SHORT FORM ORDER **INDEX NO. 601019/2018**

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

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

ANDREW DINATALE and ANGELA DINATALE,

Plaintiffs,

-against-

NICHOLAS GERBANO and MAC MECHANICAL CONVEYOR,

Defendants.

ORIG. RETURN DATE: June 25, 2019
FINAL RETURN DATE: August 13, 2019
MOT. SEQ. #: 001 MotD

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Upon the following papers read on this motion for partial summary judgment and to compel discovery: Notice of Motion and supporting papers by the plaintiffs, dated May 30, 2019; Answering Affidavits and supporting papers by the defendants, dated July 15, 2019; Replying Affidavits and supporting papers by the plaintiffs, dated August 12, 2019; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiffs Andrew DiNatale and Angela DiNatale for, inter alia, partial summary judgment in their favor on the issue of defendant's liability is granted to the extent provided herein, and is otherwise denied; and it is further

ORDERED that the parties shall appear for a preliminary conference at 10:00 a.m. on November 12, 2019, at the DCM-J Part of the Supreme Court, One Court Street, Riverhead, New York.

This action was commenced by plaintiff Andrew DiNatale to recover damages for injuries he allegedly sustained on April 29, 2015, when, while riding a bicycle, he was struck by a motor vehicle owned by defendant Mac Mechanical Conveyor and operated by defendant Nicholas Gerbano. Mr. DiNatale's wife, Angela DiNatale, asserts a derivative claim for loss of services.

Plaintiffs now move for partial summary judgment in their favor as to defendants' negligence, arguing that defendants' actions were the sole proximate cause of the accident. Plaintiffs also seek an order striking defendants' affirmative defenses related to "negligence liability" and compelling defendants to provide an affidavit regarding their "knowledge as to all potentially available excess or umbrella insurance policy limits." In support of their motion, plaintiffs submit, among other things, a copy of their marriage certificate, Mr. DiNatale's own affidavit, various photographs, and a certified copy of an MV-104A police accident report.

In his affidavit, Mr. DiNatale indicates that at approximately 6:40 a.m. on the date in question, he

was riding a bicycle eastbound in the right lane of East Main Street in Smithtown, New York, just past its intersection with Lawrence Avenue. He states that it was a "beautiful sunny day with blue skies," that he was wearing a "bright fluorescent green long sleeve shirt, fluorescent level shoes, gray bike shorts, and a helmet," and that he was riding "no more than about 1-1 ½ feet from the curb." He further states that his bicycle was equipped with functioning, and activated, lights facing both front and rear. Mr. DiNatale indicates that he was suddenly struck from behind by defendants' motor vehicle, and did not hear the sound of a horn or screeching tires beforehand. He avers that defendant Nicholas Gerbano approached him after the collision and stated "I'm so sorry, I'm so sorry, I never saw you."

In the certified copy of the MV-104A police accident report, that portion of the report entitled "Accident Description/Officer's Notes" contains the phrase "OP#1 (defendant driver in this case) states he did not see bicyclist due to strong sun glare." The police officer further adds his or her own account of the accident scene, stating "Very strong sun glare for eastbound traffic." Plaintiffs request that the Court strike that portion of the accident report containing the police officer's personal impression of the sun glare. It declines to do so. "Information in a police accident report is admissible as a business record so long as the report is made based upon the officers personal observations and while carrying out police duties" (*Shehab v Powers*, 150 AD3d 918, 919, 54 NYS3d 104 [2d Dept 2017] [internal quotation marks omitted], quoting *Memenza v Cole*, 131 AD3d 1020, 1021, 16 NYS3d 287 [2d Dept 2015]). Plaintiffs additionally request that the statement attributed to defendant driver be accepted by the Court as a party admission, and the Court will do so (*see Yong Dong Liu v Lowe*, 173 AD3d 946, 102 NYS3d 713 [2d Dept 2019]).

