SHORT FORM ORDER

INDEX No. 16-621034
CAL. No. 19-01621MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 55 - SUFFOLK COUNTY

PRESENT:

Hon. GEORGE M. NOLAN
Justice of the Supreme Court

MOTION DATE 12-5-19
ADJ. DATE 1-9-20
Mot. Seq. # 001 - MotD

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MICHAEL D. STRACUZZA,

Plaintiff,

- against -

KLEET LUMBER CO., INC., and WILLIAM CARPENTER, as Executor of the Estate of JOHN H. BIESELIN, Deceased,

Defendants.

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Upon the following papers read on this e-filed motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers filed by plaintiff, on October 28, 2019 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers filed by defendants, on November 26, 2019 ; Replying Affidavits and supporting papers filed by plaintiff, on December 31, 2019 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff for partial summary judgment on the issue of liability and to dismiss defendants' affirmative defense of culpable conduct is granted in part and denied in part.

This action was commenced by plaintiff Michael D. Stracuzza to recover damages for injuries he allegedly sustained on May 27, 2016, when his motorcycle was struck by a vehicle owned by defendant Kleet Lumber Bo, Inc., and operated by John H. Bieselin, on Park Avenue, at or near its intersection with East 5th Street, in Huntington, New York. The accident allegedly occurred when Bieselin attempted to make a left turn from the northbound lanes of Park Avenue into a parking lot, and struck plaintiff's motorcycle. After the commencement of this proceeding, Bieselin passed away, and William Carpenter, as executor of his estate, was substituted as a defendant.

Plaintiff now moves for summary judgment on the issue of Bieselin's negligence, and to dismiss defendants' affirmative defense of culpable conduct. Plaintiff argues that Bieselin violated, inter alia, Vehicle and Traffic Law § 1141 by making a left turn into the path of plaintiff's motorcycle, which was

traveling with the right-of-way. In support of the motion, plaintiff submits, inter alia, the transcript of his deposition along with the transcript of the deposition of William Carpenter. Defendants oppose the motion, arguing that triable issues of fact exist as to the happening of the accident and as to the comparative fault of plaintiff. Defendants submit, inter alia, the certified police accident file and the transcript of the deposition of plaintiff.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 87 NYS2d 316 [1985]). The moving party has the initial burden of proving entitlement to summary judgment (*id.*). Once the moving party demonstrates a prima facie entitlement to judgment as a matter of law, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient 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]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557; 427 NYS2d 595 [1980]; *see also* CPLR 3212 [b]). The failure to make such showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see* ***New York City Asbestos Litig. v Chevron Corp.***, 33 NY3d 20, 99 NYS3d 734 [2019]; ***Stonehill Capital Mgt., LLC v Bank of the West***, 28 NY3d 439, 45 NYS3d 864 [2016]).

A failure to comply with the Vehicle and Traffic Law constitutes negligence as a matter of law (*see* ***Kerolle v Nicholson***, 172 AD3d 1187, 101 NYS3d 387 [2d Dept 2019]; ***Marks v Rieckhoff***, 172 AD3d 847, 101 NYS3d 63[2d Dept 2019]; ***Kaziu v Human Care Servs. for Families & Children, Inc.***, 167 AD3d 588, 90 NYS3d 66 [2d Dept 2018]). Pursuant to Vehicle and Traffic Law § 1141, a vehicle intending to turn left within an intersection must 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 (*see* ***Ming-Fai Jon v Wager***, 165 AD3d 1253, 87 NYS3d 82 [2d Dept 2018]; ***Giannone v Urdahl***, 165 AD3d 1062, 86 NYS3d 562 [2d Dept 2018]; ***Lebron v Mensah***, 161 AD3d 972, 76 NYS3d 219 [2d Dept 2018]). Thus, a driver who attempts to make a left turn when it not reasonably safe to do so is in violation of this provision of the Vehicle and Traffic Law (*see* ***Foley v Santucci***, 135 AD3d 813, 23 NYS3d 338 [2d Dept 2016]; ***Krajiniak v Jin Y Trading, Inc.***, 114 AD3d 910, 980 NYS2d 812 [2d Dept 2014]; ***Ducie v Ippolito***, 95 AD3d 1067, 944 NYS2d 275 [2d Dept 2012]). Although the operator of a vehicle with the right-of-way is entitled to assume that other drivers will obey traffic laws requiring them to yield (*see* ***Richardson v Cablevision Sys. Corp.***, 173 AD3d 1083, 104 NYS3d 655 [2d Dept 2019]; ***Jeong Sook Lee-Son v Doe***, 170 AD3d 973, 96 NYS3d 302 [2d Dept 2019]; ***Enriquez v Joseph***, 169 AD3d 1008, 94 NYS3d 599 [2d Dept 2019]), the driver with the right-of-way also has a duty to keep a proper lookout to avoid collisions with other vehicles (*see* ***Matias v Bello***, 165 AD3d 642, 84 NYS3d 551 [2d Dept 2018]; ***Miron v Pappas***, 161 AD3d 1063, 77 NYS3d 163 [2d Dept 2018]; ***Mark v New York City Tr. Auth.***, 150 AD3d 980, 55 NYS3d 128 [2d Dept 2017]). Nonetheless, a driver with the right-of-way who only has seconds to react to a vehicle which has failed to yield the right-of-way is not comparatively negligent for failing to avoid the collision (*see* ***Jeong Sook Lee-Son v Doe***, *supra*; ***Enrique v Joseph***, *supra*; ***Rohn v Aly***, 167 AD3d 1054, 91 NYS3d 256 [2d Dept 2018]). To establish

