SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM- PART 15

Present: Honorable Mary Ann Brigantti-Hughes

FLAVIAN PETERS,

Plaintiff,

DECISION/ORDER

Index No.: 303560/2009

-against-

CREATIVE LIFESTYLES, INC. and
SANDRA KIKI LATIMORE,

Defendants.

The following papers numbered 1 to 5 read on this Motion noticed on June 1, 2010 and duly submitted on the Motion Calendar of August 20, 2010 of Part IA15.

Papers Submitted	Numbered
Motion, Affirmation & Exhibits	1, 2, 3
Affirmation	4
Reply	5

Upon the foregoing papers plaintiff Flavian Peters ("Peters") moves this Court for an Order granting summary judgment over defendants Creative Lifestyles, Inc. ("Creative") and Sandra Kiki Latimore ("Latimore") on the issue of liability. Defendants Creative and Latimore oppose this motion.

The underlying action was commenced to recover for injuries alleged to have been sustained in a motor vehicle accident which occurred on March 11, 2009 in the County of the Bronx, City and State of New York.

Peters asserts that there are no questions of fact concerning liability because Latimore admits to making an illegal left turn at the time of impact. Peters states that the time of the accident complained of, she was the owner and operator of a motor vehicle, which was broad-sided by a motor vehicle owned by Creative and operated by Latimore. Among her submissions are her affidavit and the transcripts of the EBTs of both Latimore and Peters.

At her EBT, Peters stated that the accident occurred "on the Grand Concourse northbound, at or near its intersection with Van Cortland Avenue". Within Peters' own affidavit, she states that she was "traveling northbound in the left lane on the Grand Concourse

northbound". She described the accident as having occurred when she, "approached the intersection of Grand Concourse and Van Cortland" with the green light in her favor, when, "[s]uddenly and without warning I was struck on my passenger side by the defendant's van which was making an improper and illegal left hand turn onto Van Cortland Avenue". Within her affidavit, Peters' further asserts that it is clear that defendants are fully liable because the location of the accident, being the area "where the defendant had entered onto the Grand Concourse, is not an area where vehicles traveling on the service road are allowed to merge onto the main portion of the road.". Within the transcript of Peters' EBT, she states the following: 1) that she was in the left lane of the northbound side of the Grand Concourse, 2) that she was driving twenty-five miles per hour at the time of the accident, 2) that she saw the offending vehicle before the accident occurred, 3) that she knew that the vehicle was making a left turn but does not remember whether its turn signal was blinking, 4) and that it was in the northbound service road. Latimore testified at her EBT: 1) that she was making a left hand turn from the northbound service road when she hit the vehicle that Peters was driving, 2) that she does not recall the name of the road she was trying to make a left turn onto, 3) she does not recall seeing a vehicle approaching to her left, 4) and that soon after the accident, a manager from her job, who met her at the scene of the accident, brought to her attention that she had made a left turn at an impermissible place.

Defendants Creative and Latimore argue in opposition that triable issues remain concerning Peters' comparative negligence. They state that Peters' motion fails to entitle her to summary judgment because Peter relies solely on her allegation that Latimore made an illegal left turn from the service road, into the intersection where the accident occurred, as well as the transcript of Latimore's EBT, in which she states that a left turn was impermissible at the subject intersection. Creative and Latimore contend that Peters'own testimony demonstrates comparative negligence because she admits that she saw the offending vehicle attempting to make a left turn before the accident occurred and did not take evasive action to avoid the impending collision. Additionally, that it is notable that Latimore was not ticketed for traffic violations because of the subject accident. Creative and Latimore proffer a copy of the police accident report for the

subject accident.

In reply, Peters cites *Griffin v Pennoyer*, 49 AD3d 341[1st Dept 2008], arguing that because Latimore made an impermissible left turn and failed to yield the right-of-way, defendants are completely liable. Peters also proffers photographs of the subject intersection depicting a sign prohibiting left turns made from the northbound service road.

It is well established that the "proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Pursuant to *CPLR 3212(b)*, the opponent of such motion must "show facts sufficient to require a trial of any issues of fact by producing evidentiary proof in admissible form". (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). As summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]). Accordingly, where an issue arguably exists, summary judgment should be denied. (*Stone v Goodson*, 8 NY2d 8 [1960]; *Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]).

"[U]nder the doctrine of comparative negligence, a driver who lawfully enters an intersection . . . may still be found partially at fault for an accident if he or she fails to use reasonable care to avoid a collision with another vehicle in the intersection'". (*Nevarez v S.R.M. Management Corp.*, 58 AD3d 295 [1st Dept 2008], *citing Romano v 202 Corp.*, 305 AD2d 576 [2nd Dept 2003], *quoting Siegel v Sweeney*, 266 AD2d 200 [2nd Dept 1999]). Furthermore, that Court of Appeals has held that, because the question of whether an event is foreseeable is subjective, as well as whether an party was negligent, such questions should generally be left to a jury. (*Costalas v New York*, 143 AD2d 573 [1st Dept 1988]).

Here, Peters has not demonstrated that defendants Creative and Latimore are completely liable. Peters relies on *Griffin v Pennyoer*, to support her argument, however therein the court granted summary judgment on liability because the movant had established that they had the right-of-way, but also both that defendant had made an abrupt turn into the plaintiff's path and that the plaintiff had been free from negligence. Peters has failed to demonstrate the same herein

and questions of fact remain as to whether she was comparatively negligent. Therefore it is hereby,

ORDERED, that plaintiff Flavian Peters' motion for summary judgment over defendants Creative Lifestyles, Inc. and Sandra Kiki Latimore, on the issue of liability, is **denied**.

This constitutes the Decision and Order of this Court.

Dated: November 8, 2010

Hon. Mary Ann Brigantti-Hughes, J.S.C.