At a term of the IAS Part of the Supreme Court of the State of New York, held in and for the County of Orange, at 285 Main Street, Goshen, New York 10924 on the 13th day of October, 2021.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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

SUSAN S. PESSIN,

Plaintiff,

-against-

STEPHEN H. BARD,

Defendant.

DECISION & ORDER
INDEX EF001559-2020
Motion date: 4/22/2020
Motion Seq. #1

VAZQUEZ-DOLES, J.S.C.

The following papers numbered 1 - 14 were read on plaintiff's motion for summary judgment on the issues of liability and to dismiss defendant's affirmative defenses:

Notice of Motion/Affirmation in Support/Statement of Material Facts/Exhibits A-H. 1-11
Affirmation in Opposition/Response to Statement of Material Facts. 12-13
Affirmation in Reply. 14

Background and Procedural History

In this negligence action, plaintiff seeks to recover damages for personal injuries allegedly sustained as a result of a motor vehicle accident that occurred on November 9, 2018 in Route 94 at an intersection by Round Hill Road in the Town of Blooming Grove. Plaintiff was operating a vehicle traveling east on Route 94 and defendant was operating a vehicle traveling northbound on Round Hill Road, which was controlled by a stop sign. Plaintiff claims she had the right-of-way while approaching the intersection, when defendant stopped at the stop sign and entered such intersection, without yielding the right-of-way, causing the subject collision. Plaintiff commenced this action by filing a Summons and Verified Complaint on February 26,

2020 (Exhibit B to moving papers). Defendant filed a Verified Answer with Affirmative Defenses on June 2, 2020 (Exhibit C). Plaintiff moves here for summary judgment on the issue of liability and to dismiss defendant's first and sixth affirmative defenses that are related to plaintiff's comparative negligence.

Discussion

Plaintiff argues that defendant failed to yield the right-of-way before entering Route 94. According to defendant's deposition testimony, after stopping at the stop sign, he did not see plaintiff's vehicle approaching prior to the collision. Plaintiff testified that she assumed defendant would yield the right-of-way and had lowered her speed limit when defendant entered the intersection. Defendant avers that there are material issues of fact as to whether plaintiff failed to use reasonable care to avoid the instant collision, in particular, regarding plaintiff's control of the intersection and speed under the wet road conditions.

The Court of Appeals has held that a plaintiff does not bear the burden of establishing the absence of his own comparative negligence in order to obtain partial summary judgment in a comparative negligence case (*Rodriguez v. City of New York*, 31 NY3d 312 [2018]).

In *Rodriguez*, the Court of Appeals reversed the finding of the Appellate Division, First Department, that affirmed the denial of plaintiff's motion for partial summary judgment, on the basis that plaintiff failed to make a *prima facie* showing that he was free of comparative negligence (*See, Rodriguez v. City of New York*, 142 AD3d 778 [1st Dept 2016]).

The Court of Appeals held that Article 14-A of the Civil Practice Law & Rules provides that comparative negligence does not *bar* recovery, but can act to diminish the amount of damages otherwise recoverable, in the proportion of the claimant's culpable conduct (Civ. Prac.

Law & Rules §1411). Moreover, section 1412 provides that such culpable conduct shall be an affirmative defense to be pleaded and proved by the party asserting the same.

The majority thus reasoned that to place the burden on the plaintiff to show an absence of comparative fault is inconsistent with the language of section 1412 (2018 NY Slip Op. at 3). "Comparative fault is not a defense to the cause of action of negligence, because it is not a defense to any element (duty, breach, causation) of plaintiff's prima facie cause of action for negligence . . . but rather a diminishment of the amount of damages" (Id at 779).

Pursuant to Vehicle & Traffic Law §1142(a), ". . . every driver of a vehicle approaching a stop sign shall stop 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" (N.Y. Veh. & Traf. Law § 1142 [McKinney]). "A driver who fails to yield the right of way after stopping at a stop sign controlling traffic is in violation of Vehicle and Traffic Law § 1142(a) and is negligent as a matter of law. A driver is required to see what is there to be seen, and a driver who has the right of way is entitled to anticipate that the other motorist will obey the traffic law requiring him or her to yield" (*Francavilla v. Doyno*, 96 AD3d 714 [2d Dept 2012]).

This Court finds that defendant's assertions do not raise a triable issue of fact as to whether plaintiff was at fault in the happening of the accident (see *Phillip v. D & D Carting Co.*, 136 AD3d 18 [2d Dept 2015]). According to the Police Report, "Vehicle 1 [defendant] was facing northbound on Round Hill Road and attempted to make a left turn onto State Route 94. Vehicle 2 [plaintiff] was traveling eastbound on State Route 94 when Vehicle 1 attempted to

make a left turn directly in front of Vehicle 2. Vehicle 1 failed to yield the right of way to Vehicle 2, causing the collision. Operator of Vehicle 1 stated that he thought Vehicle 2 was farther away and thought he had plenty of time to make the left turn" (Exhibit A). Defendant's statement in the police report is an admission to him driving "directly in front of Vehicle 2." "The police officer who prepared the report was acting within the scope of his duty in recording [the] statement, and the statement was admissible as the admission of a party" (*Guevara v. Zaharakis*, 303 AD2d 555 [2d Dept 2003]). Consider the following testimony by plaintiff:

> Q. What was your highest rate of speed while you were on Route 94 for the 15 minutes prior to the accident happening?
> A. Thirty-five to forty[1] . . .
> Q. Did you then see that vehicle move from the stop sign and proceed into the intersection?
> A. Right in front of me, yes.
> Q. What was the distance between your car and that car when you first began to move into the intersection?
> A. Maybe a bumper space between us (Exhibit E, p 15 & 20).

In addition, when asked whether he saw plaintiff's vehicle at any time prior to impact, defendant testified, "I don't recall seeing it" (Exhibit G, p 15). Upon view of the foregoing, it is ordered that plaintiff's motion for summary judgment on the issue of liability is granted, and defendant's first and sixth affirmative defenses are dismissed.

Conclusion

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment on the issue of liability is **GRANTED** and to dismiss defendant's first and sixth affirmative defenses is **GRANTED**, and it is further

[1] The speed limit was allegedly 40 mph.

ORDERED that the remaining issues shall be limited to plaintiff's injuries and damages.

The foregoing constitutes the Decision and Order of this Court.

Dated: October 13th, 2021
Goshen, New York

ENTER:

HON. MARIA S. VAZQUEZ-DOLES, J.S.C.