STATE OF NEW YORK
SUPREME COURT COUNTY OF GREENE

CELINE JORDAN,

Plaintiff,

DECISION and ORDER
INDEX NO.: 08-0812
RJI NO.: 19-08-3964

-against-

NICOLE M. NAZI and LEK NAZI,

Defendants.

NICOLE M. NAZI and LEK NAZI,

Third Party Plaintiffs,

-against-

BARRY E. JORDAN,

Third Party Defendant.

Supreme Court Greene County All Purpose Term, July 1, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:
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TERESI, J.:

On June 4, 2005, Barry Jordan was driving his motorcycle, with Celine Jordan (hereinafter "Plaintiff") as his passenger, in the Town of Lake George, New York. As Mr. Jordan drove southbound on Route 9, approaching the Prospect Mountain Diner (hereinafter "Diner"), a vehicle driven by Nicole Nazi (hereinafter "Defendant") exited the Diner's parking lot. She entered Route 9, at most, fifty feet from Mr. Jordan's motorcycle, which was traveling, at most, forty five miles per hour. When Defendant entered Mr. Jordan's lane of travel, Mr. Jordan took evasive action but his motorcycle tipped. Plaintiff allegedly sustained serious injuries as a result.

Plaintiff commenced this action against Defendants seeking damages due to such injuries. Issue was joined by Defendants, who commenced a third party action against Mr. Jordan. Mr. Jordan answered the third party complaint. All parties engaged in discovery, which is complete and a trial date certain is set. Mr. Jordan now moves for summary judgment dismissing the third party complaint. He claims that Defendant's negligence is the sole proximate cause of Plaintiff's injuries and that his reaction to the emergency situation Defendant caused was reasonable. Plaintiff too moves for partial summary judgment on the issue of Defendant's negligence. Defendants oppose Mr. Jordan's motion, but do not oppose Plaintiff's motion to the extent that she seeks summary judgment on the issue of her freedom from negligence. Because Mr. Jordan and Plaintiff demonstrated their entitlement to judgment as a matter of law and no issue of fact was raised by Defendants, their motions are granted.

"Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996]).

On a motion for summary judgment, the movant must "make a prima facie showing of

entitlement to judgment as a matter of law." (Ferluckaj v. Goldman Sachs & Co., 12 NY3d 316 [2009] quoting Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). "It... is incumbent upon the proponent to tender sufficient evidentiary proof in admissible form to warrant a judgment in its favor." (Salas v. Town of Lake Luzerne, 265 AD2d 770 [3d Dept. 1999]; see CPLR §3212[b]). If the movant establishes their right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish by admissible proof, the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]). In opposing a motion for summary judgment, one must produce "evidentiary proof in admissible form. . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." (Id. at 562).

"Generally, whether a driver acted reasonably in the face of an emergency situation is a question to be decided by the trier of fact. Summary resolution is possible, however, when the driver presents sufficient evidence to establish the reasonableness of his or her actions and there is no opposing evidentiary showing sufficient to raise a legitimate question of fact on the issue." (Smith v. Brennan, 245 AD2d 596, 597 [3d Dept. 1997][internal citations omitted]; Cancellaro v. Shults, 68 AD3d 1234 [3d Dept. 2009]; Hazelton v. D.A. Lajeunesse Bldg. and Remodeling, Inc., 38 AD3d 1071 [3d Dept. 2007]; Dearden v. Tompkins County, 6 AD3d 783 [3d Dept. 2004]).

In support of his motion Mr. Jordan properly submits his own affidavit and deposition transcript, Defendant's deposition transcript[1], and the affidavit of a Patrol Officer for the Warren County Sheriff's Department (hereinafter "Patrol Officer") who witnessed the accident.

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[1]"An unsigned but certified deposition transcript of a party can be used by the opposing party as an admission in support of a summary judgment motion." (Morchik v. Trinity School, 257 AD2d 534, 536 [1st Dept. 1999]).

On this record, Mr. Jordan sufficiently demonstrated that he encountered an emergency situation.

Mr. Jordan stated, at this deposition, that he believed Defendant's vehicle was approximately twenty feet in front of his motorcycle, when she turned left out of the Diner's parking lot and into his lane of traffic. He supplemented such approximation with his affidavit, which states that his motorcycle was between thirty and forty five feet from Defendant's vehicle when it entered his travel lane. Similarly, the Patrol Officer observed Defendant turn left out of the Diner's parking lot "less than fifty feet" from Mr. Jordan's motorcycle. On this record, it is uncontested that Mr. Jordan's motorcycle was no more than fifty feet from Defendant's vehicle when she exited the Diner's parking lot and entered his travel lane.

Defendant entered Mr. Jordan's driving lane, according to Mr. Jordan, while he was traveling about thirty miles per hour. Similarly, the Patrol Officer observed Mr. Jordan's speed as less than forty five miles per hour, the applicable speed limit. The Defendant, however, was unable to estimate Mr. Jordan's speed. She admittedly did not see him until she was already in his travel lane. As such, on this record it is uncontested that Mr. Jordan was traveling within the speed limit of forty five miles per hour at the time Defendant entered his travel lane. This uncontested evidence of distance and speed sufficiently demonstrates Defendant's violation of Vehicle and Traffic Law §1141. (See Pomietlasz v. Smith, 31 AD3d 1173 [4th Dept. 2006]).

