SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice
TRIAL/IAS, PART 6
NASSAU COUNTY

JOAN BRANNAN,

Plaintiff,

MOTION DATE: 11/5/09

- against -

MOTION SEQ. NO.: 001

JOSEPH D. KORN, REBECCA KORN and "JOHN/JANE DOE #1", a fictitious name intended to designate the owner of an unknown vehicle, and "JOHN/JANE DOE #2", a fictitious name intended to designate the owner of an unknown vehicle,

INDEX NO.: 0016908/07

Defendants.

The following papers read on this motion (numbered 1-3):

Notice of Motion.....1
Affirmation in Opposition.....2
Reply Affirmation.....3

The motion of defendants JOSEPH D. KORN and REBECCA KORN for summary judgment pursuant to **CPLR §3212** is determined as follows.

This is an action to recover for personal injuries sustained by plaintiff in an accident that occurred on September 22, 2004 on Ring Road north of Stewart Avenue in Garden City. The following account of the accident stems from the deposition testimony of plaintiff taken on May 5, 2009. Plaintiff testified that she was walking across Ring Road to a mall parking lot where her car was parked. Before she crossed, she observed several vehicles to her left which were stopped at a traffic light and thought that she had time to cross the street (plaintiff's deposition, pp. 24-26, 28-29). Plaintiff then stepped off the curb to begin crossing Ring Road, although not at a crosswalk, and when she was in the middle of the first right lane, she was struck in the leg by the front bumper of a vehicle in that lane (plaintiff's deposition, pp. 26, 31-35). After contact with the vehicle in the right lane, plaintiff was thrown up in the air backwards onto the hood of a motor vehicle traveling in the left lane which was driven by defendant Joseph D. Korn ("J. Korn") and owned by defendant Rebecca Korn (plaintiff's deposition, pp. 35-37, J. Korn's deposition, pp. 7-8). She thereafter slid off or fell off of the hood of J. Korn's vehicle to the ground and landed in front of his vehicle (plaintiff's deposition, pp. 38-40). The facts with respect to how plaintiff

made contact with J. Korn's vehicle are not in dispute. The vehicle in the right lane which allegedly initially made contact with plaintiff, did not stop and left the scene of the accident (plaintiff's deposition, p. 41).

A defendant is entitled to summary judgment if, upon all the papers and proof submitted, defendant establishes a cause of action sufficient to warrant judgment as a matter of law. **CPLR §3212(b).** The burden then shifts to plaintiff to provide evidence in admissible form sufficient to establish a genuine issue of material fact. **Zuckerman v. City of New York**, 49 NY2d 557.

In support of their motion for summary judgment, defendants proffer the sworn deposition testimony of J. Korn, dated May 7, 2009. J. Korn testified he was traveling 20-25 miles per hour when he observed plaintiff enter Ring Road at a brisk pace (J. Korn's deposition, pp. 34-35). A concrete median, which was four to six inches in width and height, separated the two directions of traffic (J. Korn's deposition, p. 37). J. Korn testified that "at the time, considering the vehicle I was driving, I was not confident I could cross that [median] into oncoming traffic and still be able to get my vehicle safely off the road" (J. Korn's deposition, p. 37) and that "I didn't see anything else I could do, as [plaintiff] was currently in the right lane and there was a median to my left" (J. Korn's deposition, p. 35). J. Korn testified that, as a result, he determined he needed to bring his car to a stop and attempted to do so by applying his brakes firmly (J. Korn's deposition, pp. 33-35) and that less than a minute elapsed between the time that he initially saw plaintiff and when plaintiff landed on the hood of his vehicle (J. Korn's deposition, p. 36). At the time of contact, his vehicle had almost stopped (J. Korn's deposition, pp. 39-40). Although plaintiff admits that she was first hit by an unidentified car traveling in the right lane, J. Korn testified that he did not observe any vehicles to his right (J. Korn's deposition, p. 41).

Defendants argue that the deposition testimony, as well as the police report, establish that the conduct of J. Korn was not the proximate cause of the accident but that based on plaintiff's own testimony, it was the vehicle in the right lane which initially struck plaintiff, that caused her to be propelled onto the hood of J. Korn's vehicle. Defendants argue further that it is undisputed that J. Korn did not strike plaintiff, that J. Korn was not operating his vehicle at an excessive speed, and that since the contact between plaintiff and J. Korn's vehicle was solely due to a sudden and unforeseen occurrence not of J. Korn's making, the circumstances amounted to an emergency situation which can be determined as a matter of law.

The Court finds that based on the foregoing evidence, defendants have established *prima facie* their entitlement to summary judgment as a matter of law. *See* **Williams v. Persaud**, 19 AD3d 686. Plaintiff in her own testimony admits that she was hit by a vehicle in the right lane which propelled her onto the hood of J. Korn's vehicle which was traveling in the left lane. In addition, defendants sufficiently establish that J. Korn was presented with a "sudden and unforeseen occurrence not of his own making" (**Jones v. Geoghan**, 61 AD3d 638, 639) and that J. Korn's response, namely applying his brakes, was reasonable under the circumstances. *See* **Vitale v. Levine**, 44 AD3d 935; **Bello v. Transit Authority of NYC**, 12 AD3d 58, **Borst v. Sunnydale Farms**, 258 AD2d 488; **Goff v. Goudreau**, 222 AD2d 650; **Williams v. Econ**, 221 AD2d 429.

In any event, a driver faced with an emergency is not obligated to exercise his best judgment and any error in judgment does not support a finding of negligence. **Garcia v. Prado**, 15 AD3d 347. "It would be speculative to consider that [J. Korn] could have avoided the accident under these circumstances." **Jones v. Geoghan**, *supra* at 639. *See* **Gajjar v. Shah**, 31 AD3d 377.

In opposition, plaintiff claims that there are questions of fact with regard to whether J. Korn acted reasonably under the circumstances and breached his duty as a driver in failing to see that which there is to be seen. Plaintiff argues that J. Korn's failure to keep plaintiff under constant observation, his inability to avoid hitting plaintiff despite the distant between his vehicle and plaintiff when he first observed her, and the inconsistency in J. Korn's and plaintiff's testimony regarding what they were able to see, raise an issue of fact which preclude summary judgment. The Court notes, however, to defeat summary judgment, the factual issue must be material; that is it must relate to the determination of defendant's negligence. *See* **Zuckerman v. City of New York**, *supra*. The Court finds that plaintiff's evidence in the form of the proffered deposition testimony, does not refute defendants' defense that J. Korn was not the proximate cause of the accident and was faced with an emergency situation not of his own making.

Accordingly, it is

ORDERED, that the motion of defendants JOSEPH D. KORN and REBECCA KORN for summary judgment pursuant to **CPLR §3212** is **granted**.

This constitutes the Order of the Court.

Dated: February 26, 2010

J.S.C.

ENTERED

APR 05 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE