SHORT FORM ORDER **E-FILE**

INDEX No. 15-609862
CAL. No. 17-00568MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 5-23-17
ADJ. DATE 5-30-17
Mot. Seq. # 001 - MD
002 - XMD

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CAROL PEPE-GIANNOLA,

Plaintiff,

- against -

STEVEN C. GRINDELL and DEER PARK UNION FREE SCHOOL DISTRICT,

Defendants.

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Upon the following papers numbered 1 to 26 read on these motions for summary judgment and for an order vacating the note of issue ; Notice of Motion and supporting papers 1 - 16 ; Notice of Cross Motion and supporting papers 17 - 23 ; Answering Affidavits and supporting papers 17 - 23, 24 - 26 ; Replying Affidavits and supporting papers 24 - 26 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff Carol Pepe-Giannola for partial summary judgment in her favor as to defendants' liability is denied; and it is further

ORDERED that the cross motion by defendants Steven C. Grindell and Deer Park Union Free School District for an order vacating plaintiff's note of issue is denied.

This action was commenced by plaintiff Carol Pepe-Giannola to recover damages for injuries she allegedly sustained on February 9, 2015, when her stopped motor vehicle was struck by a school bus owned by defendant Deer Park Union Free School District and operated by defendant Steven C. Grindell.

Plaintiff Carol Pepe-Giannola now moves for partial summary judgment in her favor as to defendants' liability, arguing that their actions were the sole proximate cause of her alleged injuries. In support of her motion, she submits copies of the pleadings, a transcript of plaintiff's General Municipal Law § 50-h hearing testimony, transcripts of the parties' deposition testimony, her own affidavit, six color

photographs, a certified copy of an MV-104A police accident report, and a copy of an MV-104F "Accident Report for School Vehicles."

Defendants Steven C. Grindell and Deer Park Union Free School District cross-move for an order vacating the note of issue and striking the action from the trial calendar on the ground the certificate of readiness filed by plaintiff improperly states discovery is complete. More specifically, defendants allege that plaintiff failed to comply with a discovery demand dated March 27, 2017. In support of their cross motion, defendants submit a copy of a so-ordered stipulation, a copy of their demand for discovery, and a copy of a letter from the Suffolk County District Attorney's Office. Plaintiff opposes the motion, asserting that she complied with defendants' demands for disclosure and for trial authorizations.

At a General Municipal Law § 50-h hearing held on September 10, 2015, plaintiff Carol Pepe-Giannola testified that at approximately 2:30 p.m. on the date in question, she was operating a gold colored 2005 Kia Rio motor vehicle westbound on Bowling Lane in Deer Park, New York. She indicated that she brought her vehicle to a complete stop at the stop sign regulating the point at which Bowling Lane meets Commack Road. She stated that both Bowling Lane and Commack Road were two-way streets, with Commack Road acting as the top of a "T" intersection. As to the weather on that date, plaintiff testified that it was cold, and that there was snow present on the roadway, but that it did not affect her ability to control her vehicle in any way. Plaintiff further stated that she was very familiar with the intersection in question, having traveled through it daily for the entirety of her life.

Ms. Pepe-Giannola testified that she had been stopped at the aforementioned stop sign for "[m]ore than a minute," due to a large amount of traffic on Commack Road. She indicated that her entire vehicle was behind the white "stop" line painted on the roadway and that she was intending on making a right turn. Plaintiff denied that any portion of her view was obscured, save for a large yellow school bus directly in front of her waiting to make a left turn from Commack Road onto Bowling Lane. Plaintiff testified that as the school bus proceeded to make its left turn onto Bowling Lane, the "middle" of its driver's side collided with the front driver's side of her vehicle. She indicated that, following its collision with her vehicle, the school bus stopped "on top of the car, practically." Plaintiff stated that police arrived and assisted her out of her vehicle's passenger side door, as her driver's side door was held closed by the school bus. Plaintiff further testified that the school bus driver "yelled at her," saying that she "hit him."

Steven Grindell testified that he has been a school bus driver for the Deer Park Union Free School District for 15 years, and that he had been driving the school bus in question for five years prior to the accident. Mr. Grindell stated that on the date of the accident, he used the school bus to pick up approximately 40 children from the school when classes ended at 2:10 p.m. He indicated that he made one stop to drop off students at the corner of Commack Road and Reed Drive, then proceeded southbound on Commack Road toward its intersection with Bowling Lane. He testified that Commack Road has one lane of travel in each direction, running north and south, with a single turning lane in the center. Mr. Grindell indicated that as he approached the intersection of Commack Road and Bowling Lane, he moved the school bus into Commack Road's center turning lane and stopped, intending to make a left turn onto Bowling Lane. He stated the weather was cloudy and, that while there was snow on the ground, the roads were clear. Upon questioning, Mr. Grindell testified that he looked toward Bowling Lane and saw neither any vehicles stopped at its stop sign nor any approaching from further down Bowling Lane. He stated that he waited for a "minute

or two" in the turning lane, until such time as an opening in the "heavy" northbound traffic appeared. He explained that immediately before initiating the left turn onto Bowling Lane, he looked down Bowling Lane, "didn't see nothing," then "completed [his] turn." Mr. Grindell testified that the first time he saw plaintiff's vehicle was "[w]hen the accident happened." He stated that he couldn't recall if plaintiff's vehicle was stopped or moving, but believes it was in the wrong lane at the time of the accident, despite acknowledging that no lane markings are present. Mr. Grindell further testified that the area of the driver's side of the school bus near the "third or fourth seat" collided with the front driver's side light, bumper, and hood at "four or five miles [per hour]." Upon being shown the MV-104A police accident report and being asked if he believed it was accurate, he stated that "she was not at the white [stop] line."

