SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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JACQUELINE HARCHAOUI,

Plaintiff,

-against-

LAURA E. QUEEN and ANDREW WILEY,

Defendant.

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ANDREW M. WILEY,

Plaintiff,

-against-

LAURA E. QUEEN,

Defendant.

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DECISION & ORDER

Action No. 1
Index No.: 036349/2018

(Motion # 2 and #3)

Action No. 2
Index No.: 032996/2019

(Motion #1)

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

The following papers, numbered 1 through 11, were considered in connection with (i) Plaintiff Jaqueline Harchaoui's ("Harchaoui") Notice of Motion for an Order, pursuant to *Civil Practice Law and Rules* § 3212, granting summary judgment in favor of Plaintiff on the issue of liability as against defendants Wiley and Queen (Action #1, Motion #2); (ii) Defendant Andrew Wiley's ("Wiley") Notice of Motion for an Order, pursuant to *Civil Practice Law and Rules* § 3212, granting summary judgment and dismissing the action against him (Action #1, Motion #3); (iii) Plaintiff's Andrew Wiley's Notice of Motion for an Order, pursuant to *Civil Practice Law and Rules* § 3212, granting summary judgment in favor of Plaintiff on the issue of liability as against defendant Laura E. Queen ("Queen")(Action #2, Motion #1):

PAPERS	**NUMBERED**
Action #1, Motion #2	
NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXHIBITS A-F	1-2
AFFIRMATION IN OPPOSITION BY WILEY/EXHIBITS A-C	3

AFFIRMATION IN OPPOSITION BY DEFENDANT QUEEN	4
Action #1, Motion #3	
NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXHIBITS A-D	5-6
AFFIRMATION IN OPPOSITION BY DEFENDANT QUEEN	7
AFFIRMATION IN REPLY	8
Action #2, Motion #1	
NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXHIBITS A-F	9
AFFIRMATION IN OPPOSITION BY DEFENDANT QUEEN/EXHIBITS A-B	10
AFFIRMATION IN REPLY/EXHIBITS A-D	11

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

Action #1 was commenced by Plaintiff Harchaoui on October 24, 2018. Issue was joined with the service of answers by Defendant Wiley on January 18, 2019, and by Defendant Queen on February 8, 2019. Action #2 was commenced by Plaintiff Wiley on June 7, 2019. Issue was joined as to Defendant Queen with the service of an answer on August 7, 2019. The two actions, which have been joined for trial, arise out of the same two-vehicle automobile accident that occurred on August 18, 2017, on State Highway 28, in the Town of Olive, Ulster county, New York. Andrew Wiley was driving eastbound and Laura Queen was driving westbound, when Queen attempted to make a left hand turn into a gas station, resulting in a collision between the two vehicles. Plaintiff Harchaoui was a front seat passenger in the Wiley vehicle.

Wiley moves for summary judgment in his favor in Action #2 and to dismiss the action against him in Action #1 and asserts that he is entitled to summary judgment as a matter of law based upon the Defendant Queens' violation of Vehicle and Traffic Law Sec. 1141, "Vehicle Turning Left," which states in relevant part:

> The driver of a vehicle intending to turn to the left within an intersection or into an alley, private road, or driveway shall yield the right of way to any vehicle approaching from the opposite

> direction which is within the intersection or so close as to constitute an immediate hazard.

Plaintiff further avers that Defendants violated Vehicle and Traffic Law Sec. 1163(a), entitled "Turning movements and required signals," which states in relevant part:

> No person shall turn a vehicle at an intersection unless the vehicle is in proper position upon the roadway...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.

Wiley asserts that he is not negligent for the happening of this accident since he had a right to an anticipate that Queen would obey the traffic laws and that Queen made a sudden and abrupt turn into his path, not leaving any time to avoid the subject occurrence. Wiley's front end of his vehicle made contact with the rear of Queen's vehicle. Wiley relies upon the certified police report which contains the officer's notes that "OpV-1 (Queen) attempted to pull into a gas station on the south side of the road and crossed into the opposte lane of travel into the path of V-2. OpV-2 (Wiley) was unable to avoid the collision and struck V-1."

In opposition to Wiley's motions, Queen submits a transcript of a telephone statement given by Wiley in connection with Action #1 on July 18, 2018. At that time, Wiley states the following when asked what happened:

> So basically I'm driving along. Your insured basically crossed over a double yellow line about maybe 100 feet in front of me or so. I don't even know exact distance. He just cut in front of me and basically uh, my only option was to try to avoid that car so I swerved to the lane that she came from and she them proceeded to either slow down or stop and the front passenger side of my vehicle hit the rear of her vehicle so she came into my lane.

He additionally testified that he was traveling 30 miles per hour when this occurred. Queen argues that based upon this admission, particularly the statement that Queen began her turn 100 feet in front of him while he was traveling 30 mph, there are triable issues of fact as to whether Wiley could have avoided the accident altogether.

Counsel for Queen contends that there are also triable issues of fact as to Wiley's negligence based upon Queen's testimony that she recalls seeing cars approaching from a distance and intended to enter the first (easterly) entrance to the gas station to her left; however, a truck proceeding in front of her did so, thus, she proceeded to the second (westerly entrance.) She claims she stopped, activated her left turn signal and began to turn. As she was about to enter the gas station entrance, she noticed Wiley approaching from her right, "punched" her accelerator resulting in the front portion of her vehicle reaching the incline of the drive-way with the rear portion of her vehicle beyond the white shoulder/white fog line of the east bound lane of Rt. 28, when the rear portion of her vehicle was struck.

Counsel for Harchaoui argues that Wiley failed to attach any admissible proof in support of the motion, as he attached the wrong deposition transcript to the motion which discusses his injuries and not the happening of the accident. Harchaoui further argues that the MV-104 completed by defendant Wiley is not admissible nor is the description contained in the police report as no statements are directly attributable to Queen. Counsel for Harchaoui also argues that while Queen negligently made a left hand turn, Wiley is also liable to plaintiff as a matter of law for driving too fast. In support of this contention, Harchaoui cites Queen's testimony that she was able to see between 100 and 200 feet ahead and that it was clear in terms of oncoming traffic. She testified that she saw the Wiley vehicle for about two to ten seconds prior to the accident and that it took her 5 to 15 seconds to complete her turn.

In reply, Wiley argues that he testified that the crash took place in his lane of travel when Defendant Queen unexpectedly cut in front of his vehicle, less than two seconds before the crash, with no turn signal. He further cites Queens testimony that her view of on-coming traffic was blocked by an advertising banner in the distance on the shoulder of the eastbound lane and she nonetheless made the left turn. He argues that Google Maps[1] shows

[1] The Court notes that the Google Map picture annexed to the moving papers is indecipherable.

there is only one entrance and one exit to the gas station at the place where she made her left turn, and therefore she made a turn onto a patch of grass. Lastly, Wiley argues that the uncertified unattested statement taken of him is inadmissible hearsay, and in any event, fails to support comparative negligence on his part. He further notes that it was taken without counsel present, after it was known that Wiley was represented.

Plaintiff Harchaoui moves for summary judgment as to liability in her favor on the ground that she was a passenger and not negligent as a matter of law. She argues that Queen violated the Vehicle and Traffic Law and is negligent as a matter of law and Wiley was negligent in failing to exercise due care to avoid colliding with a left turning motorist. Harchaoui argues that case law supports her contention that the right of an innocent passenger to summary judgment is not restricted by potential issues of comparative negligence as between the two drivers. Plaintiff Wiley opposes Plaintiff Harchaoui's motion for summary judgment and argues that summary judgment can only be granted as a matter of law when a driver is the sole proximate cause of an accident. Wiley contends that he is not negligent as a matter of law.

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. On a motion for summary judgment, evidence is to be viewed in the light most favorable to the party opposing the motion, giving them the benefit of every favorable inference, and the Court should not pass of issues of credibility. Torres v. Jeremias, 283 A.D.2d 484, 724 N.Y.S.2d 461 (2d Dept. 2001); Cortale v. Educational Testing Services, 251 A.D.2d 1998, 674 N.Y.S.2d 753, 756 (2d Dept. 1998).

"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). A plaintiff demonstrates a prima facie entitlement to judgment as a matter of law by establishing that the defendant driver violated Vehicle and Traffic Law Sec. 1141 when he made a left turn directly into the path of plaintiff's vehicle as the plaintiff's vehicle was legally proceeding into the intersection with the right-of-way. Berner v. Koegel, 31 A.D.3d 591, 592, 819 N.Y.S.2d 89 (2d Dept. 2006); Moreno v. Gomez, 58 A.D.3d 611, 872 N.Y.S.2d 143 (2d Dept. 2009). "The operator of a vehicle with the right-of-way is entitled to assume that the opposing driver will obey the traffic laws requiring him or her to yield." Giwa v. Bloom, 154 A.D.3d 921, 62 N.Y.S.3d 527 (2d Dept. 2017).

