SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

COURTNEY P. COSENTINO,

Plaintiff,

-against-

CAROL KERMAN OCONNOR-EISENBERG and IRVING EISENBERG,

Defendants.

Index No. 619194/18

Motion Seq: 001 MD
Decision/Order

The following electronically-filed and numbered papers were read upon this motion:

Notice of Motion/Order to Show Cause.....	10-16
Answering Papers.....	18, 22
Reply.....	21, 23

Plaintiff moves for an Order granting summary judgment in her favor on the issue of liability for the motor vehicle accident that occurred on June 19, 2017, at approximately 6:30 a.m., on Frowein Road, near its intersection with Waldon Court, in Center Moriches, New York. Plaintiff also seeks to have defendants' first affirmative defense of culpable conduct/comparative negligence stricken.

It is undisputed that Carol Kerman O'Connor-Eisenberg (the defendant) was pulling out of the driveway of a nursing home, attempting to execute a left-hand turn, when the vehicle she was operating collided with plaintiff's vehicle that was proceeding eastbound on Frowein Road.

In support of her motion, plaintiff submits the pleadings that are not verified by the parties, her own affidavit, a photograph of the location where the accident occurred, and a certified, but incomplete police accident report. Plaintiff asserts that the defendant violated Vehicle & Traffic Law (VTL) §§ 1141 (Vehicle turning left) and 1143 (Vehicle entering roadway).

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact (***Andre v. Pomeroy,*** 35 NY2d 361 [l974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (***Cauthers v. Brite Ideas, LLC,*** 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the defendants (***Makaj v. Metropolitan Transportation Authority***, 18 AD3d 625 [2d Dept 2005]).

The proponent of a summary judgment motion must tender sufficient evidence to demonstrate the absence any material issue of fact (***Winegrad v. New York University Medical Center***, 64 MY2d 851, 853 [1985]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Id.***) "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v. Prospect Hospital***, 68 NY2d 320, 324 [1986]).

VTL § 1141 provides that, "[t]he 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."

VTL § 1143 provides that "[t]he driver of a vehicle about to enter. . .a roadway from any place other than another roadway shall yield the right of way to all vehicles approaching on the roadway to be entered. . ."

Accordingly, plaintiff was entitled to anticipate that the defendant would obey the traffic laws (***Martin v. Ali***, 78 AD3d 1135, 1136 [2d Dept 2010]); however, there can be more than one proximate cause of an accident; thus, the proponent of a summary judgment motion has the burden of establishing freedom from comparative negligence as a matter of law (***Pollack v. Margolin***, 84 AD3d 1341, 1342 [2d Dept 2011]). In addition, plaintiff also has a duty to use reasonable care to avoid a collision (***Id.***). "A driver who has the right-of-way has a duty to exercise reasonable care to avoid a collision" (***Todd v. Godek***, 71 AD3d 872 [2d Dept 2010]; *see also* ***Galagotis v. Armenti***, 133 AD3d 818 [2d Dept 2015]). Furthermore, "[a] driver is negligent if he or she has failed to see that which, through the proper use of senses, should have been seen" (***Berner v. Koegel***, 31 AD3d 591 [2d Dept 2006]). However, "a driver with the right of way who has only seconds to react to a vehicle that has failed to yield is not comparatively negligent for failing to avoid the collision (***Desio v. Cerebral Palsy Transp., Inc.***, 121 AD3d 1033, 1034-35, *citing* ***Vazquez v. New York City Tr. Auth.***, 94 AD3d 870, 871 [2d Dept 2012]).

The police accident report is incomplete because it fails to include the key code. Plaintiff's counsel asserts that this report "reveals that Defendant-operator's failure to yield the right-of-way was the sole contributing factor for causing this accident (7 in box 21);" however, without the key code, the Court cannot rely on counsel's assertion. Moreover, the Court cannot rely on the narrative of the accident because there is no evidence that the police officer who prepared the report witnessed the accident, rendering the narrative inadmissible hearsay (***Watch***

v. Gertsen, 126 AD3d 687 [2d Dept 2015]; ***Conners v. Duck's Cesspool Service, Ltd.***, 144 AD2d 329 [2d Dept 1988]). The Court does note, however, that no traffic tickets were issued to either driver.