prima facie entitlement to judgment as a matter of law on the issue of negligence, a plaintiff is no longer required to show freedom from comparative fault (***Rodriguez v City of New York***, 31 NY3d 312, 76 NYS3d 898 [2018]; *see* ***Liu v Lowe***, 173 AD3d 946, 102 NYS3d 713 [2d Dept 2019]; ***Heard v Schade***, 172 AD3d 1335, 99 NYS3d 666 [2d Dept 2019]; ***Bloechle v Heritage Catering, Ltd.***, 172 AD3d 1294, 101 NYS3d 424 [2d Dept 2019]; ***Catanzaro v Edery***, 172 AD3d 995, 101 NYS3d 170 [2d Dept 2019]; ***Marks v Rieckhoff***, *supra*).

Plaintiff has established his prima facie entitlement to summary judgment on the issue of liability by demonstrating that defendant was negligent, as he violated Vehicle and Traffic Law § 1141 (*see* ***Brodney v Picinic***, 172 AD3d 673, 99 NYS3d 399 [2d Dept 2019]; ***Ming-Fai Jon v Wager***, *supra*; ***Giannone v Urdahl***, *supra*; ***Yu Mei Liu v Weihong Liu***, 163 AD3d 611, 81 NYS3d 75 [2d Dept 2018]; ***Smith v Fuentes***, 158 AD3d 731, 68 NYS3d 739 [2d Dept 2018]). Plaintiff testified that he was operating a motorcycle southbound on Park Avenue, approaching its intersection with East 5th Street. He testified that he was traveling at approximately 35 miles per hour. He testified that Bieselin's vehicle was traveling northbound on Park Avenue when he suddenly, and without warning, turned into plaintiff's path of travel. Plaintiff testified that he attempted to avoid the accident by counter steering, or leaning left, to go around Bieselin's vehicle.

Plaintiff having established prima facie entitlement to summary judgment, the burden now shifts to defendants to submit evidentiary proof in admissible form which raises a triable issue of fact (*see* ***Zuckerman v City of New York***, *supra*; ***Yu Mei Liu v Weihong Liu***, *supra*). In opposition, defendants fail to raise a triable issue of fact with respect to Bieselin's negligence (*see* ***Rodriguez v City of New York***, *supra*; ***Bloechle v Heritage Catering, Ltd.***, *supra*; ***Catanzaro v Edery***, *supra*). Therefore, the branch of plaintiff's motion for summary judgment on the issue of liability is granted.

As to the branch of plaintiff's motion seeking to dismiss defendants' affirmative defense of comparative negligence, when moving to dismiss an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is without merit as a matter of law" (***Bank of N.Y. v Penalver***, 125 AD3d 796, 797, 1 NYS3d 825 [2d Dept 2015]; ***South Point, Inc. v Redman***, 94 AD3d 1086, 1087, 943 NYS2d 543 [2d Dept 2012]). "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 . . . [and] if there is any doubt as to the availability of a defense, it should not be dismissed" (***Fireman's Fund Ins. Co. v Farrell***, 57 AD3d 721, 723, 869 NYS2d 597 [2d Dept 2008]; *see* ***Greco v Christoffersen***, 70 AD3d 769, 896 NYS2d 363 [2d Dept 2010]).

While a plaintiff is no longer required to show freedom from comparative fault (*see* ***Rodriguez v City of New York***, *supra*; ***Bloechle v Heritage Catering, Ltd.***, *supra*; ***Catanzaro v Edery***, *supra*; ***Marks v Rieckhoff***, *supra*; ***Auguste v Jeter***, *supra*), the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion if the plaintiff moves for summary judgment dismissing a defendant's affirmative defense of comparative negligence (***Poon v Nisanov***, 162 AD3d 804, 79 NYS3d 227 [2d Dept 2018]). Plaintiff has established, prima facie, entitlement to the relief requested. Plaintiff testified that he was traveling at the posted speed limit, and that he attempted evasive manuevers to avoid the collision (*see* ***Richardson v Cablevision Sys. Corp.***, supra; ***Matias v***

Bello, *supra*). However, defendants have raised a triable issue of fact with respect to plaintiff's comparative negligence. Defendants submit the certified police investigation file, which raises a question with respect to plaintiff's speed at the time of the collision. Further, plaintiff testified that he had made several lane changes in the moments leading up to the crash, which raise questions of fact that cannot be decided on a motion for summary judgment. As such, plaintiff's motion to dismiss defendants' first affirmative defense is denied.

Accordingly, the motion by plaintiff for partial summary judgment on the issue of liability is granted, and the motion by plaintiff to dismiss defendants' first affirmative defense of culpable conduct is denied.

Dated: February 25, 2020

J.S.C.
HON. GEORGE NOLAN

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION