

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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DRAME KADIATOU,

Plaintiff(s),

- against -

LUIS A. PRADO-MARTE,

Defendant(s).
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DECISION AND ORDER

Index No: 308121/11

In this action for the negligent operation of a motor vehicle, defendant moves seeking an order pursuant to CPLR § 3212 granting him summary judgment against plaintiff, thereby dismissing the complaint. Specifically, defendant contends that because he was neither negligent in the operation of his vehicle nor the cause of the accident alleged, he bears no liability. Plaintiff opposes the instant motion asserting, *inter alia*, that questions of fact as to defendant's liability, and more specifically his negligence, preclude summary judgment.

For the reasons that follow hereinafter, defendant's motion is denied.

A review of the complaint establishes the following: On January 3, 2010, plaintiff was involved in a motor vehicle accident at the intersection of Bartow and Arrow Avenues. Plaintiff alleges that her vehicle came into contact with another vehicle owned and

operated by defendant. Plaintiff alleges that defendant was negligent in the ownership and operation of his vehicle and that such negligence caused the accident and resulting injuries.

Defendant's motion for summary judgment is denied insofar as defendant's own evidence raises questions of fact with regard to his negligence such that he fails to establish prima facie entitlement to summary judgment. Specifically, plaintiff's testimony coupled with the police accident report demonstrate that the instant accident occurred when defendant sped-up, entering the intersection when plaintiff was already midway through it. Accordingly, if credited at trial, a jury could conclude that defendant was both negligent and the proximate cause of the accident, such that he's liable for the same.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish prima facie entitlement to such relief as a matter of law by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York*

City Transit Authority, 304 AD2d 634, 634 [2d Dept 2003]). There is no requirement that the proof be submitted by affidavit, but rather that all evidence proffered be in admissible form (*Muniz v Bacchus*, 282 AD2d 387, 388 [1st Dept 2001], *revd on other grounds Ortiz v City of New York*, 67 AD3d 21, 25 [1st Dept 2009]).

Once a movant meets his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562). It is worth noting, however, that while the movant's burden to proffer evidence in admissible form is absolute, the opponent's burden is not. As noted by the Court of Appeals,

> [t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing summary judgment' in his favor, and he must do so by the tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact.' Normally if the opponent is to succeed in defeating a summary judgment motion, he too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet strict requirement of tender in admissible form. Whether the

> excuse offered will be acceptable must depend on the circumstances in the particular case

(*Friends of Animals v Associated Fur Manufacturers, Inc.*, 46 NY2d 1065, 1067-1068 [1979] [Internal citations omitted]). Accordingly, generally, the opponent of a motion for summary judgment who seeks to have the court consider inadmissible evidence must proffer an excuse for failing to submit evidence in inadmissible form (*Johnson v Phillips*, 261 AD2d 269, 270 [1st Dept 1999].

Moreover, when deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. As the Court stated in *Knepka v Talman* (278 AD2d 811, 811 [4th Dept 2000]),

> Supreme Court erred in resolving issues of credibility in granting defendants' motion for summary judgment dismissing the complaint. Any inconsistencies between the deposition testimony of plaintiffs and their affidavits submitted in opposition to the motion present issues for trial

(*see also Yaziciyan v Blancato*, 267 AD2d 152, 152 [1st Dept 1999]; *Perez v Bronx Park Associates*, 285 AD2d 402, 404 [1st Dept 2001]). Accordingly, the Court's function when determining a motion for summary judgment is issue finding not issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Lastly, because summary judgment is such a drastic remedy, it

should never be granted when there is any doubt as to the existence of a triable issue of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). When the existence of an issue of fact is even debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12 [1960]).

A defendant who establishes that he was not negligent in the operation of his motor vehicle is entitled to summary judgment (*Dinham v Wagner*, 48 AD3d 349, 350 [1st Dept 2008 [Court held that defendant established prima facie entitlement to summary judgment when she tendered evidence demonstrating that she was not at fault for the accident and could not have avoided the same.]; *Cerda v Parsley*, 273 AD2d 339, 339 [2d Dept 2000] [Defendants were entitled to summary judgment because the evidence presented established that defendant operator was not negligent in the operation of defendants.]). Alternatively, a defendant can establish prima facie entitlement to summary judgment by demonstrating that the plaintiff was negligent in the operation of his/her vehicle and that said negligence was the sole proximate cause of the accident (*Espinoza v Loor*, 299 AD2d 167, 168 [2d Dept 2002] [Defendant "made out a prima facie case that the accident resulted solely from (plaintiff's) negligence."]); *Borges v Zukowski*, 22 AD3d 439, 439 [2d Dept 2005]).

