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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

----------x	**TRIAL PART: 16**
MARY ELIZABETH SARNO,	
	NASSAU COUNTY
Plaintiff,	**INDEX NO: 17944-09**
-against-	
	MOTION SEQ. NO: 1
EHE CLEANERS, INC., AND LEANORD SCHOENFELD,	
Defendants,	**SUBMIT DATE: 04/16/10**
----------x	

The following papers having been read on this motion:

Notice of Motion 1
Opposition.....2
Reply.....3

Motion by plaintiff for an order pursuant to CPLR 3212 granting her summary judgment on the issue of liability is denied.

On July 27, 2007, plaintiff pedestrian was struck by a van operated by defendant Schoenfeld and owned by defendant EHE Cleaners, Inc. The accident occurred as defendant Schoenfeld was backing his van out of the driveway of 51 Osborne Road, Garden City, New York. At the time of the accident, defendant was delivering dry cleaning.

Plaintiff seeks summary judgment based upon the pleadings and her sworn affidavit. Plaintiff asserts the following: defendant suddenly backed up his commercial vehicle; the entire back of defendant's van was filled with clothes obstructing any view of defendant's rear view mirror; plaintiff had gone outside to find out about the commotion involving the demolition of a house across the street; defendant backed up approximately fifteen feet when he struck plaintiff; and there was no evasive action she could have taken to avoid the accident.

In opposition, defendant Schoenfeld submits his own affidavit wherein he provides his account of the accident. Specifically, defendant's affidavit states, in pertinent part, as follows:

The subject incident occurred as Mr. Schoenfeld was backing his van

out of the driveway of plaintiff's home, where he was delivering dry cleaning. Mr. Schoenfeld arrived at 51 Osborne Road and parked the van fully in the driveway, facing head-first. The van was not sticking out onto the sidewalk. Mr. Schoenfeld made his delivery to the plaintiff as he did routinely twice per week, fifty weeks per year over approximately six years. Mr. Schoenfeld never saw plaintiff outside of her home until after the accident occurred. After making the delivery at the front door of plaintiff's home, Mr. Schoenfeld started the van and checked both his left and right exterior side-view mirrors, the interior rear-view mirror and the rear window. The van was equipped with reverse lights which illuminated in the rear when the van was shifted to "reverse." The van had been running for approximately one to two minutes before he began to back out of the driveway. Mr. Schoenfeld's foot was on the brake as he began to back up very slowly. The van had only moved one to two inches when Mr. Schoenfeld heard a noise from behind the van. He immediately put the van in "park" and got out to see what happened. At the time that he heard the noise, the van was moving less than one mile per hour. Mr. Schoenfeld did not feel an impact; instead he only heard a noise. When Mr. Schoenfeld saw plaintiff directly behind the van, she was standing up and flexing her leg. He asked her if she was alright, and what she was doing behind the van. The plaintiff said, "I was just crossing the street to look at the construction. You backed into me." Mr. Schoenfeld does not know when plaintiff ultimately exited her home and inexplicably walked behind his van. Mr. Schoenfeld did check the area behind the van before moving by using his mirrors.

On a motion for summary judgment, it is incumbent upon the movant to 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 (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986];

Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). The failure to make that showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*Mastrangelo v Manning*, 17 AD3d 326 [2nd Dept. 2005]; *Roberts v Carl Fenichel Community Servs., Inc.*, 13 AD3d 511 [2nd Dept. 2004]). Issue finding, as opposed to issue determination is the key to summary judgment (*see Kris v Schum*, 75 NY2d 25 [1989]). Indeed, "[e]ven the color of a triable issue forecloses the remedy" (*Rudnitsky v Robbins*, 191 AD2d 488, 489 [2nd Dept. 1993]).

It is equally well established that negligence cases by their very nature do not lend themselves to summary dismissal "since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination" (*McCummings v New York City Transit Authority*, 81 NY2d 923 [1993], *rearg den.* 82 NY2d 706 [1993], *cert den.* 510 U.S. 991 [1993], quoting *Ugarriza v Schmeider*, 46 NY2d 471, 474 [1979]).

Viewing the evidence in the light most favorable to defendant (*Judice v DeAngelo*, 272 AD2d 583 [2nd Dept. 2000]; *Robinson v Strong Memorial Hospital*, 98 AD2d 976 [4th Dept. 1983]), issues of fact as to plaintiff's comparative negligence exist here (*Lopez v Garcia*, 67 AD3d 558 [1st Dept. 2009]; *Ryan v Budget Rent a Car*, 37 AD3d 698 [2nd Dept. 2007]. These triable issues include, but are not limited to, whether plaintiff walked into the path of defendant's van, whether defendant contributed to the accident by failing to exercise due care in backing up his van(Vehicle & Traffic Law § 1211(a); *Ryan v Budget Rent a Car, supra*); and whether both parties failed to observe that which should have been observed (*see Judice v DeAngelo, supra*).

In view of the foregoing, plaintiff has not established her entitlement to judgment as a matter of law and her motion for summary judgment is denied.

This constitutes the order and judgment of this Court.

DATED: May 27, 2010

ENTER

HON. ARTHUR M. DIAMOND
J. S.C.

To:

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ENTERED
JUN 02 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE