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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH _____ PART 22
Justice

Index Number : 111035/2009
MENA, PORFIRIO
vs
CRP SANITATION, INC.
Sequence Number : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for plaintiff's MSJ on liab

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1
Answering Affidavits — Exhibits _____ | No(s). 2
Replying Affidavits _____ | No(s). 3

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

FILED
APR 17 2013
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 4.10.13

HON. ARLENE P. BLUTH, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 22

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Porfirio Mena and Carmen Zereta,

Plaintiffs,

Index No. 111035/09
Mot. Seq. 002

-v-

CRP Sanitation, Inc. And J.M. Disclifani, Jr.,

Defendants.

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Plaintiff's motion for summary judgment on the issue of liability only is granted.

This action arises from a rear end auto collision that occurred on April 18, 2008 in Yonkers, New York. According to defendant driver Disclifani's deposition, when asked "Why did your vehicle strike the back of the BMW [plaintiffs' car]?" He responded "Because I took my eyes off the road" (transcript, page 37, lines 2-5).

In order to prevail on its motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact. *Alvarez v Prospect Hospital,* 68 NY2d 320, 508 NYS2d 923 (1986). Once the movant demonstrates entitlement to judgment, the burden shifts to the opponent to rebut that prima facie showing. *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872, 433 NYS2d 1015 (1980). In opposing such a motion, the party must lay bare its evidentiary proof. Conclusory allegations are insufficient to defeat the motion; the opponent must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact. *Zuckerman v. City of New York,* 49 NY2d 557 at 562, 427 NYS2d 595 (1980).

In deciding the motion, the court must draw all reasonable inferences in favor of the non-

moving party and must not decide credibility issues. (*Dauman Displays, Inc. v Masturzo,* 168 AD2d 204, 562 NYS2d 89 [1st Dept 1990], *lv. denied* 77 NY2d 939, 569 NYS2d 612 [1991]). As summary judgment is a drastic remedy which deprives a party of being heard, it should not be granted where there is any doubt as to the existence of a triable issue of fact (*Chemical Bank v West 95th Street Development Corp.,* 161 AD2d 218, 554 NYS2d 604 [1st Dept 1990]), or where the issue is even arguable or debatable (*Stone v Goodson,* 8 NY2d 8, 200 NYS2d 627 [1960]).

In support of the motion, plaintiff submits deposition transcripts, including Disclifani's, where he admits that he was behind plaintiffs' car as they were approaching a red light, but then he took his eyes off the road. While he wasn't looking at the road, he hit into the back of plaintiff's car, which had stopped for a red light. It is well settled that a rear-end collision with a stopped vehicle creates a presumption that the operator of the moving vehicle was negligent (*Corrigan v Porter Cab Corp.*, 101 AD3d 471, 955 NYS2d 336 [1st Dept 2012], *Agramonte v City of New York*, 288 AD2d 75, 732 NYS2d 414 [1st Dept 2001]) and places the burden on the defendant to give a non-negligent explanation for the accident. Thus plaintiffs' prima facie case was made.

In opposition, defendants' attorneys seek to raise an issue of fact by invoking the emergency doctrine based upon Disclifani's excuse for taking his eyes off the road. In his deposition, defendant explains that he took his eyes off the road because he was watching another car trying to merge into his lane from a left turn only lane.[1] However, there was no contact between defendants' car and this would-be merger; no one hit defendant and propelled him into

[1]For purposes of this decision, the Court assumes defendant had reason to believe the would-be merger did in fact want to merge and that it was not merely an assumption made by defendant.

plaintiffs' car. In fact, it is clear that this would-be merger did not in fact merge into defendant's lane or cut him off – if he had, he would have been between defendant and plaintiff and defendant would no longer have been directly behind plaintiff's car.

Contrary to defendants' attorneys' argument, "emergency doctrine" is not a catch phrase which automatically requires the denial of summary judgment. Although the existence of an emergency and the reasonableness of a party's response to it will ordinarily present questions of fact for a jury, in appropriate circumstances these issues may be determined as a matter of law (*Alamo v McDaniel*, 44 AD3d 149 [1st Dept 2007]). This is one of those situations where the Court can decide, as a matter of law, that there was no emergency.

The emergency doctrine holds that "when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context" (*Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327, 569 NE2d 432, 567 NYS2d 629 [1991]). Faced with an emergency situation, a party "cannot be expected to adhere to the same accuracy of judgment as someone who has had the full opportunity to reflect" (*Caban v Vega*, 226 AD2d 109 [1st Dept 1996]).

Here, even taking defendant's version of the facts as true, there simply was no emergency – thinking that someone wants to merge does not constitute an emergency. Moreover, defendant did not make any decision to be second-guessed by a jury – he did not swerve to avoid the would-be merger, he did not stop short to avoid being cut off and cause an accident – he does not even claim that the would-be merger started to come into his lane. Rather, defendant did nothing

but watch something that he wanted to watch instead of watching the road.

In addition, the emergency doctrine does not apply to rear-end collisions because trailing drivers are absolutely required to leave a reasonable distance between their vehicles and vehicles ahead (see Vehicle and Traffic Law § 1129[a]; *Johnson v Phillips*, 261 AD2d 269 [1st Dept 1999]). Here, the defendant's own explanation of the incident demonstrates that he was not reacting to an emergency, but, rather, to a common traffic occurrence. Thus, the emergency doctrine is inapplicable and defendant's explanation fails to rebut the inference of negligence by providing a non-negligent explanation for the collision. See *Johnson v Phillips*, 261 AD2d 269 [1st Dept 1999] (claiming sun glare caused an emergency resulting in a rear-end collision fails to raise a triable issue of fact because there still was no excuse for not leaving enough space between the cars).

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment on the issue of liability is granted; and it is hereby

ORDERED that the parties are directed to appear at the conference scheduled for Part 22-DCM on May 31, 2013 at 80 Centre Street at 9:30AM.

This is the Decision and Order of the Court.

Dated: **April 10, 2013**
New York, NY

ARLENE P. BLUTH, JSC