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NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA - 5

GEORGE MANU,

Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY and ROBERT GREENE,

Defendants.

INDEX NUMBER: **23004/2014**

Present:
HON. **ALISON Y. TUITT**
Justice

The following papers numbered 1 to 3,

Read on this Defendants' Motion for Summary Judgment

On Calendar of **4/9/18**

Notice of Motion-Exhibits and Affirmation 1

Affirmation in Opposition 2

Reply Affirmation 3

Upon the foregoing papers, defendants' motion for summary judgment is granted in part and denied in part for the reasons set forth herein.

The within action involves a motor vehicle accident that occurred on October 9, 2013 at Webster Avenue and 205th Street, Bronx, New York between plaintiff's vehicle and a BX41 bus. Plaintiff claims to have sustained serious injuries as a result of the accident. Defendants provide the Court with a copy of the video purportedly depicting the accident, however, the video format would not allow it to play. Therefore, the Court relies on the photographs provided by defendants, as well as all of the other evidence in this case.

Defendant Robert Greene ("Greene"), the operator of the bus, testified that immediately prior to the accident, he was operating the bus headed north along Webster Avenue in the bus lane. As he approached the 205th Street bus stop, he shifted lanes into the regular lane of traffic as school buses were blocking the 205th

Street bus stop. Immediately to the left of the regular lane, there was a left turn only lane where plaintiff was proceeding. Mr. Greene testified that after stopping to let passengers off, he then proceeded straight on Webster Avenue when plaintiff, suddenly and without warning, cut in front of the moving bus. Defendants argue that they are entitled to summary judgment because plaintiff caused the accident in an improper lane change and defendants were faced with an emergency situation. Plaintiff testified that when he reached the point of the accident, he had been traveling in the left only lane but "was following a couple of cars, and everybody go in front of the bus... So, when it reaches my turn, which I follow the cars ahead of me. This driver pull up from the right-hand side to the left." Plaintiff claims that "all of a sudden, after a large percentage of my car has passed through the front of the bus, this bus turned from right-hand side to the left side, to hit the right side of my rear car." Thus, plaintiff claims that defendants are not entitled to summary judgment because while the bus was stopped, three other vehicles did exactly what plaintiff did, which was to use the left turn only lane to get around the stopped bus. Plaintiff argues that had defendant Greene been paying attention, he would have noticed that three other vehicles had to go around him in the only other lane available, the left turn only lane, because he had stopped his bus in the moving lane of traffic. Plaintiff contends that Mr. Greene failed to use reasonable care in failing to look for additional passing vehicles. Greene testified that after he let his passengers off, he looked in his left side mirror for 2-3 seconds, but did not see any vehicles passing him on the left. Greene also acknowledged that while the bus was stopped, other vehicles had passed him on the left in order to proceed straight on Webster Avenue.

The court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion)

shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

Vehicle and Traffic Law §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." Section (d) provides that "[w]hen official markings are in place indicating those portions of any roadway where crossing such markings would be especially hazardous, no driver of a vehicle proceeding along such highway shall at any time drive across such markings." Vehicle and Traffic Law §1143 provides that "[t]he driver of a vehicle about to enter or cross a roadway from any place other than another roadway shall yield the right of way to all vehicles approaching on the roadway to be entered or crossed." Here, it is undisputed based on the testimony of the parties and the photographs provided to the Court that plaintiff violated Vehicle and Traffic Law §1128 and such a violation is negligence per se. It is well-established that a "violation of a standard of care imposed by the Vehicle and Traffic Law constitutes negligence per se". See, Davis v. Turner, 20 N.Y.S.3d 2 (1st Dept. 2015); Garcia v. Verizon New York, Inc., 781 N.Y.S2d 93 (1st Dept. 2004); Barbieri v. Vokoun, 900 N.Y.S.2d 315 (2d Dept. 2010); Ciatto v. Lieberman, 698 N.Y.S.2d 54 (2d Dept 1999). Thus, plaintiff's negligence is established as a matter of law. The photographs as well as plaintiff's testimony makes clear that plaintiff's vehicle was in the left turn only lane when it cut in front of defendants' bus. Despite plaintiff's claims, there is no evidence that the bus crossed into plaintiff's lane before the accident. The photographs show that plaintiff clearly crossed into the bus' lane, to the right, notwithstanding that he was in a left turn only lane which was clearly and conspicuously marked as a left only turn lane.

In opposition to the prima facie showing, plaintiff raises an issue of fact regarding whether defendants were also liable in the happening of the accident. The photographs show, and defendant Greene admits, that he was stopped in the moving lane of traffic due to the school buses occupying the bus lane; as he was stopped to let passengers off, he observed at least three other vehicles use the left turn lane to go around him, since he was in fact blocking the only moving lane of traffic; he looked in his mirror for two to three seconds and did not see plaintiff's vehicle; and, plaintiff's vehicle cuts in front of his bus and the accident occurs. The jury may very well find that defendant was faced with an emergency situation and was not at all liable in the happening of the accident. However, at the very least, plaintiff has raised an issue of fact regarding

contributory negligence of defendants. Since defendant Greene was aware that vehicles were using the left turn lane to go around him, he was on notice of this happening immediately before the accident, could he avoided the accident had he properly looked for other vehicles? Summary judgment is a drastic remedy that will deprive plaintiff of his day in Court. Viewing the evidence in the light most favorable to plaintiff as the Court must do on this motion for summary judgment, there is a question of fact as to whether defendants were also negligent. "[U]nder the doctrine of comparative negligence, 'a driver who lawfully enters an intersection ... may still be found partially at fault for an accident if he or she fails to use reasonable care to avoid a collision with another vehicle in the intersection'". See, Nevarez v. S.R.M. Management Corp., 867 N.Y.S.2d 431 (1st Dept. 2008) citing Romano v. 202 Corp., 759 N.Y.S.2d 365 (2d Dept. 2003), quoting Siegel v. Sweeney, 697 N.Y.S.2d 317 (2d Dept. 1999). Where there is evidence that more than one party's negligence, it is not appropriate for a court to rule as a matter of law that only one of those parties caused the injury. See, Maniscalco v. New York City Transit Authority, 943 N.Y.S.2d 486 (1st Dept. 2012).

This constitutes the decision and Order of this Court.

Dated: 1/11/19

A. Y. Tuitt

Hon. Alison Y. Tuitt