To commence the statutory time
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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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MICHELE VAN DUNK,

Plaintiff,

-against-

WF ENRIQUE BONILLA AND EVERGREEN KOSHER, LLC,

Defendants.

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DECISION AND ORDER

INDEX NO.: EF001837-2019
Motion Date: 6/08/2021
Sequence No. 1

SCIORTINO, J.

The following papers numbered 1 to 12 were read on this motion by defendants for partial summary judgment on liability:

PAPERS:	NUMBER:
Notice of Motion/Affirmation (Moore)/Exhibit A-G	1 - 9
Affirmation in Opposition (Cambareri)	10
Affirmation in Reply (Moore)/Exhibit A	11 - 12

Background

This action for personal injuries arises out of an automobile accident which took place on July 12, 2018 at approximately 1:15 p.m. on State Route 59 in the Town of Ramapo, County of Rockland. Plaintiff commenced the action by the filings of a Summons and Complaint (Exhibit B) in Orange County on March 8, 2019. Issue was joined with filing of the defendants' answer on April 25, 2019.

Depositions of the parties were held on October 21, 2019. (Exhibits E and F)

A. Plaintiff's Testimony (Exhibit E)

Just before the accident giving rise to this claim, plaintiff was driving on Route 59 in Monsey. She stopped to make a left turn into the parking lot of her employer; her directional

signal on. (22-23, 25) As she was turning, a non-party driver pulled out of the parking lot and cut her off. She was stopped with some part of her vehicle over the yellow line dividing the lanes at the moment of impact with the defendant. (22) After that car passed, seeing no one approaching, she again began to make her lefthand turn. (18) She believed that only the wheel and the front headlight on the driver's side were over the line at the time of impact. (27) Her front driver's side, "where the headlight is," came in contact with the defendants' vehicle. (31)

Plaintiff saw the Evergreen van before the impact, but could not recall for how long, or how far away it was. (23) She did not know what part of the Evergreen van contacted her vehicle, nor did she speak to the driver at any time. (32)

B. Defendants' Testimony (Exhibit F)

Defendant Bonilla worked as a driver for defendant Evergreen, making deliveries to businesses. (14) He had been working there since 2017. (10) On the day of the accident, Bonilla was operating a van owned by Evergreen Kosher in the course of his employment. (13-14) He hd used the same van every work day for about five months before the accident. (14) That day, Bonilla exited the Evergreen parking lot onto Route 59, his normal route. (20) He made a left turn onto Route 59. (18-19) Shortly after, Bonilla felt an impact to the front left (driver's) of the van. (22-23) He had not seen the other vehicle prior to feeling the impact. (23) He pulled over to the side of the road and waited about two minutes for his manager to arrive; he then got out of the van. (26) He never spoke to the police, or the driver of the other vehicle. (28)

Motion for Partial Summary Judgment

By Notice of Motion filed April 1, 2021, defendants seek an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint. Defendants assert that plaintiff's admitted crossing of the double yellow line establishes plaintiff's negligence as a matter of law, and defendants' *prima facie* entitlement to judgment. Bonilla, as the driver with the right of way,

was not required to anticipate that plaintiff would cross over into his lane. Such a circumstance creates an emergency situation; Bonilla had no duty to have anticipated the plaintiff's presence. Any possible error in his judgment is not sufficient to constitute negligence, and plaintiff's act was the sole proximate cause of the accident.

Opposition

Plaintiff argues that there is a genuine question of material fact with regard to Bonilla's negligence in failing to yield the right of way, a violation of Vehicle & Traffic Law §1212. Defendants' reliance on the uncertified police report and a video tape (not reviewed by this Court) is misplaced as both exhibits are hearsay; neither has been authenticated.

Here, although plaintiff's view of oncoming traffic was partially obscured by the non-party driver who pulled out of the parking lot ahead of her, she nevertheless saw Bonilla's van prior to the impact. She only began her turn after the non-party car passed her, and only a small portion of her vehicle was over the double-yellow line at the point of impact. Plaintiff goes on to assert that, after the non-party vehicle passed her, *she* was struck by *defendants'* van. Because there can be more than one proximate cause of an accident, defendants cannot establish their burden to show that they bore no fault. She asserts that the parties' conflicting deposition testimony demonstrates the existence of a triable issue of fact. The emergency doctrine is inapplicable to these circumstances because Bonilla should reasonably have anticipated and been prepared to deal with the situation with which he was confronted, and which was, at least partially, of his own making. Bonilla's failure to see what was there to be seen–a vehicle emerging from the right, cutting off plaintiff–and his failure to yield the right of way to plaintiff is, at the very least, an issue of fact that requires denial of summary judgment.

Reply

Defendants argue that plaintiff's speculation that Bonilla could have done something to avoid a vehicle crossing a double-yellow line is insufficient to defeat summary judgment. A driver with the right of way is entitled to anticipate that another driver, attempting to cross over his lane, would obey traffic laws requiring her to yield, including Vehicle & Traffic Law §1141. Plaintiff's purported excuse that her view was blocked by the car exiting the parking lot is not justification for her failure to yield.

