SHORT FORM ORDER

INDEX No. 15-609890
CAL. No. 16-02038MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 2-6-17
ADJ DATE 2-10-17
Mot. Seq. # 001 - MG

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JENNIFER A. FORDE,

Plaintiff,

- against -

ALBERT M. CARROZZA,

Defendant.

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Upon the following papers read on this e-filed motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers by plaintiff, dated January 5, 2017 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers by defendant, dated January 23, 2017 ; Replying Affidavits and supporting papers January 31, 2017 ; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff Jennifer Forde for summary judgment in her favor on the issue of liability is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff Jennifer Forde as a result of a motor vehicle accident, which occurred on July 6, 2015 on Woodside Avenue, at or near its intersection with Hospital Road, in the Town of Brookhaven, New York. The accident allegedly occurred when a vehicle operated by defendant Albert Carrozza struck plaintiff's vehicle as he made a left turn across plaintiff's lane of traffic. Plaintiff contends that defendant violated Vehicle and Traffic Law §§ 1141 and 1163 by making a left turn across her lane of traffic when it was not safe to do so.

Plaintiff now moves for summary judgment in her favor on the issue of liability on the grounds that defendant violated Vehicle and Traffic Law § 1141 by making a left turn into the path of her vehicle traveling with the right-of-way. Plaintiff submits, in support of the motion, copies of the pleadings, a certified police report, and the transcripts of the parties' deposition testimony. The Court notes that

portions of the certified copy of the police report were not considered in its determination of the motion because, as there is no indication that the responding officer witnessed the accident and there is no basis given for the officer's conclusions contained therein, they are inadmissible (*see* CPLR 4518 [a]; ***Memenza v Cole***, 131 AD3d 1020, 16 NYS3d 287 [2d Dept 2015]). However, the portions of the police report based upon the responding officer's observations while carrying out police duties are admissible (*see* ***Wynn v Motor Veh. Acc. Indem. Corp.***, 137 AD3d 779, 26 NYS3d 558 [2d Dept 2016]; ***Memenza v Cole***, *supra*; ***Matter of Chu Man Woo v Qiong Yun Xi***, 106 AD3d 818, 964 NYS2d 647 [2d Dept 2013]). In opposition, defendant argues that plaintiff was comparatively negligent by failing to reduce her speed as she approached the intersection in violation of Vehicle and Traffic Law § 1180 (e).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

A failure to comply with the Vehicle and Traffic Law constitutes negligence as a matter of law (***Colpan v Allied Cent. Ambulette, Inc.***, 97 AD3d 776, 949 NYS2d 124 [2d Dept 2012]; ***Vainer v DiSalvo***, 79 AD3d 1023, 914 NYS2d 236 [2d Dept 2010]). Pursuant to Vehicle and Traffic Law § 1141, a vehicle intending to turn left within an intersection must yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection. A driver who attempts to make a left turn when it is not reasonably safe to do so, such as when another vehicle is lawfully present in the intersection and the driver fails to see this through proper use of his senses, is in violation of this provision of the Vehicle and Traffic Law (*see* ***Foley v Santucci***, 135 AD3d 813, 23 NYS3d 338 [2d Dept 2016]; ***Krajiniak v Jin Y Trading, Inc.***, 114 AD3d 910, 980 NYS2d 812 [2d Dept 2014]; ***Ducie v Ippolito***, 95 AD3d 1067, 944 NYS2d 275 [2d Dept 2012]; ***Loch v Garber***, 69 AD3d 814, 893 NYS2d 233 [2d Dept 2010]). Pursuant to Vehicle and Traffic Law § 1163, a driver shall not "turn a vehicle at an intersection...unless and until such movement can be made with reasonable safety."

Further, a motorist is required to "see that which through proper use of [his or her] senses [he or she] should have seen" (***Bongiovi v Hoffman***, 18 AD3d 686, 687, 795 NYS2d 354 [2d Dept 2005]; *see* ***Nohs v Diraimondo***, 140 AD3d 1132, 35 NYS3d 209 [2d Dept 2016]; ***Thompson v Schmitt***, 74 AD3d 789, 902 NYS2d 606 [2d Dept 2010]). The operator of a vehicle with the right-of-way is entitled to assume that the opposing driver will obey traffic laws requiring him or her to yield (*see* ***Kassim v Uddin***, 119 AD3d 529, 987 NYS2d 878 [2d Dept 2014]; ***Ducie v Ippolito***, *supra*; ***Ahern v Lanaia***, 85 AD3d 696, 924 NYS2d 802 [2d Dept 2011]; ***Dominguez v CCM Computers, Inc.***, 74 AD3d 728, 902 NYS2d 163 [2d Dept 2010]; ***Yelder v Walters***, 64 AD3d 762, 883 NYS2d 290 [2d Dept 2009]). 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" (***Gause v Martinez***, 91 AD3d 595, 596, 936 NYS2d 272 [2d Dept

2012], quoting ***Todd v Godek***, 71 AD3d 872, 872, 895 NYS2d 861 [2d Dept 2010]; *see* ***Adobea v Junel***, 114 AD3d 818, 980 NYS2d 564 [2d Dept 2014]; ***Shui-Kwan Lui v Serrone***, 103 AD3d 620, 959 NYS2d 270 [2d Dept 2013]). Nevertheless, as a matter of law, a driver is not comparatively negligent in failing to avoid the collision if he or she has a right-of-way and only has seconds to react to a vehicle that has failed to yield (*see* ***Foley v Santucci***, *supra*; ***Ducie v Ippolito***, *supra*; ***Breen v Seibert***, 123 AD3d 963, 999 NYS2d 176 [2d Dept 2014]; ***Bennett v Granata***, 118 AD3d 652, 987 NYS2d 424 [2d Dept 2014]; ***Vainer v DiSalvo***, *supra*; ***Yelder v Walters***, *supra*). Finally, even where there is evidence that another driver involved in the accident was negligent as a matter of law due to a violation of the Vehicle and Traffic Law, "the proponent of a summary judgment motion has the burden of establishing freedom from comparative negligence as a matter of law" (***Pollack v Margolin***, 84 AD3d 1341, 1342, 924 NYS2d 282 [2d Dept 2011]; *see* ***Regans v Baratta***, 106 AD3d 893, 965 NYS2d 171 [2d Dept 2013]; ***Shui-Kwan Lui v Serrone***, *supra*).

Plaintiff established prima facie entitlement to summary judgment by showing that defendant was negligent in entering the intersection without yielding the right-of-way, and that she was not comparatively negligent (*see* Vehicle and Traffic Law § 1141; ***Foley v Santucci***, *supra*). Plaintiff testified that she was driving eastbound on Woodside Avenue in light traffic at the time of the accident, that the traffic light was green as she approached the intersection, and that it never changed before the collision. Plaintiff further testified that when she was approximately four feet from the intersection, an unknown vehicle made a left turn in front her vehicle and she sounded her horn, but the vehicles did not collide. However, three seconds after the unknown car turned, defendant turned left in front of plaintiff's vehicle, colliding with her vehicle. Defendant testified that he was driving westbound on Woodside Avenue, where there was heavy traffic traveling eastbound, at the time of the accident. He testified that as he intended to turn left onto Hospital Road, he approached the intersection from the left turning lane and stopped at the end of the lane to wait for traffic to pass. After approximately 12 cars passed, defendant looked towards Hospital Road for three to four seconds before and while making a left turn. The collision occurred when his vehicle was perpendicular to Woodside Avenue in the eastbound lane of traffic.

As plaintiff had the right-of-way, her vehicle was lawfully in the roadway at the time of impact, and she was entitled to assume that defendant would obey traffic laws requiring him to yield (*see* ***Kassim v Uddin***, *supra*; ***Ducie v Ippolito***, *supra*; ***Ahern v Lanaia***, *supra*; ***Palomo v Pozzi***, 57 AD3d 498, 869 NYS2d 153 [2d Dept 2008]). The fact that defendant was unable to travel through the intersection without being struck by plaintiff's vehicle is evidence that plaintiff's approaching vehicle was an immediate hazard (*see* ***Yelder v Walters***, *supra*). By failing to yield the right-of-way when plaintiff was already lawfully in the intersection and making a left turn into the path of plaintiff's vehicle, defendant violated the Vehicle and Traffic Law and was negligent as a matter of law (*see* Vehicle and Traffic Law § 1141; ***Palomo v Pozzi***, *supra*; ***Spivak v Erickson***, 40 AD3d 962, 836 NYS2d 676 [2d Dept 2007]). Although plaintiff had a duty to use reasonable care to avoid the collision, she is not comparatively at fault, as she testified that she never saw defendant's vehicle before the collision, but the collision occurred three seconds after the first car turned left in front of her vehicle (*see* ***Foley v Santucci***, *supra*; ***Ducie v Ippolito***, *supra*).

The burden now shifts to the non-moving party to raise a triable issue of fact as to whether there was a non-negligent explanation for the accident or as to whether plaintiff's negligence contributed to

the accident (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Goemans v County of Suffolk***, 57 AD3d 478, 868 NYS2d 753 [2d Dept 2008]). Defendant argues that plaintiff's violation of Vehicle and Traffic Law § 1180 (e), requiring a driver approaching an intersection to drive at an "appropriate reduced speed," contributed to the happening of the accident. Although plaintiff testified that she did not slow her vehicle prior to the collision as she approached the intersection and that her foot remained on the accelerator at the time of impact, a driver is not required to reduce his or her speed at every intersection, but only when it is warranted by the conditions presented (*see* ***Chietan v Persaud***, 57 AD3d 471, 869 NYS2d 177 [2d Dept 2008]; ***Bagnato v Romano***, 179 AD2d 713, 578 NYS2d 613 [2d Dept 1992]). Defendant has not submitted evidence of a condition that would require plaintiff to reduce her speed as she approached the intersection (*see* ***Miglionico v Leroy Holdings Co., Inc.***, 78 AD3d 1306, 909 NYS2d 829 [3d Dept 2010]; ***Mosch v Hansen***, 295 AD2d 717, 744 NYS2d 222 [3d Dept 2002]; ***Wilke v Price***, 221 AD2d 846, 633 NYS2d 686 [3d Dept 1995]). Additionally, because defendant did not have the right-of-way when he proceeded to turn left across the eastbound lanes of traffic and failed to see plaintiff's approaching vehicle through proper use of his senses, it is immaterial whether the plaintiff reduced her speed as she approached the intersection (*see* ***Foley v Santucci***, *supra*; ***Ducie v Ippolito***, *supra*). Therefore, defendant fail to raise a triable issue of fact as to whether such negligence by the plaintiff contributed to the happening of the accident (*see* ***Marcel v Sanders***, 123 AD3d 1097, 1 NYS3d 230 [2d Dept 2014]; ***Timm v Barilli***, 109 AD3d 655, 971 NYS2d 308 [2d Dept 2013]).

Accordingly, plaintiff's motion for summary judgment in her favor on the issue of liability is granted.

Dated: 4·21·17

Denise F. Molia
A.J.S.C.
DENISE F. MOLIA

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION