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SCAN

SHORT FORM ORDER

SUPREME COURT-NEW YORK STATE-NASSAU COUNTY

PRESENT:

HON. ANTHONY L. PARGA

JUSTICE

----------X PART 8

SHARON KALINA, as Executor of the Estate of ANNABELLE KALINA, deceased, and SHARON KALINA, Individually,

INDEX NO. 794/10

MOTION DATE: 08/17/11

Plaintiffs,

SEQUENCE NO. 001

-against-

DAVID OBERST and LEON KALINA,

Defendants.

----------X

Notice of Motion, Affs. & Exs. 1

Affirmation in Opposition & Exs. 2

Affirmation in Opposition & Exs. 3

Reply Affirmation 4

Reply Affirmation 5

Upon the foregoing papers, it is ordered that the motion by defendant David Oberst, for summary judgment on the issue of liability, pursuant to CPLR §3212, is denied.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

This is an action to recover for personal injuries allegedly sustained by the plaintiffs Annabelle Kalina, deceased, and Sharon Kalina, on October 6, 2009, as the result of a motor vehicle accident which occurred on Route 25A at or near its intersection with West Gate, LIU C.W. Post University, in Brookville, Nassau County, New York. It is undisputed that the accident occurred when the vehicle driven by defendant, Leon Kalina, in which both plaintiffs were passengers (the "Kalina vehicle"), was attempting to make a left hand turn from the west bound left turn lane of Route 25A into the West Gate entrance of the LIU C.W.Post University campus. The collision occurred when contact was made with a vehicle owned and operated by defendant David Oberst (the "Oberst vehicle"), which was traveling east bound in the right hand

lane on Route 25A. The two vehicles were perpendicular to each other at the time of the impact, and the impact between the two vehicles involved the rear passenger door and rear quarter panel of the Kalina vehicle and the right front portion of the Oberst vehicle.

In support of his motion, defendant Oberst has submitted the deposition testimonies of the parties, a copy of the certified police accident report with witness statements, and the DMV Safety Hearing Bureau's Finding Sheet, dated July 23, 2010. Movant contends that he is entitled to summary judgment as defendant Kalina made a left turn in front of his vehicle as he had the right of way while traveling straight on Route 25A. Movant submits the testimony of defendant Kalina, who testified that he never saw defendant Oberst's vehicle before the accident happened. He also testified that he was making a left turn at about twenty-five miles per hour at the time that the impact occurred. Movant also submits the testimony of plaintiff Sharon Kalina, the front seat passenger, who also did not see the Oberst vehicle prior to the accident. She, too, testified that defendant Kalina was making a left hand turn into C.W. Post at the time of the accident. In addition, defendant Oberst testified that he was traveling straight at 45 miles per hour when the Kalina vehicle made a left turn in front of him.

Further, defendant Oberst argues that the Administrative Law Judge who presided over the DMV hearing found that defendant Leon Kalina violated VTL §1141 (stating that driver intending to turn left within an intersection shall yield the right of way to any vehicle approaching from the opposite direction). He also contends that, an independent non-party witness to the accident, Kyle A. Bossio, gave a statement to the police that the Kalina vehicle "cut off" the Oberst vehicle.

Moving defendant Oberst has established a prima facie showing of entitlement to summary judgment on the issue of liability by establishing that the defendant Kalina violated Vehicle and Traffic Law §1141 when he made a left turn into the path of the Oberst's oncoming vehicle and failed to yield the right of way. (*See, Loch v. Garber*, 69 A.D.3d 814, 893 N.Y.S.2d 233 (2d Dept. 2010); *Berner v. Koegel*, 31 A.D.3d 591, 819 N.Y.S.2d 89 (2d Dept. 2006); Kiernan v. Edwards, 97 A.D.2d 750, 468 N.Y.S. 2d 381 (2d Dept. 1983)). The proponent of a summary judgement motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986)). Once the movant has demonstrated a prima facie showing of entitlement to judgement, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of a fact which require a trial of the action. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980)).

