To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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HELEN KRASNOW,

Plaintiff,

-against-

DECISION & ORDER
Index No. 59814/2018
Sequence Nos. 1&2

TERRENCE FINN and ROBERT KRASNOW,

Defendants.

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WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Documents Numbers 28-47, were read in connection with plaintiff's motion (Seq 1) for an order pursuant to CPLR 3403 granting plaintiff a special preference and directing the calendar clerk to place this action on a list of preferred cases on the ground that plaintiff has reached the age of seventy years; and moving defendant Robert L. Krasnow's motion for summary judgment pursuant to CPLR 3212.

This is an action brought by plaintiff, a passenger in an automobile owned and operated by her husband, defendant Krasnow, which was involved in a collision on February 26, 2018 at 7:00 P.M., with the vehicle owned and operated by defendant Terrence Finn.

Upon the foregoing papers, the motions are decided as follows:

Plaintiff moves (Seq 1) for an order granting a trial preference on the ground plaintiff is over 70 years of age. No papers were filed in opposition to the motion. CPLR 3403(a)(4) provides that "in any action upon the application of a party who has reached the age of seventy years," such action "shall be entitled to a preference."

In view of the undisputed evidence that the plaintiff has reached the age of 70, the plaintiff's motion for a trial preference based on age, is granted (see CPLR 3403[a][4]; (Ratnikova v Ziotas, 134 AD3d 919, 920 [2d Dept 2015]). Having submitted a copy of her United States passport, plaintiff has demonstrated a prima facie entitlement to an age preference pursuant to CPLR 3403(a)(4). Accordingly, she is automatically entitled to a special trial preference (Borenstein v City of New York, 248 AD2d 425 [2d Dept 1998]).

Turning to defendant Robert Krasnow's motion for summary judgment, it is well settled that "a 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 demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; see also Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see Zuckerman v New York, 49 NY2d 557, 562 [1980]; see also Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). Conclusory, unsubstantiated assertions will not suffice to defeat a motion for summary judgment (Barclays Bank of New York, N.A. v Sokol, 128 AD2d 492 [2d Dept 1987]). A party opposing a motion for summary judgment may do so on the basis of deposition testimony as well as other admissible forms of evidence, including an expert's affidavit, and eyewitness testimony (Marconi v Reilly, 254 AD2d 463 [2d Dept 1998]). In deciding a motion for summary judgment, the court is required to view the evidence presented "in the light most favorable to the party opposing the motion and to draw every reasonable

inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). The court must accept as true the evidence presented by the nonmoving party and must deny the motion if there is "even arguably any doubt as to the existence of a triable issue" (Kolivas v Kirchoff, 14 AD3d 493 [2d Dept 2005]); Baker v Briarcliff School Dist., 205 AD2d 652,661-662 [2d Dept 1994]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (Alvarez v Prospect Hospital, 68 NY2d 320,324 [1986]).

Generally, Vehicle and Traffic Law §1129(a) imposes a duty on all drivers to drive at a safe speed and maintain a safe distance between vehicles, always compensating for any known adverse road conditions (Ortega v City of New York, 721 NYS2d 790 [2d Dept 2000]). Vehicle and Traffic Law §1143 provides that the driver of a vehicle about to enter or cross a roadway from any place other than another roadway shall yield the right of way all vehicles approaching on the roadway to be entered or crossed. A driver is negligent when an accident occurs because "he or she has failed to see that which, through the proper use of her senses he or she should have seen" Ferrara v Castro, 283 AD2d 392, 393 [2d Dept 2001]). A driver is entitled to anticipate that another motorist would obey the traffic laws that required him to yield (Lallemand v Cook, 23 AD3d 533 ([2d Dept 2005]).

A driver is not required to anticipate that a vehicle traveling in the opposite direction will cross over into oncoming traffic (Eichenwald v Chaudhry, 17 AD3d 403, 404 [2d Dept 2005]). "Crossing a double yellow line into the opposing lane of traffic, in violation of Vehicle and Traffic Law §1126(a), constitutes negligence as a matter of law, unless justified by an emergency situation not of the driver's making" (Gadon v Oliva, 294 AD2d 397 [2d Dept

2002]). Courts have held that generally whether an emergency exists and the reasonableness of the response does raise issues of fact, those issues may in appropriate circumstances be determined as a matter of law (Koenig v Lee, 53 AD3d 567 [2d Dept 2008]).

Here, the EBT testimony of both drivers, Finn and Krasnow, is sufficiently confused, confusing, and vague, to preclude summary judgment. The court finds that there is an issue as to the circumstances surrounding the head on collision, and whether both parties acted reasonably under these circumstances (O'Connor v Lopane, 24 AD3d 426 [2d Dept 2005]).

Since the evidence is viewed, as it must be, in the light most favorable to plaintiff and Finn as the nonmoving parties it shows the existence of triable issues of fact as to the circumstances that led to the accident.

Therefore for the above stated reasons, it is hereby

ORDERED, that defendant Robert Krasnow's motion for summary judgment is **denied**; and it is further

ORDERED, that the parties are directed to appear in the Settlement Conference Part on March 24, 2020 at 9:15 a.m. in courtroom 1600 of the Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Blvd., White Plains, New York 10601.

All matters not herein decided are denied. This constitutes the Decision and Order of the court.

Dated: February 4, 2020
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties by NYSCEF