaintiff's vehicle, the defendant testified that "whole left side of her driver's side, was damaged, "from the lens part all the way back to the quarter panel"(see Notice of Motion, Exhibit F, Tr. Thomas, p. 74, ln. 1-10). The plaintiff also testified that her front bumper was "hanging" and the left side of the car in the front was "banged up pretty badly" (see Notice of Motion, Exhibit E, Tr. Giannone p. 67, ln. 15-21).

In light of the foregoing, based on the testimony regarding the damage to the vehicles, and the supporting referenced pictorial evidence, the defendant has established his *prima facie* entitlement to summary judgment on the issue of negligence.

In opposition, the plaintiff contends that the defendant driver changed lanes and moved into her lane in violation of the aforementioned VTL statutes. However, while her counsel's affirmation sets forth that the defendant's truck was "bearing down" on her, after she completed a full turn, the plaintiff testified that she did not see the defendant during the final times she looked to the left before executing her right turn at the red signal (see Notice of Motion, Exhibit E, Tr. Giannone p. 169, ln. 10-19). Further, after she inched up to the intersection to make her turn, she did not see any vehicles in the left or middle lane, (see Notice of Motion, Exhibit E, Tr. Giannone p. 51, ln. 14-19). The plaintiff testified that when she finally observed the "very big truck", it was out of the corner of her left eye, and it was in the middle lane (see Notice of Motion, Exhibit E, Tr. Giannone p. 52, ln. 4-11). This, however, is not evidence that she observed a change of lane that might serve to demonstrate some negligence on Thomas's part.

As such, the plaintiff has failed to demonstrate the existence of any genuine issues of material fact as to whether the defendant was comparatively negligent or that he could have done anything to avoid the impact between the two vehicles. In sum, the plaintiff negligently entered the intersection in violation of Vehicle and Traffic Law § 1111(d)(2)(a) by making a right turn at a red traffic signal without yielding the right-of-way to the defendants. The plaintiff's entrance into the intersection in violation of Vehicle and Traffic Law § 1111(d)(2)(a) constituted negligence per se and thus was the proximate cause of the accident. See *Jones v. Radeker*, 32 AD3d 494 (2nd Dept 2006).

Accordingly, the defendants' motion is granted and plaintiff's complaint is dismissed.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: June 29, 2015

HON. DANIEL PALMIERI
Supreme Court Justice

ENTERED

JUL 07 2015

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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