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 WESTCHESTER

----------X

IRIS PEREZ,

Plaintiff,

-against -

JOSE VENTURA, COUNTY OF WESTCHESTER, WESTCHESTER COUNTY DEPARTMENT OF TRANSPORTATION, LIBERTY LINES TRANSIT, INC. and BEE-LINE BUS,

Defendants.

----------X

DECISION/ORDER

INDEX NO. 54520/2017

Motion date: 11/07/18
Mot. Seq. 1

ECKER, J.

The following papers numbered 1 through 12 were read on the motion of JOSE VENTURA, COUNTY OF WESTCHESTER, WESTCHESTER COUNTY DEPARTMENT OF TRANSPORTATION, LIBERTY LINES TRANSIT, INC. and BEE-LINE BUS ("defendants"), made pursuant to CPLR 3212, for an order granting summary judgment and dismissal of the complaint, as against IRIS PEREZ ("plaintiff"):

PAPERS	**NUMBERED**
Notice of Motion, Affirmation, Exhibits A-H	1-10
Affirmation in Opposition	11
Affirmation in Reply	12

Upon the foregoing papers, the court determines as follows:

Plaintiff alleges she sustained serious injury when the vehicle she was operating came into contact with the bus owned by the County of Westchester, managed by Liberty Lines, and operated at the time by Ventura. The accident occurred on May 12, 2016, at or about 3:10 p.m. on McLean Avenue in Yonkers, between the intersection of South Broadway and Romaine Avenue.

According to Ventura, as testified to in his deposition, the bus, while stopped at a bus stop, was passed by the car driven by plaintiff. Each vehicle was traveling in an easterly direction. After discharging and picking up passengers, which took

approximately three minutes, the bus resumed its route, traveling easterly at about 10 miles per hour. A short distance later, plaintiff, who had pulled her car into the parking lane, suddenly veered into the easterly travel lane as the bus approached her, cutting off the bus, and causing the impact. The left front of plaintiff's car collided with the right front of the bus, causing the bus to travel over the double yellow line separating east bound from westbound traffic. Plaintiff, in her deposition, denies she was attempting to make a U-turn, and faults the accident on the conduct of Ventura.

In support of the motion, defendants submit the surveillance tape from the bus, which seems to show plaintiff's car having pulled in toward the curb to its right, then re-entering the traffic lane as the bus approached. It appears that plaintiff's left rear signal light was on just prior the time of the impact. As further evidence in support of the motion, defendants submit an uncertified police accident report, several passenger "courtesy cards," an unsworn statement from bus passenger Jaime Mack, plaintiff's accident report, and the report and deposition of Mario Scavelli, a supervisor for Liberty Lines, who is Ventura's employer.

The moving party is entitled to summary judgment only if it tenders evidence sufficient to eliminate all material issues of fact from the case. *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]. Put another way, in order to obtain summary judgment, there must be no triable issue of fact presented . . . even the color of a triable issue of fact forecloses the remedy. *In re Cuttitto Family Trust*, 10 AD3d 656 [2d Dept 2004], *quoting LNL Constr. v MTF Indus.*, 190 AD2d 714, 715 [2d Dept 1993]. If a party makes a *prima facie* showing of its entitlement to summary judgment, the opposing party bears the burden of establishing the existence of a triable issue of fact. *Zuckerman v City of New York, supra*; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]. On a motion for summary judgment, the court's function is to determine if a factual issue exists, and the court must not weigh the credibility of witnesses unless it clearly appears that the issues are feigned and not genuine, and a conflict in the testimony or evidence presented merely raises an issue of fact. *Brown v Kass*, 91 AD3d 894 [2d Dept 2012].

At the outset, the court declines to ascribe probative value to the police accident report, the unsworn, untested Mack statement, or the "courtesy cards," as none of these documents meet the criteria of the business records exception to the hearsay rule, as set forth in CPLR 4518(a). Neither Mack nor any of the individuals who signed the cards, including Mack, were under a business duty to impart the information. *Johnson v Lutz*, 253 NY 124 [1930]; *Hochhauser v Electric Ins. Co.*, 46 AD3d 174 [2d Dept 2007]. Further, the responding police officer was not a witness to the accident, and nothing stated in his report constitutes a separate exception to the hearsay rule. Likewise, the Scavelli report lacks probative value because Scavelli was not a witness to the accident.

In contrast, the transcripts of the parties, which are unsworn to, were retained by

the parties, without objection for 60 days, and as such are admissible on the motion. *See* CPLR 3116(a). In addition, the videotape is admissible based on the affidavit of Neftali Negron, IT Director of Liberty Lines Transit, Inc. Negron submits an affidavit, dated September 19, 2018, in which he states that he is the IT Director of Liberty. [NYSCEF No. 30]. He states that on the date of the accident the camera system captured inside and outside of the bus. He further avers that he reviewed the video submitted with the motion and the video is a true and accurate copy and depiction of the images captured on the surveillance video taken from the bus on the date in question. He states that the video was kept in the regular course of business of Liberty and had not been altered or modified. The video was preserved and maintained in the regular course of business of Liberty. This affidavit is sufficient to authenticate the video as a true and fair representation of the events depicted. *Read v Ellenville National Bank,* 20 AD3d 408 [2d Dept 2005]; *see generally, Zegarelli v Hughes*, 3 NY3d 64 [2004].

Having reviewed the video, however, the court cannot conclusively find that plaintiff's conduct was the sole precipitating cause of the impact. The fact that Ventura testified that he was driving 10 miles per hour, and it appears that plaintiff had her left rear signal light on before the impact, does not prove definitively that she was attempting to make a U-turn or that she alone was responsible for the collision. In fact, the trier of fact could reasonably reach different conclusions as to these issues. Accordingly, the court finds that it is not able to rule, as a matter of law, that plaintiff's conduct was the sole contributing factor to the accident.

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is denied. Accordingly, it is hereby

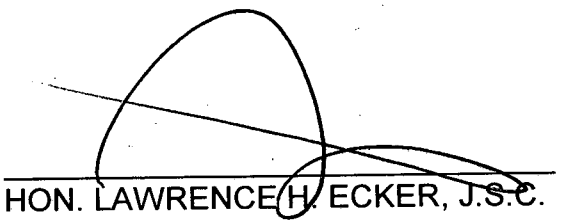
ORDERED that the motion of defendants VENTURA, COUNTY OF WESTCHESTER, WESTCHESTER COUNTY DEPARTMENT OF TRANSPORTATION, LIBERTY LINES TRANSIT, INC. and BEE-LINE BUS, for an order pursuant to CPLR 3212, dismissing the complaint, as against plaintiff IRIS PEREZ, is denied; and it is further

ORDERED that the parties shall appear at the Settlement Conference Part of the Court, Room 1600, on February 5, 2019, at 9:15 a.m.

The foregoing constitutes the Decision/Order of the court.

Dated: White Plains, New York
December 20, 2018

ENTER,



HON. LAWRENCE H. ECKER, J.S.C.

Appearances:

Pena & Kahn, PLLC
Attorneys for Plaintiff
Via NYSCEF

Keane & Bernheimer, PLLC
Attorneys for Defendants
Via NYSCEF