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SHORT FORM ORDER mg

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 5
NASSAU COUNTY

LUCREZIA VOLPE,

Plaintiff(s),

MOTION DATE: 6/22/09
INDEX No.:213/09
MOTION SEQUENCE NO:1

-against-

CAL. NO.:

ROBERT LIMONCELLI and TOWN OF OYSTER BAY,

Defendant(s).

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	1-4
Answering Affidavits.....	5-7
Replying Affidavits.....	
Briefs:	

Upon the foregoing papers, it is ordered that this motion by plaintiff for an order pursuant to CPLR 3212 granting partial summary judgment in favor of plaintiff and against defendant and dismissing the fifth, sixth, seventh, and eighth affirmative defenses interposed by defendants is disposed of as follows.

So much this motion for an order pursuant to CPLR 3212 granting partial summary judgment on the issue of liability only and setting this matter down for a trial on the issue of damages is granted.

This is a personal injury negligence action against a municipality, the Town of Oyster Bay (hereinafter "TOB"), and its municipal employee, Robert Limoncelli (hereinafter "Limoncelli"). The claim arose out of a rear end collision that occurred on April 4, 2008 at approximately 9:30 a.m. while plaintiff was stopped at a red light on the North Service Road of the Long Island Expressway

at the corner of Sunnyside Blvd. in Plainview. Plaintiff alleges that she was waiting for traffic to clear so she could make a right hand turn on red onto Sunnyside Blvd. Plaintiff further alleges that defendant Limoncelli, while negligently operating defendant TOB's garbage truck, slammed into the rear of her car without justification.

When the driver of a motor vehicle approaches another motor vehicle from the rear, he is bound to maintain a reasonably safe rate of speed and to maintain control of his vehicle and use reasonable care to avoid colliding with the other vehicle. When a rear end collision occurs, such a collision is sufficient to create a prima facie case of liability on the part of the defendant and imposes a duty of explanation with respect to the defendant driver (see Benyarko v Avis Rent-A-Car System, 162 AD 572; Daliendo v Johnson, 147 AD2d 312; Dickens v Merritt, 123 AD2d 7378 and Young v City of New York, 113 AD2d 833).

Defendants herein have failed to come forward with proof in admissible form to demonstrate a reasonable excuse for the collision. Defendants allege that the vehicle operated by plaintiff stopped suddenly. The holdings of the Appellate Division, Second Department are clear that a claim of a sudden stop is insufficient to defeat a prima facie case of negligence involving a rear end collision with a stopped vehicle (see McKeough v Rogak, 288 AD2d 196, *lv denied*, 98 NY2d 601; Girolamo v Liberty Lines Trans, 284 AD2d 564; Dileo v Greenstein, 281 AD2d 586; Shamah v Richmond County Ambulance Service, 279 AD2d 564; Liftshits v Variety Poly Bags, 278 AD2d 372; Cacace v DiStefano, 276 AD2d 457; Tricoli v Malik, 268 AD2d 469; Levine v Taylor, 268 AD)

Further, defendants argue that although plaintiff denied that it had rained on the morning of the accident, both defendant Limoncelli and the police report claim that it was raining at the time of the accident and that the roads were wet. This inconsistency does not create a triable issue of fact. Firstly, the defendants are not permitted to admit the police accident report, as it was made by a police officer who was not a witness to the accident (see Johnson v Lutz, 253 NY 124). The officer came to the scene after the accident had occurred and based his report on information from the parties involved in the accident. Secondly, Limoncelli's statement claiming that it was raining also does not create a triable issue of fact. There is no evidence of an

unavoidable skidding on the alleged wet pavement to indicate that the wet roadway was the cause of the collision (see Hurley v Izzo, 248 AD2d 674).

In opposition to this motion defendants also allege that summary judgment is premature. Defendants had the opportunity to conduct an oral examination pursuant to General Municipal Law 50-h. However, defendants claim that they are entitled to the opportunity to depose plaintiff in addition to holding a 50-h examination. When arguing that summary judgment is premature a party may not rely upon mere hope that evidence sufficient to defeat a summary judgment motion may be uncovered during the discovery process (Associates Commercial Corp. v Nationwide Mutual Insurance Co., 298 AD2d 537). Defendants must have offered some evidence to suggest that relevant evidence will be revealed upon further discovery (Wylie v District Attorney of Kings County, 2 AD3d 714). In this case defendants merely stated they are entitled to the opportunity to further question plaintiff. However, they have offered no evidence to prove that further interrogation will lead to information relevant to the case at hand.

That portion of plaintiff's motion seeking an order dismissing defendants' eighth affirmative defense is granted. Defendants' fifth, sixth, and seventh affirmative defenses have been withdrawn by the defendants' affirmation in opposition. Defendants made a General Municipal Law § 50-h demand for oral examination of the plaintiff. Plaintiff was produced for said examination and interrogated by defense counsel on July 9, 2009. General Municipal Law § 50-h provides for a subsequent medical examination following the oral examination if one is deemed necessary. No demand for a medical examination was ever made by defendants. Defendants argue in their eighth affirmative defense that plaintiff failed to comply with the General Municipal Law § 50-h when plaintiff did not comply with a demand for a physical examination of the vehicle she was operating at the time of the accident. Defendants do not offer any legal authority to demonstrate General Municipal Law § 50-h requires compliance with a demand for a physical examination of property in addition to the oral and physical examination of claimant. Therefore, defendants' eighth affirmative defense is dismissed.

Movant shall serve a copy of this order with notice of entry upon the attorneys for defendants.

Upon the completion of all discovery related to damages, the issuance of a certification order, the filing of a note of issue and certificate of readiness, together with a copy of this order,

this matter shall be scheduled for a trial in the nature of an assessment of damages.

Dated: AUG 03 2009

J.S.C.