SHORT FORM ORDER **INDEX NO. 605215/2020**

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:
Hon. Paul J. Baisley, Jr., J.S.C.

JERELENE J. CAIN,

Plaintiff,

-against-

LORETTA B. NAPOLITANO,

Defendant.

ORIG. RETURN DATE: September 21, 2020
FINAL RETURN DATE: October 19, 2020
MOT. SEQ. #: 001 MG

PLTF'S ATTORNEY:
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HOLTSVILLE, NY 11742

DEFT'S ATTORNEY:
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MINEOLA, NY 11501

Upon the following papers read on this e-filed motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers by plaintiff, filed August 20, 2020 ; Notice of Motion/Order to Show Cause and supporting papers ___; Answering Affidavits and supporting papers by defendant, filed October 22, 2020 ; Replying Affidavits and supporting papers by plaintiff, filed October 23, 2020 ; Other _____; it is

ORDERED that the motion by plaintiff Jerelene Cain for summary judgment in her favor on the issue of liability and dismissing defendant's affirmative defenses of comparative negligence, assumption of risk, and failure to wear a seatbelt is granted; and it is further

ORDERED that a preliminary conference shall be held on January 6, 2021.

This is an action to recover damages for injuries allegedly sustained by plaintiff Jerelene Cain as a result of a motor vehicle accident, which occurred on October 23, 2019, at the intersection of Veterans Memorial Highway and Harned Road, in the Town of Smithtown, New York. The accident allegedly occurred when a vehicle owned and operated by defendant Loretta Napolitano attempted to make a left turn and collided with plaintiff's vehicle.

Plaintiff now moves for summary judgment in her favor on the issue of liability on the ground that defendant violated Vehicle and Traffic Law §§ 1141 and 1163 by making a left turn into the path of her vehicle traveling with the right-of-way. Plaintiff also seeks to dismiss defendant's affirmative defenses sounding in comparative negligence, assumption of risk, and failure to wear a seatbelt. Plaintiff submits, in support of the motion, copies of the pleadings, photographs, her affidavit, and a certified police report. In opposition, defendant argues that further discovery is necessary before summary judgment may be considered, and that triable issues of fact exist as to whether she was negligent and plaintiff was comparatively negligent.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

A failure to comply with the Vehicle and Traffic Law constitutes negligence as a matter of law (*Marcel v Sanders*, 123 AD3d 1097, 1 NYS3d 230 [2d Dept 2014]; *Adobea v Junel*, 114 AD3d 818, 980 NYS2d 564 [2d Dept 2014]; *Colpan v Allied Cent. Ambulette, Inc.*, 97 AD3d 776, 949 NYS2d 124 [2d Dept 2012]). A driver is negligent if he or she failed to see that which, through the proper use of senses, should have been seen (*Nohs v Diraimondo*, 140 AD3d 1132, 35 NYS3d 209 [2d Dept 2016]; *Thompson v Schmitt*, 74 AD3d 789, 902 NYS2d 606 [2d Dept 2010]). Pursuant to Vehicle and Traffic Law § 1141, a vehicle intending to turn left within an intersection or into an alley, private road, or driveway must yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard. Pursuant to Vehicle and Traffic Law § 1163, a driver shall not "turn a vehicle at an intersection . . . unless and until such movement can be made with reasonable safety." A driver who attempts to make a left turn when it is not reasonably safe to do so, such as when another vehicle is lawfully present in the intersection, is in violation of this provision of the Vehicle and Traffic Law (*Foley v Santucci*, 135 AD3d 813, 23 NYS3d 338 [2d Dept 2016]; *Krajiniak v Jin Y Trading, Inc.*, 114 AD3d 910, 980 NYS2d 812 [2d Dept 2014]; *Ducie v Ippolito*, 95 AD3d 1067, 944 NYS2d 275 [2d Dept 2012]; *Loch v Garber*, 69 AD3d 814, 893 NYS2d 233 [2d Dept 2010]). A driver is not comparatively negligent in failing to avoid the collision if he or she has a right-of-way and only has seconds to react to a vehicle that has failed to yield (*see Foley v Santucci*, *supra*; *Ducie v Ippolito*, *supra*; *Breen v Seibert*, 123 AD3d 963, 999 NYS2d 176 [2d Dept 2014]; *Bennett v Granata*, 118 AD3d 652, 987 NYS2d 424 [2d Dept 2014]; *Vainer v DiSalvo*, *supra*).

Plaintiff established her prima facie entitlement to summary judgment by showing that defendant was negligent in making a left turn without yielding the right-of-way (*see* Vehicle and Traffic Law § 1141; *Foley v Santucci*, *supra*). By her affidavit, plaintiff stated that she was wearing her seatbelt and operating her vehicle westbound on Veterans Memorial Highway within the posted speed limit. She stated that as she approached the intersection of Veterans Memorial Highway and Harned Road, the traffic signal controlling her lane of traffic was green. Plaintiff stated that as she approached the intersection, defendant's vehicle was stopped in the northernmost turning lane of the eastbound traffic. She explained that as she proceeded through the intersection with a green traffic light in her favor, defendant's vehicle "suddenly and without warning" attempted to make a left turn across the westbound lanes of traffic towards Harned Road, striking the driver's side of her vehicle. Plaintiff stated that defendant did not initiate any turning movement until after she entered the intersection and that she was unable to take evasive action to avoid the collision.

As plaintiff had the right-of-way, her vehicle was lawfully in the roadway at the time of impact, and she was entitled to assume that defendant would obey traffic laws requiring her to yield (*see Rohn v Aly*, 167 AD3d 1054, 91 NYS3d 256 [2d Dept 2018]; *Ming-Fai Jon v Wager*, 165 AD3d 1253, 87 NYS3d 82 [2d Dept 2018]; *Katikireddy v Espinal*, 137 AD3d 866, 26 NYS3d 775 [2d Dept 2016]). The fact that defendant was unable to travel through the roadway without striking plaintiff's vehicle is evidence that plaintiff's approaching vehicle was an immediate hazard (*see Matter of Gerber v New York State Dept. of Motor Vehs.*, 129 AD3d 959, 11 NYS3d 648 [2d Dept 2015]; *Yelder v Walters*, 64 AD3d 762, 883 NYS2d 290 [2d Dept 2009]). By failing to yield the right-of-way to plaintiff's vehicle and making a left turn into the path of such vehicle, defendant violated Vehicle and Traffic Law § 1141 and was negligent as a matter of law.

When moving to dismiss an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is without merit as a matter of law" (*Bank of N.Y. v Penalver*, 125 AD3d 796, 797, 1 NYS3d 825 [2d Dept 2015]; *South Point, Inc. v Redman*, 94 AD3d 1086, 1087, 943 NYS2d 543 [2d Dept 2012]). "In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference . . . [and] if there is any doubt as to the availability of a defense, it should not be dismissed" (*Fireman's Fund Ins. Co. v Farrell*, 57 AD3d 721, 723, 869 NYS2d 597 [2d Dept 2008]; *see Greco v Christoffersen*, 70 AD3d 769, 896 NYS2d 363 [2d Dept 2010]).

In this case, plaintiff made a prima facie case that she was not comparatively negligent, as she stated that her vehicle was already in the intersection when defendant failed to yield and entered the intersection (*see Foley v Santucci*, *supra*; *Ducie v Ippolito*, *supra*; *Breen v Seibert*, *supra*; *Bennett v Granata, supra*), and that the assumption of risk doctrine is not applicable under the circumstances of this action (*see Custodi v Town of Amherst*, 20 NY3d 83, 957 NYS2d 268 [2012]; *Trupia v Lake George Cent. School Dist.*, 14 NY3d 392, 901 NYS2d 127 [2010]). Plaintiff's affidavit also established that she was wearing a seatbelt at the time of the accident. Therefore, plaintiff met her burden for dismissal of the affirmative defenses sounding in comparative negligence, assumption of risk, and failure to wear a seatbelt.

The burden now shifts to defendant to raise a triable issue of fact as to whether there was a non-negligent explanation for the accident (*see Alvarez v Prospect Hosp.*, *supra*). Defendant submits an affirmation of her attorney alleging that further discovery is necessary. However, this affirmation has no probative weight and does not fulfill defendant's duty to provide a non-negligent explanation for the collision (*see Zuckerman v City of New York*, *supra*; *Orellana v Maggies Paratransit Corp.*, 138 AD3d 941, 30 NYS3d 224 [2d Dept 2016]). As defendant has personal knowledge of the relevant facts underlying the accident, her purported need to conduct discovery does not warrant denial of the motion (*see Pierre v Demoura*, 148 AD3d 736, 48 NYS3d 260 [2d Dept 2017]; *Turner v Butler*, 139 AD3d 715, 32 NYS3d 174 [2d Dept 2016]; *Deleg v Vinci*, 82 AD3d 1146, 919 NYS2d 396 [2d Dept 2011]).

By her affidavit, defendant stated that her traffic light was green from the time she first saw it until the collision occurred. She stated that she brought her vehicle to a stop past the end of the turn lane and into the intersection prior to attempting to turn left. Defendant explained that she saw plaintiff's vehicle 10 seconds prior to the accident and believed she had enough time and space to complete her

turn before plaintiff's vehicle entered the intersection. She stated that the vehicles collided after defendant's vehicle moved approximately 10 feet from where it was stopped in the intersection. She also stated that she "did not realize the high speed in which plaintiff was traveling which caused there to be an impact." However, defendant's assertion concerning plaintiff's rate of speed was speculative and insufficient to raise a triable issue of fact (*see Rohn v Aly*, *supra*; *Hatton v Lara*, 142 AD3d 1047, 37 NYS3d 604 [2d Dept 2016]; *Loch v Garber*, 69 AD3d 814, 893 NYS2d 233 [2d Dept 2010]; *Adobea v Junel*, *supra*).

Accordingly, the motion is granted.

Dated: 12/9/20

HON. PAUL J. BAISLEY, JR., J.S.C.