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| Wachsman v Brecher |
| 2019 NY Slip Op 34468(U) |
| September 3, 2019 |
| Supreme Court, Rockland County |
| Docket Number: Index No. 032303/2017 |
| Judge: Sherri L. Eisenpress |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
AUDREY WACHSMAN,

Plaintiff,

-against-

BENJAMIN BRECHER,

Defendant.

-----X
Sherri L. Eisenpress, A.J.S.C.

DECISION & ORDER

Index No.: 032303/2017

(Motions# 1 and #2)

The following papers, numbered 1-7, were considered in connection with (i) Defendant's Notice of Motion, pursuant to Civil Practice Law and Rules § 3212, granting summary judgment in favor of Defendant and dismissal of the Complaint (Motion #1); and (ii) Plaintiff's Notice of Cross-Motion for an Order, pursuant to Civil Practice Law and Rules § 3212, granting partial summary judgment in favor of Plaintiff on the issue of liability (Motion #2):

| <u>PAPERS</u> | <u>NUMBERED</u> |
|--------------------------------------------------------------------------------------|-----------------|
| NOTICE OF MOTION/AFFIRMATION IN SUPPORT/AFFIDAVIT OF SHAWN HARRINGTON/EXHIBITS "A-I" | 1-3 |
| NOTICE OF CROSS-MOTION/AFFIRMATION IN SUPPORT/EXHIBIT "A" | 4-5 |
| AFFIRMATION IN OPPOSITION TO CROSS-MOTION/EXHIBIT "J" | 6 |
| AFFIRMATION IN FURTHER SUPPORT OF CROSS-MOTION | 7 |

Upon a careful and detailed review of the foregoing papers, the Court now rules as follows:

This action arises from a motor vehicle accident which occurred on January 26, 2017, when Plaintiff, Audrey Wachsman, was struck by a motor vehicle operated by the defendant Benjamin Brecher, as she was at or near the entrance to the driveway of her home at 28 Carlton Road, Monsey, New York. The action was commenced by Plaintiff on May 24, 2017, with the filing of the Summons and Complaint through the NYSCEF system. Issue was

joined with the filing of Defendant's Answer through the NYSCEF system on June 29, 2017. Discovery proceeded and Plaintiff filed a Note of Issue on December 6, 2018.

Defendant moves for summary judgment motion on the ground that Plaintiff was the sole proximate cause of the occurrence. He states that on the date of the accident, Plaintiff spoke to her friend, Defendant Brecher, and requested that he stop by her house to pick up a card and chocolate to bring to a wedding he was attending. Defendant asserts that as he pulled into the Plaintiff's driveway, Plaintiff exited her home from the side entrance and ran into the driveway in front of Defendant's vehicle. He states that she was on her cellphone at the time. Mr. Brecher, who was driving approximately two to four miles per hour, testified that he felt banging on the left side of his vehicle and that when he opened his door and stepped out of the car, he observed that Plaintiff's right foot had come into contact with his left side tire. Defendant asserts that Plaintiff immediately apologized and thereafter told the police officer that the accident was her fault.

In support of his summary judgment motion, Defendant submits an affidavit of Shawn Harrington, an accident reconstructionist, who visited the accident site on November 27, 2017. He opines that it was dark at the time of the accident, who opines that several factors including "lack of contrast and conspicuity," the headlight beam of the vehicle sweeping right to left, and Plaintiff's geometric position behind the driver's A-pillar of the vehicle combined to prevent Plaintiff from being detected by the driver prior to the subject incident. He further opines that Plaintiff had the best chance to avoid the collision. Additionally, Defendant contends that he is entitled to summary judgment because Plaintiff admitted to the police officer that the accident was her fault.

Plaintiff opposes the summary judgment motion and cross-moves for summary judgment in her favor. She asserts that she specifically asked defendant not to come into the driveway and waited a few minutes outside on the sidewalk in front of her house. At some point she observed him trying to turn into her driveway. She went from her sidewalk to her driveway

and believed that he would stop. She argues that Defendant testified that the weather was "nice" and that he had no problems with visibility. He further testified that he did not stop prior to turning left into the driveway and that he began his turn but never completed it, proceeding only four inches onto the driveway. Mr. Brecher testified that at no time did he see anyone coming out of the front or side doors of Plaintiff's residence and testified that there was nothing blocking his view. He did not observe Mrs. Wachsman running across her driveway and marked an "x" on a photograph for the point of impact as being immediately at the apron of the sidewalk.

