

**Tirino v Village of Freeport**

2018 NY Slip Op 34333(U)

July 11, 2018

Supreme Court, Nassau County

Docket Number: Index No. 608121/16

Judge: Denise L. Sher

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This opinion is uncorrected and not selected for official publication.

**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER  
Acting Supreme Court Justice

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SUZANN TIRINO,

Plaintiff,

- against -

THE VILLAGE OF FREEPORT, FREEPORT FIRE  
DEPARTMENT and GEAUDI MARINES-INFANTE,

Defendants.

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TRIAL/IAS PART 32  
NASSAU COUNTY

Index No.: 608121/16  
Motion Seq. No.: 02  
Motion Date: 05/09/18

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CARMEN DIAZ-RIVERA,

Plaintiff,

- against -

INCORPORATED VILLAGE OF FREEPORT, GEAUDI  
MARINES-INFANTE and SUZANN J. TIRINO,

Defendants.

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Index No.: 2789/16

ALLSTATE INSURANCE COMPANY AS SUBROGEE  
OF CARMEN DIAZ-RIVERA,

Plaintiff,

- against -

SUZANN J. TIRINO, GEAUDI MARINES-INFANTE and  
VILLAGE OF FREEPORT,

Defendants.

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Index No.: CV3355/16

**The following papers have been read on this motion:**

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition and Exhibit	2
Affirmation in Reply	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiff Suzann Tirino (“Tirino”) moves, pursuant to CPLR § 3212, for an order granting her summary judgment on the issue of liability against defendants The Village of Freeport, Freeport Fire Department (hereinafter collectively “Freeport”) and Geaudi Marines-Infante (“Marines-Infante”). Defendants Freeport and Marines-Infante oppose the motion.

The instant action was commenced with the filing of a Summons and Verified Complaint on or about October 20, 2016. *See* Plaintiff’s Affirmation in Support Exhibit A. Issue was joined on or about November 14, 2016. *See* Plaintiff’s Affirmation in Support Exhibit B.

The action arises from a motor vehicle accident which occurred on August 7, 2015, at approximately 4:40 p.m., on Brooklyn Avenue, at or near its intersection with North Ocean Avenue, Freeport, County of Nassau, State of New York. The subject accident involved three (3) vehicles - a 2008 Lexus, owned and operated by plaintiff, a 2004 Chevrolet, owned by defendants Freeport and operated by defendant Marines-Infante, and a 2008 Chevrolet, owned and operated by plaintiff Carmen Diaz-Rivera (“Diaz-Rivera”). *See* Plaintiff’s Affirmation in Support Exhibit D.

In support of the motion, counsel for plaintiff submits, in pertinent part, that, “[a]t the time of the occurrence, the Plaintiff, **SUZANN TIRINO**, was the registered owner and properly restrained operator of a 2008 Lexus motor vehicle,.... Plaintiff’s vehicle was proceeding northbound on North Ocean Avenue with the right of way, when it was struck by a 2004

Chevrolet motor vehicle, ..., owned by the Defendant, THE VILLAGE OF FREEPORT and/or FREEPORT FIRE DEPARTMENT, and permissively operated by Defendant, GEAUDI MARINES-INFANTE, an employee and/or agent of Defendant, THE VILLAGE OF FREEPORT and/or FREEPORT FIRE DEPARTMENT. The vehicle operated by the Defendant, GEAUDI MARINES-INFANTE was proceeding eastbound on Brooklyn Avenue with a traffic control device and the duty to yield the right of way to the Plaintiff.... Following that collision, the Defendant(s), THE VILLAGE OF FREEPORT, FREEPORT FIRE DEPARTMENT and GEAUDI MARINES-INFANTE's vehicle rolled over onto its side and into the Plaintiff, CARMEN DIAZ-RIVERA under Index No. 002789/2016." See Plaintiff's Affirmation in Support Exhibit C.

Counsel for plaintiff further asserts that, at plaintiff's February 19, 2016 Examination Under Oath and August 18, 2017 Examination Before Trial ("EBT"), she testified that, on the date and time of the subject incident, she was proceeding through the intersection, with the right of way, when defendant Marines-Infante failed to yield the right of way resulting in the motor vehicle accident. Specifically, she testified that there was a blinking yellow traffic light controlling the direction in which her automobile was traveling, while there was a blinking red traffic light controlling the direction in which defendant Marines-Infante's automobile was traveling. Plaintiff further testified that there were stop signs controlling the traffic on both sides of Brooklyn Avenue, the road upon which defendant Marines-Infante's automobile was traveling, and no stop signs on Ocean Avenue, the road upon which her automobile was traveling. See Plaintiff's Affirmation in Support Exhibits E and F.

Plaintiff Diaz-Rivera also testified at an EBT and confirmed the location of the blinking red light and stop signs on Brooklyn Avenue. *See* Plaintiff's Affirmation in Support Exhibit G.

Counsel for plaintiff further submits that defendant Marines-Infante testified at an EBT and contends that "[d]uring said deposition, Defendant testified that he was proceeding on Brooklyn Avenue and failed to yield the right of way to the Plaintiff, SUZANN TIRINO resulting in the motor vehicle accident." *See* Plaintiff's Affirmation in Support Exhibit H.

Counsel for plaintiff argues that, "[i]t is clear plaintiff established a prima facie case that defendant was negligent as a matter of law in proceeding into the intersection, and failing to yield the right-of-way to Plaintiff's vehicle when Defendant was faced with a stop sign.... Here, the fact that the defendant asserts that he brought his vehicle to a stop before proceeding into the intersection does not absolve the defendant of liability, as defendant was required to stop and remain stationary until it was clear to proceed across the intersection.... Furthermore, conclusory assertions that the plaintiff may have been speeding before the collision and may have had time to take evasive action to avoid the accident were completely speculative and were undermined by the evidence in the record [citations omitted]. Plaintiff had the right of way and was entitled to anticipate that the Defendant would obey any and all traffic laws requiring him to yield (*sic*) right of way. [citations omitted]. Plaintiff has demonstrated that defendant, proceeded into the intersection when it was hazardous to do so, and failed to yield the right of way to plaintiff's vehicle. Defendant was required to stop and remain stationary until it was clear to proceed across the intersection, but he proceeded into the intersection after plaintiff's vehicle had already entered the intersection, and struck plaintiff's vehicle. This establishes defendant failed to keep a proper lookout under the circumstances, to see and be aware of what was in his view, and failed to see that which, under the circumstances, he should have seen with the proper use of his senses,

which was the sole proximate cause of the accident. [citations omitted]. Thus, plaintiff has established his (*sic*) prima facie entitlement to judgment as a matter of law on the issue of liability.”

In opposition plaintiff’s motion, counsel for defendants Freeport and Marines-Infante argues, in pertinent part, that, “[t]hroughout plaintiff’s (*sic*) entire Affirmation, she (*sic*) makes one argument and one argument only: defendants had a stop sign/blinking red light and plaintiff did not. It is the portion cited in plaintiff’s Examination Under Oath, the portion cited in plaintiff’s deposition, the portion cited in plaintiff Diaz-Rivera’s deposition, and the portion cited in defendant’s deposition. It is the only argument made by plaintiff’s counsel, who assumes this is enough to warrant summary judgment on liability, as if the existence of a stop sign, without anything else, precludes a reasonable jury from finding 1% negligence for the other party in every case. What plaintiff neglects to mention is that defendant entered the intersection first, that the points of impact to the vehicles clearly show plaintiff ‘T-boning’ defendant, and that under such circumstances a reasonable jury can find comparative negligence on the part of plaintiff, as she is required to ‘see and be aware of what was in [her] view.’... It is clear that the front of plaintiff’s vehicle struck the mid to rear passenger side of defendant’s vehicle.... Plaintiff Tirino claimed that defendant’s vehicle climbed on top of her hood, as opposed to a ‘T-Bone’ accident, and this accounts for the damage to the front of her vehicle.... However, defendant Marines-Infante testified that his vehicle was struck by the Tirino vehicle in the side, which corresponds to a more traditional ‘T-bone’ accident.... Thus, there is an issue of fact as to how the accident occurred, and all issues of fact must be resolved in favor of the non-moving party for purposes of summary judgment. Moreover, plaintiff Tirino’s version of the accident does not correspond to the damage to the vehicles.... The photographs of damage to plaintiff Tirino’s vehicle also support the

premise that she T-boned the defendant.... They show crush damage to the front of her vehicle, and the center of her hood pushed in and up.” See Defendants Freeport and Marines-Infante’s Affirmation in Opposition Exhibit A.

Counsel for defendants Freeport and Marines-Infante further contends that, “[d]efendant Marines-Infante testified at his deposition that he arrived at the stop sign, waited, and looked both ways.... He saw one vehicle, and waited for it to pass.... He then looked again, and did not see any other vehicle.... He was stopped for about five seconds in total.... He entered the intersection, traveling approximately five miles per hour.... He first saw the Tirino vehicle after he already entered the intersection. At this time, the Tirino vehicle was still ‘under the train tracks’, about 20 feet from the intersection.... When he was in the center of the intersection, the front bumper, front grille, and front hood of Tirino’s vehicle struck the back door, back fender, and back tire of his vehicle.... He was about 85 percent through the intersection when the accident occurred.... The force of impact was strong enough such that defendant Marines-Infante’s vehicle flipped over, and was pushed across the remainder of the intersection, coming into contact with plaintiff Diaz-Rivera’s vehicle which was on the other side of the intersection.... As there is an issue of fact as to whether the points of impact show plaintiff T-boned defendant, and defendant testified that he had already entered the intersection when plaintiff was still under the train tracks, 20 feet from the intersection, and was 85 percent done with the intersection when he was T-boned, there exists an issue of fact as to whether defendant entered the intersection first.” See Plaintiff’s Affirmation in Support Exhibit H.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. See *Sillman v. Twentieth Century-*

*Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. See *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. See CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. See *Zuckerman v. City of New York, supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. See *Sillman v. Twentieth Century-Fox Film Corp., supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. See *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the Court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. See *Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989). It is the existence of an issue, not its relative strength that is the critical and controlling consideration. See *Barrett v. Jacobs*, 255

N.Y. 520 (1931); *Cross v. Cross*, 112 A.D.2d 62, 491 N.Y.S.2d 353 (1<sup>st</sup> Dept. 1985). The evidence should be construed in a light most favorable to the party moved against. *See Weiss v. Garfield*, 21 A.D.2d 156, 249 N.Y.S.2d 458 (3d Dept. 1964).

Summary judgment is rarely appropriate in negligence actions (*see Ugarriza v. Schneider*, 46 N.Y.2d 471, 414 N.Y.S.2d 304 (1979)), even where the salient facts are conceded, since the issue of whether the defendant or the plaintiff acted reasonably under the circumstances is generally a question for jury determination. *See Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974); *Davis v. Federated Department Stores, Inc.*, 227 A.D.2d 514, 642 N.Y.S.2d 707 (2d Dept. 1996); *John v. Leyba*, 38 A.D.3d 496, 831 N.Y.S.2d 488 (2d Dept. 2007).

It is well settled that there may be more than one proximate cause of a traffic accident (*see Steiner v. Dincesen*, 95 A.D.3d 877, 943 N.Y.S.2d 585 (2d Dept. 2012); *Gause v. Martinez*, 91 A.D.3d 595, 936 N.Y.S.2d 272 (2d Dept. 2012); *Lopez v. Reyes-Flores*, 52 A.D.3d 785, 861 N.Y.S.2d 389 (2d Dept. 2008)) and “the proponent of a summary judgment has the burden of establishing freedom from comparative negligence as a matter of law.” *See Antaki v. Mateo*, 100 A.D.3d 579, 954 N.Y.S.2d 540 (2d Dept. 2012); *Simmons v. Canady*, 95 A.D.3d 1201, 945 N.Y.S.2d 138 (2d Dept. 2012); *Pollack v. Margolin*, 84 A.D.3d 1341, 924 N.Y.S.2d 282 (2d Dept. 2011). “The issue of comparative fault is generally a question for the trier of facts.” *See Allen v. Echols*, 88 A.D.3d 926, 931 N.Y.S.2d 402 (2d Dept. 2011); *Gause v. Martinez, supra*.

Further, all drivers are required to “see that which through proper use of [his or her] senses [he or she] should have seen.” *Steiner v. Dincesen, supra, quoting Vainer v. DiSalvo*, 79 A.D.3d 1023, 914 N.Y.S.2d 236 (2d Dept. 2010) *quoting Bongiovi v. Hoffman*, 18 A.D.3d 686, 795 N.Y.S.2d 354 (2d Dept. 2005).

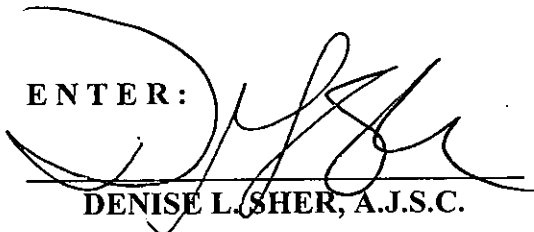
Based upon the evidence presented in the papers before it, the Court finds that there are issues of fact as to the exact cause of the subject accident and which party failed to act reasonably under the circumstances and failed to see that which he or she should have seen through the proper use of his or her senses.

Additionally, the Court finds that the facts and circumstances surrounding the subject motor vehicle accident involve determining the credibility of the parties involved in said accident and, in rendering a decision on a summary judgment motion, the Court is not to determine matters of credibility.

Accordingly, plaintiff's motion, pursuant to CPLR § 3212, for an order granting her summary judgment on the issue of liability against defendants Freeport and Marines-Infante, is hereby **DENIED**.

All parties shall appear for a Pre-Trial Conference in Nassau County Supreme Court, Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, on September 18, 2018, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:   
DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York  
July 11, 2018

**ENTERED**  
JUL 12 2018  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE