SCAN

SUPREME COURT - STATE OF NEW YORK

Present:

HON. DANIEL PALMIERI
Acting Justice Supreme Court

GREGORY YUKNEK,

Plaintiff,

-against-

SUSAN A. SCAVO,

Defendant.

TRIAL PART: 34

NASSAU COUNTY

INDEX NO: 3616-02

MOTION DATE: 7-30-03

MOTION SEQ. NOS: 001

The following papers having been read on this motion:

Notice of Motion, dated 7-10-03	**1**
Affirmation in Opposition, dated 8-21-03	**2**
Reply Affirmation, dated 8-26-03	**3**

Upon the foregoing papers, it is ordered that this motion by plaintiff for summary judgment pursuant to CPLR 3212 on the issue of liability is granted.

This action arose out of an automobile accident that took place on January 17, 2002, at the traffic light controlled intersection of Washington Avenue and South Road in Nassau County. Defendant was operating a vehicle northbound and plaintiff was operating his vehicle southbound, both on Washington. Defendant was attempting to make a left turn onto South Road and when defendant turned left into the intersection she was struck by plaintiff as he proceeded southbound. Neither driver saw the other vehicle prior to the impact.

On a motion for summary judgment the movant must establish his or her cause of action or defense sufficient to warrant a court directing judgment in its favor as a matter of law. *Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 (1988); *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986); *Rebecchi v. Whitmore*, 172 AD2d 600, (2nd

Dept. 1991). "The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact" *Frank Corp. v. Federal Ins. Co., supra*, at 967; *GTF Mktg. V. Colonial Aluminum Sales*, 66 NY2d 965 (1985); *Rebecchi v. Whitmore, supra* at 601. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue *Frank Corp. v. Federal Ins. Co., supra.*

Further to grant summary judgment, it must clearly appear that no material triable issues of fact are presented. The burden on the court deciding this type of motion is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist *Barr v. County of Albany*, 50 NY2d 247 (1980); *Daliendo v. Johnson*, 147 AD2d 312, 317 (2nd Dept. 1989). Based on the foregoing uncontroverted facts, the plaintiff has established entitlement to summary judgment as to defendant. *Zuckerman v. City of New York*, 49 NY2d 557 (1980).

The plaintiff demonstrated entitlement to judgment as a matter of law by establishing that the defendant violated Vehicle and Traffic law § 1141 and § 1163(a) when she made a left turn directly into the path of his vehicle. The defendant was negligent in failing to see that which, under the circumstances, she should have seen and in crossing into the plaintiff's lane of traffic when it was hazardous to do so (see *Russo v. Scibetti*, 298 AD2d 514 (2nd Dept. 2002); *Agin v. Rehfeldt*, 284 AD2d 352 (2nd Dept. 2001); *Stiles v. County of Dutchess*, 278 AD2d 304 (2nd Dept. 2000). Plaintiff, who had the right of way, was entitled to anticipate that the defendant would obey the traffic laws which required her to yield and to turn only when able to do so

with reasonable safety, see *Cenovski v. Lee*, 266 AD2d 424 (2nd Dept. 1999). The submissions do not support the defendant's contention that issues of fact exist as to whether plaintiff was negligent in some manner in the operation of his vehicle, see *Agin v. Rehfeldt, supra*; *Welch v. Norman*, 282 AD2d 448 (2nd Dept. 2001); *Cenovski v. Lee, supra*; *Gravina v. Wakschal*, 255 AD2d 291 (2nd Dept. 1998). See also *Wilkins v. Davis*, 305 AD2d 584 (2nd Dept. 2003).

Defendant had a duty to see what was to be seen, namely the plaintiff's vehicle *Stiles v. County of Dutchess, supra*, *Zambrano v. Seok,* 277 AD2d 312 (2nd Dept. 2000). See also *Hudson v. Goodwin*, 272 AD2d 296 (2nd Dept. 2000) and a driver is negligent where an accident occurs because he or she has failed to see that which through proper use of his or her senses he or she should have seen. *Breslin v. Rudden,* 291 AD2d 471 (2d Dept. 2002). In this case defendant failed to see plaintiff's approaching vehicle and failed to yield the right of way. *Szczotka v. Adler*, 291 AD2d 444 (2nd Dept. 2002).

Based on the foregoing, the motion is granted as to liability and fault only.

This constitutes the Decision and Order of this Court.

ENTER

DATED: September 3, 2003

HON. DANIEL PALMIERI
Acting J.S.C.

TO: **ROTH & ROTH, LLP**
Attorneys for Plaintiff
32 Court Street, Suite 1208
Brooklyn, NY 11201
ATT: AUDRA R. ROTH, ESQ.

MARTYN, TOHER, ESPOSITO and MARTYN
Attorneys for Defendant
330 Old Country Road, Suite 211
Mineola, NY 11501
ATT: JACQUELINE R. SOBOTTA, ESQ.