SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. J. MACHELLE SWEETING** **PART** **62**

Justice

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JASMINE VELAZQUEZ,

Plaintiff,

- v -

THE CITY OF NEW YORK, BOGAR MARTINEZ

Defendants.

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INDEX NO. 160506/2020

MOTION DATE 10/01/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21

were read on this motion to/for JUDGMENT - SUMMARY.

This is an action to recover monetary damages for personal injuries allegedly sustained by plaintiff JASMINE D. VELAZQUEZ on December 12, 2019, as a result of a motor vehicle accident at or near the intersection of Morningside Avenue and West 122nd Street, in the City, County, and State of New York, involving plaintiff's vehicle and a New York City Department of Parks and Recreation vehicle (the "City vehicle") operated by BOGAR JOEL MARTINEZ (the "City Driver") (collectively, the "City").

Pending now before the court is a motion filed by plaintiff, seeking an order:

A. Pursuant to CPLR § 3212, granting summary judgment in favor of the plaintiff and against defendants on the issue of liability; and/or

B. Dismissing the affirmative defenses raised in paragraphs 6, 7, and 10 of defendants' amended answer; and/or

C. Pursuant to CPLR § 3212, granting summary judgment in favor of the plaintiff holding plaintiff free of any comparative fault; and/or

D. Directing a trial on the issue of damages only.

Upon the forgoing documents, this motion is DENIED.

Standard for Summary Judgment

The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [Sup. Ct. App. Div. 1st Dept. 1985]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [Sup. Ct. App. Div. 1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]).

The 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, and failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues

of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320 [N.Y. Ct. of Appeals 1986]).

Further, pursuant to the New York Court of Appeals, "We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (Zuckerman v City of New York, 49 NY2d 557 [N.Y. Ct. of Appeals 1980]).

Instant Motion

Plaintiff argues that her vehicle was completely stopped behind the City vehicle, for "no more than 10 seconds," when the City Driver reversed into her vehicle. Plaintiff argues that the City Driver violated section 1211(a) of the Vehicle and Traffic Law ("VTL") and that such a violation constitutes negligence *per se*. Plaintiff argues that no questions of law or fact exist regarding the liability of the defendant for the happening of the accident, as no non-negligent explanation was provided for the failure of the City Driver to observe plaintiff's vehicle, which was stopped directly behind his. In support of her motion, plaintiff submits the transcript from plaintiff's 50-h hearing (NYSCEF Document #14), as well as a certified copy of the Police Accident Report (NYSCEF Document #13).

In opposition, the City submits a sworn Affidavit from the City Driver (NYSCEF Document #18), which states, *inter alia*:

> 2. On December 12, 2019, while assigned to District 9 - Morningside Park, I was operating a 2011 Ford pick-up truck owned by Parks with a work crew in the vehicle. As I was traveling to my assignment, I was driving along Morningside Avenue. As I approached West 122nd Street, I made a left turn onto West 122nd Street and attempted to proceed down the street. After approximately three minutes of standing still in traffic, I attempted to reverse my vehicle at a speed of less than one mile per hour, per my estimate. Prior to reversing, I checked the rearview mirror, right sideview mirror, and left sideview mirror to confirm that there were no vehicles in the path behind my vehicle. I further confirmed same by looking through the back window of the crew cab and again did not observe any cars behind me. Within seconds after checking all three mirrors and looking behind me, I released my foot from the brake and began to reverse my vehicle. As I was backing up, with the reverse lights on as well as the audible backup alarm safety beepers on, while simultaneously utilizing all mirrors, I continued to observe no vehicles behind my vehicle.
>
> 3. While traveling at a speed of less than one mile per hour by my estimate, the back of my vehicle suddenly came into contact with the front bumper of Plaintiffs vehicle. Based upon the amount of time between reversing my vehicle and the collision and the distance traveled by my vehicle, I estimate that Plaintiffs vehicle was approximately one to two feet from the rear of my vehicle.
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> 4. During the entire time as I was backing up, I did not observe the Plaintiffs vehicle behind my vehicle.

The City argues that significant issues of fact exist, making summary judgment inappropriate. They first argue that plaintiff fails to state the distance between her vehicle and the City vehicle, and that a question of fact remains as to whether plaintiff failed to use reasonable care under the circumstances to avoid the collision. Importantly, the City argues, "This statement by Plaintiff evidences that by the time Mr. Martinez checked all three mirrors, looked behind him, and then began to reverse with his lights and audible safety beepers activated, that *it is very possible that Plaintiff had abruptly approached the rear of Mr. Martinez's truck in that short span of time*. As noted, Mr. Martinez never observed Plaintiff's vehicle behind him […] The fact that he did not see Plaintiff's vehicle prior to the incident illustrates that causation is still very much in dispute."

Conclusions of Law

Here, plaintiff and the City Driver offer divergent accounts of the facts. Plaintiff argues that her vehicle was already stopped behind the City vehicle, prior to the City vehicle backing up. In contrast, the City Driver avers that there was no vehicle behind him, and the City seems to suggest that plaintiff herself may have "abruptly approached" the City vehicle from behind as it had already begun the process of backing up. It is undisputed that in the case at bar, discovery has not yet commenced; that no Preliminary Conference has been held and no Case Scheduling Order has been issued; that no depositions of any party to this action, including any potential witnesses, have been held; and that the City has not received a Verified Bill of Particulars or any medical authorizations from plaintiff for medical treatment received as related to this incident.

Given the discrepancy in the account of the alleged facts and the early infancy of this case, summary judgment is not appropriate at this juncture, and the City is entitled, at a minimum, to question plaintiff and to explore the facts through basic discovery. *See also* Belziti v. Langford, 105 A.D.3d 649 (Sup. Ct. App. Div, 1st Dept. 2013) ("Green's motion for summary judgment was properly denied as premature, since limited discovery has taken place and Green himself has not yet been deposed in this matter"); Weinstein v. WB/Stellar IP Owner, LLC, 125 A.D.3d 526 (Sup. Ct. App. Div, 1st Dept. 2015) ("Plaintiff opposed the motion on the ground that it was premature since 'facts essential to justify opposition may exist but cannot then be stated' […] Stellar's motion should have been denied as premature, since plaintiff had no opportunity to depose Stellar, codefendant Friends, or nonparty EDC concerning, among other things, the project and maintenance of the extended sidewalk area following its completion").

Accordingly, it is hereby:

ORDERED that plaintiff's motion is DENIED, without prejudice, as premature and plaintiff is granted leave of court to re-file for summary judgment, at her election, after relevant discovery has been completed.

This is the Decision and Order of the court.

12/20/2021
DATE

J. MACHELLE SWEETING, J.S.C.

CHECK ONE:	☐	**CASE DISPOSED**		☒	**NON-FINAL DISPOSITION**		
	☐	**GRANTED**	☐ **DENIED**	☐	**GRANTED IN PART**	☒	**OTHER**
APPLICATION:	☐	**SETTLE ORDER**		☐	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	☐	**INCLUDES TRANSFER/REASSIGN**		☐	**FIDUCIARY APPOINTMENT**	☐	**REFERENCE**