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SHORT FORM ORDER

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

Present: HON. WILLIAM R. LaMARCA
Justice

RICHIE F. GERALDI,

Plaintiff,

-against-

JAMES T. PARANZINO and CATHY PARANZINO,

Defendants,

Motion Sequence #1
Submitted November 25, 2008

INDEX NO: 12105/07

The following papers were read on this petition:

Plaintiff's Notice of Motion.....1
Defendant's Affirmation in Opposition.....2

Requested Relief

Counsel for plaintiff, RICHIE F. GERALDI (hereinafter referred to as "GERALDI") moves, pursuant to CPLR § 3212, for an order granting partial summary judgment on the issue of liability against the defendants JAMES T. PARANZINO and CATHY PARANZINO (hereinafter referred to as "PARANZINO"). GERALDI moves on the ground that there is no issue of fact and that plaintiff was not negligent with respect to the happening of the subject accident. Counsel for defendants, in the Affirmation in Opposition, points out that CATHY PARANZINO is apparently a misnomer and no such person is known to exist. (See Defendant's "Exhibit A"). The motion is determined as follows:

Background

Plaintiff commenced the action by filing a summons and verified complaint, dated June 27, 2007. Issue was joined by the Service of an Answer on behalf of the defendant, dated September 12, 2007, and a verified Bill of Particulars was served upon defendant, on January 15, 2008.

This is an action seeking damages for personal injuries sustained by the plaintiff due to a motor vehicle accident which occurred on December 23, 2006 at approximately 1:00 p.m. in Rosedale, Queens County, New York. According to plaintiff's affidavit he was stopped at a red traffic light at the intersection of 246th Street and Francis Lewis Boulevard, a two way street with one moving lane in each direction. When the light turned green, GERALDI proceeded to make a left turn to go southbound on Francis Lewis Boulevard. Plaintiff alleges that defendant, operating a 2003 Ford motor vehicle, pulled out of a parking spot along the curb of Francis Lewis Boulevard, heading south, and sideswiped GERALDI's vehicle. According to plaintiff's affidavit, he was traveling at approximately ten (10) to fifteen (15) miles per hour and did not see defendant prior to the accident nor hear any horns or shriek of brakes prior to the collision. Plaintiff claims that PARANZINO was clearly negligent in pulling away from the curb and into moving traffic without yielding the right of way under the circumstances and therefore partial summary judgement should be granted to the plaintiff on liability. Plaintiff alleges that defendant's conduct fell below the standard of due care and that plaintiff's conduct was not a contributing factor under the circumstances.

According to defendant's deposition testimony, he was driving a 2000 Ford Econoline van and was coming from Pennsylvania and was on his way to Long Beach to

visit his family. Defendant testified that, on his way, he stopped at a deli where he parked, facing southbound, on the curbside of Francis Lewis Boulevard, approximately ten (10) to twenty (20) feet from the corner. Defendant alleges that, prior to pulling out of the parking spot, he saw a car pass by him heading south, and that the northbound traffic on Francis Lewis Boulevard seemed to be stopped. Defendant claims that, approximately only "fifteen to twenty" seconds elapsed between when he began to move out of the parking spot and when the accident occurred, and that, his van moved three (3) to five (5) feet from the parked location to where the accident occurred. According to defendant's deposition, the back end of the van was still in the parking spot when the accident occurred.

In support of the motion to grant partial summary judgment, counsel for plaintiff contends that PARANZINO entered the traveling lanes of the roadway from a parked position in a manner which violated Vehicle and Traffic Law ("VTL") §1128 (a), which provides: "A vehicle shall be driven as nearly as practicable entirely within a single lane, and shall not be moved from such lane until the driver has first ascertained that such movement can't be made with safety." Counsel for plaintiff argues that a motorist who violates the aforementioned VTL is guilty of negligence as a matter of law, citing *DeBlasi v NYC*, 306 AD2d 308, 760 NYS2d 667 (2nd Dept. 2003). Moreover plaintiff relies on *Calandra v Dishotsky*, 244 AD2d 376, 664 NYS2d 95 (2nd Dept. 2006), where the Appellate Division affirmed the grant of summary judgment to the plaintiff where it was not contested that defendant pulled into a travel lane from a parking space, because he "failed to present evidence sufficient to create a triable issue of fact as to his liability..." It is plaintiff's position that he has made a *prima facie* showing of entitlement to summary judgment since failure

to comply with the VTL constitutes negligence *per se*, citing *Martin v Herzog*, 228 NY 164, 126 NE 814 (C.A. 1920), *McCauley v Sidor*, 272 AD2d 528, 708 NYS2d (2nd Dept. 2000), and *Dalal v NYC*, 262 AD2d 596, 692 NYS2d 468 (2nd Dept. 1999). Counsel urges that this Court grant plaintiff partial summary judgment on the issue of liability.

