

5471

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. JOSEPH COVELLO

Justice

ROSEMARIE HURD and THOMAS HURD,

Plaintiffs,

-against-

KATHERINE G. YUN and PETER S. YUN,

Defendants.

**TRIAL/IAS PART 22
NASSAU COUNTY**

Index No.: 8101/04

Motion Seq.: 001

Motion Date: 12/17/04

The following papers read on this motion:

Notice of Motion	x
Affirmation in Opposition	x
Reply Affirmation	x

Upon the foregoing papers, the motion by plaintiffs, Rosemarie Hurd and Thomas Hurd, for an Order pursuant to CPLR §3212 granting 1) partial summary judgment, on the issue of liability, against defendants, Katherine G. Yun and Peter S. Yun, 2) setting the matter down for an immediate inquest as to damages and 3) granting a special preference pursuant to CPLR §3212 (c), is determined as set forth herein.

Plaintiffs commenced this action to recover damages for personal injuries sustained by plaintiff, Rosemarie Hurd ("Hurd") on April 20, 2004, when the vehicle she was operating was involved in an accident with the motor vehicle owned by defendant, Peter S. Yun and operated by defendant, Katherine G. Yun ("Yun"). Plaintiff, Thomas Hurd, husband of Rosemarie Hurd has a derivative claim.

Plaintiff, Hurd alleges that the accident occurred at the intersection of South Oyster Bay Road and Market Drive, Town of Oyster Bay, County of Nassau, New York, solely due to the negligence of the defendant, Yun in failing to stop at a stop sign and in failing to yield the right

of way to her oncoming motor vehicle.

It is undisputed that prior to the accident the plaintiff, Hurd was traveling northbound on South Oyster Bay Road and defendant, Yun was traveling westbound on Market Drive. It is also undisputed that there were no traffic control devices controlling northbound traffic on South Oyster Bay Road at its intersection with Market Drive and that a stop sign controlled westbound traffic on Market Drive at the subject intersection.

Plaintiff contends that she is entitled to summary judgment on the issue of liability pursuant to Vehicle and Traffic Law §1142 and §1172, due to Yun's failure to stop at the stop sign and failure to yield the right of way to her. See, **Gravina v. Wakschal**, 255 AD2d 291; **Snow v. Howe**, 253 AD2d 870; **Rumanov v. Greenblatt**, 251 AD2d 566; **Maxwell v. Land-Sanders**, 233 Ad2d 459; **Bolta v. Lohan**, 242 AD2d 356.

However, summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (**Alvarez v. Prospect Hosp.**, 68 NY2d 320, 325; **Andre v. Pomeroy**, 35 NY2d 361). The decisive consideration upon a motion for summary judgment is the existence of issues of fact. (**Ugarizza v Schmieder**, 46 NY2d 471.) "Negligence cases by their very nature do not usually lend themselves to summary judgment, since often, even if all parties are in agreement as to the underlining facts, the very question of negligence is itself a question for jury determination" **Id.** at 474. Summary judgement is the procedural equivalent of a trial (**Museums at Stony Brook v. Village of Patchogue Fire Dept.**, 146 AD2d 572). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (see, **Whelen v. G.T,E, Sylvania Inc.**, 182 AD2d 446).

The court's role is issue finding rather than issue determination (see, e.g., **Sillman v. Twentieth Century-Fox Film Corp.**, 3 NY2d 395; **Gervasio v. Di Napoli**, 134 AD2d 235, 236; **Assing v. United Rubber Supply Co.**, 126 AD2d 590). Nevertheless, "the court must evaluate

whether the alleged factual issues presented are genuine or unsubstantiated” (**Gervasio v. Di Napoli**, supra, at 236, quoting from **Assing v. United Rubber Supply Co.**, supra; see also, **Columbus Trust Co. v. Campolo**, 110 AD2d 616, aff’d 66 NY2d 701). If the issue claimed to exist is not genuine, and therefore, there is nothing to be resolved at the trial, the case should be summarily decided (see, **Andre v. Pomeroy**, 35 NY2d at 364; **Assing v. United Rubber Supply Co.**, supra).

“It is well established that a party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (**Winegrad v. New York Univ. Med. Center**, 64 NY2d 851, 853; **Zuckerman v. City of New York**, 49 NY2d 557, 562).

Plaintiff asserts that defendant, Yun failed to stop at the afore-noted stop sign and entered into the intersection striking plaintiff, Hurd’s vehicle. In support of the motion plaintiffs’ annex the only page 19 of plaintiff, Hurd’s unsigned deposition transcript which reads precisely as follows:

you first saw the Mercedes until the moment of impact ?

A: A split second.

Q. What lane were you traveling in at the exact moment of impact; the left northbound, the right northbound or something else?

A: The right northbound

Q. What part of your vehicle was involved in the accident?

A. The front.

Q. What part of the Mercedes was involved in the accident?

A. Left front.

Q. When you say the “left front,” are you referring to the bumper or maybe the fender of door?

A. The driver’s side door into the front of the car.

Q. During that time, from when you first saw the Mercedes until the moment of impact, did you do anything with respect to the operation of your car?

A. I tried to brake.

Q. Other than for braking, did you take any other action?

A. Um, avoid the accident. I turned the
(Plaintiffs' Exhibit F)

Plaintiff also submits portions of defendant, Yun's unsigned deposition transcript. In the submitted portions Yun testified that she was stopped at the subject intersection which was controlled by a stop sign for a minute or two as she waited for cars to pass before she entered into the intersection. She further testified that while stopped she was able to see two blocks to her left (the direction plaintiff was proceeding from). That she then proceeded into the intersection and was halfway into the intersection when she first saw the plaintiff's vehicle about thirty feet away in the left northbound lane.(Plaintiff's Exhibit G).

Plaintiff also submitted an uncertified copy of a police accident report (Plaintiffs' exhibit A) which is inadmissible as hearsay. The inadmissibility of the police report is confirmed by plaintiff's attorney in plaintiffs' reply affirmation.

Defendants opposition annexed additional portions of plaintiff, Hurd's deposition transcript's (defendants Exhibit B) wherein she testified that she first saw the defendant's vehicle when it was in the intersection a split second prior to impact. She also testified that the impact points of the vehicles were the front of her vehicle and the left front, Drivers side door into the front of the car of the defendant, Yun's vehicle.

Based upon the admissible submitted evidence, which includes limited portions of plaintiff's deposition transcript, the alleged impact points and defendant, Yun's testimony that she was halfway through the intersection when she first saw plaintiff's vehicle thirty feet away, the plaintiffs have failed to establish a right to summary judgment as a matter of law.

Accordingly, the plaintiffs' motion for summary judgment must be denied as clearly issues of fact exist as to which lane plaintiff was in at the time of the accident, and who had the right of way at the subject intersection.

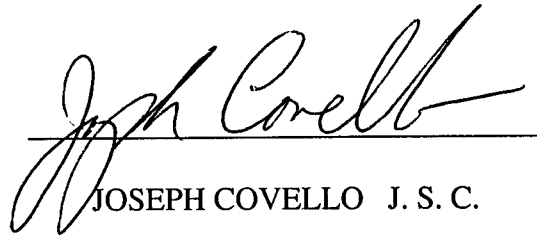
Similarly, the portion of plaintiffs' motion for a special preference pursuant to CPLR §3212 (c) must also be denied as it is based upon the granting of summary judgment and a trial only on the issue of damages.

Therefore, it is hereby

ORDERED, that the plaintiffs' motion is denied in its entirety.

This constitutes the decision and Order of the Court.

Dated: February 18, 2005


JOSEPH COVELLO J. S. C.

ENTERED
FEB 28 2005
NASSAU COUNTY
COUNTY CLERK'S OFFICE