

**Suk Kyung Kim v Stamarie**

2020 NY Slip Op 35685(U)

January 29, 2020

Supreme Court, Queens County

Docket Number: Index No. 711831/2017

Judge: Chereé A. Buggs

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Short Form Order

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

Present: Hon. Chereé A. Buggs
Justice

IAS PART 30

SUK KYUNG KIM and HYUN OK HAN,

Index No. 711831/2017

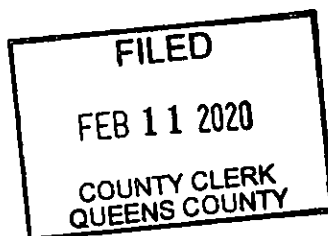
Plaintiffs,

Motion Date:

December 11, 2019

-against-

SAMUEL D. STAMARIE,



Motion Cal. No.: 32

Motion Seq. No.: 2

Defendant.

The following efile papers numbered 25-43 submitted and considered on this motion by Plaintiffs Suk Kyung Kim and Hyun Ok Han seeking an Order pursuant to Civil Practice Law and Rules (CPLR) 3212 granting them summary judgment on the issue of liability against Defendant Samuel D. Stamarie, striking defendant's affirmative defenses alleging culpable conduct and seat belt.

Notice of Motion - Affidavits - Exhibits ... EF 25-39
Affirmation in Opposition-Affidavits-Exhibits..... EF 40
Reply Affirmation-Affidavits-Exhibits..... EF 41-43

Facts and Procedural History

On August 24, 2017, plaintiffs Suk Kyung Kim (hereinafter "Kim") and Hyun Ok Han (hereinafter "Han") commenced this action with the filing of a summons and verified complaint, alleging that on June 19, 2016, at or near the intersection of Route 25A (Northern Boulevard) and Jayson Avenue in Great Neck, New York, Kim sustained serious injuries when defendant Samuel D. Sta. Maria's s/h/a Samuel D. Stamarie (hereinafter "Sta. Maria") vehicle came into contact with his vehicle. Han is Kim's wife and has asserted a derivative claim for loss of services in the verified complaint. Sta. Maria filed a verified answer with affirmative defenses on October 5, 2017, asserting inter alia the affirmative defenses of Kim's culpable conduct as well as the seat belt defense. An amended verified complaint was filed on or about October 13, 2017, and an amended answer was filed on or about October 16, 2017. Kim and Han served a verified bill of particulars on or about

February 20, 2018 and discovery proceeded pursuant to exchanged demands and Court Orders.

Now, Kim and Han move for summary judgment on the issue of liability pursuant to CPLR 3212 against Sta. Maria, striking his affirmative defenses as asserted in his verified answer of culpable conduct and seat belt. Kim and Han filed a Note of Issue on May 10, 2019. Discovery was not complete and Sta. Maria moved to vacate the Note of Issue. The motion resulted in the So-Ordered Stipulation of Hon. Chereé A. Buggs dated May 10, 2019 wherein discovery was directed to be completed, and the time to file a motion for summary judgment was extended to October 31, 2019, making this motion timely. In support of the motion, Kim and Han submitted the pleadings; party deposition transcripts; and a certified police report.

#### **Deposition testimony of Suk Kyung Kim**

Kim gave sworn testimony on December 18, 2018. He stated that on the date of the collision, he was driving his vehicle, a Honda Pilot at the aforementioned intersection. The vehicle is leased by his wife, Han. He testified that Northern Boulevard is a two way street but he did believe it had three lanes. He related that prior to the accident, he was stopped in the right lane at a red light at the aforementioned intersection, driving his vehicle in the right lane, close to the sidewalk. Another vehicle was also stopped at the light, and that vehicle was located to his left. When the light turned green he attempted to make a right turn. Kim related that he saw the car on his left move also when the light turned green but it was proceeding straight. He proceeded to make a right turn when the vehicle to his left all of a sudden jumped and hit the driver side of his vehicle. At the time of the occurrence he was wearing his seatbelt.

#### **Deposition testimony of Han**

Han gave sworn testimony on July 26, 2019. She is married to Kim and she was a front seated passenger in the vehicle at the time of the accident. She owns the Honda Pilot which was operated by Kim. She testified that for at least five minutes prior to the accident, their car was in the right-hand lane and remained in the right-hand lane the entire time the vehicle was traveling up Northern Boulevard, and had not changed lanes before the accident. She did not know if there was a parking lane or shoulder at the intersection. She stated that Kim was wearing a seatbelt at the time of the occurrence. She also stated that Kim had the right turn signal on prior to the accident. Her vehicle had stopped at a red light, which turned green, then it proceeded to make a right turn when the other vehicle turned into it.

#### **Deposition testimony of Samuel Sta. Maria**

Sta. Maria gave sworn testimony on December 18, 2018. He testified that on the date of the accident, that his wife was also in his vehicle, a Honda CRV, and that the "guy came from nowhere down the right side and she asked me didn't I see him and I said no." He saw the other vehicle, out of the corner of his eye, then the cars collided, and less than five seconds elapsed prior to the accident. He testified that on the date of the accident, there was a lot of traffic on Northern

Boulevard. He alleged he was stopped at a red light for about three minutes at the intersection prior to the accident. He testified that there were two lanes for travel at the intersection and that prior to the accident, he signaled to make a right turn and then proceeded to make a right turn. He recalled the other vehicle was coming from behind him down the shoulder lane and that when the cars collided the other vehicle was in the shoulder lane. He only saw the other vehicle after the accident. When he turned right the other vehicle was in the shoulder lane and he collided with it. Sta. Maria agreed that the police accident report indicated that he made an improper turn, but he disagreed with it, stating that he attempted to contact the police department about this information, however the police officer refused to speak to him. He also disagreed with the interpretation of the attached diagram of the police accident report. He also stated that he told the police officer that the other driver was driving on the shoulder, which is also not reflected in the police accident report. He conceded that the other vehicle was positioned to the right of his vehicle. He reiterated that he did not see the other vehicle until the collision. He also conceded that since he did not see the other vehicle until impact he could not state for a fact where it was located prior to the collision.

### Discussion

“Where there are no material and triable issues of fact, the motion for summary judgment should be granted....[t]he party making the motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by offering sufficient evidence to demonstrate the absence of any material issue of fact and the party must do so by tender of evidentiary proof in admissible form.” (*See Dougherty v Kinard*, 215 AD2d 521 [2d Dept 1995]; *see also Friends of Animals, Inc. v Assoc. Fur Mfrs.*, 46 NY2d 1065 [1979].) “To be entitled to partial summary judgment a plaintiff does not bear the ... burden of establishing... the absence of his or her comparative fault.” (*See Rodriguez v City of New York*, 31 NY3d 312, 324–325 [2018].) “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... the issue of a plaintiff’s comparative negligence may be decided where, as here, the plaintiff specifically argued the absence of comparative fault in support of his [or her] motion.” (*See Flores v Rubenstein*, 175 AD3d 1490 [2d Dept 2019] [internal quotations omitted]; *see also Balladares v City of New York*, 177 AD3d 942 [2d Dept 2019]; *Tsyganash v Auto Mall Fleet Mgt. Inc.*, 163 AD3d 1033 [2d Dept 2018]).

Kim and Han argued that at the time of the collision, Kim’s vehicle was in the right lane, the lane closest to the shoulder, attempting to make a right turn, when Sta. Maria’s vehicle came into contact with it, causing the collision. Both Kim and Sta. Maria agreed that the traffic light at the intersection had been red prior to the collision and that Kim’s vehicle was to the right of Sta. Maria’s. Sta. Maria admitted that he failed to see Kim and Han’s vehicle until mere seconds before the collision. A driver is negligent as a matter of law if she or he fails to see what there is to be seen with the proper use of ones senses. (*See Blasso v Parente*, 79 AD3d 923 [2d Dept 2010]; *Laino v Lucchese*, 35 AD3d 672 [2d Dept 2006]). Kim asserted that Sta. Maria violated Vehicle and Traffic Law (VTL) §1160(a) when Sta. Maria attempted to make a right turn from a position that was not “as close to as practicable to the right hand curb or edge of the roadway.” Moreover, VTL §1128

requires a driver to operate her or his vehicle as nearly practicable within a single lane and not to move it from the lane unless the driver has ascertained that the movement can be safely made. The violation of a statutory standard of care constitutes negligence per se (*see Dalal v City of New York*, 262 AD2d 596 [2d Dept 1999]). Further Kim and Han argue that whether their vehicle was in the right lane or in the right shoulder or parking lane, it was positioned to make a right turn from as close as practicable to the right hand curb of the road. Therefore, liability cannot be imposed upon Kim the driver of plaintiffs' vehicle, because Kim's making a right turn from a position to the right of Sta. Maria could at most be the occasion for the occurrence herein, not one of its causes. Further, the affirmative defenses of culpable conduct and the seat belt defense should be dismissed because the were both asserted and are without any evidentiary proof. Kim testified at the time of the occurrence he was wearing his seatbelt, and also Sta. Maria cannot demonstrate that Kim was comparatively negligent. Whether Kim was operating the vehicle in the right lane or the right shoulder lane, he could not have been comparatively at fault for the collision because Sta. Maria testified that he saw Kim and Han's vehicle only seconds before impact, thus, the sole proximate cause of the accident is Sta. Maria's failure to see what there was to be seen, Kim and Han's vehicle, prior to Sta. Maria attempting to make a right hand turn.

The Court finds that Kim and Han have demonstrated their prima facie entitlement to judgment as a matter of law now requiring Sta. Maria to come forward with evidence to raise a triable issue of fact. (*See Friends of Animals, Inc. v Assoc. Fur Mfrs.*, 46 NY2d 1065 [1979].) In opposition, Sta. Maria alleged that Kim was traveling on the shoulder or in the parking lane in order to bypass stopped traffic or for any other reason in violation of VTL §1131 titled "Driving on shoulder or slopes" which Sta. Maria asserted stated the following:

"Except for bicycles and those classes of vehicles required to travel on shoulders or slopes, no motor vehicle shall be drive over, across, along, or within any shoulder or slope of any state controlled-access highway except at a location specifically authorized and posted by the department of transportation. The foregoing limitation shall not prevent motor vehicles from using shoulders or slopes when directed by police officers or flagpersons, nor does it prevent motor vehicles from stopping, standing, or parking on shoulders or slopes where such stopping, standing or parking is lawful."

He alleged that Kim was not operating a bicycle or class of vehicle covered by the statute and was not directed by anyone to use the shoulder. However, the statute actually reads as follows:

"Except for bicycles and those classes of vehicles required to travel on shoulders or slopes, no motor vehicle shall be drive over, across, along, or within any shoulder or slope of any state controlled-access highway except at a location specifically authorized and posted by the department of transportation. The foregoing limitation shall not prevent tow trucks from using shoulders or slopes in as limited and

incidental a manner as practicable when dispatched to the scene of an accident by a law enforcement agency or an authority, department or agency having jurisdiction over such controlled-access highway and all lanes ... nor shall it prevent motor vehicles from using shoulders or slopes when directed by police officers or flagpersons, nor does it prevent motor vehicles from stopping, standing, or parking on shoulders or slopes where such stopping, standing, or parking is lawful.

Sta. Maria also alleged that Kim violated VTL §1123 titled "When overtaking on the right is permitted" which states as follows:

(a) The driver of a vehicle may overtake and pass upon the right of another vehicle only under the following conditions"

1. When the vehicle overtaken is making or about to make a left turn;
2. Upon a street or highway with unobstructed pavement not occupied by parked vehicles or sufficient width for two or more lines of moving vehicles in each direction;
3. Upon a one-way street, or upon any roadway on which traffic is restricted to one direction of movement, where the roadway is free from obstructions and of sufficient width for two or more lines of moving vehicles.

(b) The driver of a vehicle may overtake and pass another vehicle upon the right only under conditions permitting such movement in safety. Such movement shall not be made by driving off the pavement or main-traveled portion of the roadway, except as permitted by section eleven hundred thirty-one of this article.

Thus, Sta. Maria asserted, that based upon the foregoing, there are issues of fact to be determined by a jury because the testimony of the parties are in conflict.

In reply, Kim and Han asserted that the subject accident was solely caused by Sta. Maria's failure to observe their car and turning into it. A driver is negligent as a matter of law when they fail to see what there is to be seen through the proper use of their senses. They cite the case *Blasso v Parente*, 79 AD3d 923 (2d Dept 2010) for that proposition. In *Blasso*, the Second Department held that defendant was solely responsible for a rear end collision with plaintiff's stopped vehicle, which had sustained a mechanical failure and was on the Long Island Expressway for at least several minutes before the accident occurred, thus plaintiff's motion for summary judgment on the issue of liability should have been granted. Defendant admitted at his deposition that he first observed plaintiff's vehicle about seven seconds prior to the accident, and that its brake lights appeared to be on, that the roadway was unobstructed, thus the sole cause of the accident was the "defendant driver's negligent failure to see what there was to be seen, to drive at a safe speed and distance behind plaintiff's vehicle, which admittedly was braking" (*Id.*) Kim and Han maintained that Sta.

Maria violated Vehicle and Traffic Law 1160(a) when he attempted to make a right turn from a position that was not "as close to as practicable to the right hand curb or edge of the roadway." Even under Sta. Maria's version of events, he attempted to make a right turn far enough away from the right hand curb that another car was able to drive next to him on the right. Further his claim that Kim violated Vehicle and Traffic Law 1131 must fail because Route 25A is not a "state controlled-access highway." Route 25A also known as Northern Boulevard, is a busy thoroughfare with traffic signals, and VTL §1131 does not apply here. Also, Stamarie's argument that there was a violation of VTL §1123 by overtaking Stamarie on the right is also not availing. The certified police accident report depicts the street where the accident occurred as falling under VTL§1123(b)(2), wherein passing on the right is permitted. The certified police accident report depicts westbound Northern Boulevard at Jayson Avenue as fitting within the definition as defined under the statute, having two lanes of travel as well as a left turn lane. Sta. Maria's failure to recall the specific layout does not change his testimony wherein he stated that he was traveling in the lane closest to the curb and was turning right from this lane when Sta. Maria turned into him from the lane to his left. The testimony adduced by Kim shows that Kim was stopped at a red light, in the right lane, waiting to make a right turn onto Jayson Avenue. The fact that Sta. Maria only observed Kim's car either not at all or seconds prior to the collision is irrelevant. Also, the affirmative defenses on the issues of culpable conduct and the seat belt defense should be dismissed as this part of the motion remains unopposed. Sta. Maria struck Kim and Han's vehicle while attempting to make a right turn in violation of Vehicle and Traffic Law §1160(a).

The Court finds that Sta. Maria failed to raise a triable issue of fact. VTL §1131 does not apply to the facts of this case. This accident did not occur on a controlled-access highway as defined under VTL §109, which defines a controlled-access highway as "[e]very highway, street, or roadway in respect to which owners or occupants of abutting lands and other persons have no legal right of access to or from the same except at such points only and in such manner as may be determined by the public authority having jurisdiction over such highway, street, or roadway." (*See also Mack v Harley*, 165 AD3d 641 [2d Dept 2018].) The facts of this case are that Kim was wearing his seatbelt, was in the right lane with his right signal on and proceeding to make a right hand turn when Sta. Maria's vehicle turned into his vehicle in violation of VTL §1160(a). VTL §1123(a)(2) provides that a vehicle may pass another vehicle on the right "[u]pon a street or highway with unobstructed pavement not occupied by parked vehicles of sufficient width for two or more lines of moving vehicle in each direction." Sta. Maria testified that he did not see Kim and Han's vehicle prior to attempting the right turn, however, he is obligated to see that which is there to be seen. (*See Meliarenne v Prisco*, 9 AD3d 353 [2d Dept 2004].)

Therefore, based upon the foregoing, plaintiffs' motion is granted.

The foregoing constitutes the decision and Order of the Court.

Dated: January 29, 2020

  
Hon. Chereé A. Buggs, JSC

