SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

FRANCINE G. BENIGNO and CHARLES F. CORRADO,

Plaintiffs,

- against -

KARIN E. ERHART,

Defendant.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 3447/11
Motion Seq. No.: 01
Motion Dates: 06/17/11

The following papers have been read on this motion:

	Papers Numbered
Amended Notice of Motion, Affirmation, Affidavit and Exhibits	1
Affirmation in Opposition and Exhibit	2
Reply Affirmation	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiffs move, pursuant to CPLR § 3212, for an order granting partial summary judgment against the defendant on the issue of liability upon the ground that there are no triable issues of fact and directing an immediate inquest on damages. Defendant opposes the motion.

This action arises from a motor vehicle accident which occurred on September 20, 2010, at approximately 4:20 p.m., on Hicksville Road at or near its intersection with Manchester Road, Bethpage, New York. The accident involved two vehicles, a 2001 Chrysler owned and operated by plaintiff Francine G. Benigno ("Benigno"), in which plaintiff Charles F. Corrado ("Corrado") was a front seat passenger, and a 2005 Hyundai owned and operated by defendant.

Plaintiffs commenced the action by the filing and service of a Summons and Verified Complaint on or about March 7, 2011. Issue was joined on or about April 4, 2011.

Briefly, it is plaintiffs' contention that the accident occurred when plaintiffs' vehicle was stopped at the aforementioned intersection, where she was waiting for traffic to clear so she could make a left turn onto Manchester Road. Plaintiffs assert that plaintiff Benigno applied her left turn signal at this time. While plaintiffs' vehicle was stopped awaiting to make the left turn, defendant, without warning, crashed into the rear of plaintiffs' vehicle. Plaintiffs submit that, following the collision, defendant apologized to them for her inattention and said that the accident was her fault. Plaintiffs submitted the affidavit of plaintiff Corrado in support of their motion. *See* Plaintiffs' Affirmation in Support Exhibit C.

Plaintiffs claim that defendant was the negligent party in that she failed to maintain a safe distance behind plaintiffs' vehicle, as well as failed her duty to exercise reasonable care under the circumstances to avoid an accident. Plaintiffs additionally claim that defendant cannot come up with a non-negligent explanation for striking their vehicle in the rear.

Defendant argues that plaintiffs' summary judgment motion should be denied as premature because the Examinations Before Trial have not yet been conducted. In opposition to plaintiffs' motion, defendant submits her own affidavit which states, " [a]s I was proceeding on Hicksville Road, the plaintiff Francine G. Benigno suddenly and without warning brought her vehicle to an abrupt stop in front of my vehicle. Plaintiff Francine G. Benigno did not put on a turn signal prior to the accident occurring."

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient

evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.,* 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra.* When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra.* Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.,* 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the Court in 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. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989). It is the existence of an issue, not its relative strength that is the critical and controlling consideration. *See Barrett v. Jacobs*, 255 N.Y. 520 (1931); *Cross v. Cross*, 112 A.D.2d 62, 491 N.Y.S.2d 353 (1st Dept. 1985). The evidence should be construed in a light most favorable to the party moved against. *See Weiss v. Garfield*, 21 A.D.2d 156, 249 N.Y.S.2d 458 (3d Dept. 1964).

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 pursuant to New York State Vehicle and Traffic Law ("VTL") § 1129(a). *See Krakowska v. Niksa*, 298 A.D.2d 561, 749 N.Y.S.2d 55 (2d Dept. 2002); *Bucceri v. Frazer*, 297 A.D.2d 304, 746 N.Y.S.2d 185 (2d Dept. 2002).

A rear end collision with a stopped vehicle establishes a *prima facie* case of negligence on the part of the operator of the offending vehicle. *See Tutrani v. County of Suffolk*, 10 N.Y.3d 906, 861 N.Y.S.2d 610 (2008). Such a collision imposes a duty of explanation on the operator. *See Hughes v. Cai*, 55 A.D.3d 675, 866 N.Y.S.2d 253 (2d Dept. 2008); *Gregson v. Terry*, 35 A.D.3d 358, 827 N.Y.S.2d 181 (2d Dept. 2006); *Belitsis v. Airborne Express Freight Corp.*, 306 A.D.2d 507, 761 N.Y.S.2d 329 (2d Dept. 2003).

Of course, in a rear-end collision, the frontmost driver has the duty not to stop suddenly or slow down without proper signaling, pursuant to VTL § 1163, so as to avoid a collision. *See Gaeta v. Carter*, 6 A.D.2d 576, 775 N.Y.S.2d 86 (2d Dept. 2004); *Purcell v. Axelsen*, 286 A.D.2d 379, 729 N.Y.S.2d 495 (2d Dept. 2001).

