| **Gonzalez-Torres v Schiaffo** |
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| 2020 NY Slip Op 34626(U) |
| February 18, 2020 |
| Supreme Court, Orange County |
| Docket Number: INDEX NO.: EF000977-2019 |
| Judge: Sandra B. Sciortino |
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To commence the statutory time 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 ORANGE

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**JEANNETTE GONZALEZ-TORRES,**
Plaintiff,

-against-

**JAMES C. SCHIAFFO,**
Defendant.

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**DECISION AND ORDER**

**INDEX NO.: EF000977-2019**
**Motion Date: 12/11/19**
Sequence No. 1

**SCIORTINO, J.**

The following papers numbered 1 to 16 were considered in connection with the application of plaintiff for summary judgment on the issue of liability:

| PAPERS | NUMBERED |
|---|---|
| Notice of Motion/Affirmation (Milligram)/Plaintiff's Affidavit/ Exhibits A-I | 1 - 12 |
| Affirmation in Opposition (McCusker)/Defendant's Affidavit/Exhibit 1 | 13 - 15 |
| Reply Affirmation (Four-Rosenbaum) | 16 |

**Background and Procedural History**

This personal injury action arises out of a motor vehicle accident that occurred on April 11, 2017 on Route 211 east near Ballard Road, in the Town of Wallkill, Orange County. On the day of the accident, plaintiff was attempting to exit the parking lot driveway of a UPS store onto Route 211. In the area where the accident occurred, Route 211 has two lanes of traffic running east and two lanes running west. A fifth lane is in the center of the four travel lanes and is available to vehicles intending to make left hand turns from either direction. The center turning lane is marked by two sets of yellow lines.

At the time of the accident, traffic on Route 211 heading east toward Ballard Road was bumper-to-bumper. Plaintiff's intent was to turn left and travel westbound on Route 211. In order to do so, she had to cross the two eastbound travel lanes and the center turning lane.

Plaintiff pulled up to the end of the driveway at the UPS store. She looked to her left and saw that cars in the two eastbound lanes were completely stopped at the edge of the driveway. She asserts that the drivers in the two eastbound cars gestured for her to leave the driveway and to turn left. She slowly crept up into the center turn lane, placing her entire vehicle within the yellow lines. She came to a complete stop and checked for oncoming westbound traffic to her right before attempting to enter the right lane of the two westbound lanes. Plaintiff claims that her vehicle remained completely stopped when it was struck by defendant who was traveling eastbound in the turning lane.

Defendant was issued a citation at the scene of the accident for violation of Vehicle & Traffic Law § 1128(b) pertaining to travel in a center lane. He subsequently pled guilty to a violation of the Vehicle and Traffic Law which, the Court has determined, was erroneously identified as section 1152(0A) in the moving papers.

Plaintiff commenced this action by the electronic filing of a Summons and Verified Complaint (Exhibit A) on February 5, 2019. Defendant's Answer (Exhibit B) was served and filed on February 27, 2019, together with discovery demands. Plaintiff's Verified Bill of Particulars (Exhibit D) was served on March 11, 2019; and a Supplemental Bill of Particulars (Exhibit E) was served and filed on September 25, 2019. Both parties were deposed (Exhibits F and G) on July 17, 2019.

The Note of Issue has not yet been filed.

**Motion for Partial Summary Judgment**

By Notice of Motion electronically filed October 10, 2019, plaintiff seeks summary judgment on the issue of liability. She states that the defendant, at his deposition, admitted that he was using the center turning lane to bypass stopped traffic. The accident occurred one tenth of a mile from the point where defendant intended to make a left turn onto Ballard Road, a distance plaintiff asserts is much greater than what is required for safely preparing to make a left turn. In the plaintiff's opinion, the defendant's action in using the center lane to avoid backed-up traffic at a time when plaintiff's car was completely stopped within the turning lane constitutes violations of both VTL §§ 1126 and 1128 and demonstrates negligence *per se*, entitling plaintiff to summary judgment on liability.

The motion is accompanied by plaintiff's affidavit in which she reiterates her deposition testimony: she was stopped at the end of the UPS driveway and saw the occupants of vehicles stopped to her left gesture to her to move forward and make the turn. She slowly drove into the center turn lane and came to a complete stop, with her car fully within the yellow lines. There were no other cars in the turning lane when she entered it. She remained at a complete stop, waiting for oncoming traffic to her right to subside so she could enter the westbound right lane, and was still stopped when defendant's vehicle struck hers.

**Opposition**

In opposition, defendant submits his own affidavit in which he claims that plaintiff's version of the facts is "absolute lies." He acknowledges that he moved into the center lane in order to pass the backed up traffic in the two lanes in front of him "as I thought I was allowed to do at the time." He was driving about twenty miles per hour in the turning lane. He did not see plaintiff's car crossing the two eastbound lanes before it entered the turning lane because the backed up stopped cars

blocked his view of the driveway. When his car was two or three car lengths in front of the driveway, plaintiff's car suddenly appeared from the right at a ninety-degree angle to his lane and directly in front of him. Plaintiff's car never slowed or stopped and at no time was her vehicle fully across the center lane. Only one or two seconds went by between plaintiff's car coming into the lane and the impact. He swerved to the left, but his right front bumper still struck the left front bumper and fender of plaintiff's car. The defendant is aware that he should not have used the center turn lane to bypass traffic, but believes plaintiff is equally at fault for driving out of the driveway and directly in front of him without seeing him approaching. Defendant argues that plaintiff clearly violated the statutes requiring a driver to see what is there to be seen and to yield to oncoming vehicles. Such violation constitutes negligence as a matter of law and requires denial of summary judgment.

**Reply**

Plaintiff reiterates that defendant's admission of improper use of the turning lane in violation of the VTL, as well as his common-law duty to see that which he should have seen, constitutes negligence *per se*. There is no evidence that plaintiff failed to yield the right of way, as defendant, through his improper use of the lane, never had the right of way.

Plaintiff also points to differences between defendant's deposition testimony and his opposing affidavit. At deposition, defendant testified, "As I was driving approaching the traffic light or approaching the Appliance City area, a car come out in front of me, I turned to the left and my right side bumper caught the left side of the car bumper and I didn't see the car come out and that's what happened." (Exhibit G at 19-20) The plaintiff argues that the detailed recollections outlined in the affidavit are self-serving attempts to create issues of fact where none exist. But even if defendant's claims of plaintiff's comparative negligence are accepted as true, the same does not

defeat her right to partial summary judgment on liability. Any comparative fault is to be considered on a damages finding only.

The Court has fully considered the submissions of the parties.

**Discussion**

For the reasons which follow, plaintiff's motion is granted.

Summary judgment is a drastic remedy, and is appropriate only when there is a clear demonstration of the absence of any triable issue of fact. (*Piccirillo v. Piccirillo*, 156 AD2d 748 [2d Dept 1989], citing *Andre v. Pomeroy*, 35 NY2d 361 [1974]) The function of the court on such a motion is issue finding, and not issue determination. (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]) The Court is not to engage in the weighing of evidence; rather, the court's function is to determine whether "by no rational process could the trier of facts find for the non-moving party." (*Jastrzebski v. N. Shore Sch. Dist.*, 232 AD2d 677, 678 [2d Dept 1996])

The Court is obliged to draw all reasonable inferences in favor of the non-moving party. (*Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 [(2d Dept 1995]) Where there is any doubt about the existence of a material and triable issue of fact, summary judgment must not be granted. (*Anyanwu v. Johnson*, 276 AD2d 572 [2d Dept 2000]) Where facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility, summary judgment must not be granted. (*Jastrzebski,* 223 AD2d at 678)

It is well-established that a violation of a statutory standard such as the Vehicle & Traffic Law constitutes negligence *per se*. (*See, e.g., Batal v. Associated Univs., Inc.*, 293 AD2d 558 [2d Dept 2002]; *Johnson v. Ahmed*, 63 AD3d 1108 [2d Dept 2009]; *Brodney v. Picinic*, 172 AD3d 673 [2d Dept 2019])

VTL section 1126 provides, in relevant part, that where a two-way left turn lane separates the travel lanes for traffic proceeding in opposite directions, a driver may travel in the lane "for such distance as is required for safety in preparing to turn left leaving such highway or in completing a left turn entering such highway."

Similarly, VTL section 1128(b) provides that, on a roadway which is divided into three lanes and provides for two-way movement of traffic, a vehicle shall not be driven in the center lane except in preparation for making a left turn. In the matter at bar, defendant's own testimony, both at deposition and in his opposing affidavit, demonstrate his violation of VTL sections 1126 and 1128. Defendant not only testified that he entered the lane to bypass the stopped traffic in front of him, he testified at his deposition that he understood that the turning lane was not intended for him to use in that way. (Exhibit G at 24) His affidavit repeats that he "realize[s] now that [he] should not have used the center lane to bypass the stopped traffic." (Exhibit 1 at ¶20)

Contrary to defendant's asserts, under the circumstances, a jury could not reasonably find that defendant was free from negligence. (*Johnson v. Ahmed*, 63 AD3d at 1109)

Nor is defendant's assertion that the plaintiff's alleged comparative negligence precluding summary judgment persuasive. Civil Practice Law & Rules section 3212(b), governing summary judgment, provides that "[t]he motion shall be granted if...the cause of action...[is] established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." Section 1411 of the Civil Practice Law & Rules provides that '[i]n any action to recover damages for personal injury...the culpable conduct attributable to the claimant..., including contributory negligence, *shall not bar recovery*, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant...bears to the

culpable conduct which caused the damages." (Emphasis added) (*Rodriguez v. City of New York*, 31 NY 3d 312, 317 [2018])

In *Rodriguez*, the Court of Appeals illustrated its point, assuming a hypothetical case in which a defendant's negligence could be established as a matter of law because it was in violation of a statute. If plaintiff were denied partial summary judgment on the issue of defendant's negligence because plaintiff failed to establish the absence of her own comparative negligence, the jury would be permitted to decide the question of whether defendant was negligence, and whether defendant's negligence proximately caused plaintiff's injuries. If the jury answered in the negative on the question of defendant's negligence, plaintiff would be barred from recovery even though defendant's negligence was established as a matter of law. (*Id.* at 319) Such a windfall to defendant would be in contradiction to the plain language of Civil Practice Law & Rules section 1411. (*Id.* at 320) Courts are to consider the question of plaintiff's comparative fault only when considering the amount of damages a defendant owes to plaintiff. (*Id.* at 319)

To be entitled to 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. (*Id.* at 324-25; *see also, Outar v. Sumner*, 164 AD3d 1356 [2d Dept 2018]) Granting of partial summary judgment, however, does not preclude a finding of comparative negligence,

On the basis of the foregoing, plaintiff's application for partial summary judgment on liability is hereby granted. At trial, the jury will be instructed that, prior to trial, the Court determined that defendant was at fault in causing the accident. The jury will decide whether plaintiff was also at fault in causing the accident, and if so, what percentage each party bears for causing the accident.

The parties shall appear for conference on March 3, 2020 at 9:00 a.m.

This decision shall constitute the order of the Court.

Dated: February 18, 2020
Goshen, New York

ENTER:

HON. SANDRA B. SCIORTINO, J.S.C.

To: *Counsel of Record via NYSCEF*