SUPREME COURT OF THE STATE OF NY
COUNTY OF NEW YORK: PART 22

Index No.: 150526/11

Maria Maysonet and Miguel Maysonet,

Motion Seq. 02

Plaintiffs,

-against-

DECISION/ORDER

EAN Holdings, LLC, Daniel Rivera, Cornelius M. Cooper and Haseen Sharma-Cooper,

HON. ARLENE P. BLUTH, JSC

Defendants.

The Cooper defendants' motion for summary judgment dismissing the complaint and any cross-claims against them is granted.

In this motor vehicle accident/personal injury case, plaintiffs were passengers in the vehicle owned by EAN Holdings, LLC and operated by Daniel Rivera which was struck by a vehicle owned by Cornelius Cooper and operated by Sharma-Cooper ("Cooper") at the intersection of Broadway and 120th Street in Manhattan. The northbound lanes of Broadway are separated from the southbound lanes by a planted mall/median. Rivera acknowledged that the mall/median contained trees (Rivera T. 58, lines 16-18) and Cooper stated that it contained shrubs and bushes (Cooper T. p. 21, lines 21-25). Before the accident, Rivera was traveling south and Cooper was traveling north; each was traveling in the lane closest to the median/mall. Rivera decided to turn left onto 120th Street; when he did, Cooper, who was going straight up Broadway in the lane closest to the median, hit Rivera's car on the passenger-side doors.

There is no question that Rivera was negligent. Rivera should not have turned left across Cooper's path; instead, Rivera should have yielded to Cooper, who was going straight and who had the right of way (Vehicle and Traffic Law §1141). In fact, Rivera never stopped to check for

traffic before he cleared the median/mall - he turned the wheel to the left and kept moving (Rivera T. p. 60, lines 9-14). He never saw Cooper's car before the accident (Rivera T. p. 23, lines 16-20; p. 37, lines 4-9).

According to Rivera, the accident happened while he was "passing the median" (Rivera T. p. 37, lines 16-18; p. 63, lines 20-23; p. 68, lines 16-23). According to Cooper, she saw a flash of red to her left and "slammed on the brakes" (Cooper T. p. 26, lines 12-13) in an attempt to avoid the collision, but could not stop in time and hit the red car (Rivera) one second later. The scene is clear: as Rivera's car came out from behind the median and into Cooper's lane, Cooper braked (which slowed her down); Rivera never saw her, never stopped or hesitated, and he kept going. Thus the impact, which occurred about a second after Cooper saw the flash of red (Cooper T. p. 25, lines 13-16), was to the passenger-side doors of Rivera's vehicle, more toward the rear. A driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively at fault for failing to avoid the collision (*see Nova Soto-Bay v Prunty,* 115 AD3d 586, 982 NYS2d 123 [1st Dept 2014] *citing Figueroa v Diaz*, 107 AD3d 754, 967 NYS2d 109 [2d Dept 2013]; *Barbato v Moloney*, 94 AD3d 1028, 943 NYS2d 204 [2d Dept 2012]).

In the instant motion, the Coopers move to dismiss all claims against them. The Coopers' burden on this motion is to establish, through admissible evidence, that the accident was not proximately caused by any negligence on their part (*see Rogers v City of New York*, 52 AD3d 589 [2nd Dept 2008], *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). It is well settled that a driver who has the right of way is entitled to anticipate that other drivers will obey the traffic laws that require them to yield and has no duty to watch for and avoid a driver who might

not follow the rules of the road. *See Tiefenthaler v Islam*, 66 AD3d 588 (1st Dept 2009) citing *Dinham v Wagner*, 48 AD3d 349 (1st Dept 2008). Cooper has shown that she was not negligent by presenting admissible evidence (deposition transcripts) that the red car operated by codefendant Rivera made a left turn across the path of her oncoming vehicle in violation of VTL §1141, and that Cooper slammed on her brakes, but could not avoid the collision. This fulfills movant's prima facie burden; the burden shifts to the opposition to raise an issue of fact.

The plaintiffs and codefendant Rivera failed to raise an issue of fact in opposition, since their contention that Cooper failed to "see what there was to be seen" or otherwise failed to avoid the accident was unsupported by any evidence and is mere speculation. Rivera stated he never even saw Cooper and has offered no factual reason by which Cooper could have avoided the accident. The opposition has failed to contest Cooper's testimony that she was traveling with the right of way at or below the speed limit and that she was too close to the intersection when Rivera entered it to avoid the accident, despite slamming on her brakes. Instead, the opposition simply theorizes that because Cooper hit Rivera on the passenger doors, more to the rear, that Cooper *may* be comparatively at fault because she *may* not "have seen what there was to be seen". Theories and speculation do not defeat summary judgment; facts do. And here, because the opposition has failed to present any facts to contradict Cooper's testimony, summary judgment is appropriate. *See Foreman v Skeif*, 115 AD3d 568 (1st Dept 2014) (Supreme Court properly granted summary judgment when movant presented unrefuted evidence that co-defendant made a left turn across the path of movant's vehicle, and movant applied the brakes but could not avoid the collision).

Accordingly, the Cooper defendants' motion for summary judgment is granted and all

claims and cross claims against them are dismissed. The balance of the action shall continue against defendants EAN Holdings, LLC and Rivera.

This is the Decision and Order of the Court.

next conference: PT 22
DCM
8.4.14

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Dated: June 18, 2014
New York, New York

HON. ARLENE P. BLUTH, JSC