SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x **TRIAL TERM PART 50**

JEAN MARIE SUCCES,

INDEX NO.: 015044/05

Plaintiffs,

MOTION DATE:10-31-07
SUBMIT DATE: 11-16-07
SEQ. NUMBER - 002 & 003

-against-

ANDREW PHILLIPS and VINCENT SAKAL,

Defendants.

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The following papers have been read on this motion:

Notice of Motion, dated 10-9-07.....1
Memorandum of Law, Pltf. (not separately bound), dated 10-9-07.....2
Notice of Cross Motion (Def. Sakal), dated 10-16-07.....3
Affirmation of in Opposition (Def. Phillips), dated 11-9-07....4
Reply Affirmation (Pltf.), dated 10-29-07.....5
Reply Affirmation (Def. Sakal), dated 11-13-07.....6

This motion by the plaintiff, in effect, for partial summary judgment pursuant to CPLR 3212 on the issue of liability/fault against the defendants is granted with respect to defendant Andrew Phillips, and is otherwise denied; the cross motion by defendant Vincent Sakal for summary judgment dismissing the complaint as to him, and, in effect for sanctions in the forms of costs and attorneys' fees against the plaintiff is granted to the extent that summary judgment is granted to this defendant and the complaint and all cross claims asserted against him are dismissed, and is otherwise denied. The case will proceed to trial

on the issues of the plaintiff's injuries and damages, against defendant Andrew Phillips.

In this motor vehicle accident case the facts necessary for disposition of this motion are undisputed. On June 13, 2005 at approximately 7 a.m. the plaintiff was driving a school "minivan" bus east in the right of two eastbound lanes on Jericho Turnpike, in Woodbury, New York. [1] The roads were dry, the weather was clear, and the roadway was straight and level. On the other side of the roadway, driving westbound in the left lane, were defendants Vincent Sakal and Andrew Phillips. Phillips was behind Sakal. At some point immediately before the accident, traffic ahead of Sakal caused him to slow and stop, and he did not come into contact with the vehicle in front of him. Phillips too noted the slowing traffic; he testified that he saw a tractor trailer making a left turn into a construction area about two to four car lengths ahead of him. He also stated that he saw Sakal's brake lights go on, but was unable to stop in time.

As Phillips attempted to stop and swerve around Sakal to the right, the front left of his vehicle came into contact with the right rear of the Sakal vehicle. As a result of this collision, the Sakal vehicle crossed over into the opposing lanes of traffic. Sakal testified that his foot had come off the brake from the impact and he was thrown about the inside of the vehicle, which rolled across the two lanes of oncoming traffic, where he was hit by the plaintiff's school minivan school bus. The plaintiff testified that he first saw the Sakal vehicle when it was already halfway across the yellow lines dividing east and westbound traffic, and that the collision between his vehicle and the Sakal vehicle occurred "a third of a second" later.

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[1] Plaintiff testified to having four other persons in the bus, three school children and an adult assistant, but their status is irrelevant to the matter at hand.

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957); *Bhatti v. Roche*, 140 AD2d 660 (2d Dept. 1988). It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v. Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82 AD2d 168 (3d Dept. 1981).

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines,* 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v. Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof

in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993). Nor can mere speculation serve to defeat the motion. *Pluhar v Town of Southampton,* 29 AD3d 975 (2d Dept. 2006); *Ciccone v Bedford Cent. School Dist.,* 21 AD3d 437 (2d Dept. 2005).

Applying these well-established principles to the present case, the Court finds that the plaintiff has made a *prima facie* showing of entitlement to judgment as a matter of law as against defendant Phillips, but has failed to do so as against defendant Sakal. His proof, in the form of an affidavit and deposition transcripts annexed to his attorney's affirmation, demonstrates that through no fault of his own the Sakal vehicle suddenly appeared in his lane of travel after crossing from the other side of the road, causing the collision. A motorist confronted with a sudden and unanticipated situation, such as a car appearing in front of him as a result of a roadway cross-over, is held not to be responsible for the ensuing collision under the emergency doctrine, which provides that in such in such unforeseeable circumstances any reasonable response is sufficient to exonerate such motorist. *See Roviello v Schoolman Transp. Sys., Inc.,* 10 AD3d 356 (2d Dept. 2004); *Lyons v Rumpler,* 254 AD2d 261 (2d Dept. 1998); *Rivas v Metropolitan Suburban Bus Auth.,* 203 AD2d 349 (2d Dept. 1994); *Glick v City of New York,* 191 AD2d 677 (2d Dept. 1993). Here, the proof was that there was simply no time for the plaintiff to react and avoid the accident. Accordingly, the fault lies elsewhere.

