To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

ANTHONY RIVERA,

Plaintiff,

-against-

ELIZABETH G. KOLSKY and JONATHAN D. KOLSKY,

Defendants.

DECISION AND ORDER
Motion Seq. No. 001

INDEX NO. 62171/12

DIBELLA, J.

The following papers have been read and considered on this motion by plaintiff for partial summary judgment against defendants on the issue of liability:

1) Notice of Motion; Affirmation in Support of Michael B. Ronemus, Esq.; Exhibits A–F;
2) Affirmation in Opposition of Robert S. Ondrovic, Esq.; Exhibits A–B; and
3) Reply Affirmation of Michael B. Ronemus, Esq.

In this personal injury action arising out of a motor vehicle accident, plaintiff moves for partial summary judgment on the issue of liability and to set this matter down for an assessment of damages, pursuant to CPLR 3212. Defendants oppose the motion. For the reasons set forth below, the motion is granted.

The within action stems from a motor vehicle accident which occurred on May 26, 2010. Plaintiff Anthony Rivera was operating his vehicle and proceeding straight on a two lane roadway known as Long Ridge Road in Pound Ridge, New York when a vehicle operated by defendant Elizabeth G. Kolsky and owned by defendant Jonathan D. Kolsky (the "Kolsky vehicle") made a left turn into the path of plaintiff's oncoming vehicle. Plaintiff alleges that, at the intersection of Long Ridge Road and Shad Road West, the defendant-

driver made the turn without yielding the right of way to plaintiff and under circumstances wherein the turn was not made with reasonable safety, in violation of the Vehicle and Traffic Law.

It is well settled that 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 demonstrate the absence of any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman*, 49 NY2d at 562. Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment. *Id.*

At his deposition, plaintiff testified that, while he was traveling on Long Ridge Road, he observed the Kolsky vehicle driving in the lane coming towards him. He indicated that he did not observe any turn signals on the Kolsky vehicle but that she suddenly and without any indication, made a left turn in front of him and caused the collision. Plaintiff alleges that once he saw defendant's vehicle making the left turn, he immediately stepped on his brakes, honked, and steered to the right, but was unable to prevent the collision.

At her deposition, defendant Elizabeth Kolsky testified that she was traveling North on Long Ridge Road with the intention of making a left on Shad Road West, which was in the direction of her home. Mrs. Kolsky testified that she put on her left turn indicator. She

also testified that there were other vehicles going straight in front of her which blocked her visibility as far as seeing vehicles that were coming south on Long Ridge Road. Mrs. Kolsky further attested that as she approached the intersection, she slowed down, but did not stop, made the left hand turn, and then she was involved in the accident (Elizabeth Kolsky EBT 45:16-46:1, 48:17-49:17). She further stated that she did not see plaintiff's vehicle at any time before the impact.

Plaintiff contends that defendant violated Vehicle and Traffic Law § 1141 when she made a left turn directly into his path and that defendant was negligent in failing to see that which, under the circumstances, she should have seen and in crossing in front of plaintiff's oncoming vehicle when it was hazardous to do so. *See Almonte v. Tobias*, 36 AD3d 636 (2d Dep't 2007). Vehicle and Traffic Law § 1141 states:

> Vehicle turning left. The driver 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.

Plaintiff further contends that since defendant admitted that she never saw plaintiff's vehicle prior to making the left turn across Long Ridge Road, she was negligent as a matter of law in failing to see that which she should have seen through the proper use of her senses. *See Gabler v. Marly Building Supply Corp.*, 27 AD3d 519 (2d Dep't 2006). Additionally, as plaintiff had the right of way, plaintiff argues he was entitled to anticipate that defendant would obey the traffic laws which required her to yield to plaintiff's vehicle. *See Spivak v. Erickson*, 40 AD3d 962 (2d Dep't 2007); *Almonte*, 36 AD3d at 636.

Moreover, plaintiff argues that there was no comparative negligence by plaintiff and only defendant's actions caused the accident.