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 [or her] 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]). Further, 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]).

Vehicle and Traffic Law § 1146 (a) provides, in relevant part, that "every driver of a vehicle shall

exercise due care to avoid colliding with any bicyclist, pedestrian, or domestic animal upon any roadway and shall give warning by sounding the horn when necessary." 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]).

Plaintiffs' submissions established a prima facie case of entitlement to judgment in their favor on the issue of defendants' liability for their alleged injuries, and as to their own freedom from comparative negligence (*see generally Alvarez v Prospect Hosp.*, *supra*). Plaintiffs demonstrated that Mr. DiNatale was riding his bicycle in a lawful manner when defendants' motor vehicle struck him without warning. With regard to that portion of plaintiffs' motion seeking an order striking defendants' first, second, fourth, fifth, and sixth affirmative defenses relating to liability, "the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where, as here, the plaintiff moved for summary judgment dismissing a defendant's affirmative defense of comparative negligence" (*Poon v Nisanov*, 162 AD3d 804, 808, 79 NYS3d 227 [2d Dept 2018]). Here, Mr. DiNatale's affidavit is sufficient to demonstrate, prima facie, that the sole proximate cause of the subject collision was defendant driver's vehicle striking him from behind. In addition, as to defendant Mac Mechanical Conveyor, 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 defendants to raise a triable issue (*see generally Vega v Restani Constr. Corp.*, *supra*).

In opposition, defendants submit only the affirmation of their counsel, wherein they argue that plaintiff's motion is premature, and that defendant driver's statements regarding his inability to see plaintiff bicyclist due to sun glare raise a triable issue. Specifically, defendants assert that sun glare can present an emergency situation precluding defendants' liability.

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]).

As to the issue of alleged sun glare creating an emergency situation, defendant driver does not submit an affidavit detailing the circumstances immediately prior to the subject accident, seemingly relying upon his statement recorded in the certified police accident report. However, such statement merely supports the idea that defendant driver was caused to have difficulty seeing due to glare. The emergency doctrine "recognizes that when an actor is faced with a sudden and unexpected circumstance

which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context, provided the actor has not created the emergency" (*Lifson v City of Syracuse*, 17 NY3d 492, 497, 934 NYS2d 38 [2011], quoting *Caristo v Sanzone*, 96 NY2d 172, 174, 726 NYS2d 334 [2001]). Here, defendant driver did not state that his temporary "blindness" caused him to direct his vehicle toward the right side of the roadway, such that contact with plaintiff bicyclist was possible, nor did he state that he was unable to slow or halt his motor vehicle in response to his loss of visual acuity. In addition, defendant driver did not state the duration of the sun glare condition, the specific manner in which the glare manifested itself, the position of his motor vehicle before and after the glare condition occurred, or if there were any actions taken by plaintiff bicyclist to contribute to the accident. Thus, defendant driver did not establish that his actions in response to the alleged emergency were reasonable, and did not raise a triable issue regarding the applicability of the emergency doctrine to the instant matter (*cf. Chwojdak v Schunk*, 164 AD3d 1630, 84 NYS3d 635 [4th Dept 2018]; *Majid v New York City Tr. Auth.*, 128 AD3d 648, 8 NYS3d 432 [2d Dept 2015]; *Johnson v Phillips*, 261 AD2d 269, 690 NYS2d 545 [1st Dept 1999]). Further, defendants have failed to demonstrate, prima facie, the existence of any negligence on plaintiffs' part.

Accordingly, the motion by plaintiffs Andrew DiNatale and Angela DiNatale for partial summary judgment in their favor on the issue of defendants' liability and dismissal of defendants' affirmative defenses regarding liability is granted.

As to plaintiffs' request for an order compelling defendants to provide certain affidavits and discovery, that branch of plaintiffs' motion is granted to the extent that the parties shall appear for a preliminary conference as stated above.

Dated: 10/10/19

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