However, the evidence submitted also demonstrates that in this case Sakal himself was not responsible for crossing over to the opposing lanes of traffic, in that he had been stopped in traffic and was struck from behind by the Phillips vehicle, and thereby propelled

into the path of the plaintiff's minivan. [2] The law is clear that under such circumstances the driver of the vehicle hit from behind bears no responsibility for the ensuing collision, even though he was the party who crossed over the divide into the opposing lanes. *Stretch v Tedesco,* 263 AD2d 538 (2d Dept. 1999); *Fischella v Gibbs,* 261 AD2d 572 (2d Dept. 1999); *Murphy v Spickler,* 224 AD2d 814 (3d Dept. 1996); *Ross v Szoke,* 196 Misc 2d 588 (App Term, 2d Dept. 2003). It is only where there is some evidence that the driver might have been in some way responsible for the initial, rear-end collision that an issue of fact regarding his fault may be found. *See, Foster v Sanchez,* 17 AD3d 312 (2d Dept. 2005). However, in this case the plaintiff has not presented any such evidence. Accordingly, the motion must be denied as to this defendant, without regard to the strength of the opposing papers. It would have been denied in any event based upon the submission by Sakal in his cross motion, decided below.

With regard to Phillips, the Court reaches a different conclusion. The act of striking the stopped Sakal vehicle from the rear constitutes negligence as a matter of law absent a non-negligent explanation for such conduct. *See, e.g., Gross v Marc,* 2 AD3d 681 (2d Dept. 2003); *Leal v Wolff,* 224 AD2d 392 (2d Dept. 1996); *Gambino v City of New York,* 205 AD2d 583 (2d Dept. 1994); *see also,* Vehicle and Traffic Law § 1129(a). Further, the testimony of Sakal is sufficient to provide the nexus between this act and the collision between Sakal and the plaintiff. Accordingly, the burden shifts to Phillips to demonstrate

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[2] Although the plaintiff for some unknown reason has not annexed the Phillips deposition transcript to the moving papers, the testimony found in the Succes and Sakal transcripts, and the undisputed fact that Phillips was behind Sakal and struck his vehicle from the rear, is sufficient to make out a *prima facie* case given the law cited in this decision.

that issues of fact exist meriting a trial.

This has not been accomplished. The only opposition comes from Phillips' counsel, who submits that Sakal was attempting an illegal left turn and that his wheels must have been turned to the left to avoid a collision himself with the vehicle in front of him; that Phillips testified that Sakal came to a sudden stop; and that the plaintiff could have taken evasive action to avoid the collision with Sakal. With the exception of the Phillips testimony, counsel's arguments amount to no more than speculation, without evidentiary foundation, and are insufficient to defeat the motion. [3] Nor is the "sudden stop" sufficient, as this is no defense where it occurs, as here, in slowing/heavy traffic. *See, Espinoza v Diaz,* 280 AD2d 639 (2d Dept. 2001); *Bando-Twomey v Richheimer,* 229 AD2d 554 (2d Dept. 1996).

The cross motion by Sakal is granted. Based upon the proof submitted, he has made out a *prima facie* case that he was struck from behind while stopped. Because he has demonstrated that he was free from fault in the happening of this initial impact, and was thereby pushed into the opposing lane of travel, he is entitled to judgment as a matter of law. *Stretch v Tedesco, supra*; *Fischella v Gibbs, supra*; *Murphy v Spickler, supra*; *Ross v Szoke, supra.* In opposition, neither the co-defendant nor the plaintiff has provided any opposing proof that would place the absence of fault in issue.

Finally, that branch of the cross motion that seeks sanctions is considered under 22 NYCRR § 130-1.1, and is denied. The Court does not find that the plaintiff's motion as directed to Sakal was frivolous as that term is defined in the Uniform Rules.

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[3] It should be noted that even if the wheels had been turned, the result would not be different, as this is not a negligent act. *See, Stretch v Tedesco, supra.*

The Court notes that this ruling in favor of the plaintiff does not relieve him from proving the presence of a "serious injury" as that term is defined by the Insurance Law before an assessment of damages may be made, as this issue is not addressed in the present applications. *See, Sheehan v Marshall,* 9 AD3d 403 (2d Dept. 2004); *Zecca v Riccardelli,* 293 AD2d 31 (2d Dept. 2002).

This shall constitute the Decision and Order of this Court.

ENTER

DATED: November 29, 2007

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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