SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, J.S.C.

SUPREME COURT : ORANGE COUNTY

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ELIZABETH MOORES,

Plaintiff,

- against –

CHARLES ZANLUNGHI, JR.,

Defendant.

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To commence the statutory time period 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.

Index No. EF002023-2020

DECISION and ORDER

Motion Date: September 23, 2020

The following papers numbered 1 to 5 were read and considered on a motion by the Plaintiff, pursuant to CPLR § 3212, for summary judgment on the issue of liability.

Notice of Motion- Furst Affirmation- Exhibits 1-4	1-3
Affirmation in Opposition- Epstein	4
Affirmation in Reply- Baum	5

Upon the foregoing papers, it is hereby,

ORDERED, that the motion is granted.

Introduction

The Plaintiff Elizabeth Moores commenced this action to recover damages allegedly arising from a four vehicle motor vehicle accident. She now moves for summary judgment on the issue of liability. The motion is granted.

Factual/Procedural Background

According to the police report of the accident, the Plaintiff's vehicle was slowing down

for traffic when it was struck from the rear and driven into a ditch by a vehicle being driven by the Defendant Charles Zanlunghi, Jr.

The Plaintiff moves for summary judgment on the issue of liability.

In support of the motion, the Plaintiff submits, *inter alia*, her own affidavit.

The Plaintiff avers that, on October 1, 2017, at approximately 7:44 p.m., she was operating a motor vehicle eastbound on Route 6 in the Town of Central Valley, New York. She noticed traffic ahead was slowing, so she applied her brakes slowly and gradually, keeping a safe distance from the slowing traffic ahead. While she was gradually slowing down, she was violently rear-ended by a vehicle being driven by the Defendant, which forced her off the road and into a ditch.

In opposition to the motion, the Defendant submits an affirmation from counsel, George Epstein.

Epstein argues that the motion is premature because the Defendant's answer was just filed, and there had not been even a single court conference. Further, he notes, responses to disclosure demands remain open.

In addition, he notes, the police report indicates that four vehicles were involved in the accident, and the "plaintiff's simple affidavit does not explain why plaintiff's vehicle was the only one to veer off the road." However, he argues, this issue is addressed by the Defendant, who testified that the Plaintiff's vehicle went off the road because she "had jutted into the break down lane just prior to the collision precipitating the occurrence."

Epstein argues that the jury could easily infer from the Defendant's testimony that the Plaintiff's "jutting into the breakdown lane essentially took away ZANLUNGHI's opportunity to

avoid the collision. ZANLUNGHI's view was blocked by the SUV. ZANLUNGHI, entitled to assume that plaintiff's vehicle was traveling at a safe speed, traveled at the same speed while plaintiff's vehicle obstructed his view. When plaintiff jutted into the breakdown lane to avoid the consequences of failing to stop for the traffic, the traffic was only then revealed to ZANLUNGHI. The danger of the stopped traffic was concealed by plaintiff's vehicle, and then ZANLUNGHI's opportunity to avoid the traffic was taken away by plaintiff's occupation of the breakdown lane."

Further, Epstein asserts, an additional independent non-negligent explanation for the occurrence is the Defendant's testimony that the vehicle in front of the SUV did not have its brake lights activated.

Appended as an exhibit to Epstein's affirmation is a transcript of the Defendant's examination before trial. At the same, the Defendant testified, *inter alia*, as follows.

The accident at issue occurred on Route 6. It was dark out, and traffic was moderate. The weather was dry. He was unsure of his speed, "55, 60. Maybe 55."

Before a merge, there was "a big pickup truck, or a big SUV" driving in front of him. He was "maybe 50 feet" behind the vehicle. The SUV obstructed his view of the roadway ahead. The accident occurred about "Five, ten seconds," after he completed his merge. The driver of the SUV "hit his brakes and jutted into the right lane." Before he saw the SUV apply the brakes, he was "[p]robably 50 feet" behind the SUV, and driving "40, 45 miles an hour." When he saw the SUV apply the brakes, he "quickly looked to [his] right, 'cause he pulled into the breakdown lane. (Indicating)."

Concerning the accident, the following colloquy occurred.

A. Okay. Here -- here's what I did, I quickly glanced at him, because I was startled, and then I looked back at the road, and I realized why he did it; traffic was stopped. I tried to get in front of him, as I was going by.

Q. So did you try to move your vehicle into the breakdown lane as well?

A. Yes.

Q. Is there any reason why you didn't bring your vehicle to a stop in the lane on Route 6 east?

A. Because the traffic was stopped right there. (Indicating).

Q. Just before you reach the split,

A. Yes.

Q. -- where one lane goes West Point and the other lane continues on 6 east, are you able to see for a distance on 6 east?