As noted, 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 the operator to rebut the inference of negligence by providing a non-negligent explanation for the collision. *See Francisco v. Schoepfer*, 30 A.D.3d 275, 817 N.Y.S.2d 52 (1st Dept. 2006); *McGregor v. Manzo*, 295 A.D.2d 487, 744 N.Y.S.2d 467 (2d Dept. 2002).

Vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since the following driver is under a duty to maintain a safe distance between his or her car and the car ahead. *See Shamah v. Richmond County Ambulance Service, Inc.*, 279 A.D.2d 564, 719 N.Y.S.2d 287 (2d Dept. 2001).

Drivers must maintain safe distances between their cars and the cars in front of them and this rule imposes on them a duty to be aware of traffic conditions including stopped vehicles. *See* VTL § 1129(a); *Johnson v. Phillips*, 261 A.D.2d 269, 690 N.Y.S.2d 545 (1st Dept. 1999).

Drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident. *See Filippazzo v. Santiago*, 277 A.D.2d 419, 716 N.Y.S.2d 710 (2d Dept. 2000).

In the context of a rear end collision, a claim that the driver of the lead vehicle made a sudden stop, stranding alone, is insufficient to rebut the presumption of negligence. *See Campbell v. City of Yonkers*, 37 A.D.3d 750, 833 N.Y.S.2d 101 (2d Dept. 2007); *Ayach v. Ghazal*, 25 A.D.3d 742, 808 N.Y.S.2d 759 (2d Dept. 2006); *Rainford v. Han*, 18 A.D.3d 638, 795 N.Y.S.2d 645 (2d Dept. 2005).

One of the several non-negligent explanations for a rear-end collision is a sudden stop of the lead vehicle. *See Chepel v. Meyers*, 306 A.D.2d 235, 762 N.Y.S.2d 95 (2d Dept. 2003).

As noted, conclusory assertions that the driver of the lead vehicle made a sudden

unexpected stop is, without more, insufficient to rebut the presumption of negligence. *See Vecchio v. Hildebrand*, 304 A.D.2d 749, 758 N.Y.S.2d 666 (2d Dept. 2003); *McGregor v. Manzo, supra; Dileo v. Greenstein*, 281 A.D.2d 586, 722 N.Y.S.2d (2d Dept. 2001); *Shamah v Richmond County Ambulance Services, Inc., supra.*

The Appellate Division, Second Department, has held that the explanation that the stopped vehicle came to a sudden stop, standing alone, is insufficient to rebut the inference of negligence. S*ee Geschwind v Hoffman*, 285 A.D.2d 448, 727 N.Y.S.2d 155 (2d Dept. 2001). Thus, a sudden stop coupled with other evidence, such as a failure to comply with the VTL with respect to proper signaling (*see Purcell v. Axelsen, supra*), or stopping in high speed traffic (*see Mundo v. City of Yonkers*, 249 A.D.2d 522, 672 N.Y.S.2d 128 (2d Dept. 1998) or in response to an emergency created by a non-party (*see Kienzle v. McLoughlin*, 202 A.D.2d 299, 610 N.Y.S.2d 771 (1st Dept. 1994)) can all constitute a non-negligent explanation for the rear-end collision.

Plaintiffs, in their motion, have demonstrated *prima facie* entitlement to summary judgment on the issue of liability against defendant. Therefore, the burden shifts to defendant to demonstrate an issue of fact which precludes summary judgment. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

After applying the law to the facts in this case, the Court finds that the defendant has meet her burden and demonstrated an issue of fact which precludes summary judgment. Defendant contends that plaintiffs' vehicle failed to signal when it stopped to make the left turn. As stated above, a sudden stop coupled with other evidence, such as a failure to comply with the VTL with respect to proper signaling (*see Purcell v. Axelsen, supra*) can constitute a non-negligent explanation for the rear-end collision. *See Morrison v. Montzoutsos*, 40 A.D.3d 717,

835 N.Y.S.2d 713 (2d Dept. 2007); *Quezada v. Aquino*, 38 A.D.3d 873, 833 N.Y.S.2d 169 (2d Dept. 2007).

Therefore, based upon the foregoing, plaintiffs' motion, pursuant to CPLR § 3212, for an order granting partial summary judgment against the defendant on the issue of liability upon the ground that there are no triable issues of fact and directing an immediate inquest on damages is hereby **DENIED**.

It is hereby ordered that the parties shall appear for a Compliance Conference on November 15, 2011, at 9:30 a.m., at IAS Part 32 of the Nassau County Supreme Court,100 Supreme Court Drive, Mineola, New York.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
August 26, 2011

ENTERED
AUG 30 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE