SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. GEOFFREY J. O'CONNELL

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

DAWN V. WICKLINE,

Plaintiff(s),

INDEX No. 7568/05

-against-

MOTION DATE: 12/11/06

KRISTEN N. SOTTILE and LUCY SOTTILE,

Defendant(s).

MOTION SEQ. No. 1-MD

The following papers read on this motion:
Notice of Motion/Affirmation/Exhibits
Affirmation in Opposition/Exhibits
Reply

In this action arising out of an automobile collision, defendants seek an Order granting them summary judgment dismissing the Complaint. They contend that the plaintiff cannot demonstrate that there is a triable issue of fact with respect to their liability for the accident. Plaintiff opposes.

It is undisputed that the underlying automobile collision occurred on February 13, 2004, at the intersection of Elbert Avenue and Newbridge Road. That intersection has no traffic devices.

At her deposition plaintiff testified that she was traveling eastbound on Elbert Avenue toward the intersection with Newbridge Road. Plaintiff testified that she was making a left hand turn from Elbert to travel north on Newbridge Road. She testified that she had stopped her vehicle at the intersection and had her left turn signal on prior to beginning her turn. The plaintiff testified that she did not see the defendant's vehicle approaching until the collision. She testified that she lost consciousness, and that the left side of her vehicle, including the drivers and passengers doors were damaged as a result of the collision. (Motion, Exh. D)

The defendant KRISTEN SOTTILE testified at her deposition that she was traveling southbound on Newbridge Road. At the time of the collision defendant was a high school senior and her friend was a passenger in the car. She had picked up her friend and was driving to Mepham High School from a 7-11 store on Newbridge Road at the time of the accident. She did not recall if Newbridge Road had a double, single or broken yellow line in the area of the collision. Defendant testified that the accident occurred less than a minute after she left the 7-11. She also testified that she had opened a cup of coffee she had purchased prior to the collision. She testified that she first observed plaintiff's vehicle stopped at the intersection approximately one and one-half blocks away. She did not recall how fast she was traveling at that time. She testified that she did not continually observe the intersection prior to the collision. She testified that she did not see plaintiff's car move until it was approximately three inches away from the collision when it came out directly in front of her vehicle, and that she had no time to stop or avoid the collision. (Motion, Exh E).

In support of their application the defendants also provide an unsworn statement from the defendant's passenger, dated more than two years after the accident. This is not considered as it is not evidentiary proof in admissible form. *Friends of Animals v. Associated Fur Mfrs.* 46 NY2d 1065 (1979); *Phillips v. Kantor & Co.*, 31 NY2d 307 (1972). Even if considered, the opinions and speculations of the writer are not dispositive proof of lack of negligence by the defendant KRISTEN SOTTILE.

Defendants argue that there is no evidence that the defendant caused the accident.

Plaintiff opposes the application arguing that there is a triable issue of fact with respect to the liability of both drivers. Counsel argues that pursuant to NY Vehicle and Traffic Law § 1140(b), when both vehicles enter an intersection from different highways at approximately the same time, the driver on the left shall yield the right of way to the driver on the right. He argues that in this instance, there is a question of whether the defendant had the legal right to proceed through the intersection, and a question of wether she failed to properly yield the right of way to the plaintiff.

Summary judgment is a drastic measure only to be had if there is no issue of fact. The very question of whether the defendant's conduct amounts to negligence is inherently a question for the fact-trier in all but the most egregious instances. Even the so-called "rear-end" collision can be shown to involve questions of fact necessitating a trial, such as an oil slick on the road which caused a defendant to skid. *Velten v. Kirkbride*,

20 A.D.2d 546 (2nd Dept. 1963). Comparative negligence requires the fact-trier to determine the parties respective share of causative fault, so that even if the plaintiff confesses to conduct that evinces fault, it still must be the fact-trier who determines the percentage of that fault vis-a-vis the defendant's. If there is any issue of fact relating to degrees of liability, CPLR § 3212(b) directs that a motion for summary judgment be denied. Where there is a doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Exchange Leasing Corp. v. Bundy*, 29 A.D.2d 828 (1968).

In the present instance, plaintiff denies entering onto Newbridge Road prior to it being clear. However, even if the Court were to find that she did improperly do so, the action was not necessarily the sole cause of the collision. A violation of a vehicle and traffic law does not equate total negligence. There is a question of whether SOTTILE's vehicle was proceeding cautiously or entered the intersection properly. *Baker v. Close*, 204 NY 92 (1912); *Oberman v. Alexander's Rent-A-Car*, 56 AD2d 814 (1st Dept. 1977); *Woolley v. Coppola*, 179 AD2d 991 (3rd Dept. 1992). The defendant testified that she saw the plaintiff's vehicle was there prior to her arriving at the intersection and she did not testify that she slowed her vehicle or continually observed the plaintiff's vehicle until it was too late to avoid collision. Summary judgment should only be employed where there is no doubt as to the absence of triable issues. *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). It should not be granted where, as here, there is a doubt as to the existence of a triable issue or even when its existence is arguable. *Falk v. Goodman*, 7 N.Y.2d 87 (1959).

In this instance, the Court finds that the conflict in testimony between plaintiff and KRISTEN SOTTILE demonstrates that there is triable issue of fact with respect to both and or either party's liability for this accident, *Hartwig v. Three F. Conservation Co., Inc.*, 49 A.D.2d 678 (1975).

Based on the testimony of all of the parties, there is a question of whether both, or either, of the parties were operating their respective vehicles in an unreasonable manner, causing the collision, injuries and property damages which are the subject of this suit. It cannot be determined on reading of the submissions of the parties that the acts of either plaintiff or KRISTEN SOTTILE were the sole proximate cause of the accident and all related injuries. *Detko v. McDonald's Restaurants of New York Inc.*, 198 A.D.2d 208 (2nd Dept. 1993). The cause of the accident is clearly disputed. *Allen v. New York Housing Authority*, 194 A.D.2d

427 (1st Dept. 1993); *Ugarriza v. Schmieder*, 46 N.Y.2d 471 (1979); *Carillo v. Kreckel*, 43 A.D.2d 499 (1974).

Based on the conflicting testimony presented, the Court finds that there is a question of fact regarding whether the defendant's vehicle was negligent, and a question of whether she is liable for all or part of the collision.

Thus, the defendants' motion for summary judgment is Denied.

It is, SO ORDERED.

Dated: Feb 14, 2007

HON. GEOFFREY J. O'CONNELL, J.S.C.