Discussion

For the reasons which follow, defendants' motion for summary judgment pursuant to CPLR 3212 is granted.

Summary judgment is a drastic remedy, and is appropriate only when there is a clear demonstration of the absence of any triable issue of fact. (*Piccirillo v. Piccirillo*, 156 AD2d 748 [2d Dept 1989], citing *Andre v. Pomeroy*, 35 NY2d 361 [1974]) The function of the Court on such a motion is issue finding, and not issue determination. (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]) The Court is not to engage in the weighing of evidence; rather, the Court's function is to determine whether "by no rational process could the trier of facts find for the non-moving party." (*Jastrzebski v. N. Shore Sch. Dist.*, 232 AD2d 677, 678 [2d Dept 1996])

Summary judgment will be granted in the absence of any material issues of fact. To prevail on a motion for summary judgment, the movant must make a *prima facie* showing of entitlement, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact. (*Zuckerman v. City of N.Y.*, 49 NY 2d 557 [1980]) The movant has the initial burden, and the facts must be viewed in the light most favorable to the non-moving party. (*Jacobsen v. New York City Health & Hosps. Corp.*, 22 N.Y.3d 824, 834 [2014]) If the moving party fails to make its *prima facie* showing, the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers. (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853 [1985]) However, if the moving party meets its burden, the burden shifts to the party opposing the motion

to establish, by admissible evidence, the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for the failure to do so. (*Zuckerman*, 49 N.Y.2d at 556)

Here, defendants established their prima facie entitlement to judgment as a matter of law. This is not a situation where there are conflicting versions of the event. The undisputed testimony demonstrates that plaintiff crossed over the double yellow line into an opposing lane of traffic, thereby causing the collision. (*See Scott v. Kass,* 48 AD3d 785 [2d Dept 2008]) Plaintiff's violation of Vehicle and Traffic Law § 1126(a) is sufficient grounds to establish entitlement to summary judgment.[1] (*id.*)

In response, plaintiff argues that there is a material issue of fact regarding causation. There may be more than one proximate cause for an accident, and generally, it is for the trier of fact to determine the issue of proximate cause. (*Gaudio v. City of New York*, 189 AD3d 1546 [2d Dept 2020]) "However, the issue of proximate cause may be decided as a matter of law where only one conclusion may be drawn from the established facts." (*Cook v. Gomez*, 138 AD3d 675 [2d Dept 2016])

Here, plaintiff argues that Bonilla was negligent because he failed to see that which, through the proper use of senses, should have been seen. (*Berner v. Koegel*, 31 AD3d 591 [2d Dept 2006]) She argues that Bonilla's failure to see plaintiff prior to the impact suggests either that he was unobservant or speeding. However, mere speculation that the defendant driver could have done something to avoid a vehicle crossing over a double yellow line is insufficient to defeat a motion for summary judgment. (*See Eichenwald v. Chaudhry,* 17 AD3d 403 [2d Dept 2005])

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[1]Defendants further argue that Bonilla is entitled to the protection of the "emergency doctrine." Under the "emergency doctrine," when an actor is faced with a sudden and unexpected circumstance "which leaves little or no time for thought, deliberation, or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context, provided the actor has not created the emergency." (*Caristo v. Sanzone*, 96 N.Y.2d 172 [2001]) In this matter, however, the doctrine is inapplicable to a driver who testified that he was unaware of plaintiff's vehicle until the impact. Thus, as plaintiff correctly argues, there was no emergency situation.

Rather, a driver who has the right-of-way is entitled to anticipate that other drivers will obey the traffic laws requiring them to yield to the driver with the right-of-way. (*Cook*, 138 AD3d at 677) A driver is not required to anticipate that an automobile going in the opposite direction will cross over into oncoming traffic. (*See Snemyr v. Morales–Aparicio*, 47 AD3d 702 [2d Dept 2008]; *Lee v. Ratz*, 19 AD3d 552 [2d Dept 2005])

The presence of the third-party driver who allegedly cut off the plaintiff does nothing to change that outcome, and, if anything, only serves to bolster defendants' position. Plaintiff testified that she was able to stop her vehicle safely in her lane when she was cut off. If her line of sight was partially obscured because of that driver, she was aware of the need to be sure the lane was sufficiently clear before proceeding. Nor does plaintiff's accurate argument concerning the inadmissibility of the uncertified police report alter the conclusion. (*See, Yassin v. Blackman*, 188 AD3d 62 [2d Dept 2020]) (Where a police report is uncertified, and no foundation for its admissibility has been laid by another method, the report and its contents are inadmissible hearsay) The police report is unnecessary to establish what is uncontroverted in the party depositions: plaintiff crossed over a double yellow line, causing a collision with a driver properly exercising his right-of-way.

Conclusion

On the basis of the foregoing, it is

ORDERED that defendant's application for summary judgment on liability is granted.

This Decision shall constitute the order of the Court.

Dated: July 9, 2021
Goshen, New York

ENTER:

HON. SANDRA B. SCIORTINO, J.S.C.

TO: *Counsel of Record via NYSCEF*