Vehicle and Traffic Law § 1142 reads, in pertinent part,

> (a) Except when directed to proceed by a police officer, every driver of a vehicle approaching a stop sign shall stop as required by section as required by section eleven hundred seventy-two and after having stopped shall yield the right of way to any vehicle which has entered the intersection from another highway or which is approaching so closely on said highway as to constitute an immediate hazard during the time when such driver is moving across or within the intersection.

It is well settled that a violation of VTL § 1142 constitutes negligence as a matter of law (*Cenovski v Lee*, 266 AD2d 424, 424 [1st Dept 1999]; *Weiser v Dalbo*, 184 AD2d 935, 936 [3d Dept 1992]). Moreover, a driver's failure to see, what under the circumstances there is to be seen, also constitutes negligence as a matter of law (*Breslin v Rudden*, 291 AD2d 471, 471-472 [2d Dept 2002]; *Smalley v McCarthy*, 254 AD2d 478, 478-479 [2nd Dept 1998]).

While all drivers have a common-law duty to see what there is to be seen (*Le Claire v Pratt*, 270 AD2d 612, 613 [3d Dept 2000]; *Weiser v Dalbo*, 184 AD2d 935, 936 [3d Dept 1992]; *Terrel v Kissel*, 116 AD2d 637, 639-640 [2nd Dept 1986]), our courts have consistently held that when a approaching a stop sign, the driver with the right of way - meaning the one not subject to a stop sign - is entitled to anticipate that the other driver will comply with its obligation to yield at a stop sign []; *Doxtader v Janczuk*, 294 AD2d 859, 859-860 [4th Dept 2002]; *Perez v Brux Cab Corp.*, 251 AD2d 157, 159-160 [1st Dept 1998] ["This Court has ruled that the

plaintiff driver had no duty to watch for and avoid a driver who might fail to stop or to proceed with due caution at a stop sign."]; *Namisnak v Martin*, 244 AD2d 258, 260 [1st Dept 1997] ["(A)n operator who has the right of way is entitled to anticipate that other vehicles will obey the traffic laws that require them to yield"]). Accordingly, a driver not subject to a stop sign has no duty to watch for an avoid a driver who might fail to stop or proceed with caution at a stop sign (*Perez* at 159-160]).

A party establishes prima facie entitlement to summary judgment when he demonstrates a violation of VTL § 1142, by establishing that the party subject to a stop sign enters the intersection, failing to yield the right of way to the other vehicle not subject to a stop sign (*Breslin* at 472; *Heath v Liberato*, 82 AD3d 841, 841 [2d Dept 2011]; *Paljevic v Smith*, 20 A.D.3d 517, 517 [2d Dept 2005]). Thus, essentially, a violation of §1142, creates a rebuttable presumption of negligence (*Murchinson v Incognoli*, 5 AD3d 271, 271 [1st Dept 2004]). In order to rebut the presumption, a party needs to present evidence that the other driver was negligent (*Breslin* at 471). In *Breslin*, the court granted summary judgment in favor of defendant after concluding that defendant had established prima facie entitlement to summary judgment by tendering evidence that while plaintiff brought his vehicle to stop at a stop sign, he nevertheless proceeded through the intersection directly into the path of defendant's vehicle (*id.*

at 471). The court held that in failing to establish that the defendant was negligent in the operation of his vehicle, plaintiff failed to raise a triable issue of fact as to defendant's negligence (*id.*).

In support of this motion, defendant submitsplaintiff's deposition transcript wherein she testified, in pertinent part, as follows: On January 3, 2010, at approximately 7:30PM, she was involved in a motor vehicle accident at the intersection of Arrow and Bruner Avenues. Plaintiff was operating her 2008 Nissan Versa and was traveling on Bruner Avenue, a two-way road with one lane of traffic in each direction. As she approached the intersection of Bruner and Arrow Avenues, she came to a stop at a stop sign. She looked to her left and to her right and seeing no traffic approaching, she proceeded through the intersection at approximately 5 miles per hour. As she was midway through the intersection, she was impacted by a vehicle traveling on Arrow Avenue, which she didn't see until immediately before impact. The vehicle was traveling from her left to her right. The other vehicle's front hit the middle of the passenger side of plaintiff's vehicle. The impact was heavy.

Defendant submits his deposition transcript wherein he testified, in pertinent part, as follows: On January 3, 2010, at approximately 11:30AM, he was involved in a motor vehicle accident

at the intersection of Arrow and Bruner Avenues. Defendant was operating his 1997 Blazer and was traveling on Arrow Avenue, a two-way road with one lane of traffic in each direction. As he approached the intersection of Bruner and Arrow Avenues - which only had a stop sign for traffic traveling on Bruner - he slowed his vehicle and upon entering the intersection, he came into contact with a vehicle traveling on Arrow from his left to his right. Prior to impact, defendant did not see the vehicle with which he came into contact. The other vehicle's front hit the middle of the driver side of defendants vehicle. The impact was heavy.

In support of the instant motion, defendant submits a police accident report, which establishes the following[1]: On January 3, 2010, at approximately 8:09PM, the parties were involved in an accident at the intersection of Bartow and Arrow Avenues. Plaintiff's statement to the police indicates that defendant,

[1] Defendant submits the police accident report describing the accident herein in inadmissible form. While the proponent of a motion for summary judgment must submit all evidence in support thereof in admissible form (*Muniz v Bacchus*, 282 AD2d 387, 388 [1st Dept 2001], *revd on other grounds Ortiz v City of New York*, 67 AD3d 21, 25 [1st Dept 2009]), defendant's failure to do so vis a vis the report, is irrelevant because plaintiff does not object. As such, this Court cannot make the argument for them (*Misicki v Caradonna*, 12 NY3d 511, 519 [2009]["We are not in the business of blindsiding litigants, who expect us to decide their appeals on rationales advanced by the parties, not arguments their adversaries never made"]). In fact, plaintiff relies on the foregoing report in opposition to this motion.

traveling on Arrow Avenue "sped into the intersection and hit her car."

Based on the foregoing, defendant's own evidence raises an issue of fact with respect to his liability, thereby precluding summary judgment. As note above a defendant who establishes that he was not negligent in the operation of his motor vehicle is entitled to summary judgment (*Dinham* at 350; *Cerda* at 339). Moreover, because a violation of VTL § 1142 constitutes negligence as a matter of law (*Cenovski* at 424; *Weiser* at 936), a party establishes prima facie entitlement to summary judgment when he demonstrates a violation of VTL § 1142 - namely, that the party subject to a stop sign enters the intersection, failing to yield the right of way to the other vehicle not subject to a stop sign (*Breslin* at 472; *Heath* at 841; *Paljevic* at 517). In order to rebut the foreoging, the opposing party then needs to present evidence that the other driver was negligent (*Breslin* at 471).

Here, defendant's testimony, by itself, establishes that he was not negligent in the operation of his vehicle. Specifically, defendant testified that he was impacted when he lawfully entered the intersection at issue and that it was plaintiff who had to obey the stop sign, and apparently did not. The foregoing is indeed evidence that plaintiff violated VTL § 1142. However, plaintiff's testimony and the police accident report controvert the foregoing

in that plaintiff testified that she did indeed come to a full stop at the intersection and only proceeded slowly into it after not seeing any approaching the intersection. Moreover, plaintiff's statement to the police, as memorialized by the accident report, establishes that defendant sped-up and entered the intersection after plaintiff was already within it. Thus, the foregoing testimony not only belies any assertion that plaintiff violated VTL § 1142, but it also casts defendant in negligence and paints him as the proximate cause of this accident.

Defendant, thus, fails to establish prima facie entitlement to summary judgment and the Court need address the sufficiency of plaintiff's opposition (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). It is hereby

ORDERED that plaintiff serve a copy of this Order with Notice of Entry upon all parties within thirty days (30) hereof.

This constitutes this Court's decision and Order.

Dated : September 9, 2016

Bronx, New York

BEN BARBATO, J.S.C.