SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

DAVID KONG,

Plaintiff,

- against -

JAMIE L. ABISH,

Defendant.

- x

Index No.: 700384/2010

Motion Date: 10/18/12

Motion No.: 7

Motion Seq.: 2

The following papers numbered 1 to 12 were read on this motion by plaintiff, David Kong, for an order pursuant to CPLR 3212(b) granting plaintiff partial summary judgment on the issue of liability and setting the matter down for a trial on damages:

	Papers Numbered
Kong Notice of Motion	1 - 6
Abish Affirmation in Opposition	7 - 9
Kong Reply Affirmation	10 - 12

In this action for negligence, the plaintiff, David Kong, seeks to recover damages for personal injuries he sustained as a result of a motor vehicle accident that occurred on August 18, 2010. The three-vehicle accident took place on the westbound lanes of the Long Island Expressway near the exit for 150th Street in Queens County, New York. Plaintiff alleges that he sustained injuries when his vehicle, that was stopped in traffic, was struck in the rear by the vehicle owned and operated by the defendant causing his vehicle to be propelled into the vehicle in front of it.

This action was commenced by the plaintiff by the filing of a summons and complaint on November 30, 2010. Issue was joined by service of defendant's verified answer on March 9, 2011. A note of issue was filed on June 14, 2012. Plaintiff now moves for an

order pursuant to CPLR 3212(b), granting summary judgment on the issue of liability and setting this matter down for a trial on damages.

In support of the motion, the plaintiff submits an affirmation from counsel, Matthew C. Lombardi, Esq; a copy of the pleadings; copies of the deposition testimony of the plaintiff and the defendant; and a copy of the police accident report (MV-104).

In his examination before trial, taken on March 14, 2012, plaintiff David Kang, age 37, a real estate sales person, testified that on the date of the accident he was driving a Lexus SUV. He stated that at approximately 8:20 a.m. he was traveling westbound on the Long Island Expressway with his wife proceeding from their house in Douglaston to their place of business in Manhattan. As they approached exit 22 he stated that the traffic was bumper to bumper. He testified that his vehicle was stopped in traffic with his foot on the brake for a few seconds when it was struck in the rear by the defendant's vehicle. He stated that prior to the impact he saw the defendant's vehicle in his rear view mirror and he noticed that the driver was not looking forward but rather was looking to the right and down. He stated that the impact was very hard and forced his vehicle to be propelled into the vehicle that was stopped in front of his. Plaintiff alleges that as a result of the accident he sustained a torn rotator cuff of the right shoulder which required arthroscopic surgery and herniated discs in his cervical and lumbar spines.

Defendant, Jamie L. Abish, testified at an examination before trial on July 19, 2012 that on the date of the accident she was operating a 2004 Toyota Rav4. She was coming from her home and proceeding to her place of business in Manhattan. She stated that at that time there was heavy stop and go traffic. She stated that she struck the plaintiff's vehicle in the rear but she had been looking straight ahead and did not take her eyes off the road. She testified that the plaintiff's vehicle was moving when it was struck but she also stated that she told the officer at the scene that the plaintiff's vehicle stopped suddenly and she hit her brakes but went into his vehicle. Ms. Abish testified that she observed the plaintiff's vehicle being pushed into the vehicle in front of it.

The police accident report based upon the statements of the drivers states:

"At t/p/o Veh #2 (plaintiff) and #3 (non-party), were

stopped in traffic. Operator Veh #1 (defendant) stated Veh #2 (plaintiff) suddenly stopped. Veh #1 struck Veh #2; Veh #2 then struck Veh #3. Pass Veh #2 is pregnant and was sent to Hosp. for cautionary checkup. PO did not witness."

The plaintiff contends that the defendant driver was negligent in the operation of her vehicle in striking the plaintiff's vehicle in the rear. Plaintiff's counsel contends that the accident was caused solely by the negligence of the defendant driver in that her vehicle was traveling too closely in violation of VTL § 1129(a) and that the driver failed to safely stop her vehicle prior to rear-ending the plaintiff's vehicle. Counsel contends that the evidence indicates that the plaintiff's vehicle was stopped in heavy traffic on the Long Island Expressway when it was struck from behind by the defendant's vehicle. Counsel contends, therefore, that the plaintiff is entitled to partial summary judgment as to liability because the defendant was solely responsible for causing the accident while the plaintiff was free from culpable conduct.

In opposition, defendant's counsel, Serafina M. Cassata, Esq. contends that the deposition transcripts submitted by the plaintiff are not in admissible form as they were unsigned by the parties. Counsel also contends that plaintiff has failed to make a prima facie case as there is conflicting testimony as to whether the plaintiff's vehicle was moving or stopped at the time of the impact. Counsel asserts that plaintiff claims his vehicle was stopped however, according to the defendant's deposition testimony the plaintiff's vehicle was moving at the time of impact.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position (see Zuckerman v City of New York, 49 NY2d 557[1980]).

"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" (Macauley v ELRAC, Inc., 6 AD3d 584 [2d Dept. 2003]). It is well established law that a rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence on the part of the driver of the rearmost vehicle, requiring the operator of that vehicle to proffer an adequate,

non-negligent explanation for the accident (see Klopchin v Masri, 45 AD3d 737 [2d Dept. 2007]; Hakakian v McCabe, 38 AD3d 493 2d Dept. 2007]; Reed v New York City Transit Authority, 299 AD2 330 [2d Dept. 2002]; Velazquez v Denton Limo, Inc., 7 AD3d787 [2d Dept. 2004].

Here, plaintiff testified that his vehicle was completely stopped in traffic on the Long Island Expressway when it was struck from behind by defendant's motor vehicle. Thus, the plaintiff satisfied his prima facie burden of establishing entitlement to judgment as a matter of law on the issue of liability by demonstrating that his vehicle was stopped when it was struck in the rear by the vehicle operated by defendant Jamie L. Abish (see Volpe v Limoncelli,74 AD3d 795 [2d Dept. 2010]; Vavoulis v Adler, 43 AD3d 1154 [2d Dept. 2007]; Levine v Taylor, 268 AD2d 566 [2d Dept. 2000]).

Having made the requisite prima facie showing of entitlement to summary judgment, the burden then shifted to defendant to raise a triable issue of fact as to whether plaintiff was also negligent, and if so, whether his negligence contributed to the happening of the accident (see Goemans v County of Suffolk, 57 AD3d 478 [2d Dept. 2007])..,

This court finds that the defendant failed to submit evidence as to any negligence on the part of plaintiff or to provide a non-negligent explanation for the accident sufficient to raise a triable question of fact (see Lampkin v Chan, 68 AD3d 727 [2d Dept. 2009]; Gomez v Sammy's Transp., Inc., 19 AD3d 544 [2d Dept. 2005]). If the operator of the moving vehicle cannot come forward with evidence to rebut the inference of negligence, the occupants and owner of the stationary vehicle are entitled to summary judgment on the issue of liability (see Kimyagarov v. Nixon Taxi Corp., 45 AD3d 736 [2d Dept. 2007]). The evidence demonstrated that the plaintiff, whether in a moving or stopped vehicle, operated his vehicle in a nonnegligent manner and no evidence was presented to show that he contributed to the happening of the injury-producing event (see Aikens-Hobson v. Bruno, 2012 NY Slip Op 5604 [2d Dept. 2012]; Daramboukas v Samlidis, 84 AD3d 719 [2d Dept. 2011]; Franco v Breceus, 70 AD3d 767[2d Dept. 2010]; Shirman v Lawal, 69 AD3d 838 [2d Dept. 2010]; Katz v Masada II Car & Limo Serv., Inc., 43 AD3d 876 [2d Dept. 2007]). Further, although defendant told the police officer at the scene that the accident was the result of plaintiff braking or stopping suddenly, this does not explain her failure to maintain a safe distance from the vehicle in front of her [see Dicturel v Dukureh,71 AD3d 558 [1st Dept. 2010]; Shirman v Lawal,69 AD3d 838 [2d Dept. 2010]; Lampkin v Chan,68 AD3d 727 [2d

Dept. 2009]; Zdenek v Safety Consultants, Inc.,63 AD3d 918 [2d Dept. 2009]). The defendant's argument that the plaintiff's vehicle may have stopped short is not sufficient to provide a non-negligent explanation for the rear-end collision (see Plummer v Nourddine, 82 AD3d 1069 [2d Dept. 2011][the mere assertion that the respondents' (vehicle) came to a sudden stop while traveling in heavy traffic was insufficient to raise a triable issue of fact}]; Staton v Ilic, 69 AD3d 606 [2d Dept. 2010]; Ramirez v Konstanzer, 61 AD3d 837 [2d Dept. 2009]).

The contention of defendant, raised in opposition to the motion, that the deposition transcripts are not in evidentiary form is without merit. Although the deposition of the defendant was unsigned, the transcript was certified by the court reporter and the defendant did not raise any challenges to its accuracy. Thus, the transcript qualifies as admissible evidence for purposes of the motion for summary judgment (see Rodriguez v Ryder Truck, Inc., 91 AD3d 935 [2d Dept. 2012]; Zalot v Zieba, 81 AD3d 935 [2d Dept. 2011]). The deposition transcript of plaintiff is admissible under CPLR 3116(a) as it was signed and further since that transcript was submitted by the party deponent himself it was adopted as accurate by the plaintiff(see Rodriguez v Ryder Truck, Inc., 91 AD3d 935 [2d Dept. 2012]; Ashif v Won Ok Lee, 57 AD3d 700 [2d Dept. 2008]).

Accordingly, this court finds that in opposition to plaintiff's motion, defendant failed to submit any evidence sufficient to raise a triable issue of fact (see Arias v Rosario, 52 AD3d 551 [2d Dept. 2008]; Smith v Seskin, 49 AD3d 628 [2d Dept.2008]; Campbell v City of Yonkers, 37 AD3d 750 [2d Dept. 2007]). As the evidence in the record demonstrates that the defendant failed to provide a non-negligent explanation for the collision and as no triable issues of fact have been put forth as to whether plaintiff may have borne comparative fault for the causation of the accident, and based on the foregoing, it is hereby

ORDERED, that the plaintiff's motion is granted, and the plaintiff, David Kong, shall have partial summary judgment on the issue of liability against the defendant, Jamie L. Abish, and the Clerk of Court is authorized to enter judgment accordingly; and it is further,

ORDERED, that upon compliance with all the rules of the Court, this action shall be placed on the trial calendar of the Court for a trial as to damages.

Dated: October 19, 2012
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.