"The driver traveling with the right -of-way may nevertheless be found to have contributed to the happening of the accident if he or she did not use reasonable care to avoid the accident." Aponte v. Vani, 155 A.D.3d 929, 930, 64 N.Y.S.3d 123 (2d Dept. 2017). Thus, although a plaintiff may have established his prima facie entitlement to judgment as a matter of law on the issue of liability by showing that the defendant driver violated VTL Sec. 1141 by turning left in front of his vehicle without warning or signaling, leaving him no time to react, triable issues of fact may be raised by showing that, at the time the defendant driver initiated her turn, the plaintiff's vehicle was not "so close as to constitute an immediate hazard." Brodney v. Picinic, 172 A.D.3d 673, 99 N.Y.S.3d 399, 401 (2d Dept. 2019). See also Wilson v. Mazewski, 175 A.D.3d 1352, 105 N.Y.S.3d 888 (2d Dept. 2019)(although plaintiff had the

right of way, summary judgment denied because issues of fact as to whether plaintiff contributed to the occurrence of the collision.)

In the instant matter, the Court finds that Wiley has met his prima facie burden for entitlement to summary judgment based upon his deposition testimony that Queen made a sudden left turn in front of his vehicle such that there was a violation of VTL Sec. 1141 and Sec. 1163(a). However, in opposition thereto, the remaining parties have demonstrated a triable issue of fact based upon statements made by Wiley in his recorded statement with respect to the distance at which he first observed Queen begin to turn, as well as Queen's testimony that the rear portion of her vehicle was beyond the white shoulder/white fog line of the east bound lane of Rt. 28, when the rear portion of her vehicle was struck. Contrary to Wiley's contentions, his statement that Queen's vehicle was 100 feet away when he observed her begin her left turn is admissible as a party admission. Giving every favorable inference to the opposing parties, as this Court must on a summary judgment motion, a jury could find that Queen began her left turn at a point wherein it did not pose an immediate hazard and/or that Wiley could have avoided the accident. Accordingly, Wiley's summary judgment motions are denied.

The Court reaches a different conclusion with respect to Harchaoui's summary judgment motion, which is granted. It is well established that the right of an innocent passenger to summary judgment is not restricted by potential issues of comparative negligence as between two drivers. Choi v. Schwabenbauer, 124 A.D.3d 574, 575, 1 N.Y.S.3d 276 (2d Dept. 2015); Anzel v. Pistorino, 105 A.D.3d 784, 786, 962 N.Y.S.2d 700 (2d dept. 2013). In Garcia v. Tri-County Ambulette Service, Inc., 282 A.D.2d 206, 723 N.Y.S.2d 163 (1st Dept. 2001), the court specifically rejected the same argument made by Wiley that Harchaoui cannot be entitled to summary judgment as to liability against both defendants, where the possibility exists that or the other may not be found negligent by a jury. Here, Harchaoui is free from comparative negligence and a a passenger is entitled to summary

judgment notwithstanding the fact that one of the defendants may be found not responsible for the accident.

Accordingly, it is hereby

ORDERED that Plaintiff Harchaoui's Notice of Motion for Summary Judgment as to liability is GRANTED in its entirety (Action #1, Motion #2); and it is further

ORDERED that Defendant Wiley's Notice of Motion for Summary Judgment and dismissal of the action against him in Action #1 is DENIED in its entirety (Action #1, Motion #3); and it is further

ORDERED that Plaintiff Wiley's Notice of Motion for Summary Judgment as to liability in his favor in Action #2 is DENIED in its entirety (Action #2, Motion #1); and it is further

ORDERED that counsel for the parties shall appear before the undersigned for the previously scheduled SKYPE conference on June 30, 2020, at 3 p.m.

The foregoing constitutes the Decision and Order of this Court on Motions #2 and #3 in Action #1 and Motion #1 in Action #2.

Dated: New City, New York
June 16, 2020

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

To: All parties (via NYSCEF)