SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

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

PATRICIA R. SCHRENZEL,

Plaintiff,

- against -

GENA A. SCOTTO and STEPHEN L. SCOTTO,

Defendants.

TRIAL/IAS PART 31
NASSAU COUNTY

Index No.: 12203/11
Motion Seq. No.: 01
Motion Dates: 04/23/12

The following papers have been read on this motion:

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

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

Plaintiff moves, pursuant to CPLR § 3212, for an order granting partial summary judgment against defendants on the issue of liability. Defendants oppose the motion.

This action arises from a motor vehicle accident which occurred on March 17, 2011, at approximately 1:45 p.m., in the parking lot of the Americana Shopping Center in Manhasset, New York. The accident involved two vehicles, a 2003 Honda operated by plaintiff and a 2009 Cadillac owned by defendant Stephen L. Scotto and operated by defendant Gena A. Scotto. Plaintiff commenced the action by the filing and service of a Summons and Verified Complaint on or about August 19, 2011. Issue was joined on or about September 8, 2011.

Briefly, it is plaintiff's contention that the accident occurred when plaintiff, while

operating her vehicle, was stopped at a stop sign within the aforementioned parking lot when her vehicle was struck in the rear by defendants' vehicle.

In support of her motion, plaintiff submits her own Examination Before Trial ("EBT") testimony, as well as the EBT testimony of defendant Gena A. Scotto. *See* Plaintiff's Affirmation in Support Exhibits C and D. Plaintiff states that defendant Gena A. Scotto testified that, when her vehicle struck the rear of plaintiff's vehicle, she was really not paying attention and that the only excuse defendant Gena A. Scotto offered for her vehicle striking plaintiff's vehicle was that she was probably distracted.

Plaintiff claims that defendant Gena A. Scotto was the negligent party in that she failed to maintain a safe distance behind plaintiff's vehicle, as well as failed her duty to exercise reasonable care under the circumstances to avoid an accident. Plaintiff additionally claims that defendant Gena A. Scotto cannot come up with a reasonable excuse or a non-negligent explanation for striking plaintiff's vehicle in the rear.

In opposition to plaintiff's motion, defendants argue that "plaintiff has failed to demonstrate that the purported hit in the rear was unexcused or not justified by a non-negligent explanation. The plaintiff has further failed to demonstrate that she did not contribute to the happening of the accident." Defendants claim that defendant Gena A. Scotto testified at the EBT that, after both plaintiff's vehicle and her own vehicle were stopped at the stop sign, because plaintiff's vehicle started to move, she started to move her vehicle, but then plaintiff stopped short and her vehicle rolled into plaintiff's vehicle. *See* Plaintiff's Affirmation in Support Exhibit D.

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).

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.

Plaintiff, in her motion, has demonstrated *prima facie* entitlement to summary judgment on the issue of liability against defendants. Therefore, the burden shifts to defendants to demonstrate an issue of fact which precludes summary judgment. *See Zuckerman v. City of New York, supra.*

After applying the law to the facts in this case, the Court finds that defendants have failed to meet their burden to demonstrate an issue of fact which precludes summary judgment on the issue of liability. Defendants offer a conclusory assertion that plaintiff's vehicle made a sudden unexpected stop and do not offer any further evidence in support of said assertion. This is, therefore, insufficient to rebut the presumption of negligence. S*ee Geschwind v Hoffman, supra.*

Accordingly, in light of defendants' failure to meet their burden and raise any triable issue of fact, plaintiff's motion, pursuant to CPLR § 3212, for an order granting partial summary judgment on the issue of liability is hereby **GRANTED**.

All parties shall appear for a Certification Conference in IAS Part 31, Nassau County Supreme Court, 100 Supreme Court Drive, Mineola, New York, on May 15, 2012, 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
May 4, 2012