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 PUTNAM

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GEORGE IERVOLINO,

Plaintiff,

-against -

MONICA KLEIN,

Defendant.

----------X

DECISION & ORDER

Index No.501186/2018
Sequence No. 1
Motion Date: 1/17/19

GROSSMAN, J.S.C.

The following papers, numbered 1 to 16, were considered in connection with Plaintiff's Notice of Motion, dated November 26, 2018, seeking, inter alia, partial summary judgment on the issue of liability.

PAPERS	**NUMBERED**
Notice of Motion/Affirmation in Support/Exhs. 1-10/Memorandum in Support	1-13
Affirmation in Opposition/Exh. A	14-15
Affirmation in Reply	16

This is an action to recover damages for personal injuries, stemming from a 2-car accident on Route 6, Mahopac, New York on May 23, 2018. At the time of the accident, Plaintiff George Iervolino was driving in the westbound lane proceeding down a small hill when Defendant Monica Klein exited the driveway of a local business and began to make a left-turn across Plaintiff's lane of traffic. Plaintiff swerved left in an attempt to avoid a collision, but the cars collided, causing Plaintiff to be injured.

Plaintiff commenced this action on September 21, 2018. Defendant interposed her Answer on November 21, 2018.

Plaintiff moves for summary judgment on the issue of liability. In support of his motion, Plaintiff submitted, inter alia, his affidavit, photographs of the location of the accident, the police report, the Summons and Verified Complaint, and Defendant's Verified Answer.

In opposition, Defendant proffers Ms. Klein's affidavit.

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).

"Where * * * a driver enters traffic without yielding and collides with another vehicle, he or she is negligent as a matter of law and his or her negligence is a proximate cause of the accident (Vehicle and Traffic Law §§1143, 1173); see Yasinosky v. Lenio, 28 A.D.3d 652, 653 [2d Dept. 2006]; Lallemand v. Cook, 23 A.D.3d 533 [2d Dept. 2005]; Trzepacz v. Jara, 11

A.D.3d 531 [2d Dept. 2004]; Bolta v. Lohan, 242 A.D.2d 356 [2d Dept. 1997]). In addition, 'a driver is negligent where an accident occurs because [he or she] has failed to see that which through the proper use of [his or her] senses [he or she] should have seen' (Bolta v. Lohan, supra; see Stiles v. County of Dutchess 278 A.D.2d 304)." Kuper v. Bretstein, 2016 WL 1122184 (Sup. Ct. [Queens] February 10, 2016). "However, "'[t]here can be more than one proximate cause of an accident.'" Rabenstein v. Suffolk County Dept. of Pub. Works, 131 A.D.3d 1145 (2d Dept. 2015), quoting Cox v. Nunez, 23 A.D.3d 427 (2d Dept. 2005). Therefore, "a driver traveling with the right-of-way may nevertheless be found to have contributed to the happening of the accident if he or she did not use reasonable care to avoid the accident." Rabenstein v. Suffolk County Dept. of Pub. Works, supra at 1146. But, "[t]o be entitled to partial summary judgment a plaintiff does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault." Rodriguez v. City of New York, 31 N.Y.3d 312, 324-25 (2018).

As a threshold matter, there is no evidence that the police officer who authored the report witnessed the accident. Therefore, the report is inadmissible hearsay, and cannot be relied upon in a summary judgment motion. See Memenza v. Cole, 131 A.D.3d 1020, 1021-22 (2d Dept. 2015); see also Shehab v. Powers, 150 A.D.3d 918, 919 (2d Dept. 2017).

Therefore, the Court must evaluate the parties' dueling affidavits. Plaintiff states that he was driving westbound along Route 6 at the posted speed limit when Defendant suddenly pulled out into his lane to make a left-hand turn into the eastbound lane of traffic, and did so "without bothering to stop and let me pass" (Notice of Motion, Exh. 1 at ¶¶3, 6, 9). He continues to state that Defendant did not activate her turn signal or look to see if there was traffic in the westbound

lane (Notice of Motion, Exh. 1 at ¶¶8-9). Plaintiff maintains that he had no choice but to swerve to the left to avoid a collision, but nevertheless, he collided with Defendant's car (Notice of Motion, Exh. 1 at ¶10). In her affidavit, Defendant states that Plaintiff was speeding, that she activated her "left-hand blinker,"and that she looked both ways (Affirmation in Opposition, Exh. A at ¶5). Defendant states further that she was at a complete stop before entering Route 6, and that "[a] vehicle, which I later learned was operated by plaintiff GEORGE IERVOLINO, approached on Route 6 from around the curve and down the decline," and he was "proceeding down the decline at a speed that, in my estimation, was in excess of the 40-mph posted speed limit" (Affirmation in Opposition, Exh. A at ¶5). Defendant attests that "[a]s I made my left-hand turn, plaintiff came into the lane I was attempting to turn into, and our vehicles impacted" (Affirmation in Opposition, Exh. A at ¶6). Accordingly, the Court finds that there are issues of fact, warranting a denial of the summary judgment motion.

Moreover, "'CPLR 3212(f) permits a court to deny a motion for summary judgment where it appears that the facts essential to oppose the motion exist but cannot be stated.'" Brielmeier v. Leal, 145 A.D.3d 753, 754 (2d Dept. 2016), quoting Sepulveda v. Cammeby's Mgt. Co., LLC, 119 A.D.3d 927 (2d Dept. 2014). "'This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion.'" Brielmeier v. Leal, supra, quoting Baron v. Incorporated Vil. of Freeport, 143 A.D.2d 792, 793 (2d Dept. 1988). "A party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment." Herrera v. Gargiso, 140 A.D.3d 1122, 1123 (2d Dept. 2016).

On the facts before the Court, the only thing that is undisputed is that the two cars

collided in the middle of Route 6. Both parties claim that they acted lawfully. In addition, Defendant asserts that she should be permitted to question Plaintiff at a deposition about his speed, and what he saw prior to the accident – facts that are in the exclusive knowledge and possession of Plaintiff. See Cueva v. 373 Wythe Realty, Inc., 111 A.D.3d 876, 877 (2d Dept. 2013); see also Resetartis Constr. Corp. v. Olmsted, 118 A.D.3d 1454, 1456 (4th Dept. 2014). Moreover, there has been no opportunity to engage in any discovery due to the immediate filing of the instant motion (see Cueva v. 373 Wythe Realty, Inc., supra). Plaintiff moved for summary judgment five (5) days after the service and filing of Defendant's Verified Answer and Discovery Demands, and essentially thwarted Defendant's discovery demands. The Court finds that it cannot make a determination of liability, if at all, without having the benefit of all the facts before it.

To the extent Plaintiff seeks to recoup his additional costs incurred in serving Defendant with process by alternative means after Defendant failed to answer or complete the acknowledgment of receipt of service by mail, in accordance with CPLR §321-a, the Court grants that portion of the motion and awards $42.00 to Plaintiff, which is the amount incurred to serve Defendant with process via Putnam County Sheriff. See CPLR §312-a(f); McGriff v. Mallory, 160 A.D.3d 1460 (4th Dept. 2018); Dazco Heating & A.C. Corp. v. C.B.C. Indus., 225 A.D.2d 578, 579 (2d Dept. 1996). Defendant provides no reason for her failure to complete the acknowledgment of receipt other than her conclusory, self-serving claim that she did not receive the papers. There is no evidence before the Court that the mailing was returned to sender.

In light of the above, the Court declines to address the remaining arguments without prejudice, and it is hereby

ORDERED that that portion of Plaintiff's motion for an immediate entry of judgment for costs incurred to serve Defendant with process by the Putnam County Sheriff is granted; and it is further

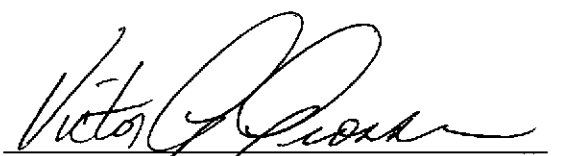
ORDERED that upon presentation of a copy of this Decision and Order, with notice of entry, accompanied by a proper form of judgment, the Clerk is hereby directed to permit entry of judgment in the amount of $42.00 in favor of Plaintiff and against Defendant Monica Klein; and it is further

ORDERED that the remainder of Plaintiff's motion is denied without prejudice; and it is further

ORDERED that the parties and counsel are to appear before the undersigned on Friday, March 1, 2019 at 9:30 a.m. for a preliminary conference.

The foregoing constitutes the Decision and Order of the Court.

Dated: Carmel, New York
February 15, 2019



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