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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 15**

**Present: HON. WILLIAM R. LaMARCA
Justice**

LISEDA SHELEGU,

**Motion Sequence #1
Submitted June 17, 2009**

Plaintiff,

-against-

INDEX NO: 14326/08

TAI-HO KANG and YOUNGSUN CHO,

Defendants,

The following papers were read on this petition:

TAI-HO KANG's Notice of Motion.....	1
YOUNGSUN CHO's Affirmation in Opposition.....	2
Plaintiff's Affirmation in Opposition.....	3
TAI-HO KANGS's Reply Affirmation.....	4

Requested Relief

Counsel for defendant, TAI-HO KANG (hereinafter referred to as "KANG") moves, pursuant to CPLR § 3212, for an order granting summary judgment, dismissing plaintiff, LISEDA SHELEGU's (hereinafter referred to as "SHELEGU") complaint and any cross claims asserted by co-defendant, YOUNGSUN CHO, (hereinafter referred to as "CHO"), on the ground that no liability rests with the moving defendant. The Court notes that, KANG's Notice of Motion contains numerous typographical errors, references to individuals not listed as parties in the

instant action, and refers to the motion as a cross-motion. Neither counsel for the plaintiff nor counsel for CHO calls the Court's attention to these discrepancies, and, therefore, the Court finds these inconsistencies to be ministerial mistakes that will be corrected by the Court (See, CPLR § 2001). Plaintiff and co-defendant CHO oppose the motion, which is determined as follows:

Background

This is an action seeking damages for personal injuries allegedly sustained by the plaintiff, SHEGELU, due to a motor vehicle accident that occurred on January 5, 2007, at approximately 2:00 p.m., at the intersection of East 21st Street and Park Avenue South, New York, New York. KANG was driving and SHELEGU was a back seat passenger in a 2002 Ford Crown Victoria motor vehicle, a taxi, (hereinafter referred to as the "taxi"), at the time of the collision. According to KANG, he was traveling southbound in the center lane of Park Avenue South, a two (2) way street with three (3) moving lanes in each direction with a concrete median in the center separating the adverse moving lanes. Co-defendant CHO was driving a 1998 Isuzu sport utility vehicle at the time of the accident and was initially traveling northbound on Park Avenue South. CHO stated that he was attempting to make a left hand turn across the southbound lanes of traffic at the intersection with 21st Street. It is uncontested that the intersection at Park Avenue South and 21st Street is controlled by three phase traffic lights regulating both directions of travel and that the traffic lights were green in both the northbound and southbound directions at the time of the collision. There are no turning arrows at the intersection. KANG testified that he was driving at approximately twenty (20) miles per hour for ten (10) blocks in the center southbound lane of Park Avenue South before the collision occurred, which is

uncontested. CHO testified at his examination before trial that he came to a complete stop for a few seconds in the left northbound lane of travel at the intersection of Park Avenue South and 21st Street prior to commencing his left hand turn, and then proceeded to make a left hand turn to enter 21st Street. CHO asserts that he saw the taxi initially at a distance of approximately one (1) block away from the intersection, then again saw the taxi five (5) or ten (10) seconds before the impact. CHO testified that as he was turning onto 21st Street from Park Avenue his car was “slipping” and further stated it had rained earlier in the day. KANG testified that he applied the taxi’s brakes when he noticed the CHO vehicle “coming towards” the taxi. The KANG taxi and the CHO vehicle collided at the intersection in the southbound center lane of Park Avenue South. The KANG vehicle’s front bumper struck the CHO vehicle’s front and rear passenger side doors.

Counsel for KANG asserts that, co-defendant CHO violated New York Vehicle and Traffic Law § 1141 when he made a left turn into the path of the taxi, citing *Galvin v Zacholl*, 302 AD2d 965, 755 NYS2d 175 (4th Dept. 2003); *Pescheiri v Estate of Ballweber*, 285 AD2d 921, 727 NYS2d 811 (3rd Dept. 2001); *Agin v Rehfeldt*, 284 AD2d 351, 726 NYS2d 131, *lv. denied*, 97 NYS2d 603, 735 NYS2d 492, 760 NE2d 1288 (C.A. 2001); *Stiles v County of Dutchess*, 278 AD2d 304, 717 NYS2d 325 (2nd Dept. 2000). Counsel argues that, CHO made a left turn into the KANG vehicle’s path, failed to yield the right of way, and that such negligent acts were the proximate cause of the collision, therefore entitling KANG to summary judgment, citing *Rivera v Frontier Telephone of Rochester*, 13 AD3d 1065, 787 NYS2d 794 (4th Dept. 2004); *Feder v Greco*, 240 AD2d 364, 658 NYS2d 111 (2nd Dept. 1997). Counsel for KANG

urges the court to grant it summary judgment dismissing the complaint and any and all cross-claims.

In opposition to the motion, in which counsel for plaintiff SHELEGU joins, counsel for co-defendant CHO contends that, KANG's failure to reduce his speed upon approaching the intersection and his failure to see the CHO vehicle prior to the impact was negligence on the part of KANG. It is counsel for CHO's position that, as a result of such negligence, KANG violated Vehicle and Traffic Law § 1180(e), "in that he failed to reduce his speed upon approaching an intersection", citing *Bagnato v Romano*, 179 AD2d 713, 578 NYS2d 613 (2nd Dept. 1992). Counsel argues that, KANG's violation of Vehicle and Traffic Law § 1180(e) was negligence *per se*, and in conjunction with KANG's failure to see the CHO vehicle, precludes the granting of summary judgment.