Both defendant Leon Kalina and plaintiff submit opposition in which they argue that there are questions of fact regarding defendant Oberst's comparative negligence which preclude the granting of summary judgment. To begin, the opponents contend that while the Administrative Law Judge's determined that defendant Kalina violated VTL §1141, she made no findings as to proximate cause or whether defendant Oberst bears any comparative negligence for the subject accident. In addition, the deposition testimony of the parties, as well as the photographs from the scene of the accident, demonstrate that the Kalina vehicle entered the intersection before the Oberst vehicle, as the point of impact between the two vehicles was the right front of the Oberst vehicle to the passenger rear door and rear quarter panel of the Kalina vehicle. Defendant Leon Kalina also testified that the rear portion of his vehicle might have been in the eastbound lane at the time the accident happened. In addition, a non-party independent witness who was stopped for a red light in the left turning lane at the West Gate to C.W. Post, Kyle A. Bossio, testified that the front of the Kalina vehicle was just turning into the gate and that the rear end of the Kalina vehicle was in the right east bound travel lane at the time of the impact. As such, the Kalina vehicle was almost through the intersection when the accident occurred, having fully crossed over the left east bound lane of Route 25A and having only its rear portion in the right east bound lane at the time of impact.

In addition, and more significantly, the opponents to the motion contend that defendant Oberst was operating his vehicle at an excessive rate of speed for the circumstances at the time of the accident, as non-party witness, Kyle A. Bossio, testified that the Oberst vehicle was traveling at fifty-five to sixty miles per hour before braking. He also heard the sound of brakes screeching coming from the Oberst vehicle. Mr. Bossio further testified that from the time the Oberst vehicle began to brake, there was not enough space to slow down enough to avoid the impact.

Lastly, defendant Oberst testified at his deposition that he first saw the Kalina vehicle when he was about one hundred yards away from it, while it was stopped in the left turn lane. He further testified that at the time he first saw the Kalina vehicle move from the left turn lane, he was fifty to one-hundred feet away from it and only about three seconds passed from that point until the point of impact. As such, the opponents to the motion argue that defendant Oberst was aware that the Kalina vehicle was in the left turning lane before the accident and that the Kalina vehicle entered the intersection before his vehicle.

Both defendant Kalina and plaintiff argue that there are questions of fact sufficient to defeat defendant Oberst's prima facie showing. Plaintiff argues that questions exist as to whether

or not the Oberst vehicle used reasonable care under the circumstances to avoid the accident, whether defendant Oberst saw what he should have seen under the circumstances, whether defendant Oberst was operating his vehicle at an excessive speed under the circumstances, and whether or not such conduct contributed to this accident.

Based upon the evidence submitted herein, the plaintiff and defendant Kalina have demonstrated triable issues of fact sufficient to defeat the instant motion for summary judgment. 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, however, a driver who has the right of way also has a duty to keep a proper lookout to avoid colliding with other vehicles. (*Bonilla v. Calabria*, 80 A.D.3d 720, 915 N.Y.S.2d 615 (2d Dept. 2011); *see*, VTL §§1128, 1143)). A driver with the right-of-way has a duty to use reasonable care to avoid a collision. (Tapia v. Royal Tours Service, Inc., 67 A.D.3d 894, 889 N.Y.S.2d 225 (2d Dept. 2009); *Cox v. Nunez*, 23 A.D.3d 427, 805 N.Y.S.2d 604 (2d Dept. 2005); *Rotondi v. Rao*, 49 A.D.3d 520, 855 N.Y.S.2d 156 (2d Dept. 2008); *Siegel v. Sweeny*, 266 A.D.2d 200, 697 N.Y.S.2d 317 (2d Dept. 1999); *See also,* N.Y. Vehicle & Traffic Law §1146). Under the doctrine of comparative negligence, a driver with the right-of-way 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. (*Siegel v. Sweeny*, 266 A.D.2d 200, 697 N.Y.S.2d 317 (2d Dept. 1999); *See,* CPLR §1411).

In addition, there may be more than one proximate cause of an accident, and there are questions of fact herein as to whether defendant Oberst's negligence contributed to the accident. (*Cox v. Nunez*, 23 A.D.3d 427, 805 N.Y.S.2d 604 (2d Dept. 2005); *Rotondi v. Rao*, 49 A.D.3d 520, 855 N.Y.S.2d 156 (2d Dept. 2008); *Bonilla v. Calabria*, 80 A.D.3d 720, 915 N.Y.S.2d 615 (2d Dept. 2011); *Tapia v. Royal Tours Service, Inc.*, 67 A.D.3d 894, 889 N.Y.S.2d 225 (2d Dept. 2009)). The deposition testimony of non-party witness Kyle Bossio regarding the speed of the Oberst vehicle prior to the accident raises a question of fact as to whether defendant Oberst was traveling at an excess speed at the time of the accident and whether that excessive speed contributed to the accident. (*Cameron v. Steel*, 24 A.D.3d 1206, 807 N.Y.S.2d 234 (2d Dept. 2005); *Bonilla v. Guitierrez*, 81 A.D.3d 581, 915 N.Y.S.2d 634 (2d Dept. 2011)(where defendant failed to stop at stop sign and yield right of way to the plaintiff, the Court found that although plaintiff made a prima facie showing of entitlement to summary judgment, there was a triable issue of fact as to whether the plaintiff was driving at an excessive rate of speed and whether he could have avoided the accident through the exercise of reasonable care); *Salmonese v. Gulli*, 64 A.D.3d 563, 882 N.Y.S.2d 478 (2d Dept. 2009)(summary judgment denied where plaintiff failed