In opposition to the motion, defendant's counsel asserts that, because the plaintiff's affidavit lacked any indication of where the accident occurred in relation to the intersection or any other details substantiating the manner in which the accident occurred, plaintiff's request for an order granting partial summary judgment on liability issues should be denied. Furthermore, defendant's counsel asserts that plaintiff's reliance on *Calandra v Dishotsky*, *supra*, is misplaced. According to defendant, in *Calandra*, the Court acknowledged that the presumption of negligence can be rebutted by evidence raising a triable issue of fact either as to the liability of the defendant or the comparative fault of the plaintiff which would preclude granting of summary judgment. Defendant's counsel alleges that there exists a triable issue of fact in light of both parties' deposition testimony. Defendant's counsel asserts that, according to PARANZINO's deposition, he looked both physically and through his mirrors on several occasions prior to beginning to pull into traffic, and there was no moving traffic vehicle when he began to head south on Francis Lewis Boulevard. Additionally, counsel points out, that GERALDI's deposition testimony and affidavit do not indicate how far the plaintiff traveled before the impact, the time frame prior to the impact, or any substantial information necessary to establish that there is no comparative fault. Based on the testimony of the parties, defendant's counsel asserts that it cannot be said, as a matter of law, that defendant's actions were the sole proximate

cause of the accident and questions exist as to whether plaintiff's comparative fault in making a left turn may have been an additional proximate cause of the occurrence.

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 burden on the moving party for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062, 601 NYS2d 463, 619 NE2d 400 [C.A.1993]; *Winegrad v New York University Medical Center*, 64 NY2d 851, 487

NYS2d 316, 476 NE2d 642 (C.A. 1985); *Drago v King*, 283 AD2d 603, 725 NYS2d 859 [2nd Dept. 2001]). If the initial burden is met, the burden then shifts to the non-moving party to come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. (CPLR§ 3212, subd [b]; see also *GTF Marketing, Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 498 NYS2d 786, 489 NE2d 755 [C.A. 1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595, 404 NE2d 718 [C.A. 1980]). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. (*Mgrditchian v Donato*, 141 AD2d 513, 529 NYS2d 134 [2nd Dept. 1988]).

In an action where negligence is the basis for liability, the unexcused violation of a statutory standard of care is negligence *per se* and can create liability if found to be the proximate cause of the accident. *See, Cordero v City of New York*, 112 AD2d 914, 492 NYS2d 430 (2nd Dept. 1985); *Koziol v Wright*, 26 AD3d 793, 809 NYS2d 350 (4th Dept. 2006); *Hellenbrecht v Radeker,* 309 AD2d 834, 766 NYS2d 81 (2nd Dept. 2003); *Holleman v Miner,* 267 AD2d 867 (3rd Dept. 1999). It is the duty of the driver to operate the vehicle with reasonable care taking into account the actual and potential dangers existing from weather, road, traffic and other conditions. A driver has a duty to maintain a reasonably safe rate of speed, to have the vehicle under reasonable control, to keep a proper lookout under the circumstances and to use reasonable care to avoid an accident. *See, Guzzardi v Grotas,* 98 AD2d 761, 469 NYS2d 475 (2nd Dept. 1983); *Oberman v Alexander's Rent-A-Car*, 56 AD2d 814, 392 NYS2d 662 (1st Dept. 1977); *see also, McCauley v ELRAC, Inc.*, 6 AD3d 584, 775 NYS2d 78 (2nd Dept. 2004).

Conclusion

After a careful reading of the submissions herein, it is the judgment of the Court that the issues of fact exist as to the proximate cause of the accident, and the degrees of fault of each party, which are all questions of fact for the jury. *Cf., Wheaton v Guthrie*, 89 AD2d 809, 453 NYS2d 480 (4th Dept. 1982). Summary judgment is not appropriate when issues of comparative fault must be resolved. *Rios v Nicoletta*, 119 AD2d 562, 500 NYS2d 730 (2nd Dept. 1986). Defendant's counsel has adequately distinguished the case law offered by plaintiff and the Court concludes that plaintiff has failed to demonstrate that he is entitled to partial summary judgment as a matter of law. On the record before it, the Court finds that defendant has raised sufficient issues of fact to require a trial. Accordingly, it is hereby

ORDERED, that plaintiff's motion for an order granting partial summary judgment is denied.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: January 23, 2009

WILLIAM R. LaMARCA, J.S.C.

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