SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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AVAJONNE WARNER,

Index No.: 52168/2020

Plaintiff,

MOTION FOR SUMMARY JUDGMENT

-against-

DECISION and ORDER
Motion Seq. #1

CHHAVI AGARWAL,

Defendants.

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Hubert, J.S.C.

On the motion before the Court, Plaintiff seeks an order pursuant to CPLR § 3212 granting summary judgment on the issue of liability as set forth in the Plaintiff's first cause of action, and an order striking Defendant's second, third and sixth affirmative defenses pursuant to CPLR § 3211(b) on the ground that a defense is not stated or has no merit. For the reasons set forth below, Plaintiff's motion is denied.

The complaint alleges that on October 19, 2019, at or about 4:56 p.m., Plaintiff Avajonne Warner sustained serious physical injury when the front bumper of the motor vehicle she was operating came in contact with the passenger side of the motor vehicle operated by the Defendant Chhavi Agarwal. The two cars were each being driven by the respective litigants in the parking lot area of the Yonkers Gateway Center located at 2548 Central Park Avenue, City of Yonkers.

The Plaintiff alleges that immediately prior to the accident she was driving her vehicle, heading northbound, in a two-way travel lane separated by double yellow lines in the subject parking lot. Her speed was "about 15-20 miles per hour" (Affidavit, p.2, ¶5). The Plaintiff further states that the Defendant's car came "suddenly, and without warning" from her left at a high rate of speed. She further states she had "no time to react before the Defendant's vehicle

crossed the double yellow line separating the north and south lane of travel and crashed into her car "with great force" deploying the airbags in the Plaintiff's car (Affidavit, p.2, ¶7-9).

The Defendant's car, immediately prior to the accident, was also in the subject parking lot headed eastbound (towards the Plaintiff's lane of travel) in an east/west two-way lane of travel that was perpendicular to the Plaintiff's lane of travel (Affidavit, p.2, ¶5). The Defendant states her speed was "10-15 miles per hour" (Affidavit, p.3, ¶9). She further claims there were no traffic signals, stop signs or stop lines facing her direction of travel at the intersection of the respective travel lanes. The Defendant further states there were no double yellow lines going through the intersection (Affidavit, p.3, ¶¶ 7-8). "Traveling slowly," the Defendant states that she proceeded "straight through the intersection." It was then that she first saw the Plaintiff's car approaching the intersection, at a high rate of speed, from her right side (Affidavit, p.3, ¶¶ 9-10). The Defendant states that she applied her brakes, but was unable to avoid being struck by the Plaintiff's car. The front of the Plaintiff's car, she states, hit the front door on the passenger side of the Defendant's car, which caused the Defendant's vehicle to spin ninety degrees to her left, and caused the airbags in the Plaintiff's car to deploy (Affidavit, p.3, ¶¶ 10-14). The accident, she concludes, was caused solely by the Plaintiff's negligence and high speed. (Affidavit, p.3, ¶15).

In order to prevail on a motion for summary judgment, the movant must make a *prima facie* showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). "A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and

that the defendant's negligence was a proximate cause of the alleged injuries." *Tejada v. Cedeno*, 173 A.D.3d 808, 99 N.Y.S.3d 686 (2d Dep't 2019).

A failure to make that showing requires the denial of the summary judgment motion, regardless of the adequacy of the opposing papers. However, if the movant establishes a *prima facie* right 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 require a trial of material questions of fact on which he rests his claim." *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595 (1980).

To the extent that the Plaintiff relies upon weight of evidence considerations, it is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact. Rather it is the task of the Court to identify material triable issues of fact, or point to the lack thereof. *Vega v. Restani Const. Corp*, 18 N.Y.3d 499, 505, 942 N.Y.S.2d 13 (2012).

The affidavits of the two drivers, in the instant action, set forth competing facts. For example, according to their affidavits, neither driver saw the other vehicle at any time prior to entering the intersection in the subject parking lot where the accident occurred. Whether their views were blocked, and if so by what, remains unknown.

As to the photographs submitted as exhibits by the Plaintiff, the majority just show damage to the front grill and front driver side fender of the Plaintiff's car. Photographic evidence of damage to the Defendant's car is unclear. The passenger side of the Defendant's vehicle is substantially blocked by the camera angle used to show both cars (*see*, Exhibit 2). Thus, while the pictures depict a two car accident, the pictures alone do not show how the accident happened.

They do show that both cars were pushed out of their respective lanes of travel when they came to rest as a result of the collision.

Who did, or did not, see the other vehicle in sufficient time to avoid collision cannot be determined by the evidence presented. Who did, or did not, have the duty to stop or pause before entering the intersection cannot be determined from the statements of the litigants. The Plaintiff avers that the Defendant's car came "suddenly, and without warning." The Defendant claims there were no traffic control signs or signals facing her direction of travel. She claims not to have seen the Plaintiff coming toward her in the intersection (at a right angle to her vehicle and at a high rate of speed) until she was in the intersection and it was too late for her to effectively apply her brakes.

The Police Accident Report, submitted by the Plaintiff, does contain statements attributed to each driver (Plaintiff and Defendant). In the report, the Plaintiff states that the Defendant's vehicle crossed into her lane of travel and struck the front of the Plaintiff's car. The Defendant states she was traveling eastbound and crossed into the Plaintiff's vehicle's lane of travel and struck Plaintiff's vehicle. Nevertheless, neither statement is dispositive of any or all material issues of fact. Both sides present evidence that presents issues of fact which must be resolved by a finder of fact.

There are further issues regarding the timing of the Plaintiff's motion. It is well established that a party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment (*see Video Voice, Inc. v Local T.V., Inc.*, 114 AD3d 935 [2014]; *Bank of Am., N.A. v Hillside Cycles, Inc.*, 89 AD3d 653 [2011]; *Venables v Sagona*, 46 AD3d 672, 673 [2007]). A party opposing summary judgment is entitled to obtain

further discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated. *Malester v. Rampil*, 118 A.D.3d 855, 856, 988 N.Y.S.2d 226 (2d Dep't 2014), *citing,* CPLR 3212 (f); *Nicholson v Bader*, 83 AD3d 802 (2011); *Family-Friendly Media, Inc. v Recorder Tel. Network*, 74 AD3d 738, 739 (2010); *Juseinoski v New York Hosp. Med. Ctr. of Queens*, 29 AD3d 636, 637 (2006).

The instant motion was filed on May 4, 2020. The Defendant filed papers in opposition shortly thereafter. Full submissions on the motion, by both sides, occurred on May 29, 2020. As of that date, virtually no discovery had been undertaken by either side. A preliminary conference stipulated discovery order was not executed until July 7, 2020. To date, no bill of particulars, depositions, medical reports, or I.M.Es have been undertaken by either side and none are scheduled to occur before September 16, 2020.

Accordingly, the Plaintiff's motion for summary judgment must be denied, and is dismissed. Plaintiff has failed to establish, *prima facie*, that the Defendant breached a duty owed to the Plaintiff and that the Defendant's negligence was a proximate cause of the alleged injuries. But even assuming, *arguendo*, that the *prima facie* burden was met, the Defendant produced evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the Plaintiff's claim rests. It is hereby

ORDERED, that the Plaintiff's motion is denied, and it is further

ORDERED, that this matter is referred to the Compliance Conference Part for scheduling on a date to be determined by that Part.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York
September 15, 2020

Hon. James W. Hubert, JSC