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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present:

HON. ANTHONY L. PARGA

Justice

----------X PART 6

SURAYA ANDKHOIE,

INDEX NO. 23429/10

Plaintiffs,

MOTION DATE: 01/06/12

-against- SEQUENCE NO: 001

BINU V. THOMAS and CHARLES A. CHARLES,

Defendants

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Notice of Motion, Aff & Exs.....1
Affirmation in Opposition & Exs.....2
Reply Affirmation.....3

Upon the foregoing papers, plaintiffs' motion for partial summary judgment on the issue of liability, pursuant to CPLR §3212, is granted.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, Suraya Andkhoie, as a result of a motor vehicle accident which occurred on December 4, 2008 on Old Country Road, just east of Route 135, in Plainview, New York. Plaintiff alleges that the defendants' vehicle exited a parking lot and struck the plaintiff's vehicle as plaintiff proceeded, with the right of way, eastbound on Old Country Road. As such, plaintiff moves for summary judgment on liability grounds.

In support of her motion, plaintiff submits the deposition transcripts of the parties hereto. Plaintiff testified that she was traveling eastbound on Old Country Road at the time of the accident. She remained in the left lane as she traveled on Old Country Road up to the time of the accident. Plaintiff testified that while traveling on Old Country Road, at about 30-35 miles per hour, she observed the front of the defendants' vehicle coming at her "too fast" from a parking lot on her right side. She saw the defendants' vehicle only a "split second" before the accident.

She testified that it appeared that the defendants' vehicle was attempting to turn left, across Old Country Road, as it exited the parking lot. Plaintiff further testified that she was unable to turn her steering wheel to the left to try to avoid the defendants' vehicle because there were cars traveling in the opposite direction on Old Country Road.

Defendant driver, Charles A. Charles, testified at his deposition that he was exiting the parking lot where he worked at Central Island Nursing home, on the south side of Old Country Road, prior to the accident. He testified that it was his intention to take Route 135 to his home that evening. As such, he testified that he was intending to make a right turn out of the parking lot, go east on Old Country Road, and then make a U-turn to head west on Old Country Road toward Route 135, as there was a "no left turn" sign prohibiting vehicles from turning left onto Old Country Road from the parking lot. Defendant Charles testified that he stopped his vehicle and looked to his left prior to proceeding out of the parking lot onto Old Country Road. He testified that when he made his right turn onto Old Country Road, he was involved in an accident with the plaintiff's vehicle. He testified further that three to five seconds passed from the time he first started to move his car from its stopped position until the point of impact. He traveled approximately three to five meters before the accident occurred. The front driver's side of his vehicle, near the front wheel, and the front passenger side of the plaintiff's vehicle made contact. Defendant Charles testified further that he never saw the other vehicle prior to the impact, but that the impact occurred in the "right side" lane of traffic.

Plaintiff contends that she is entitled to partial summary judgment on liability grounds as she had the right of way and the defendant violated Vehicle and Traffic Law §1143 by failing to yield the right of way as he exited the parking lot onto Old Country Road.

Plaintiff has made a prima facie showing of entitlement to summary judgment on liability grounds by submitting admissible evidence that the defendant entered into a roadway without yielding the right of way to the plaintiff, as the plaintiff traveled straight on said roadway, in violation of Vehicle and Traffic Law §1143, and that the defendant's negligence was a proximate cause of the accident. (*Ferrara v. Castro,* 283 A.D.2d 392, 724 N.Y.S.2d 81 (2d Dept. 2001); *See also, Rieman v. Smith*, 302 A.D.2d 510, 755 N.Y.S.2d 256 (2d Dept. 2003); *Klein v. Vencak*, 298 A.D.2d 434, 748 N.Y.S.2d 166 (2d Dept. 2002)). Vehicle and Traffic Law §1143 provides that "the driver of a vehicle about to enter or cross a roadway from any place other than another roadway shall yield the right of way to all vehicles approaching on the roadway to be entered or

crossed. The defendant's entrance into traffic from a parking lot exit ramp without yielding the right of way as required by VTL §1143 was negligent as a matter of law and a proximate cause of the accident (*Lallemand v. Cook*, 23 A.D.3d 533, 806 N.Y.S.2d 619 (2d Dept. 2005); *Ferrara v. Castro*, 283 A.D.2d 392, 724 N.Y.S.2d 81 (2d Dept. 2001); *Palumbo v. Holtzer*, 283 A.D.2d 392, 724 N.Y.S.2d 81 (2d Dpet. 1997); *Mazza v. Manzella*, 49 A.D.3d 609, 854 N.Y.S.2d 424 (2d Dept. 2008); *Yasinosky v. Lenio*, 28 A.D.3d 652 (2d Dept. 2005); *See also*, *Pressner v. Serrano*, 260 A.D.2d 458, 688 N.Y.S.2d 227 (2d Dept. 1999)). In addition, the plaintiff was entitled to anticipate that the defendant would obey the traffic laws that required him to yield. (*Lallemand v. Cook*, 23 A.D.3d 533, 806 N.Y.S.2d 619 (2d Dept. 2005); *Palomo v. Pozzi*, 57 A.D.3d 498, 869 N.Y.S.2d 153 (2d Dept. 2008)). Further, defendant Charles was obligated, by the proper use of his senses, to see the plaintiff's vehicle which was on the roadway when he entered it, and to yield the right of way. (*Klein v. Vencak*, 298 A.D.2d 434, 748 N.Y.S.2d 166 (2d Dept. 2002)(holding that the defendant motorist, who exited a parking lot and immediately proceeded to cross the roadway and did not see the plaintiff until collision, was obligated by the use of her senses to see the plaintiff's vehicle, which was in the roadway when she entered, and to yield the right of way); *Ferrara v. Castro*, 283 A.D.2d 392, 724 N.Y.S.2d 81 (2d Dept. 2001)(a driver is negligent where an accident occurs because the driver has failed to see that which through the proper use of his sense he should have seen); *Bolta v. Lohan*, 242 A.D.2d 356, 661 N.Y.S.2d 286 (2d Dept. 1997); *Batal v. Associated Univs.*, 293 A.D.2d 558, 741 N.Y.S.2d 551 (2002)).

The proponent of a summary judgement 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 N.Y.2d 320 (1986)). Once the movant has demonstrated a prima facie showing of entitlement to judgement, 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 a fact which require a trial of the action. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980)).

In opposition, the defendants contend that plaintiff's testimony that she only observed the defendant's vehicle a split second before the accident happened, and that she could not take any evasive action to avoid the accident, creates a question of fact warranting the denial of plaintiff's motion. Defendants also contend that said testimony creates a question of fact with respect to

whether the plaintiff was traveling at an excessive rate of speed or was otherwise. Additionally, defendants contend that as the plaintiff testified that she was traveling in the left lane at the time of the accident and the defendant testified that the accident occurred in the right lane, there is a question of fact as to the location of the accident and the liabilities of the parties.

The opposition submitted by the defendant fails to create a question of fact sufficient to defeat plaintiff's prima facie showing of entitlement to summary judgment. There is no evidence that the plaintiff was traveling at an excessive rate of speed, as she testified that she was traveling at 30-35 miles per hour and there is no evidence to contradict same. Additionally, the differing testimonies regarding the lane in which the accident occurred also fail to create a question of fact, as the defendant exited the parking lot without yielding to oncoming traffic, in violation of VTL §1143, regardless of what lane the plaintiff was traveling in, and collided with the plaintiff's vehicle, which had the right of way. In addition, the record before this Court does not support the defendant's contention that a triable issue of fact exists as to whether the plaintiff was comparatively negligent by failing to take evasive action to avoid the accident. The conclusory and speculative assertions concerning the plaintiff's speed and possible negligence in failing to avoid the accident are unsupported by the evidence herein and are insufficient to warrant the denial of summary judgment to the plaintiff on liability grounds. *(See, Berner v. Koegel*, 31 A.D.3d 591, 819 N.Y.S.2d 89 (2d Dept. 2006); *Maloney* v. Niewender, 27 A.D.3d 426, 812 N.Y.S.2d 585 (2d Dept. 2006); *Loch v. Garber*, 69 A.D.3d 814, 893 N.Y.S.2d 233 (2d Dept. 2010)).

Accordingly, plaintiff's motion for partial summary judgment on liability grounds, only, is granted.

Dated: February 29, 2012

Anthony L. Parga, J.S.C.

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