to demonstrate the absence of a triable issue of fact as to whether he was operating his motor vehicle at an excessive rate of speed and whether that conduct was a proximate cause of the accident); *Rotondo v. Rao*, 49 A.D.3d 520, 855 N.Y.S.2d 156 (2d Dept. 2008)(summary judgment denied where defendant did not eliminate all issues of fact as to whether he was operating his vehicle in excess of the speed limit and if so, whether such conduct contributed to the accident); *Cooley v. Urban*, 1 A.D.3d 900, 767 N.Y.S.2d 546 (4th Dept. 2003)(the fact that plaintiff made a left-hand turn in front of defendant's vehicle was not dispositive of the issue of whether defendant failed to exercise reasonable care in proceeding toward the area where the accident occurred without slowing, despite seeing the plaintiff's vehicle exit its lane of travel and traverse the entire median before turning into defendant's lane of traffic)).

In addition, the point of impact to the rear of the Kalina vehicle and Mr. Bossio's testimony regarding the position of the Kalina vehicle at the time of impact, raise questions of fact regarding whether defendant Oberst failed to see that which through the proper use of his senses he should have seen and whether he failed to use reasonable care to avoid the collision. (*Lee v. Kew Gardens Sung Shin Reformed Church of New York*, 84 A.D.3d 1299, 923 N.Y.S.2d 725 (2d Dept. 2011)(summary judgment denied where plaintiff failed to establish his freedom from comparative fault where the point of impact between the vehicles suggested that the defendant's vehicle was well within the intersection at the point of impact and where the force of the impact suggested that the plaintiff's vehicle was traveling at a high rate of speed); *Tapia v. Royal Tours Service, Inc.*, 67 A.D.3d 894, 889 N.Y.S.2d 225 (2d Dept. 2009)(summary judgment denied where a bus driver with a green light in his favor who struck bicyclist in the cross-walk failed to establish that his negligence did not contribute to the occurrence where a non-party witness testified that the bicyclist was there to be seen and visible from across the street)).

Finally, while defendant Oberst also argues that he was faced with an emergency situation when the Kalina vehicle made its left turn, he did not plead same as an affirmative defense in his answer. Even if same was plead, however, defendant Oberst failed to establish that an emergency situation existed here or that his actions in response to same were reasonable and prudent under the circumstances. Defendant Oberst testified that he saw the Kalina vehicle in the left turn lane when he was one hundred yards away from it, so defendant Oberst's contention that it was not foreseeable that the Kalina vehicle would turn left, and that said action created an "emergency," is without merit. 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." (*See, Gonzalez v. New York City Transit Authority*, 78 A.D.3d 1120, 911 N.Y.S.2d 653 (2d Dept. 2010)). Further, the existence of an emergency and the reasonableness of a party's response to it will ordinarily present questions of fact for a jury, but they may in appropriate circumstances be determined as a matter of law. (*Id.*; *Bello v. Transit Authority of New York City*, 12 A.D.3d 58, 783 N.Y.S.2d 648 (2d Dept. 2004)).

As such, considering the evidence in the light most favorable to the non-moving parties, there are questions of fact which cannot be determined summarily and must be determined by a jury. If there is any doubt as to the existence of a triable issue of fact, or if a material issue of fact is arguable, summary judgment should be denied. With respect to summary judgment, issue finding, rather than issue determination, is the court's function. (*Celardo v. Bell*, 222 A.D.2d 547, 635 N.Y.S.2d 85 (2d Dept. 1995); *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 A.D.2d 572, 536 N.Y.S.2d 177 (2d Dept. 1989)).

This constitutes the decision and order of this Court.

Dated: October 7, 2011

Anthony L. Parga, J.S.C.

ENTERED
OCT 12 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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