Plaintiff contends that she is entitled to summary judgment because defendant failed to yield the right of way in violation of Section 1151(a) and Sec. 1163(a) of the Vehicle and Traffic Law. VTL Sec. 1151-a states as follows:

"Pedestrians' right of way on sidewalks": The driver of a vehicle emerging from or entering an alleyway, building, private road or driveway shall yield the right of way to any pedestrian approaching on any sidewalk extending across such alleyway, building entrance, road or driveway.

VTL Sec. 1163 states as follows:

"Turning movements and required signals: (a) No person shall turn a vehicle at an intersection unless the vehicle is in proper position upon the roadway as required in section eleven hundred sixty, or turn a vehicle to enter a private road or driveway, or otherwise turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety. No person shall turn any vehicle without giving an appropriate signal in the manner hereinafter provided.

In the instant action, Plaintiff contends that she was waiting on the sidewalk in front of the driveway and only backed up when she realized that Defendant was making an unexpected turn into her driveway.

With respect to Defendant's allegation that she admitted her fault to the police officer, Plaintiff argues that she and Defendant enjoyed an extremely close and friendly relationship before and after the accident and that she didn't want him to get in trouble with the

police officer. She further asserts that in conjunction with her acceptance of fault in the context of their relationship, Mr. Brecher also testified at his examination before trial that he replied "And I said I'm so sorry for what I put you through and that was it." Accordingly, she contends that these statements reflect the sentiments expressed between two good friends, not legal admissions of fault.

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v. Citibank Corp., et al., 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v. Gonzalez, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), citing Alvarez, supra, and Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 508 N.Y.S.2d 923 (1985). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980), 427 N.Y.S.2d 595.

In the instant matter, the Court finds that triable issues of fact exist as to both Plaintiff and Defendant's negligence in the happening of the accident. With respect to Defendant, a driver is bound to see what is there to be seen through the proper use of his or her senses, and is negligent for the failure to do so. Shui-Kwan Lui v. Serrone, 103 A.D.3d 620, 959 N.Y.S.2d 270 (2d Dept. 2013). Additionally, a driver also has a duty to exercise reasonable care under the circumstances to avoid an accident. Id. With respect to Plaintiff's cross-motion, while "a violation of the Vehicle and Traffic Law constitutes negligence as a matter of law," Gluck v.

New York City Tr. Auth, 118 A.D.3d 667, 669, 987 N.Y.S.2d 89 (2d Dept. 2014), triable issues of fact remain as to whether these statutory provisions were violated by Defendant. Moreover, while Plaintiff stated to the police officer that the accident was her fault, this does not eliminate the legal possibility that the accident may have also been Defendant's fault. As such, both Defendant's motion for summary judgment and Plaintiff's cross-motion for summary judgment must be denied.

Accordingly, it is hereby

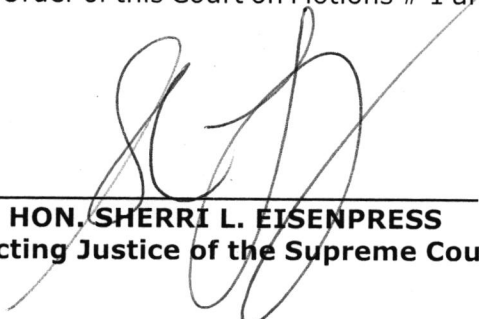
ORDERED that Defendant's Notice of Motion for Summary Judgment on the issue of liability and dismissal of the Complaint (Motion #1) is DENIED in its entirety; and it is further

ORDERED that Plaintiff's Notice of Cross-Motion for Summary Judgment on the issue of liability (Motion #2) is DENIED in its entirety; and it is further

ORDERED that counsel shall appear in the Trial Readiness Part on **WEDNESDAY, OCTOBER 2, 2019, at 9:30 a.m.**

The foregoing constitutes the Decision and Order of this Court on Motions # 1 and #2.

Dated: New City, New York
September 3, 2019



HON. SHERRI L. EISENPRESS
Acting Justice of the Supreme Court

To: All parties (via NYSCEF)