SHORT FORM ORDER **INDEX NO. 617608/2018**

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:
Hon. Paul J. Baisley, Jr., J.S.C.

SHANIQUEWA M. MILES and KYLE MILES,

Plaintiffs,

-against-

CARL CARDO and CARDO SITE DEVELOPMENT INC.,

Defendants.

ORIG. RETURN DATE: December 26, 2018
FINAL RETURN DATE: January 25, 2019
MOT. SEQ. #001 MG

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Upon the following papers read on this motion for partial summary judgment ; Notice of Motion and supporting papers by the plaintiffs, dated December 10, 2018 ; Answering Affidavits and supporting papers by the defendants, dated January 23, 2019 ; Replying Affidavits and supporting papers by the plaintiffs dated January 24, 2019 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiffs Shaniquewa M. Miles and Kyle Miles for partial summary judgment in their favor on the issue of defendants' liability is granted; and it is further

ORDERED that the parties shall appear for a preliminary conference at 10:00 a.m. on March 28, 2019, at the DCM-J Part of the Supreme Court, One Court Street, Riverhead, New York.

This action was commenced by plaintiff Shaniquewa M. Miles to recover damages for injuries she allegedly sustained on September 13, 2017, when her motor vehicle was struck by a motor vehicle operated by defendant Carl Cardo and owned by defendant Cardo Site Development, Inc. Mrs. Miles' spouse, Kyle Miles, asserts a derivative claim for loss of services.

Plaintiffs now moves for partial summary judgment in their favor as to defendants' liability, arguing that defendant driver violated, among other things, Vehicle and Traffic Law § 1128 (a) and, therefore, was negligent per se in the happening of the subject motor vehicle accident. In support of the motion, plaintiffs submit copies of the pleadings, an affidavit of Mrs. Miles, an affidavit of nonparty Justin Fowler, and a certified copy of an MV-104A police accident report. Initially, the Court notes it did not consider that portion of the police accident report entitled "Accident Description/Officer's notes," as statements therein are inadmissible hearsay (*see Memenza v Cole*, 131 AD3d 1020, 16 NYS3d 287 [2d Dept 2015]).

In her affidavit, Shaniquewa Miles states that on the date in question, she was operating her motor vehicle westbound in a lane of travel between rows of parked cars inside the parking lot of Best Market located at 70 Sunset Avenue, Westhampton Beach, New York. She indicates that as she traveled in the lane toward the parking lot's exit on Sunset Avenue, defendants' vehicle struck the driver's side of her vehicle. Mrs. Miles avers that defendant driver "drove over [empty] designated parking spaces and entered the lane [she] was traveling in." In conclusion, she states that she "never had a chance to avoid the collision as the defendant [driver] shot out from the designated parking spots, from behind parked vehicles that [she] was approaching, as [she] traveled in the lane."

In his affidavit, nonparty Justin Fowler states that on the date in question, he was standing in the subject parking lot and "waving at [Mrs. Miles] as she attempted to leave the parking lot in her vehicle." He indicates that he further observed a 1985 Chevrolet El Camino "driving through the designated parking spaces . . . a hit [Mrs. Miles'] car on the driver's side door."

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" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). 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 (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*see O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 52 NYS3d 68 [2017]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

A plaintiff "is no longer required to show freedom from comparative fault in order to establish his prima facie entitlement to judgment as a matter of law on the issue of liability" (*Merino v Tessel*, 166 AD3d 760, 760, 87 NYS3d 554 [2d Dept 2018]; *see Rodriguez v City of New York*, 31 NY3d 312, 76 NYS3d 898 [2018]). 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]).

Vehicle and Traffic Law § 1128 (a) provides, in relevant part:

> Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply:
>
> (a) 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.

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, while "the driver with the right-of-way is entitled to assume that other drivers will obey the traffic laws requiring them to yield, the driver with the right-of-way also has an obligation to keep a proper lookout and see what can be seen through the reasonable use of his or her senses to avoid colliding with other vehicles" (*Miron v Pappas*, 161 AD3d 1063, 1064, 77 NYS3d 163 [2d Dept 2018][internal citation omitted]).

Plaintiffs' submissions established a prima facie case of entitlement to judgment in their favor on the issue of defendants' liability for their alleged injuries (*see Ricciardi v Nelson*, 142 AD3d 492, 35 NYS3d 724 [2d Dept 2016]; *see generally Alvarez v Prospect Hosp.*, *supra*). Plaintiffs' contention that defendants violated Vehicle and Traffic Law § 1128 (a) is unsupported, as it applies only to roadways that have been "divided into two or more clearly marked lanes." Here, there is no evidence that the roadway upon which the incident occurred was marked in such a manner. However, plaintiffs demonstrated, prima facie, that defendant driver violated Vehicle and Traffic Law § 1143, which provides "[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." In addition, as to defendant Cardo Site Development, Inc., Vehicle and Traffic Law § 388 (1) provides that "[e]very owner of a vehicle used or operated in this state shall be liable and responsible for . . . injuries to person or property resulting from negligence in the use or operation of such vehicle . . . by any person using or operating the same with the permission, express or implied, of such owner." The burden then shifted to defendant to raise a triable issue (*see generally Vega v Restani Constr. Corp.*, *supra*).

Defendants oppose plaintiffs' motion, arguing that triable issues of fact remain, that the motion is premature, and that issues of proximate cause and serious injury are "beyond the scope of the instant application." In opposition to plaintiffs' motion, defendant driver Carl Cardo submits his own affidavit, wherein he states that on the date in question, he was operating a 1985 Chevrolet and was "attempting to exit" the subject parking lot "via the Sunset Avenue exit." He indicates that "[j]ust prior to entering the lane of traffic, [he] looked out to see if any other vehicles were coming towards [him]," but "did not see the plaintiff's vehicle just prior to entering the traffic lane." As a result, "[s]hortly after entering the traffic lane" at "approximately 2 to 3 miles per hour," the "front right bumper area of [his] vehicle came into contact with the front left corner panel of the plaintiff's vehicle." Mr. Cardo states that he "did not have an opportunity to avoid the occurrence."

Defendants' evidence fails to raise a triable issue (*see Marcel v Sanders*, 123 AD3d 1097, 1 NYS3d 230 [2d Dept 2014]). Initially, summary judgment may not be avoided based on a claim that discovery is needed "unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence" (*Anne Koplick Designs, Inc. v Lite*, 76 AD3d 535, 536, 906 NYS2d 331 [2d Dept 2010], quoting *Ruttura & Sons Constr. Co. v J. Petrocelli Constr.*, 257 AD2d 614, 615, 684 NYS2d 286 [2d Dept 1999]; *see Wienfeld v HR Photography, Inc.*, 149 AD3d 1014, 52 NYS3d 458 [2d Dept 2017]). Here, there is no evidentiary basis suggesting discovery "might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the

movant" (*Skura v Wojtlowski*, 165 AD3d 1196, 1200, 87 NYS3d 100 [2d Dept 2018], quoting *MVB Collision, Inc. v Progressive Ins. Co.*, 129 AD3d 1040, 1041, 13 NYS3d 139 [2d Dept 2015] [internal quotations and citations omitted]).

Further, defendants adduced no evidence that plaintiff driver was negligent in the happening of this incident. Any issue of whether plaintiff driver was comparatively negligent is left for the damages phase of this proceeding, and does not preclude the Court's present finding of liability on the part of the defendant (*see Rodriguez v City of New York*, 31 NY3d 312, 76 NYS3d 898 [2018]).

Accordingly, the motion by plaintiffs for partial summary judgment on the issue of defendants' liability is granted.

Dated: 3/5/19

HON. PAUL J. BAISLEY, JR., J.S.C.