

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present:

HON. ANTHONY L. PARGA

Justice

-----X PART 11  
CAROL JOYCE BIRNHAK,

Plaintiff,

INDEX NO. 1183/08

-against-

MOTION DATE: 9/26/08  
SEQUENCE NO. 001

ARLENE BERTINI and CARYN CALISI,

Defendants.

-----X

Notice of Motion, Affs. & Exs.....	<u>1</u>
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Reply Affirmation & Exs.....	<u>4</u>

Upon the foregoing papers, it is ordered that the motion by defendant Caryn Calisi for an order dismissing the complaint against her on the issue of liability is denied.

This personal injury case involves a two-car accident which occurred on November 20, 2006 on Route 25A in Mount Sinai, N.Y. Plaintiff was a passenger in a car owned and operated by defendant Arlene Bertini which was struck at an intersection by a car owned and operated by defendant Caryn Calisi.

The proponent of a summary judgment motion "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986)). Once the movant has demonstrated a *prima facie* showing of

entitlement to judgment, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v. City of New York*, 49 NY2d 557 (1980)).

In support of this application, defendant Calisi refers to sworn deposition testimony of all parties as to the details of the accident allegedly while defendant Bertini was attempting a left turn to go east onto Route 25A from a side street while defendant Calisi was driving westbound on Route 25A.

In opposition defendants Bertini and plaintiff refer to movant Calisi's sworn deposition testimony that she did not see defendant Bertini's car before the accident and did not sound her horn or hit the brakes prior to the impact. Plaintiff and defendant Bertini contend that: "since defendant Calisi admittedly failed to ever see the other vehicle prior to the impact, failed to hit her brakes and failed to steer her vehicle away to avoid the impact, her motion for summary judgment should be denied since she failed to meet her burden of proving her freedom from comparative negligence."

Significant in the assessment of this vehicle negligence case is the application of the statutory principles enunciated in both VTL §1180(a) and in Pattern Jury Instruction 2:77:

"It was the duty of each of the drivers to operate (his, her) automobile with reasonable care taking into account the actual and potential dangers existing from weather, road, traffic and other conditions.

"Each of these drivers were under a duty:

"To maintain a reasonably safe rate of speed.

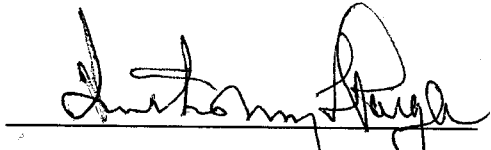
"To have (his, her) automobile under reasonable control.

"To keep a proper lookout under the circumstances then existing to see and be aware of what was in (his, her) view.

"To use reasonable care to avoid an accident."

There are numerous questions of fact concerning the conduct of both drivers which preclude a summary disposition of the issue of liability.

Dated: December 8, 2008.

  
Anthony L. Parga, J. S. C.

**ENTERED**

DEC 10 2008

**NASSAU COUNTY**  
COUNTY CLERK'S OFFICE