Defendant contends that the motion should be denied because there are issues of fact as to whether defendant was negligent in failing to see that which, under the circumstances, she should have seen, and in crossing in front of plaintiff's vehicle when it was hazardous to do so. Defendant contends that, due to the topography of the location of the accident and the cars traveling in front of her, defendant was unable to see plaintiff. Defendant also contends there is a question as to whether plaintiff's speed contributed to the happening of the event.

Plaintiff has met his *prima facie* burden of establishing entitlement to judgment as a matter of law by demonstrating that defendant-driver violated Vehicle and Traffic Law § 1141. It is undisputed by defendant that plaintiff was in the intersection of Long Ridge Road and Shad Road West when the accident occurred. Mrs. Kolsky indicated that she did not see plaintiff as a result of the vehicles in her lane going straight, but yet she made a left turn without stopping. As the party who was making the left hand turn, defendant was required to see "that which under the facts and circumstances he should have seen by the proper use of his senses" and to refrain from turning if it would be a hazard to do so. *Hernandez v. Joseph*, 143 AD2d 632 (2d Dep't 1988).

The evidence demonstrates that defendant was negligent when she failed to stop and allow the vehicles in front of her to get out of her line of vision so that she could see if any vehicles were coming in the opposite direction. Instead, she made the left hand turn

without stopping directly into plaintiff's path, while he had the right of way, when it was hazardous to do so. *See Spivak*, 40 AD3d at 962; *Almonte*, 36 AD3d at 636; *Maloney v. Niewender*, 27 AD3d 426 (2d Dep't 2006); *see also Burns v. Mastroianni*, 173 AD2d 754 (2d Dep't 1991); *Hernandez*, 143 AD2d at 632. As plaintiff had the right of way, he was entitled to assume that defendant would obey the traffic laws and not make a left hand turn if it was hazardous to do so. *See Almonte*, 36 AD3d at 636; *Russo v. Scibetti*, 298 AD2d 514 (2d Dep't 2002). "Although a driver with a right-of-way also has a duty to use reasonable care to avoid a collision, a driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision." *Ducie v. Ippolito*, 95 AD3d 1067, 1067–68 (2d Dep't 2012), *quoting Yelder v. Walters*, 64 AD3d 762, 764 (2d Dep't 2009).

The burden now shifts to defendant to demonstrate admissible evidence that material issues of fact exist. However, she has failed to offer sufficient admissible evidence to demonstrate issues of fact exist as to plaintiff's comparative negligence. *See Spivak*, 40 AD3d at 963; *Gabler*, 27 AD3d at 520; *Moreback v. Mesquita*, 17 AD3d 420 (2d Dep't 2005). Although defendant argues that, since it was hard to see around the curve and due to the vehicles traveling ahead of her she could not be required to wait an indefinite time, she acknowledged at her deposition that, even though she could not see past the vehicles in front of her, she did not stop at all but merely made the left at a "turning speed". Further, as defendant stated that she did not see plaintiff, her deposition is inadequate evidence that plaintiff's vehicle was not so close to intersection to constitute

an immediate hazard.

As to defendant's contention that there is a question of fact as to whether plaintiff's speed contributed to the happening of the event, that contention is purely speculative, as there is no admissible evidence of plaintiff's speed that was submitted to raise this issue and defendant indicated that she did not even see plaintiff. *See Ducie*, 95 AD3d at 1068.

Accordingly, it is

ORDERED that plaintiff's motion for partial summary judgment on the issue of liability is granted and an assessment of damages is ordered; and it is further

ORDERED that counsel are directed to appear for a settlement conference on October 6, 2014 at 9:15 A.M. in the Settlement Conference Part of the Westchester County Supreme Court, Room 1600, 111 Dr. Martin Luther King, Jr. Blvd., White Plains, New York.

This is the Decision and Order of the Court.

Dated: August 29, 2014
White Plains, New York

Hon. Robert DiBella, JSC

To: Ronemus & Vilensky
Via e-filing

Boeggeman, George & Corde, PC
Via e-filing