SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 11
NASSAU COUNTY

BEATRICE POLASKI and RAYMOND POLASKI,

Plaintiffs,

-against-

CHARLES A. TABONE and DIANA L. LOPEZ-TABONE,

Defendant(s).

INDEX NO.: 011752/04

MOTION DATE: 03/01/06

MOTION SEQ # 001

The following papers having been read on the motion: [numbered 1-2]

Notice of Motion and Affirmation in Support & Exhibits.....1
Affirmation in Opposition.....2

Motion by plaintiffs pursuant to CPLR 3212 for partial summary judgment of liability against defendants is **denied** as hereinafter provided.

Plaintiff Beatrice Polaski was allegedly injured on June 1, 2004 when the vehicle she was operating eastbound on Merrick Avenue collided with the vehicle driven by defendant Diana Lopez-Tabone when Ms. Lopez-Tabone, who had been proceeding westbound, allegedly made a sudden left-hand turn, across a double yellow line directly into the path of plaintiff's oncoming vehicle. Plaintiff alleges she was unable to stop in time to avoid a collision and the front of her vehicle collided with the middle portion of the Tabone vehicle.

In her deposition, defendant Lopez-Tabone contradicts plaintiff's version of the accident testifying that the collision occurred after she had made a left-hand turn from the turning lane on Merrick Road into the Millennium gas station located on the right hand side of the eastbound traffic lane of Merrick Road. She claims her vehicle was stopped with motor idling, on the "lip" or apron located at the entrance to the station as she waited

for the car, completing its transaction at the pump, to pull away so she could move her vehicle up to the pump in order to purchase gas. Since only her rear tires were on the apron, defendant opines in her testimony that "the back rear end [of her vehicle] must have been out" i.e. protruding onto the roadway.

Plaintiffs contend that defendant Lopez-Tabone, by her negligence, was solely responsible for the injuries plaintiff Beatrice Polaski sustained and would have this court ignore Ms. Lopez-Tabone's differing testimony *vis a vis* the happening of the accident. The post accident police report, prepared by an officer who did not witness the accident, does not resolve the disputed factual issue as to the manner in which the accident occurred. The report contains no specifics, i.e., a diagram, witness statements or admissions by either of the parties on this issue. Generally, a police accident report, made by a police officer who was not an eyewitness to the accident, which contains hearsay statements regarding the ultimate issues of fact may not be admitted into evidence for the purpose of establishing the cause of the accident in question. *Santanastasio v Doe*, 301 AD2d 511 [2nd Dept. 2003]; *see Aetna Cas. & Sur. Co. v Island Transp. Corp.*, 233 AD2d 157, 158 [1st Dept. 1996]. In the absence of any expert proof from either party establishing conclusively how the accident occurred, an award of partial summary judgment on the issue of liability against defendants must be denied.

While it is true that an operator of a vehicle "intending to turn to the left within an intersection or into an alley, private road or driveway shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard" (Vehicle and Traffic Law § 1141), and that a violation of the statute constitutes negligence as a matter of Law (*Moussouros v Liter*, 22 AD3d 469, 470 [2nd Dept. 2005], whether defendant Lopez-Tabone was, in fact, in the process of making a left-hand turn directly into the path of the oncoming vehicle driven by the injured plaintiff, or had already completed a left-hand turn into the Millennium gas station, and whether said defendant was negligent in failing to see that which, under the circumstances, she should have seen (*Spatola v Gelco Corp.*, 5 AD3d 469, 470 [2nd Dept.

2004]), are disputed issues which must be resolved by the trier of fact as is the issue of whether Ms. Lopez-Tabone's conduct was the sole cause of the accident herein.

While it is beyond cavil that a driver proceeding with the right of way is entitled to anticipate that the defendant will obey traffic laws which require him/her to yield (*Bongiovi v Hoffman*, 18 AD3d 686 [2nd Dept. 2005]), plaintiffs have not established that the sole cause of the accident was the defendant driver's failure to yield the right of way. Neither the police accident report, nor the photograph of plaintiffs' car, submitted by plaintiffs in support of their request for partial summary judgment of liability against defendant Lopez-Tabone, is sufficient to establish defendant Lopez-Tabone's negligence as a matter of law.

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 eliminate any material issues of fact from the case by producing evidentiary proof in admissible form. *JMD Holding Corp. v Congress Financial Corp.*, 4 NY3d 373, 384 [2005]. In the absence of admissible evidence sufficient to preclude any material issues of fact, summary judgment is unavailable. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993].

Under the facts of this case, and viewing the evidence in the light most favorable to the defendants and affording them the benefit of all reasonable inferences (*Abrams v Ho*, 3 AD3d 544, 545 [2nd Dept. 2004]), the conflicting accounts as to the manner in which the accident occurred require that plaintiffs' motion for partial summary judgment on the issue of liability be **denied**.

Dated: May 17, 2006 **ENTER:**

J.S.C.