By an affidavit submitted in support of her motion, Carol Pepe-Giannola avers that "[n]o portion of [her] vehicle ever went outside the westbound lane of traffic up until the time of the accident." She further states that when she brought her vehicle to a stop, the "front of [her] vehicle was approximately one foot behind the white line and [she] never moved from that location prior to the accident." She indicates that the school bus "crossed over onto [her] side of Bowling Lane and struck the front driver's side of [her] vehicle."

A party moving for summary judgment 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 issues of fact (***Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP***, 26 NY3d 40, 19 NYS3d 488 [2015]; ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (***Nomura***, *supra*; *see also* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (***Daliendo v Johnson***, 147 AD2d 312, 543 NYS2d 987 [2d Dept 1989]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (***Nomura***, *supra*; *see also* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157 [2011]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

A plaintiff in a personal injury action who moves for summary judgment on the issue of liability "has the burden of establishing, prima facie, both that the defendant was negligent and that he or she was free from comparative fault" (***McLaughlin v Lunn***, 137 AD3d 757, 757, 26 NYS3d 338 [2d Dept 2016]). The Vehicle and Traffic Law establishes standards of care for motorists, and an unexcused violation of such standards of care constitutes negligence per se (*see* ***Shui-Kwan Lui v Serrone***, 103 AD3d 620, 959 NYS2d 270 [2d Dept 2013]; ***Barbieri v Vokoun***, 72 AD3d 853, 900 NYS2d 315 [2d Dept 2010]; ***Coogan v Torrisi***, 47 AD3d 669, 849 NYS2d 621 [2d Dept 2008]). Moreover, an operator of a motor vehicle has a "common-law duty to see that which [he or she] should have seen through the proper use of [his or her] senses" (***Botero v Erraez***, 289 AD2d 274, 275, 734 NYS2d 565, 566 [2d Dept 2001]; *see also* ***Ferrara v Castro***, 283 AD2d 392, 724 NYS2d 81 [2d Dept 2001]). Nevertheless, "[t]here can be more than one proximate cause of an accident and generally, it is for the trier of fact to determine the issue of proximate cause" (***Victor v Daley***, 150 AD3d 1307, 1307, 2017 NY Slip Op 04315 [2d Dept 2017] [internal citations and quotations omitted]).

Here, plaintiff has failed to eliminate all triable issues (*see* ***McLaughlin v Lunn***, *supra*; *see generally* ***Alvarez v Prospect Hosp.***, *supra*). While plaintiff testified, without equivocation, that she was fully stopped in the right lane of Bowling Lane, behind its white stop line, Mr. Grindell's deposition testimony disputes plaintiff's version of events. Therefore, the conflicting testimony implicates the credibility of the parties. It is well established that summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (***Scott v Long Is. Power Auth.***, 294 AD2d 348, 348, 741 NYS2d 708 [2d Dept 2002]). Accordingly, plaintiff's motion for summary judgment in her favor as to defendants' liability is denied.

Regarding defendants' cross motion, parties to litigation are entitled to "full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR 3101 [a]). Further, the filing of a note of issue and certificate of readiness denotes the end of the discovery phase of litigation (***Arons v Jutkowtiz***, 9 NY3d 393, 411, 850 NYS2d 345 [2007]; *see* ***Tirado v Miller***, 75 AD3d 153, 901 NYS2d 358 [2d Dept 2010]). The Uniform Rules for Trial Courts (22 NYCRR) § 202.21 (e) provides, in relevant part, that within 20 days after service of a note of issue and certificate of readiness, any party to the action may move to vacate the note of issue "upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect." A court, however, may deny a motion to vacate the note of issue, even when discovery demand outstanding, if the defendant had ample time to complete the disclosure process (*see* ***Remark Elec. Corp. v Manshul Const. Corp.***, 242 AD2d 694, 662 NYS2d 592 [2d Dept 1997]; ***Simmons v Kemble***, 150 AD2d 986, 541 NYS2d 875 [3d Dept 1989]; ***Bycomp, Inc. v New York Racing Assn., Inc.***, 116 AD2d 895, 498 NYS2d 274 [3d Dept 1986]). In addition, the Uniform Rules for Trial Courts (22 NYCRR) §202.7 (a) provides that a motion relating to disclosure must be supported by an affirmation that counsel "has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." The affirmation of good-faith effort "shall indicate the time, place, and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held" (Uniform Rules for Trial Courts [22 NYCRR] § 202.7 [c]).

Here, defendants established they made a good faith effort to obtain the demanded discovery. However, plaintiff appears to have supplied the demanded discovery items as an addendum to their reply affirmation submitted in support of the instant motion. Accordingly, defendants' cross motion for an order striking the note of issue based on plaintiff's failure to comply with the March 2017 notice of discovery and inspection is denied, as moot.

Dated: Sept 8, 2017

W. Gerard Asher
J.S.C.
HON. W. GERARD ASHER

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**