To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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ELINOR E. BAURCZARSKI,

Plaintiff,

-against -

ALI MOHSIN SAID,

Defendants.

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DECISION & ORDER

Index No. 50072/2017

Sequence No. 1
Motion Date: 7/27/17

GROSSMAN, J.S.C.

The following papers, numbered 1 to 14, were considered in connection with Plaintiff's Notice of Motion, dated July 7, 2017, for an Order, granting partial summary judgment on the issue of liability on the ground that Defendant is totally liable for the accident and Plaintiff's injuries, and granting leave to amend the complaint to allege punitive damages.

PAPERS	**NUMBERED**
Notice of Motion/Affirmation/Affidavit/ Exhs. 1-9	1-12
Affirmation in Opposition	13
Reply Affirmation	14

On November 26, 2015 at 5:43 p.m., Plaintiff Elinor E. Baurczarski was involved in an automobile accident while driving southwest on Route 82 in East Fishkill, New York near the intersection of Helin Road. At the time, Defendant Ali Mohsin Said, while traveling in the opposite direction, crossed over the double yellow line into Plaintiff's lane. Plaintiff slowed down her vehicle and drove onto the shoulder, but Defendant's car struck the front driver's side of Plaintiff's car. Plaintiff sustained serious physical injuries, including a fracture to her right leg and her left

prosthetic leg was mangled and had to be replaced.

Defendant pled guilty to vehicular assault in the second degree and was sentenced to a term of imprisonment. At the time of the accident, Defendant's BAC was .16 percent – twice the legal limit.

Partial Summary Judgment on Liability

Plaintiff moves for partial summary judgment on the issue of liability in this motor vehicle personal injury action. In support of her application, Plaintiff proffers the Summons and Complaint, the Answer, 3 photographs, the MV-104 report, Defendant's plea minutes, and the East Fishkill Police Department paperwork. Plaintiff submits an affidavit in support of her motion in which she states that she did nothing to cause or contribute to the crash. Plaintiff also points to Defendant's plea hearing at which he admitted to being drunk and that he should not have been driving.

Specifically, Defendant stated (Notice of Motion, Exh. 7 at 14-17):

THE COURT: Do you have any questions for me or your attorney about what I've said to you today?

THE DEFENDANT: No.

THE COURT: Understanding all that I've said how do you plead to vehicular assault in the second degree as a Class E felony?

THE DEFENDANT: Guilty, yes.

THE COURT: I direct your attention to the Town of East Fishkill, County of Dutchess and State of New York on November 26, 2015, at that date and time were you operating a motor vehicle on a public highway? * * *

THE DEFENDANT: Yes.

THE COURT: What kind of vehicle were you driving?

THE DEFENDANT: Acura.

THE COURT: Acura?

THE DEFENDANT: Acura MDX.

THE COURT: What road or street where [sic] you nearby in East Fishkill?

THE DEFENDANT: I was in East Fishkill, 84 – 94, which I go home.

THE COURT: Route 94?

THE DEFENDANT: Yeah, we come from work to home and I come I think it's 94.

THE COURT: Is that Route 84?

THE DEFENDANT: 84.

THE COURT: And at that time –

THE DEFENDANT: 94, I'm sorry.

THE COURT: 94?

THE DEFENDANT: Which I get to 82.

THE COURT: That's County Route 94?

THE DEFENDANT: Exactly, yeah.

THE COURT: At that time were you driving that vehicle on that public highway in an intoxicated condition?

THE DEFENDANT: Yes.

THE COURT: What had you been drinking?

THE DEFENDANT: Wine.

THE COURT: And do you agree that at that date and time you had had too much to drink and you shouldn't have been driving; is that

fair?

THE DEFENDANT: I don't know if that's what happened. That's what happened when I have the accident because –

THE COURT: Sir, let me explain my question. Do you now agree that you were driving and you had had too much to drink and you shouldn't have been driving; is that fair?

THE DEFENDANT: Yes.

THE COURT: And you weren't just driving drunk, you actually hit somebody and hurt them, correct?

THE DEFENDANT: Yes.

THE COURT: Is it fair and do you agree that you caused serious physical injury to another person, a person with the initials E.B.?

THE DEFENDANT: Yes.

THE COURT: Do you agree with that?

THE DEFENDANT: Yes.

THE COURT: Counsel, you don't contest the nature of the degree of the injury?

MS. MANPEL-SCIANNA: Right, correct, Your Honor.

THE COURT: Do you understand, sir, now that there was a blood alcohol content test and had your blood above .08, which is above the legal limit, do you acknowledge that?

THE DEFENDANT: Yes.

In opposition, Defendant argues that this motion is premature because preliminary discovery has not been completed and depositions have not been held. In addition, Defendant argues that there may be triable issues of fact related to the events leading up to the accident, including: (1) the speed that both cars were traveling; (2) whether Plaintiff used reasonable care to avoid the collision; (3)

the position of Plaintiff's vehicle at the time of the accident; (4) whether there were any mechanical issues with Plaintiff's car that contributed to accident; (5) whether Plaintiff's car lights were illuminated at the time of the accident; (6) whether Plaintiff's actions were a causative factor to the accident; (7) whether Defendant's alleged acts and/or omissions were the sole cause of the accident; and (8) the general facts and circumstances surrounding the accident.

Defendant asserts that in a negligence action, there may be more than one proximate cause of the accident. In addition, Defendant argues that Plaintiff's affidavit is self serving and that his plea allocution does not eliminate any question of fact, despite Plaintiff's position to the contrary. Finally, Defendant states that Plaintiff's reliance on the unsworn police report does not resolve questions of fact, as it is hearsay and inadmissible in a summary judgment motion.

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of facts are raised and cannot be resolved on conflicting affidavits. See Millerton Agway Coop. v. Briarcliff Farms, 17 N.Y.2d 57, 61 (1966); Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 (1957). Initially, "the proponent... must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact." However, once a movant makes a sufficient showing, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). Where the moving papers are insufficient, the court need not consider the sufficiency of the opposing papers. Id.; see also Fabbricatore v. Lindenhurst Union Free School Dist., 259 A.D.2d 659 (2d Dept. 1999).

Here, Plaintiff established her prima facie entitlement to judgment as a matter of law by

submitting evidence that Defendant crossed over the double yellow line into her lane of traffic, causing the collision. See Snemyr v. Morales-Aparicio, 47 A.D.3d 702, 703 (2d Dept. 2008). "A driver is not required to anticipate that a vehicle traveling in the opposite direction will cross over into oncoming traffic." Eichenwald v. Chaudry, 17 A.D.3d 403 (2d Dept. 2005). In addition, Defendant acknowledged liability where, during his plea allocution, Defendant admitted to driving drunk, striking Plaintiff, and injuring her.

In opposition, Defendant failed to demonstrate the existence of a triable issue of fact. There is no factual evidence proffered in support of his opposition. In fact, Defendant did not even submit his own affidavit. Furthermore, counsel's affirmation is worthless and cannot be relied upon to meet Defendant's burden. See Zuckerman v. City of New York, 49 N.Y.2d 557, 560 (1980).

Moreover, while Defendant argues that this motion should be denied as premature, it is well settled that "[t]o defeat a motion for summary judgment based on outstanding discovery, it is incumbent upon the opposing party to provide an evidentiary basis to suggest that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were in the exclusive knowledge and control of the moving party." Rodriguez v. Gutierrez, 138 A.D.3d 964, 968 (2d Dept. 2016). "The mere 'hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is an insufficient basis for denying the motion.'" Rodriguez v. Gutierrez, supra, quoting Suero-Sosa v. Cardona, 112 A.D.3d 706, 708 (2d Dept. 2013)(internal quotation marks omitted). Here, Defendant failed to demonstrate how further discovery may reveal or lead to additional relevant evidence, especially in light of his guilty plea to vehicular assault.

Motion to Amend the Complaint

Plaintiff also moves this Court for leave to amend the complaint in order to seek punitive damages. Defendant naturally opposes.

Leave to amend a pleading pursuant to CPLR §3025(b) shall be freely granted, "absent prejudice or surprise resulting directly from the delay in seeking such leave," and unless the proposed amendment "is palpably insufficient or devoid of merit." Lucido v. Mancuso, 49 A.D.3d 220, 229 (2d Dept. 2009). "An award of punitive damages is warranted where the conduct of the party being held liable 'evidences a high degree of moral culpability, or where the conduct is so flagrant as to transcend mere carelessness, or where the conduct constitutes willful or wanton negligence or recklessness.'" Pellegrini v. Richmond County Ambulance Service, Inc., 48 A.D.3d 436, 437 (2d Dept. 2008), quoting Buckholz v. Maple Garden Apts., LLC, 38 A.D.3d 584, 585 (2d Dept. 2007). And, "gross negligence requires 'a reckless disregard for the rights of others, bordering on intentional wrongdoing.'" Horwitz v. Camelot Assoc. Corp., 66 A.D.3d 1299, 1302 (3d Dept. 2009), quoting Haire v. Bonelli, 57 A.D.3d 1354, 1358 (3d Dept. 2008). While intoxication alone does not open the door for punitive damages, the court must consider each situation on a case-by-case basis. Trudeau v. Cooke, 2 A.D.3d 1133 (3d Dept. 2003). And a plea of guilty to driving while intoxicated does not automatically warrant an imposition of punitive damages. See Schragel v. Juszczyk, 43 A.D.3d 1375 (4th Dept. 2007).

Here, the Court finds that the record is devoid of evidence sufficient to justify an award of punitive damages. While it is true the there is evidence that Defendant drove with an BAC twice the legal limit, and while the Court cannot condone this sort of behavior, the Court finds that that is essentially the only evidence proffered to justify an award of punitive damages. See Deon v.

Fortuna, 283 A.D.2d 388 (2d Dept. 2001)(evidence of driving while intoxicated insufficient by itself to justify imposition of punitive damages; motion to amend denied); Sweeney v. McCormick, 159 A.D.2d 832 (3d Dept. 1990)(evidence of intoxication at time of accident alone insufficient for punitive damages; there must be a showing of wanton or reckless conduct); see also Rodgers v. Duffy, 95 A.D.3d 864, 867 (2d Dept. 2012)(demand for punitive damages dismissed where driver was intoxicated, but there was no other evidence that he "acted with evil or reprehensible motives, or so recklessly or wantonly as to warrant an award of punitive damages").

* * *

Accordingly, in light of the above, it is hereby

ORDERED that Plaintiff's motion is granted to the extent Plaintiff is awarded partial summary judgment on the issue of liability; and it is further

ORDERED that Plaintiff's motion for leave to amend the complaint is denied; and it is further

ORDERED that the parties and counsel are to appear before the undersigned on Tuesday, October 24, 2017 at 9:30 a.m. for a compliance conference.

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York
September 6, 2017

HON. VICTOR G. GROSSMAN, J.S.C.

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