SHORT FORM ORDER

SCAN

SUPREME COURT - STATE OF NEW YORK

Present:

HON. DANIEL PALMIERI
Acting Justice Supreme Court

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CLARENCE O. THORNTON and CAROL THORNTON,

Plaintiffs,

-against-

CHARLES R. SYNDER, JR. and DOUGLAS BATTERY CO.,

Defendants.

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TRIAL PART: 35

NASSAU COUNTY

INDEX NO: 001229-00

MOTION DATE: 3-30-01

MOTION SEQ. NO: 01

The following papers having been read on this motion:

Notice of Motion, dated 2-22-01..... 1
Affirmation in Opposition, dated 3-30-01 2
Reply Affirmation, dated 4-27-01..... 3

Upon the foregoing papers, it is ordered that this motion by the plaintiffs, Clarence and Carol Thornton for summary judgment pursuant to CPLR 3212 on the issue of liability is granted.

On a motion for summary judgment the movant must establish his or her cause of action or defense sufficient to warrant a court directing judgment in its favor as a matter of law (*see Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 (1988); *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986), *Rebecchi v. Whitmore*, 172 AD2d 600, (2nd Dept. 1991). "The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact" Frank Corp. v. Federal Ins. Co., supra at 967; *GTF Mktg. V. Colonial Aluminum Sales*, 66 NY2d 965 (1985), *Rebecchi v. Whitmore*, *supra* at 601. Mere conclusions or unsubstantiated allegations are insufficient to

raise a triable issue (*see Frank Corp. v. Federal Ins. Co., supra*).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the Court deciding this type of motion is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist see, *Barr v. County of Albany*, 50 NY2d 247 (1980); *Daliendo v. Johnson*, 147 AD2d 312, 317 (2nd Dept. 1989).

The movants' submission in support of the motion established their entitlement to judgment thus shifting the burden to the defendants to rebut the movants' case by submitting proof in evidentiary form showing the existence of triable issues of fact. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Friends of Animals v. Associated Fur Manufacturers, Inc.*, 46 NY2d 1065 (1979). Here, the defendants have failed to offer any testimony to establish the existence of triable issues of fact and the motion is granted on the issue of liability and all affirmative defenses as to liability are dismissed.

Based upon this record, the Court finds no material fact issues requiring a trial with respect to the parties' involvement in the cause of the accident. There are no triable issues of fact regarding the actions of plaintiff Clarence Thornton or of defendant Charles Snyder, Jr. The parties submit copies of the pleadings and the deposition testimony of both Clarence Thornton and Charles Snyder, Jr. in support of their positions. Clarence Thornton states in his deposition that he was operating his vehicle on Old Country Road and with in seconds of moving on a green signal to cross over the intersection at Route 107, the front of his vehicle came in contact with the rear passenger door, fender and tire area of the defendant's vehicle. He never observed the defendant's car prior to impact. Neither party disputes that there was

a red

traffic light signal controlling defendant's traffic movement and that the plaintiff's was green.

Defendant, Charles Snyder, Jr. testified at his Examination Before Trial that he was distracted upon approaching the intersection and failed to see the red traffic signal before proceeding into the intersection and then collided with the plaintiffs' car which was already in the intersection. Defendant also signed and filed a New York State accident report wherein he basically gave the same information. He identified this document and his signature during his deposition

In response to the motion, counsel for defendant argues that questions of fact have been raised by the parties' testimony since it raises the question of whether the plaintiff might have contributed to the accident, however no evidence to support this theory is proffered. Plaintiff has established a *prima facie* entitlement to judgment as a matter of law. (See, Vehicle and Traffic Law § 1111[d], *Casanova v. New York City Transit,* ___AD2d___(2nd Dept., 2001). Defendant's admission that he entered the intersection in which the accident occurred while the light was red creates a prima facie case that he was solely liable for the accident. *Diasparra v. Smith,* 253 AD2d 840 (2nd Dept. 1998). Viewing the evidence in the light most favorable to defendant and according him every reasonable inference, the Court finds that a jury could not find comparative negligence on the part of Clarence Thornton as the defendant's evidence in opposition to the motion was insufficient to raise a triable issue of fact. *Rumanov v. Greenblatt*, 251 ADd2d 566, (2nd Dept. 1998).

The record offered by the defendant is that he never observed the red signal before he proceeded into the intersection without yielding the right of way to the plaintiff, in violation of Vehicle and Traffic Law § 1111(d). In opposition, the defendant failed to raise a triable

issue of fact s to whether the plaintiff driver was at fault in the happening of this accident or whether he could have done anything to avoid the impact. *Casanova v. New York City Transit*, supra, at 126. Such negligence was a proximate cause of the accident. Consequently it is clear as there is no conflicting testimony and defendant fails to raise any material factual issues as to the plaintiff's culpability, as a matter of law, defendant was solely at fault for this occurrence. *Snow v. Howe*, 253 AD2d 870 (2nd Dept. 1998). As defendant has failed to come forward with any evidence of culpability on the part of the plaintiffs, they are entitled to summary judgment in the issue of liability against the defendant.

Here, the defendant has failed to come forward with sufficient evidence to rebut the inference of negligence and plaintiff is entitled to judgment as a matter of law. *Benvarko v. Avis Rent a Car System*, 162 AD2d 572 (1990); *Abramowicz v. Roberto*, 220 AD2d 374 (1995); *Leal v. Wolff*, 224 AD2d 392 (1996).

Having found no material issues of fact, plaintiffs' motion for summary judgment on the issue of liability against defendants must be granted. This case has been certified for trial, and is returned to the Calendar Control Part for trial on the issue of damages.

This constitutes the Decision and Order of this Court.

ENTER

DATED: May 18, 2001

Daniel Palmieri

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