SHORT FORM ORDER

INDEX NO.: 00867/2007
SUBMIT DATE: 4/1/2009
MTN. SEQ.#: 002

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 SUFFOLK COUNTY

Present:

HON. JOHN J.J. JONES, JR.
Justice

MOTION DATE: 3/3/2009
MOTION NO.: MG

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MARYANN MATTESICH and NICHOLAS MATTESICH,

Plaintiffs,

-against-

MILES A. MOORE,

Defendant.

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ACTION 1

Index No.: 0016979/2006

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ELECTRIC INSURANCE COMPANY s/h/o NICHOLAS MATTESICH,

Plaintiff,

-against-

A. MILES MOORE,

Defendant.

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ACTION 2

Index No.: 00867/2007

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ALLSTATE INSURANCE COMPANY a/s/o CHERYL ASHDOWN, :

Plaintiff, :

-against- :

MILES MOORE and NICHOLAS MATTESICH, :

Defendants. :

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ACTION 3

Index No.: 0041430/2008

Upon the following papers numbered 1 to 30 read on this application for partial summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1-15 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 16-25;26-27 ; Replying Affidavits and supporting papers 28-30 ; Other ____; it is

ORDERED that this motion by plaintiff, Electric Insurance Company, as subrogee of Nicholas Mattessich, for an order granting partial summary judgment in its favor against defendant, A. Miles Moore, is granted; and it is further

ORDERED that upon filing of a Note of Issue and payment of the appropriate fee, this action shall proceed to inquest.

Plaintiff insurer commenced this action in subrogation to recover damages for payments made to its subrogor, Nicholas Mattessich, for property damage sustained to his motor vehicle as the result of an accident which occurred on January 25, 2006. By order of this Court dated September 21, 2007, this action was joined for trial with a personal injury action that was commenced by Mary Ann Mattessich, the operator of the Mattessich vehicle, as well as with another subrogation action commenced by the insurer of another vehicle involved in the accident that was owned and operated by Cheryl Ashdown. A. Miles Moore, also known as Miles A. Moore and Miles Moore, named as a defendant in all three actions, owned and operated a third vehicle that was allegedly involved in the accident. Plaintiff (who is incorrectly identified in the notice of motion as "defendant Nicholas Mattessich") now moves for an order granting partial summary judgment in its favor on the issue of liability against defendant Moore.

In support of the motion, movant submitted the transcript of the deposition testimony of a non-party, Cheryl Ashdown, who is the plaintiff subrogor in a related action. Ashdown

testified at her deposition that on January 25, 2006 at "a little before 4:30" pm she was driving east on the Long Island Expressway in the left lane in her 2002 Trail Blazer. Traffic was slowing down, and Ashdown was traveling at about 45 mph when she glanced into her rear-view mirror and "saw a big black truck coming really fast" which was "in between the left lane and the center lane riding on the white line. . ." It was also her testimony that the front of the truck hit the back corner of the passenger side of her vehicle "hard." In addition she testified that she "got hit and then spun and then hit again" in a matter of seconds, that she did not see what the second contact was with, "but when everything had stopped, there was just that black truck sitting alongside mine" in the HOV lane. The black truck was driven by a male. She did not see another vehicle involved in the accident, but she did observe a third vehicle in the grass past the right lane.

Defendant A. Miles Moore testified at his deposition that on the day of the accident he was driving a 2003 Cadillac Escalade in the left lane of the Expressway. While he was given information indicating that his vehicle came into contact with two other vehicles, he recalled only one contact. He admitted, however, that he was involved in a motor vehicle accident with a vehicle driven by Mary Ann Mattessich. He could not recall his approximate rate of speed or whether he applied his brakes when the accident occurred, and it was his testimony that he could not recall the last 30 seconds prior to contact. Moore also testified that after the accident his vehicle came to rest in the HOV lane to the left, next to a third vehicle. The day following the accident, Moore inspected his vehicle and saw damage to the right front passenger's side.

Mary Ann Mattessich testified that she left work on the day of the accident and was driving a Trail Blazer. While she recalled driving in the left lane of the Expressway, she could not remember the accident. A sworn statement taken by the police from a non-party, Mike Arzano Jr., explained, "Black Escalade . . .driving east bound on 495 hit into a light metalic [sic] tan SUV that was slowed for traffic. Driver of Escalade never hit his brakes."

A rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of liability with respect to the operator of the moving vehicle and imposes a duty on that operator to rebut the inference of negligence to provide a non-negligent explanation for the collision (***Katz v Masada II Car & Limo Serv., Inc.***, 43 AD3d 876, 841 NYS2d [2d Dept 2007], citing ***Rainford v Sung S. Han***, 18 AD3d 638, 639, 795 NYS2d 645). Moreover, it is well-settled that 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, to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident (***see Johnson v Phillips***, 261 AD2d 269, 271, 690 NYS2d 545 [1st Dept 1999]). The evidence before this Court establishes plaintiff's claims sufficiently to warrant a court's directing judgment in its favor as a matter of law and defendant has failed to produce evidentiary proof in admissible form sufficient to require a trial of material

questions of fact, as defendant's speculative assertions are insufficient to defeat summary judgment (*see* ***Gilbert Frank Corp. v Federal Insurance Co.***, 70 NY2d 966, 525 NYS2d 793, 520 NE2d 512 [1988], citing ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595, 404 NE2d 718 [1980]; ***Friends of Animals v. Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790, 390 NE2d 298 [1979]). Accordingly, summary judgment in favor of plaintiff on the issue of liability is warranted.

DATED: 12 June 2009

HON. JOHN J.J. JONES, JR.
J.S.C.

CHECK ONE: [ ] FINAL DISPOSITION **[X] NON-FINAL DISPOSITION**

TO:

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