To commence the 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 WESTCHESTER

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STEVEN FIGUEROA,

Plaintiff,

DECISION & ORDER
Index No. 63456/2016
Sequence No. 2

-against-

ANNE C. HENTSCHEL AND ISABELLE G. HENTSCHEL,

Defendants.

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WOOD, J.

The court read NYSCEF documents Numbers 48 through 74, in connection with plaintiff's motion for partial summary judgment on the issue of liability; and pursuant to CPLR 3211 (b) dismissing defendants' affirmative defenses as to culpable conduct and assumption of risk.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff from a motor vehicle accident on August 17, 2016, around 3:15 PM, at the intersection of Mamaroneck Avenue and Union Avenue in Harrison. While driving a vehicle owned by defendant Anne C. Hentchel ("Mrs. Hentchel"), her daughter, Isabelle G. Hentschel ("defendant") executed a U-turn from the northbound side to the southbound side of Mamaroneck Avenue. Defendant turned into plaintiff's lane and struck plaintiff's vehicle, which was driving straight on the southbound side of Mamaroneck Avenue. In this accident there were two impacts.

Plaintiff argues that defendant violated Vehicle and Traffic Law §1212 (Reckless Driving), §1160(e)(Required position and method of turning at intersections,) and §1163(a) (turning movements and required signals).

Upon the foregoing papers, the motion is decided as follows:

It is well settled that "a proponent of a summary judgment motion 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 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; see also Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see Zuckerman v New York, 49 NY2d 557, 562 [1980]; see also Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). Conclusory, unsubstantiated assertions will not suffice to defeat a motion for summary judgment (Barclays Bank of New York, N.A. v Sokol, 128 AD2d 492 [2d Dept 1987]). A party opposing a motion for summary judgment may do so on the basis of deposition testimony as well as other admissible forms of evidence, including an expert's affidavit, and eyewitness testimony (Marconi v Reilly, 254 AD2d 463 [2d Dept 1998]). In deciding a motion for summary judgment, the court is required to view the evidence presented "in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). The court must accept as true the evidence presented by the nonmoving party and must deny the motion if there is "even arguably any doubt as to the existence of a triable issue" (Kolivas v Kirchoff, 14 AD3d 493 [2d Dept 2005]); Baker v Briarcliff School Dist., 205 AD2d 652,661-662 [2d Dept 1994]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable

issue (Alvarez v Prospect Hospital, 68 NY2d 320, 324). On a summary judgment motion, a court must regard issue finding rather than issue determination (Celardo v Bell, 222 AD2d 547 [2d Dept 1995]).

Generally, Vehicle and Traffic Law §1129(a) imposes a duty on all drivers to drive at a safe speed and maintain a safe distance between vehicles, always compensating for any known adverse road conditions (Ortega v City of New York, 721 NYS2d 790 [2d Dept 2000]). A violation of the Vehicle and Traffic Law is negligence as a matter of law (Truckenmiller v Duran, 125 AD3d 639, 639–40 [2d Dept 2015]).

Specifically, VTL §1160(e) provides that " U-turns shall be made from and to that portion of the highway nearest the marked center line. Where more than one lane of a highway has been designated for left turns, U-turns shall be made only from the lane so designated that is adjacent to the marked center line" (VTL§1160).

During her deposition, defendant conceded that she did not see plaintiff's vehicle before the collision, but only a second before the impact.

At the time of the accident, plaintiff was in the right furthest lane away from the northbound traffic when defendant's motor vehicle struck his, seemingly in direct contravention of VTL §1160(e).

In further support of his motion, plaintiff contends that defendant violated VTL §1160 (e) by performing a U-turn when it was not reasonable safe to do so; VTL §1163(a) was violated by performing a u-turn where plaintiff was lawfully driving straight thus causing the accident; and VTL §1212 in attempted to execute the U-turn defendant unreasonably interfered with plaintiff's free and proper use of a public highway. Also it is suspect that defendant can

opine about plaintiff's rate of speed, as she did not see plaintiff's vehicle much before the accident. Under these circumstances, defendant failed to yield the right of way to plaintiff and while executing a U-turn failed to see what there was to be seen, namely, plaintiff's vehicle that was lawfully driving straight in the right most lane on the southbound side of Mamaroneck Avenue. The fact that defendant never saw plaintiff does not excuse her conduct (Domanova v. State, 41 AD3d 633, 634 [2d Dept 2007]). Notwithstanding any alleged negligence on the part of plaintiff, defendant had a common-law duty to see that which she should have seen through the proper use of her senses (Domanova v State, 41 AD3d 633, 634 [2d Dept 2007]). A driver who has the right of way is entitled to anticipate that other drivers will obey the traffic laws.

