2

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

VINCENT MESSINA, Plaintiff, - against - PUBLIC ADMINISTRATOR OF SUFFOLK COUNTY, AS ADMINISTRATOR OF THE ESTATE O F KEVIN T. FOGARTY, Defendants.	TRIAL / IAS PART 32 NASSAU COUNTY Index No. 3326/05 Motion Sequence No. 001

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits 1
Answering Affidavits . . . . . _____
Replying Affidavits . . . . . _____
Briefs: Plaintiff's / Petitioner's . . . . . _____
Defendant's / Respondent's . . . . . _____

The plaintiff moves, without opposition, for an order pursuant to CPLR 3212 granting summary judgment to the plaintiff on the issue of liability. The underlying personal injury action arises from a motor vehicle accident on October 11, 2000, while the plaintiff was traveling north on Middle Country Road at or near the intersection with Springmeadow Drive, in Holbrook, Suffolk County, New York.

The attorney for the plaintiff states, in a supporting affirmation dated July 27, 2007, there are no triable issues of fact about liability because the plaintiff's stopped car was struck in the rear by the defendant's moving vehicle. The attorney for the plaintiff

points to a copy of the police report for the date of the occurrence, and an examination before trial of the plaintiff on January 18, 2007. The attorney for the plaintiff notes the defendant was not produced for an examination before trial because of his death. The attorney for the plaintiff points out the plaintiff testified his vehicle was struck in the rear by the defendant's vehicle, and the defendant apologized to the plaintiff stating he was up all night and was asleep at the wheel.

Under CPLR 3212(b), a motion for summary judgment "shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." "The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (***Alvarez v. Prospect Hosp.***, 68 N.Y.2d 320, 325; ***Andre v. Pomeroy***, 35 N.Y.2d 361). Summary judgment is the procedural equivalent of a trial (***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, 146 A.D. 2d 572). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (***see, Whelen v. G.T.E. Sylvania Inc.***, 182 A.D. 2d 446). The court's role is issue finding rather than issue determination (***see, e.g., Sillman v. Twentieth Century-Fox Film Corp.***, 3 N.Y.2d 395; ***Gervasio v. Di Napoli***, 134 A.D.2d 235, 236; ***Assing v. United Rubber***

Supply Co., 126 A.D.2d 590). Nevertheless, "the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated" (***Gervasio v. Di Napoli, supra***, 134 A.D.2d at 236, quoting from ***Assing v. United Rubber Supply Co., supra***; ***see, Columbus Trust Co. v. Campolo***, 110 A.D.2d 616, ***aff'd*** 66 N.Y.2d 701). If the issue claimed to exist is not genuine, and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (***see, Andre v. Pomeroy***, 35 N.Y.2d at 364; ***Assing v. United Rubber Supply Co., supra***).

"A rear-end collision with a stationary vehicle creates a prima facie case of negligence, unless the defendant can proffer a non-negligent explanation for his or her failure to maintain a safe distance between the cars. In this case, plaintiff made such a prima facie showing of entitlement to summary judgment as a matter of law, and in opposition the defendant submitted nothing to raise a triable issue of fact. [citations omitted]" (***Jean v. Zong Hai Xu***, 288 A.D.2d 62). Drivers must maintain safe distances between their cars and cars in front of them (Vehicle and Traffic Law § 1129 [a]) and this rule imposes on them a duty to be aware of traffic conditions, including vehicle stoppages. As we have phrased it, drivers have a "duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident." By now it is well established that a rear-end collision with a stopped vehicle establishes a prima facie case of negligence on the part of the operator of the second vehicle...When such a rear-end collision occurs, the injured occupants of the front vehicle are entitled to summary

judgment on liability, unless the driver of the following vehicle can provide a non-negligent explanation, in evidentiary form, for the collision [citations omitted] (***Johnson v. Phillips***, 261 A.D.2d 269, 271

"The balance of knowledge of the accident is clearly on the side of the defendant operator and the responsibility of going forward with the burden of explanation as to the cause of the accident should be placed on the defendants [citation omitted]" (***Carter v. Castle Elec. Contracting Co.***, 26 AD2d 83, 85). It is well established that when the driver of an automobile approaches another automobile from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle...A rear-end collision with a stopped 'or stopping' vehicle creates a prima facie case of liability with respect to the operator of the rearmost vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision (***Chepel v. Meyers***, 306 AD2d 235, 236-237)

If the operator cannot come forward with any evidence to rebut the inference of negligence, the plaintiff may properly be awarded judgment as a matter of law (***see Doodnauth v. Catholic Medical Center of Brooklyn and Queens, Inc.***, 297 AD2d 781) Here, the defendant has not come forth with a defense of circumstances which could have contributed to the happening of the accident, raising a triable issue of fact for a jury or trier of fact to decide. It is undisputed the defense vehicle here without any accounting by

the defendant operator struck the rear of the plaintiff's vehicle. As a matter of law, the defendant has not supplied an explanation for the cause of the accident, nor raised a triable issue of fact sufficient to defeat the motion leaving any opposition by the defendant fatally deficient (***see Briceno v. Milbry***, 16 AD3d 448, 448-449).

It is ORDERED that partial summary judgment is granted to the plaintiff against the defendant on the issue of liability. A trial is required on the issue of damages.

A copy of this order shall be served and accompany the note of issue when filed to add this matter to the Calendar Control Part calendar of this court for trial. Entry of judgment is stayed pending a determination of damages. A copy of this order with notice of entry shall be served upon all the parties within 20 days of the date of this order.

So ordered.

Dated: **October 4, 2007**

ENTER:

J. S. C.

HON. ANTONIO I. BRANDVEEN

FINAL DISPOSITION NON FINAL DISPOSITION XXX

ENTERED

OCT 09 2007

NASSAU COUNTY CLERK'S OFFICE