The only other competent evidence submitted by plaintiff is her own affidavit. In that affidavit, plaintiff states that she was traveling eastbound on Frowein Road within the posted speed limit of fifty (50) miles per hour (mph). She further states that she "first noticed Defendants' vehicle approximately two to three (2-3) seconds prior to the impact. At that time, Defendants' vehicle was within the exit driveway of the Oasis Rehabilitation and Nursing parking lot which was located on the south side of Frowein Road."

Plaintiff continued driving eastbound on Frowein Road when, according to her affidavit, the defendant "suddenly and without any warning. . . darted out of the driveway and entered [her] lane of travel in an attempt to make a left turn. . ."

Plaintiff avers that she had only a second to react and attempted to avoid the impact by immediately applying her brakes. Despite her effort, she was unable to avoid the collision with the defendants' vehicle. Plaintiff further states that she did not cause or contribute to the collision.

The plaintiff has established her *prima facie* entitlement to summary judgment as a matter of law on the issue of liability based upon the foregoing.

In opposition, defendants contend that the instant motion is premature, and, in any case, that there are issues of fact requiring a trial. In support of the opposition, defendants submit the affidavit of the defendant-driver.[1]

The Court does not find persuasive defendant's suggestion that the instant motion is premature because depositions have not yet been held. Although depositions have not yet been held, the defendant-driver has personal knowledge of the relevant facts; therefore, the fact that depositions have not yet been conducted does not warrant denial of the motion on this ground since the defendant-driver may submit an affidavit in opposition to the instant motion offering her version of the happening of the accident (*see* ***Emil Norsic & Son v. L.P. Transportation, Inc.***, 30 AD3d 368 [2d Dept 2006]; ***Rainford v. Han***, 18 AD3d 638 [2d Dept 2005]).

Concerning the other ground advanced by defendants for denial of plaintiff's motion, the Court determines that the defendant-driver's affidavit is sufficient to raise material issues of fact and credibility that must be assessed by the trier of fact.

In her affidavit, the defendant states that she was exiting the parking lot of a nursing home and intended to make a left onto Frowein Road. According to the defendant, "[t]here was a long line of parked vehicles on Frowein Road, beginning very close to the exit from the

---

[1] Apparently, the defendant-driver's affidavit was inadvertently omitted from the opposition papers. The Court provided defense counsel an opportunity to submit that affidavit and provided plaintiff's counsel an opportunity to submit a sur-reply after receiving the defendant-driver's affidavit.

parking lot," and "[t]he parked vehicles were obstructing my view of traffic on Frowein Road;" "[a]s such, I inched my vehicle slowly out of the parking lot and beyond the first parked vehicle to my left, a large pickup truck. As I inched out slowly, my vehicle was hit by the plaintiff's vehicle." The defendant also states that she had no warning prior to the impact in terms of hearing any horns, or screeching brakes or tires. The defendant described that her vehicle was struck on its driver's side front quarter panel by plaintiff's vehicle. Thus, defendant's affidavit seemingly contradicts plaintiff's statement that the defendant "suddenly and without any warning. . . darted out of the driveway. . ."

Also, an issue of fact is raised by virtue of plaintiff having stated that she "first noticed Defendants' vehicle approximately two to three (2-3) seconds prior to the impact," when defendants' vehicle was *within* the exit driveway of the Oasis Rehabilitation and Nursing parking lot, as compared with the defendant's statement that her view of traffic was obstructed by parked vehicles, including a large pickup truck, requiring her to "inch out" of the driveway. Since the photograph of the roadway and driveway submitted by plaintiff (Exhibit D) shows that the roadway and driveway are both on level ground, issues of fact are raised as to the parties' respective lines of sight.

Accordingly, plaintiff's summary judgment motion is denied.

Counsel for all parties shall appear for the previously scheduled compliance conference set down for January 27, 2020, at 9:30 a.m.

The foregoing constitutes the Decision and Order of this Court.

Dated: January 13, 2020
Riverhead, NY

CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [ ] NON-FINAL DISPOSITION [X]