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Short Form Order

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

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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DANIEL PRISCO,

Plaintiff(s),

-against-

JOSEPHINE QUINN,

Defendant(s).

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Index No. 21790/09

Motion Submitted: 7/18/11
Motion Sequence: 001

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....X

Plaintiff moves this Court for an Order granting summary judgment in his favor on the issue of liability. Defendant opposes the requested relief.

Plaintiff commenced this action as the result of a motor vehicle accident that occurred on September 4, 2009, at approximately 3:30 p.m. Plaintiff was riding his motorcycle when he alleges that defendant made a left-hand turn across his path of travel, causing plaintiff to strike the rear passenger portion of defendant's car. As a result of the collision, plaintiff and his motorcycle careened over the back of defendant's car, coming to rest on the roadway. As a result of this accident, plaintiff suffered various injuries. Defendant was not hurt.[1]

Defendant asserts that plaintiff's motion should be denied because it failed to include a full copy of the pleadings, and because plaintiff failed to attach signed transcripts to his motion papers. Lastly, defendant asserts that questions of fact exist, thereby precluding this

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[1]There is no evidence before this Court that either plaintiff, or defendant, received a summons for a Vehicle and Traffic Law violation as a result of this accident.

Court from granting summary judgment for plaintiff.

As to the first ground raised by defendant, the Court notes that plaintiff submitted a second amended notice of motion, including all of the pleadings in this action, on June 23, 2011, and that defendant advised the Court that she would not be submitting any further opposition papers subsequent to plaintiff's filing of the second amended notice of motion. Plaintiff's original motion was never decided prior to the filing of the second amended motion. Inasmuch as this Court could have properly denied plaintiff's original motion without prejudice to renewal upon submission of proper papers (***Fiber Consultants, Inc. v. Fiber Optek Interconnect Corp.***, 84 A.D.3d 1153, 924 N.Y.S.2d 276 (2d Dept., 2011), and acknowledging that plaintiff's second amended motion includes all of the pleadings, defendant's first ground for dismissal is rendered moot. This Court will consider plaintiff's second amended motion submitted to it on June 23, 2011, as it includes all of the pleadings, and it is in the interests of judicial economy to do so.

Plaintiff's motion submitted to the Court on June 23, 2011 includes plaintiff's signed and sworn transcript. It also includes the transcript of defendant's deposition testimony, which is not signed and sworn by defendant.[2]

CPLR § 3116(a) requires in relevant part that, "[t]hat the deposition shall be submitted to the witness for examination and . . . shall then be signed by the witness before any officer authorized to administer an oath. If the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed . . . ."

The requirements of CPLR § 3116(a) are strictly adhered to in the Second Department, whether the deposition sought to be introduced by a party is that of the opposing party, or of a non-party witness (***Marmer v. IF USA Express, Inc.***, 73 A.D.3d 868, 899 N.Y.S.2d 884 (2d Dept., 2010); ***Martinez v. 123-16 Liberty Avenue Realty Corp.***, 47 A.D.3d 901, 850 N.Y.S.2d 201 (2d Dept., 2008); ***Martinez v. 123-16 Liberty Avenue Realty Corp.***, 2008 N.Y. Slip Op. 31184(U), 2008 WL 1881542 (Sup. Ct., Queens County 2008)[defendant submitted a second motion for summary judgment, which was granted, including the transmittal letter pursuant to CPLR § 3116(a), and a reasonable excuse for having failed to do so on its original motion]).

Although the First and Fourth Departments have permitted an unsigned but certified deposition transcript of a party to be used by the opposing party as an admission (***Morchick v. Trinity School***, 257 A.D.2d 534, 684 N.Y.S.2d 534 (1st Dept., 1999); ***R.M. Newell Co. v. Rice***, 236 A.D.2d 843, 653 N.Y.S.2d 1004 [4th Dept., 1997]), this position "has not commended itself to the Second Department, and this Court is bound to follow the Second

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[2]Defendant's transcript is sworn to by the reporter.

Department" (***Delishi v. Property Owner LLC***, et. al., 31 Misc.3d 661, 666, 920 N.Y.S.2d 597 [Sup. Ct., Kings County 2011]).

Plaintiff's counsel has not established that the transcript was submitted to defendant for examination pursuant to CPLR § 3116(a). Thus, this Court will not consider defendant's deposition testimony in the determination of plaintiff's summary judgment motion.

