SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

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

AMOS HALFOM,

Plaintiff,

- against -

JOSEF SHALEM, FILIPPO RAGUSA and SALVATORE RUPPA,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 26316/09
Motion Seq. Nos.: 03, 04
Motion Dates: 09/14/11
10/14/11

Action No. 1

JOSEF SHALEM and CHOHAVA SHALEM,

Plaintiffs,

- against -

FILIPPO RAGUSA, SALVATORE C. RAPPA and JOSEPH J. POLIZZI,

Defendants.

Index No.: 21021/09

Action No. 02

The following papers have been read on the motions:

	Papers Numbered
Notice of Motion (Seq. No. 03), Affirmation and Exhibits	1
Notice of Motion (Seq. No. 04), Affirmation and Exhibits and Memorandum of Law	2
Affirmation in Opposition to Motion Seq. No. 03	3
Affirmation in Opposition to Motion Seq. No. 04	4
Reply Affirmation	5
"Response"Affirmation	6
Reply Affirmation	7

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

In Action No.1, defendant Josef Shalem ("Shalem") moves (Seq. No. 03), pursuant to CPLR § 3212, for an order granting summary judgment in his favor and dismissing plaintiff's Verified Complaint and any and all cross-claims asserted therein. Also in Action No. 01, defendant Filippo Ragusa ("Ragusa") moves (Seq. No. 04), pursuant to CPLR § 3212, for an order granting summary judgment in his favor and dismissing plaintiff's Verified Complaint on the basis that he did not breach any duty owed to plaintiff because his vehicle was stopped when it was rear-ended. Defendant Salvatore Rappa s/h/a Salvatore Ruppa ("Rappa") opposes both defendant Shalem's and defendant Ragusa's motions. Plaintiff did not submit any opposition to either motion.

Action No. 01 arises from a multi-vehicle, chain reaction, rear-end accident which occurred on October 31, 2006, at approximately 5:20 p.m., near westbound Exit 13 on the Belt Parkway in Staten Island, New York. The accident involved four vehicles - an automobile owned and operated by defendant Shalem in which plaintiff was a passenger, an automobile owned and operated by defendant Ragusa, an automobile owned and operated by defendant Rappa and a vehicle owned and operated by Action No. 02 defendant Joseph J. Polizzi. Plaintiff commenced the action by the filing and service of a Summons and Verified Complaint on or about May 12, 2009. Defendant Shalem served his Verified Answer with Cross-Claims on or about June 26, 2009. Defendant Ragusa served his Verified Answer with Cross-Claim on or about June 23, 2009. Defendant Rappa served his Verified Answer and Cross-Claim on or about July 27, 2009.

Defendant Shalem submits (Motion Seq. No. 03) that, according to the Examination

Before Trial ("EBT") testimony of plaintiff, who was a passenger in defendant Shalem's automobile at the time of the subject accident, there were two impacts involving defendant Shalem's automobile - the first to the back and the second to the front. At the time of the first impact, defendant Shalem's vehicle was stopped. Additionally, plaintiff denied that defendant Shalem's vehicle struck any of the other vehicles before it was hit in the rear. At defendant Shalem's own EBT, he testified that, at the time of the accident, he and plaintiff were traveling westbound on the Belt Parkway and that he was in the left hand lane of three lanes of traffic when he brought his vehicle to a stop because of traffic in front of him. Defendant Shalem claims that his vehicle was stopped for approximately thirty seconds before being struck and, at that time, he heard the sounds of impacts involving other vehicles. Defendant Shalem stated that, after the initial impact to the rear of his car, he was pushed forward and struck the car in front of him.

Defendant Shalem also submits that, according to the EBT testimony of defendant Ragusa, at the time of the accident, defendant Ragusa was also traveling westbound on the Belt Parkway. Defendant Ragusa was in the left hand lane and his vehicle was stopped because of the traffic ahead of him. Defendant Ragusa stated that his automobile was rear-ended twice by defendant Rappa's automobile. As a result of the second contact, his vehicle was pushed forward and came into contact with the vehicle being operated by defendant Shalem. Defendant Ragusa added that, before the first impact involving his car, he believes that defendant Shalem's vehicle in front of his vehicle was stopped.