Mr. Jordan also demonstrated that he had seconds to react. As Mr. Jordan "had the right of way [he] was entitled to anticipate that [Defendant] would comply with her obligation to yield." (Marmaduke v. Spraker, 34 AD3d 1007 [3d Dept. 2006]; Vehicle and Traffic Law §1141). However, Mr. Jordan states that he had "mere seconds" to react to Defendant's entering his driving lane. Likewise, while Defendant was unable to estimate distance or speed, she

acknowledged that when she first saw Mr. Jordan's motorcycle it was upright, but only "for a second, then it was sliding." Mr. Jordan's reply papers also correctly note that a motorcycle traveling forty five miles per hour (equal to 66 feet per second) would travel a distance of fifty feet in less than one second.

The above proof amply demonstrates that Mr. Jordan was faced with an emergency situation caused by Defendant's wrongful entry into Mr. Jordan's travel lane.

Mr. Jordan also demonstrated that his reaction to the emergency situation was reasonable. He alleged that the weather conditions were optimal, "sunny and dry." Defendant also confirmed that the weather was "clear" and that the road was "flat" and "straight." No obstructions were noted by either of the parties. Due to such driving conditions, Mr. Jordan's traveling at or below the speed limit was reasonable.

Additionally, Mr. Jordan described his reasonable reaction to the emergency situation he was faced with. Mr. Jordan alleged that at the time of the accident he was operating his motorcycle with his headlight and running lights on, while wearing a helmet. He testified that just prior to the accident he was carefully watching Defendant's car as he approached. He saw Defendant's face and believed that he made eye contact with her. He was traveling well below the speed limit, when Defendant's vehicle "suddenly and unexpectedly pulled out in front of [his] motorcycle." Mr. Jordan describes braking immediately. When he leaned and steered to the right to avoid Defendant, his motorcycle tipped and skidded toward Defendant's vehicle. He saw no other options in the limited reaction time he had.

Corroborating Mr. Jordan's description of events, the Patrol Officer's affidavit also describes the accident. The Patrol Officer states that he observed the accident from well within one hundred yards, with his attention focused on the motorcycle and Defendant's vehicle. He saw

Mr. Jordan's motorcycle "not going very fast" and observed the "limited distance between the motorcycle and the Defendant" when Defendant pulled out of the Diner's parking lot. He described how, just prior to the accident, Mr. Jordan's "motorcycle slow[ed], the front wheel of the motorcycle turn[ed] to the right, and the back part of the motorcycle move[d] to the left." Further, the Patrol Officer established his experience in both operating and investigating motorcycle accidents. Based upon such experience and his observations of the accident, he opined that if Mr. Jordan's motorcycle had not tipped over it would surely have struck the mid section of Defendant's vehicle.

Due to the foregoing uncontroverted evidence, Mr. Jordan demonstrated that his reaction to the emergency situation he faced was reasonable, as a matter of law, and that Defendant's conduct was the sole proximate cause of the accident. (Groboski v. Godfroy, __AD3d__, 2010 WL 2302705 [3d Dept. 2010]). As such, the burden shifts to Defendant to make an "evidentiary showing sufficient to raise a legitimate question of fact on the issue." (Smith, supra at 597).

On this record, Defendant failed to raise an issue of fact. Defendant submits no factual or expert affidavits, or any other admissible proof in opposition. Her attorney's affidavit is of no probative value as it is not based upon personal knowledge (Groboski, supra at fn.2), and her exclusive reliance on the attachments to Mr. Jordan's motion is unavailing. Moreover, the unsigned and unsworn"Claim Management System" summary Defendant relies on is of no probative value and is rejected as lacking any foundation. (Autiello v. Cummins, 66 AD3d 1072 [3d Dept. 2009]).

Defendant's characterization of Mr. Jordan's statements as contradictory is belied by the statements themselves. Considering Mr. Jordan's admissible statements as a whole, as set forth above, he demonstrated that Defendant presented him with an emergency situation which he

reasonably attempted to avoid. Nor is Defendant's speculation that Mr. Jordan could have moved his mortorcycle into another lane persuasive. "Speculation regarding evasive action that a... driver should have taken to avoid a collision, especially when the driver had, at most, a few seconds to react, does not raise a triable issue of fact." (Cancellaro, supra at 1237, quoting Dearden, supra at 785). On this record, Defendant raised no issue of fact regarding the reasonableness of Mr. Jordan's evasive actions.

Accordingly, Mr. Jordan's motion is granted and the third party complaint against him is dismissed. Additionally, Plaintiff's motion is also granted to the extent that she sought partial summary judgment on the issue of Defendant's negligence. This Decision and Order makes no determination about Plaintiff's alleged "serious injury".

This Decision and Order is being returned to the attorneys for the Third Party Defendant. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Greene County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: July 9, 2010
Albany, New York

Joseph C. Teresi J.S.C.
JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated May 19, 2010 with attached Affidavit of Gerald D'Amelia, dated May 19, 2010, with attached Exhibits A - K.
2. Notice of Motion, dated June 1, 2010, with attached Affidavit of Celine Jordan, dated May 28, 2010 with attached Exhibits A - E.
3. Affirmation in Opposition of Melissa J. Smallacombe, dated June 11, 2010.
4. Affidavit of Gerald D'Amelia, dated June 28, 2010, with attached Exhibit A.