Accordingly, based upon this record, including the police report, and the depositions of the parties and the non-party witness, plaintiff made a prima facie showing that he had the right of way, that he was entitled to anticipate that defendant would obey the traffic laws which required defendant to yield, and that defendant's failure to yield was the proximate cause of the accident (Colandrea v Choku, 94 AD3d 1034, 1035 [2d Dept 2012]).

To the extent defendants suggest the possibility that the accident might have been avoided, or that the plaintiff may have been speeding, such assertions, upon this record, are completely speculative and inadequate to withstand summary judgment (Colandrea v Choku, 94 AD3d at1036). Thus, defendants failed to provide any evidence of a non-negligent explanation for the accident sufficient to raise a triable question of fact (Grimm v Bailey, 105 AD3d 703 [2d Dept 2013]).

Further, the law in New York no longer mandates that plaintiff must disprove comparative negligence. The Court of Appeals has recently clarified that Article 14-A of the CPLR contains New York's codified comparative negligence principles, and that the legislative

history of Article 14-A makes clear that "a plaintiff's comparative negligence is no longer a complete defense to be pleaded and proven by the plaintiff, but rather is only relevant to the mitigation of plaintiff's damages and should be pleaded and proven by the defendant" (Rodriguez v City of New York, 31 N.Y.3d 312 [2018]). "To 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. Thus, to be entitled to summary judgment on the issue of liability, a plaintiff is no longer required to show freedom from comparative fault in establishing his or her prima facie case to the extent that the opposing party is negligent and a proximate cause of the incident (Edgerton v City of New York, 160 A.D.3d 809 [2d Dept 2018]).

For the reasons as discussed above, and of those advanced by plaintiff, he has demonstrated that defendant was negligent and a proximate cause of the accident.

Turning next to plaintiff's motion to dismiss the affirmative defenses, plaintiff bears the burden of demonstrating that the affirmative defense is 'without merit as a matter of law' " 'In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference' " '[I]f there is any doubt as to the availability of a defense, it should not be dismissed' " (Gonzalez v Wingate at Beacon, 137 AD3d 747 [2d Dept 2016]). Although a plaintiff need not demonstrate the absence of his or her own comparative negligence to be entitled to partial summary judgment as to a defendant's 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, [2d Dept 2018]).

Plaintiff argues that defendants do not demonstrate by way of case law or the factual record, how they provided a factual basis for the affirmative defenses, because the record does not support either defense. In addition, defendants' affirmative defense of culpable conduct must be stricken as the case for liability against defendants is premises primarily on the fact that defendant failed to see plaintiff's vehicle, failed to yield the right of way to plaintiff's vehicle and improperly and unsafely performed a u-turn into the lane plaintiff was driving in, causing the accident. Plaintiff contends that a driver who has the right of way and who only has seconds to react does not have to show their efforts to evade a vehicle which ignores his right of way. Plaintiff also claims that defendants cannot opine as to plaintiff's rate of speed or manner of driving before the collision.

While comparative negligence is not a bar to a plaintiff's recovery under CPLR §1411 (Rodriguez, 31 NY3d at 320), it may be used by defendants to reduce the amount of recoverable damages (id.). Giving defendants every reasonable inference, the branch of plaintiff's motion seeking to strike defendants' affirmative defenses is denied.

Therefore for the above stated reasons, it is hereby

ORDERED that the partial summary judgment motion by plaintiff pursuant to CPLR 3212 is **granted** to the extent that liability is found in his favor against defendants, and is otherwise **denied**; and it is further

ORDERED that the branch of plaintiff's motion seeking to strike the affirmative defenses of defendants is **denied**; and it is further

ORDERED, that serious injury will be tried during the damages phase of the trial, and that the granting of this summary judgment motion does not preclude further determination that plaintiff may or may not have sustained serious injury as defined by Insurance Law §5102[d]; and it is further

ORDERED, that the parties are directed to appear in the Settlement Conference Part on November 19, 2019 at 9:15 a.m. in courtroom 1600 of the Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Blvd., White Plains, New York 10601.

The Clerk shall mark his records accordingly.

All matters not herein decided are denied. This constitutes the Decision and Order of the court.

Dated: September 17, 2019
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

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