A. Not really. I had him in front of me. (Indicating). And since I'm on the left side of the car, I couldn't see to the right of him. He was wider than I was. (Indicating).

Q. But if that vehicle wasn't there, would you be able to see straight ahead of you –

A. Yes.

Q. -- on 6 east –

A. Yes.

Q. -- or is there something obstructing your view of the roadway?

A. Other than darkness, no.

Q. And right at that point, is the road on an incline, on an decline, or more or less flat?

A. Decline.

Q. So you testified that you tried to move your vehicle in front of the SUV, in the breakdown lane, in response to observing him brake and move his vehicle; is that correct?

A. Yes.

Q. And were you able to successfully maneuver your car in that fashion?

A. I don't think so. I -- like I said, it happened so quick. I -- I don't recall hitting anybody.

Q. So do you have any recollection of contacting any vehicles in this accident?

A. Not really.

Q. What is the last thing that you do remember before the accident?

A. My Jeep tilting. (Indicating.)

MR. GALLAGHER: You're making a maneuver to your left.

THE WITNESS: Yes. I was -- I was going right, and the Jeep tilted left.

Q. Is it your testimony that you lost consciousness while you were driving?

A. I'm -- yes. I lost consciousness at the accident.

* * *

Q. Okay. So once you saw the SUV move its vehicle into the breakdown lane, –

A. Yes.

Q. -- you attempted to move your vehicle into the breakdown lane in front of it; correct?

A. Yes.

Q. And did you make it into the breakdown lane, or did your vehicle flip before you got there?

A. I think it flipped.

Q. Okay.

A. I can't -- like I said, it happened so quickly.

Q. When the vehicle flipped, did it flip to the right –

A. To the left.

Q. -- or to the left?

A. To the left, on the driver's side.

Q. Do you recall contacting any vehicle in the accident?

A. I don't recall that.

Q. After your vehicle came to rest, where was it in the roadway?

A. I don't know.

Q. Did you lose consciousness as a result of the accident?

A. I think so.

Prior to the accident, the Defendant did not hear the sound of a horn or the screeching of tires.

If his vehicle came into contact with the SUV, he was not aware of it.

He did not observe any vehicle in the ditch by the road.

He told the police officer at the scene that he was "distracted by the vehicle in front of [him] making an abrupt move. And I told him, I didn't see brake lights on the car that I impacted, before I impacted it." Concerning the same, the following colloquy occurred.

Q: Okay. So how do you know you didn't see any brake lights on it, if you weren't aware that you even impacted a car?

A. Because he pulled over. I didn't see the red on the car. You know how they have that bright, red light in the center of the car. (Indicating).

Q. Do you have any idea what kind of car that was?

A. No.

Q. So is it your testimony that the vehicle in front of the SUV didn't have any brake

lights?

A. I didn't see a brake light on.

Q. Were you looking at that vehicle before the accident?

A. Quickly.

Q. What was the distance that you were from that vehicle, when you quickly looked at it before the accident?

MR. GALLAGHER: I think it was asked and answered, but he can answer again.

A. Less than 50 feet.

Q. Did you tell the police officer at the scene of the accident that you didn't see any brake lights on the vehicle?

A. Yes, I think -- I think I did.

Q. Did you have any conversations with the individual driving the SUV?

A. No.

Discussion/Legal Analysis

A party seeking summary judgment bears the initial burden of establishing a *prima facie* entitlement to judgment as a matter of law by tendering competent evidence in admissible form sufficient to eliminate any triable, material issues of fact from the case. If the moving party fails to meet this burden, the papers submitted in opposition need not be considered. If the moving party makes such a *prima facie* showing, the burden then shifts to the opposing party to demonstrate the existence of an issue of fact requiring a trial. *Phillip v. D & D Carting Co., Inc.*, 136 A.D.3d 18 [2nd Dept. 2015]; *Dempster v. Liotti*, 86 A.D.3d 169 [2nd Dept. 2011].

A rear-end collision with a stopped or stopping vehicle establishes a *prima facie* case of negligence on the part of the operator of the rear vehicle, requiring that operator to come forward

with evidence of a non-negligent explanation for the collision in order to rebut the inference of negligence. *Nikolic v. City-Wide Sewer & Drain Service Corp.*, 150 A.D.3d 754 [2nd Dept. 2017]; *Tumminello v. City of New York*, 148 A.D.3d 1084 [2nd Dept. 2017]. A non-negligent explanation may include a mechanical failure, a sudden, unexplained stop of the vehicle ahead, an unavoidable skidding on wet pavement, or any other reasonable cause. *Tumminello v. City of New York*, 148 A.D.3d 1084 [2nd Dept. 2017]. However, while a non-negligent explanation for a rear-end collision may include evidence of a sudden stop of the lead vehicle, vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her car and the car ahead. *Tumminello v. City of New York*, 148 A.D.3d 1084 [2nd Dept. 2017].

To prevail on a motion for summary judgment on the issue of liability in a negligence case, the movant need no longer demonstrate that he or she was free from comparative fault. *Davis v. Commack Hotel, LLC*, 174 A.D.3d 501 [2nd Dept. 2019].

Pursuant to CPLR 3212(f), a motion for summary judgment may be denied as premature when it appears that facts essential to justify opposition may exist but cannot then be stated. *Aurora Loan Services, LLC v. LaMattina & Associates, Inc.*, 59 A.D.3d 578 [2nd Dept. 2009]. This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion. *Aurora Loan Services, LLC v. LaMattina & Associates, Inc.*, 59 A.D.3d 578 [2nd Dept. 2009]. However, the proponent must offer an evidentiary basis for a determination that disclosure might reveal or lead to relevant evidence, or that facts essential to oppose the motion were exclusively within the knowledge and control of the plaintiff. *Yiming*

Zhou v. 828 Hamilton, Inc., 173 A.D.3d 943 [2nd Dept. 2019]. The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the disclosure process is insufficient to deny the motion. *Cortes v. Whelan*, 83 A.D.3d 763, 922 N.Y.S.2d 419 [2nd Dept. 2011].

Here, the Plaintiff submitted competent evidence in admissible form (her own affidavit) sufficient to demonstrate, *prima facie,* that the Defendant was negligent in the happening of the accident, to wit: that the Defendant rear-ended her vehicle while she was slowing for traffic.

In opposition, the Defendant failed to raise a triable issue of fact.

First, nothing in the Defendant's testimony at his examination before trial raises a triable issue of fact as to whether he was free from negligence in the happening of the accident, or as to whether the Plaintiff was contributorily negligent.

Indeed, in arguing to the contrary, the Defendant's counsel appears to be reading the Defendant's testimony as indicating that the Plaintiff was the driver of the SUV or pickup truck that "jutted" into the breakdown lane. However, this argument is without merit.

First, the Defendant does not expressly state that the Plaintiff was the driver of the SUV or pickup truck that "jutted" into the breakdown lane. Nor is this reflected in the police report itself. Rather, the Plaintiff's vehicle is identified as a Nissan "SDN," which is DMV code for sedan. Https://dmv.ny.gov/forms/p33.pdf. The DMV code for pickup truck is "PICK" and the code for an sport utility vehicle is "SUBN" https://dmv.ny.gov/forms/p33.pdf.

Second, the Defendant consistently used the pronouns he, him and his to refer to both the SUV/pick up and its driver. The Plaintiff is identified as a female in the police report.

Finally, the later part of the Defendant's testimony at his examination before trial clearly

indicates that he crashed into vehicles that were revealed to be in front of him in his lane of travel after the SUV/pick up truck cleared his line of sight (*see e.g.*, pages 45 through 48).

In sum, the Defendant failed to raise a triable issue of fact.

In addition, the Court notes, the Defendant's contention that the motion is premature lacks merit. Clearly, knowledge of the relevant facts is primarily with the Defendant.

Thus, the Plaintiff is granted summary judgment on the issue of liability.

Accordingly, and for the reasons cited herein, it is hereby,

ORDERED, that the motion is granted; and it is further,

ORDERED that the parties are directed to appear for a status conference on Tuesday, February 2, 202[illegible], at 1:30 p.m., at the Orange County Supreme Court, Court room #3, 285 Main Street, Goshen, New York, to determine how the matter shall proceed on the issue of damages. If the Courts are not yet open to the public at that time, a virtual conference will be scheduled. Respective counsel will be provided with the appropriate information from the Court in order to conduct the same.

The foregoing constitutes the decision and order of the court.

Dated: November 9, 2020
Goshen, New York

ENTER

HON. ROBERT A. ONOFRY, J.S.C.

VIA NYSCEF

TO: SOBO & SOBO, LLP
Attorneys for Plaintiff
Office & P.O. Address
One Dolson Avenue
Middletown, New York 19940

MEAD, HECHT, CONKLIN & GALLAGHER, LLP,
Attorneys for the Defendant
Office & P.O. Address
925 Westchester Avenue, Suite 302,
White Plains, New York 10604