This Court recognizes that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (***Andre v. Pomeroy,*** 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact. (***Cauthers v. Brite Ideas, LLC,*** 41 A.D.3d 755, 837 N.Y.S.2d 594 [2d Dept., 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, in this case the defendant (***Makaj v. Metropolitan Transportation Authority***, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

In support of his motion, plaintiff has submitted, *inter alia*, his deposition testimony and his affidavit. Plaintiff was traveling eastbound on Jericho Turnpike at or near its intersection with Third Avenue in Garden City Park, New York. Approximately two blocks before the accident location, plaintiff stopped for a red light. After the light turned green, plaintiff continued to travel eastbound, in the left lane. Defendant was traveling westbound on the same roadway, at the same intersection, and she was in the left-hand westbound lane. Defendant was attempting to make a left turn at this T-intersection, onto Third Street. There is no traffic signal device, or stop sign, at that T-intersection.

In his affidavit, plaintiff asserts that defendant attempted to make the left turn onto Third Avenue, "in front of my motorcycle, leaving me no opportunity to stop causing my motorcycle to hit her passenger side." Plaintiff further avers that he did not have an opportunity to avoid the collision, "or otherwise prevent the vehicle owned by [defendant] from striking the front of my motorcycle."

In plaintiff's deposition, which is far more detailed regarding the happening of the accident, plaintiff establishes that it was a clear day, that the roadway was dry, and that it was 3:30 in the afternoon. Plaintiff further establishes that the roadway at the accident location is straight and level. Plaintiff claims that he first saw defendant's car from a distance of fifteen to twenty feet away, and that his speed was approximately thirty (30) miles per hour. At the time plaintiff first saw defendant's car, "it was turning into [his] lane." Plaintiff also testified that "roughly the front half" of defendant's car was in his lane, when he first saw defendant's car. Plaintiff was unable to estimate the speed of defendant's car, but testified that it was constantly moving from his first observation of it until impact. According to plaintiff, the speed of defendant's car appeared to remain constant throughout.

Plaintiff testified that he braked as hard as he could, using both his hand and foot brakes, but that, "[i]t felt like less than a second" from the time he first saw defendant's car until impact. Plaintiff impacted the right rear quarter of defendant's car with his motorcycle, and plaintiff was thrown over defendant's trunk and onto the roadway.

"A driver who has the right-of-way is entitled to anticipate that the other driver will obey traffic laws which require him or her to yield" (***Wilson v. Rosedom***, 82 A.D.3d 970, 919 N.Y.S.2d 59 (2d Dept., 2011); *see also* ***Vehicle and Traffic Law § 1141***). Nonetheless, a driver with the right-of-way has a duty to use reasonable care to avoid a collision (***Cox v. Nunez***, 23 A.D.3d 427, 805 N.Y.S.2d 604 [2d Dept., 2005]).

Given that the roadway was straight, dry and level at the accident location, plus the fact that plaintiff claims to have been traveling only thirty (30) miles per hour and admits having seen defendant's car in his lane of travel prior to impact, it cannot be said, without more, that plaintiff has established that he used reasonable care to avoid the collision.

Also, issues of credibility generally require the denial of summary judgment and are to be resolved by the trier of fact. ***Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR § 3212:6***, at 14; ***Donato v. ELRAC, Inc.***, 18 A.D.3d 696, 794 N.Y.S.2d 348 (2d Dept., 2005); ***Frame v. Markowitz***, 125 A.D.2d 442, 509 N.Y.S.2d 372 [2d Dept., 1986]).

Based solely upon plaintiff's testimony and affidavit, which is all that this Court may properly consider, plaintiff has not established his entitlement to summary judgment as a matter of law on the issue of defendant's alleged liability for this accident (*cf.* ***Berner v. Koegel***, 31 A.D.3d 591, 819 N.Y.S.2d 89 (2d Dept., 2006) [plaintiff's summary judgment motion granted where defendant admitted in her deposition testimony that she never saw plaintiff's vehicle although the road was straight and level]).

Plaintiff's summary judgment motion is denied.

Since the plaintiff has failed to meet his *prima facie* burden, it is unnecessary to determine whether the defendant's papers submitted in opposition are sufficient to raise a triable issue of fact (*See* ***Levin v. Khan***, 73 A.D.3d 991, 904 N.Y.S.2d 73 (2d Dept., 2010); ***Kjono v. Fenning***, 69 A.D.3d 581, 893 N.Y.S.2d 157 [2d Dept., 2010]).

The foregoing constitutes the Order of this Court.

Dated: September 30, 2011
Mineola, N.Y.

Karen V. Murphy
J. S. C.

ENTERED
OCT 05 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE