SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

----------X **TRIAL/IAS PART 17**

CARMEN FONTAINE,

Plaintiff(s),

-against-

LISA A. CURTIN and RYAN DANIEL DIETZ,

Defendant(s).

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INDEX # 5659/12
Motion Seq. 1
Motion Date 4.26.13
Submit Date 6.19.13

The following papers were read on this motion: Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed..... 1
Answering Affidavit 2
Reply Affidavit..... 3

Plaintiff moves pursuant to CPLR 3212 for summary judgment on the issue of liability. This personal injury action arises out of a motor vehicle accident which occurred on December 21, 2011.

In support of this application, plaintiff submits plaintiff's and defendant Daniel Dietz' examinations before trial dated January 31, 2013. Plaintiff testified that she was traveling westbound on Lafayette Street and came to a stop at the stop sign located at the intersection of Herricks Road and remained there due to medium to heavy traffic on Herricks Road. She observed a cargo van on Herricks Road traveling at approximately 50 miles per hour (defendants' vehicle). The van was attempting to execute a right hand turn onto Lafayette Street when it struck plaintiff's vehicle on her driver's side with the front bumper. Plaintiff had not moved her vehicle for approximately one minute from the time she stopped for the stop sign until the happening of the accident.

Defendant Dietz testified that a few feet before turning into Lafayette Street he observed plaintiff's vehicle which was stopped. As defendant was attempting to make a right turn onto Lafayette, his van slid on the pavement resulting in the collision.

In opposition to this motion, defendants submit an affirmation from counsel. Counsel concedes that his client cannot establish a non-negligent explanation for striking plaintiff's vehicle. However, in making reference to plaintiff's deposition testimony, defendants contend that plaintiff's conduct of going from a stopped position to accelerating the vehicle over four lanes of traffic after the collision establishes issues regarding plaintiff's comparative negligence. Plaintiff testified that as a result of the contact, her vehicle moved across Herricks Road and struck a tree on the other side of the road. She believes she was attempting to place her foot on the brake and that her foot may have come in contact with the accelerator, but she could not be 100 percent sure. At the time of contact with the tree she was traveling at approximately 15 miles per hour.

> "It is well settled that a the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact (*Sillman v Twentieth Century Fox,* 3 NY2d 395 [1957]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Zuckerman v City of New York,* 49 NY2d 557 [1980]; *Bhatti v Roche,* 140 AD2d 660 [2d Dept 1998]). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the Court, as a matter of law, to direct judgment in the movant's favor (*Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065 [1979]). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation (CPLR § 3212 [b]; *Olan v Farrell Lines*, 64 NY2d 1092 [1985]).
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> "If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial (*Zuckerman v City of New York*, 49 NY2d 557 [1980], supra). It is incumbent upon the non-moving party to lay bare all of the facts which bear on the issues raised in the motion (*Mgrditchian v Donato*, 141 AD2d 513 [2d Dept 1998]). Conclusory allegations are insufficient to defeat the application and the opposing party must provide more than a mere reiteration of those facts contained in the pleadings (*Toth v Carver Street Associates,* 191 AD2d 631 [2d Dept 1993]).

> When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist (*Sillman v Twentieth Century Fox*, 3 NY2d 395 [1957], *supra*)." *Recine v. Margolis*, 24 Misc. 3d 1244A; 901 N.Y.S.2d 902.

In the case at bar, the defendants concede that plaintiff has made a *prima facie* showing in favor of awarding summary judgment, therefore, the burden shifts to defendants to come forward with competent evidence to demonstrate that a material issue of fact exists to preclude such relief. Defendants concede that plaintiff was stopped at the time of the accident. However, they argue that the post contact acceleration contributed to the accident and her alleged injuries.

It must be noted that there is a distinction between "comparative negligence" that could contribute to the cause of the actual accident and post contact conduct on the part of the plaintiff that may exacerbate her injuries. The Court of Appeals in the seminal seatbelt case of *Spier v. Barker* (35 NY2d 444 [1974]) held: "In our view, the doctrine of contributory negligence is applicable only if the plaintiff's failure to exercise due care causes, in whole or in part, the accident, rather than when it merely exacerbates or enhances the severity of the injuries" (*see also Dillon v Humphreys*, 56 Misc2d 211, 214 [1968], *Abrams v Woods*, 64 Misc2d 1093,1094 [1970], *Noth v Scheurer*, 285 F. Supp. 81, 85 [1968]). In this case, plaintiff's alleged negligent conduct does not come into play until after the accident had occurred. As a result, it would not be a consideration for this court in determining this summary judgment motion.

Applying the above principles to the case at bar, the court finds that plaintiff has made a *prima facie* showing of entitlement to summary judgment on the issue of liability. Further, she has established that she is free from comparative negligence regarding the happening of the accident since the defendant's vehicle came into contact with her stopped vehicle. In the cases cited by the defendants, there was a failure to demonstrate that the plaintiffs were free from comparative negligence as a matter of law (*Thomas v Ronai*, 82 NY2d 736 [1993]; *Bonilla v Guitierrez*, 81 AD3d 581 [2011]; *Roman v A1 Limousine, Inc.*, 76 AD3d 552 [2010]). It was then incumbent upon defendants to submit competent evidence demonstrating the existence of a material issue of fact. The defendants have failed to come forward with such evidence.

Plaintiff's application for an order granting summary judgment on the issue of liability is **GRANTED**, and this matter shall proceed to trial on the issue of damages.

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
July 26, 2013

ENTER:

HON. JEFFREY S. BROWN
J.S.C.

ENTERED

JUL 31 2013

NASSAU COUNTY
COUNTY CLERK'S OFFICE

Attorney for Plaintiff
Kaston & Aberle, LLP
259 Mineola Boulevard
Mineola, NY 11501

Attorney for Defendants
Nicolini Paradise Ferretti & Sabella, PLLC
114 Old Country Road, Ste. 500
Mineola, NY 11501