Defendant Shalem further submits that, according to the EBT testimony of defendant Rappa, at the time of the accident, defendant Rappa was traveling in the left hand land of the

Belt Parkway and that just before said accident he was holding a cell phone. Defendant Rappa testified that before the accident he was texting on his cell phone and that his automobile then rear-ended a stopped vehicle in front of him. Defendant Rappa did not recall hearing any other impacts before or after his vehicle struck the vehicle in front of it in the rear. Defendant Rappa admitted to the police at the scene of the accident that his car hit the car in front of him and that he took his eyes off of the road while texting. When he looked up from texting, he saw that the car in front of him was very close and stopped.

Defendant Shalem argues that there is no evidence, in admissible form, to show that he had any liability whatsoever for the happening of the subject accident. Both he and plaintiff testified that his vehicle was stopped in traffic at the time of the accident. Defendant Ragusa also testified that he believed defendant Shalem's vehicle was stopped before his vehicle hit it after being struck twice in the rear by defendant Rappa's vehicle.

Defendant Shalem submits that it is well settled law that a rear-end collision with a stopped vehicle creates a *prima facie* case of liability with respect to the operator of the moving vehicle and imposes a duty of explanation on the operator of said moving vehicle.

In opposition to defendant Shalem's motion (Seq. No. 03), defendant Rappa argues that "[i]n the instant action, although defendant, Josef Shalem, allege (*sic*) that he is entitled to summary judgment dismissing the complaint and cross-claim, the evidence in this case clearly demonstrates that there are numerous questions of fact sufficient to defeat summary judgment. Specifically, while defendant, Josef Shalem, maintains that his conduct prior to the accident did not contribute to the occurrence of the accident, there are questions of fact as to whether she (*sic*) could have taken steps to avoid the accident. Indeed, during his deposition, defendant, Josef Shalem, testified that she (*sic*) heard the screeching of brakes a short time prior to being

struck in the rear by the Ragusa vehicle....Nevertheless, there is no indication that he took any evasive actions." Defendant Rappa contends that there are questions of fact as to whether defendant Shalem acted reasonably in failing to avoid the impact.

In reply to defendant Rappa's opposition, defendant Shalem argues that defendant Rappa's "counsel comes up with an interesting and albeit novel argument in seeking to deny summary judgment in favor of the defendant, Josef Shalem. It is argued that the said defendant, who was stopped in traffic for over thirty (30) seconds, still had an obligation to take some type of evasive action in order to avoid a rear end accident because he heard the sound of screeching brakes behind him. The counsel holds that in failing to do so he has in some way contributed to, or was the proximate cause, of this accident. It is interesting to note that she does not dispute any of the testimony of her own client in that he did admit that prior to the accident he was texting on his phone, took his eyes off the road and when he looked up he saw that the defendant's, Rappa, (*sic*) vehicle was very close and stopped before he hit that vehicle in the rear. He did not hear any impacts involving any other vehicles before or after he struck the Rappa (*sic*) vehicle....The defendant Josef Shalem had no duty to take evasive actions in an attempt to avoid an accident when he was lawfully stopped in traffic and eventually is rear ended by a vehicle who was stopped behind him who in turn had been rear ended by another vehicle."

In his summary judgment motion (Seq. No. 04), defendant Ragusa relies upon the same EBT testimony that defendant Shalem did in his summary judgment motion, said testimony having been discussed above. Defendant Ragusa argues that the EBT testimony of defendant Rappa establishes that defendant Rappa was negligent *per se* because he was texting just prior to the subject accident in violation of New York State Vehicle and Traffic Law § 1225-d.

Defendant Rappa's texting admittedly caused him to take his eyes off of the road and, as a result, he failed to observe defendant Ragusa's vehicle, as well as any other traffic, come to a stop in front of him. Defendant Ragusa contends that the EBT testimony of the parties establishes that defendant Ragusa lawfully brought his vehicle to a stop behind defendant Shalem's vehicle and was subsequently propelled into defendant Shalem's vehicle due to the negligence of defendant Rappa. Defendant Ragusa additionally argues that New York case law does not impose any liability on the driver of a middle vehicle in a multi-vehicle chain reaction collision where it is not disputed that the operator of the middle vehicle brought his or her vehicle to a lawful stop behind the lead vehicle and was subsequently propelled into the lead vehicle due to the negligence of the operator of a vehicle approaching from the rear.

In opposition to defendant Ragusa's motion (Seq. No. 04), defendant Rappa argues that "[i]n the instant action, although defendant, Filippo Ragusa, alleges that he is entitled to summary judgment dismissing the complaint and cross-claim, the evidence in this case clearly demonstrates that there are numerous questions of fact sufficient to defeat summary judgment. Specifically, there are questions of fact as to how the accident occurred. Indeed, while defendant, Filippo Ragusa, testified that there were two impacts to the rear of his car defendant Salvatore C. Rappa, indicated that his vehicle was only involved in one impact....This conflict as to how may impacts there were to the rear of Filippo Ragusa's car clearly raises a question of fact sufficient to defeat summary judgment. Moreover, while defendant, Filippo Ragusa, maintains that his conduct prior to the accident did not contribute to the occurrence of the accident, there are questions of fact as to whether he could have taken steps to avoid the accident. Indeed, during his deposition, defendant, Filippo Ragusa, testified that she (*sic*) heard the screeching of brakes a short time prior to being struck in the rear by the Rappa

vehicle....Nevertheless, there is no indication that he took any evasive actions." Defendant Rappa contends that there are questions of fact as to whether defendant Ragusa acted reasonably in failing to avoid the impact.

In reply to defendant Rappa's opposition, defendant Ragusa argues that "codefendant, Salvatore Rappa, is grasping at straws, trying to find an issue of fact with regard to the liability of the defendant, Filippos Ragusa, in a case where none exists. Rather than accepting responsibility for this accident due to his texting immediately before this accident and first realizing that traffic was stopped in front of him from a distance of only five (5) feet, the defendant, Salvatore Rappa, is pointing fingers at the driver of the vehicle that his vehicle rear-ended. The fact remains, the defendant Salvatore Rappa, has failed to provide a non-negligent explanation for striking the rear of the Ragusa vehicle. Whether the defendant, Filippos Ragusa, felt one or two rear end impacts does not affect his liability. His vehicle was stopped in traffic just before this accident happened. The defendant Salvatore Rappa's suggestion that the defendant, Filippo Ragusa, did not take any evasive measures to avoid the rear-end collision defies logic, especially since the Ragus vehicle would have had to quickly change lanes on the heavily traveled Belt Parkway."

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).

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).

Both defendant Shalem (Seq. No. 03) and defendant Ragusa (Seq. No. 04) have demonstrated *prima facie* entitlement to summary judgment. Therefore, the burden shifts to plaintiff and defendant Ruppa 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). As previously mentioned, plaintiff did not submit any opposition to the instant motions.

After applying the law to the facts in this case, the Court finds that defendant Rappa has failed to meet his burden to demonstrate an issue of fact which precludes summary judgment. Defendant Rappa failed to submit any evidence to establish a non-negligent explanation for striking defendants Ragusa's vehicle in the rear causing it to then strike defendant Shalem's vehicle in which plaintiff was a passenger. The Court finds that the undisputed facts on the record establish that defendant Rappa was negligent *per se* because he was texting just prior to the subject accident in violation of New York State Vehicle and Traffic Law § 1225-d. Defendant Rappa's texting caused him to take his eyes off of the road. Consequently, he failed to observe defendant Ragusa's vehicle come to a stop in front of his vehicle and proceeded to strike defendant Ragusa's vehicle. Furthermore, as argued by defendant Ragusa, New York case law does not impose any liability on the driver of a middle vehicle in a multi-vehicle chain reaction collision where it is not disputed that the operator of the middle vehicle brought his or her vehicle to a lawful stop behind the lead vehicle and was subsequently propelled into the lead

vehicle due to the negligence of the operator of a vehicle approaching from the rear. The Court finds that arguments set forth in defendant Rappa's opposition papers are without merit. Defendant Rappa has failed to establish that any liability exists on behalf of defendants Shalem and Ragusa.

Therefore, based upon the foregoing, defendant Shalem's motion (Seq. No. 03), pursuant to CPLR § 3212, for an order granting summary judgment in his favor and dismissing plaintiff's Verified Complaint and any and all cross-claims asserted therein is hereby **GRANTED**. Additionally, defendant Ragusa's motion (Seq. No. 04), pursuant to CPLR § 3212, for an order granting summary judgment in his favor and dismissing plaintiff's Verified Complaint on the basis that he did not breach any duty owed to plaintiff because his vehicle was stopped when it was rear-ended is hereby **GRANTED**.

The remaining parties shall appear for a Pre-Trial Conference in Nassau County Supreme Court, Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, on December 6, 2011, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:

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

Dated: Mineola, New York
November 1, 2011