In reply, counsel for KANG argues that, the opposition's argument is speculative at best and insufficient to raise a question of fact to defeat the instant motion, citing *Patella v Yonkers Contracting Co. Inc.*, 262 AD2d 471, 692 NYS2d 151 (2nd Dept. 1991). It is counsel's position that, there is no evidence KANG could have avoided the collision, even if he was traveling at a lesser speed, citing *Lucksinger v MT Unloading Svc.*, 280 AD2d 741, 720 NYS2d 272 (3rd Dept. 2001); *Russo v Scibetti*, 298 AD2d 514, 748 NYS2d 871 (2nd Dept. 2002). Counsel argues that a driver who has the right-of-way is entitled to anticipate that turning vehicles will obey traffic laws that require the turning vehicle to yield, citing *Moreno v Gomez*, 58 AD2d 611, 872 NYS2d 143 (2nd Dept. 2009). Counsel for KANG contends that the opposition's reliance on *Bagnato v Romano*, *supra*, is misplaced because the Court in that case reasoned that, Vehicle and Traffic Law § 1180(e), when read in

conjunction with § 1180(a), mandates a driver to reduce his speed at an intersection only when warranted by the conditions presented. Counsel urges the Court to grant KANG's motion for summary judgment dismissing the action and any and all cross-claims against him.

The Law

In viewing motions for summary judgment, it is well settled that summary judgment is a drastic remedy which may only be granted where there is no clear triable issue of fact (see, *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853 [C.A. 1974]; *Mosheyev v Pilevsky*, 283 AD2d 469, 725 NYS2d 206 [2nd Dept. 2001]. Indeed, “[e]ven the color of a triable issue, forecloses the remedy” *Rudnitsky v Robbins*, 191 AD2d 488, 594 NYS2d 354 [2nd Dept. 1993]). Moreover “[i]t is axiomatic that summary judgment requires issue finding rather than issue-determination and that resolution of issues of credibility is not appropriate” (*Greco v Posillico*, 290 AD2d 532, 736 NYS2d 418 [2nd Dept. 2002]; *Judice v DeAngelo*, 272 AD2d 583, 709 NYS2d 817 [2nd Dept. 2000]; see also *S.J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [C.A.1974]). Further, on a motion for summary judgment, the submissions of the opposing party's pleadings must be accepted as true (see *Glover v City of New York*, 298 AD2d 428, 748 NYS2d 393 [2nd Dept. 2002]). As is often stated, the facts must be viewed in a light most favorable to the non-moving party. (See, *Mosheyev v Pilevsky*, *supra*).

The Second Department has repeatedly held that a party who makes a left hand turn directly into the path of another vehicle as that vehicle legally proceeds through an intersection is negligent as a matter of law, citing, *inter alia*, *Berner v Koegel*, 31 AD3d 591, 819 NYS2d 89 (2nd Dept. 2006); *Lubitz v Village of Scarsdale*,

31 AD3d 618, 819 NYS2d 92 (2nd Dept. 2006); *Pryor v Reichert*, 265 AD2d 470, 696 NYS2d 525 (2nd Dept. 1999) and *Russo v Scibetti*, *supra*. In *Russo*, the Court held that plaintiffs demonstrated their entitlement to judgment as a matter of law by establishing that defendant violated VTL §1141, when she made a left hand turn directly into the path of plaintiff's vehicle, and further found that plaintiff, who had the right of way, had the right to anticipate that the defendant would obey the traffic laws which required her to yield. Further, a driver is "negligent in failing to see that which, under the circumstances, he should have seen, and in crossing in front of [a] vehicle when it was hazardous to do so" (*Stiles v County of Dutchess*, *supra*; see, *Pryor v Reichert*, 265 AD2d 470, 696 NYS2d 525 [2nd Dept. 1999]).

Discussion

After a careful reading of the submissions herein, it is the judgment of the Court that, KANG has demonstrated his entitlement to judgment as a matter of law. The Court finds that, KANG had the right of way as he was attempting to proceed lawfully through the intersection at Park Avenue South and 21st Street and that he had the right to anticipate that CHO would obey traffic laws requiring him to yield (*See, Russo v Scibetti, supra*). In the case at bar, it is undisputed that the KANG taxi and CHO vehicle collided in the center southbound lane of Park Avenue South at the intersection with 21st Street, New York, New York. The parties concede that the CHO vehicle made a left hand turn from Park Avenue South, and was attempting to cross the southbound lanes of travel, onto 21st Street, when the collision occurred. CHO admitted the he saw the KANG vehicle as far as one (1) block away before he made the left hand turn and that he did not keep the KANG taxi under constant supervision before making the turn. CHO stated that there was nothing obstructing

his view of the southbound flow of traffic that would have blocked his view of the KANG taxi. The Court finds that defendant CHO negligently made a left hand turn into the KANG taxi's path of travel when it was too hazardous to do so, which was the proximate cause of the collision (*See, Stiles v County of Dutchess, supra*). The Court rejects counsel for CHO's arguments regarding the possibility of KANG's negligence, in that they are speculative at best and no evidence has been presented of KANG's negligence sufficient to raise a triable issue of fact.

Conclusion

Accordingly, it is hereby

ORDERED, that defendant KANG's motion for an order granting summary judgment dismissing the complaint and any and all cross-claims against him is **granted**; and it is further

ORDERED, that the caption shall henceforth read as follows:

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

LISEDA SHELEGU,

Plaintiff,

-against-

INDEX NO: 14326/08


YOUNGSUN CHO,

Defendant.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: July 28, 2009



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ENTERED
AUG 05 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE

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