NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA - 5

JOAQUIN HERNANDEZ,

Plaintiff,

-against-

TIMOTHY D. KEY and MATTHEW H.L. MAYO,

Defendants.

INDEX NUMBER: **305673/2013**

Present:
HON. **ALISON Y. TUITT**
Justice

The following papers numbered 1 to 4,

Read on this Plaintiff's Motion for Partial Summary Judgment

On Calendar of **8/10/15**

Notice of Motion-Exhibits and Affirmation 1

Affirmations in Opposition 2, 3

Reply Affirmation 4

Upon the foregoing papers, plaintiff's motion for partial summary judgment on the issue of liability is granted for the reasons set forth herein.

The within action involves a motor vehicle accident that occurred on May 21, 2012 as a result of which plaintiff claims to have sustained serious injuries. The accident occurred at St. Nicholas Avenue at its intersection with West 134th Street in the County and State of New York. Plaintiff alleges that at the time of the accident, his vehicle was stopped on St. Nicholas Avenue when it was struck in the rear by defendants' vehicle. Defendant Timothy D. Key (hereinafter "Key") was the owner of the vehicle and defendant Matthew H.L. Mayo (hereinafter "Mayo") was the operator of the motor vehicle that struck plaintiff's vehicle. Defendant Key opposes plaintiff's motion arguing that defendant Mayo did not have permission to operate his vehicle. Defendant Mayo testified that he did not have defendant Key's permission to operate the vehicle, but had Key's

sister's permission, who was his girlfriend and the mother of his three children. He testified that Key was loaning her the vehicle because he was going to give it to her. Defendant Mayo further testified that the accident occurred when plaintiff's vehicle stopped suddenly and he tried to apply the brakes, but his foot slipped off the pedal. Defendant Mayo claims that plaintiff was attempting to make a left turn and stopped suddenly in the middle of the intersection to turn left when the signal was green and without having the directional signal on causing the accident.

Defendant Key testified that the defendant Mayo was his sister's boyfriend and he did not know how Mayo came into possession of his car on the date of the accident. He further testified that a year before, in May 2011, his sister took his car to drive someone home and she never returned the car. When he asked her when she was going to return the car, "she just laughed." Defendant Key also testified that he did not want Mayo to drive "[n]ot just my car, any car. I didn't feel he was a safe driver. To my knowledge, he didn't have a license, so I didn't tell him to drive" and he told this to his sister. He demanded that his sister return the car and when she didn't, he told her she needed to register the vehicle in her name.

The police accident report provides, in relevant part, that "[a]t t/p/o operator of Veh # 1 stated that he was going S/B on St. Nicholas, at which point he stopped @ W 134 St to make a left turn, when Veh #2 rear ended Veh #1. Operator of Veh #2 stated that due to the weather condition his shoes were wet which slipped when he attempted to press the brakes, which cause (sic) him to rear end Veh #1."

The court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue

of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

It is well established that a rear-end collision with a stationary vehicle creates a prima facie case of negligence on the part of the operator of offending vehicle and imposes a duty upon that operator to proffer a non-negligent explanation for his failure to maintain a safe distance between cars. Agramonte v. City of New York, 732 N.Y.S.2d 414 (1st Dept. 2001); Mitchell v. Gonzalez, 703 N.Y.S.2d 124 (1st Dept. 2000). "Drivers must maintain safe distances between their cars and cars in front of them and this rule imposes on them a duty to be aware of traffic conditions, including vehicle stoppages". Johnson v. Phillips, 690 N.Y.S.2d 545 (1st Dept. 1999).

Here, defendant fails to provide a non-negligent explanation for the happening of the accident. Defendant does not explain why he failed maintain a safe distance between his vehicle and plaintiff's vehicle. Drivers are charged with a responsibility to maintain a safe distance between vehicles and to be prepared for such vehicle stoppages. Vehicle and Traffic Law §1129(a). Furthermore, it is not a sufficient defense to claim that the vehicle in front stopped short. See, Mitchell, 703 N.Y.S.2d at 124; Figueroa v. Luna, 721 N.Y.S.2d 635 (1st Dept. 2001); Moustapha v. Riteway International Removal, Inc., 724 N.Y.S.2d 52 (1st Dept. 2001). See also Joplin v. City of New York, 982 N.Y.S.2d 762 (1st Dept. 2014)(Defendants' evidence that plaintiff's vehicle suddenly stopped was insufficient to raise an issue of fact with respect to their liability); Williams v. Kadri, 976 N.Y.S.2d 460 (1st Dept. 2013)(Taxi driver's explanation that the taxi slipped on ice was inadequate to establish a non-negligent explanation for accident, as required to overcome presumption that taxi driver's negligence was cause for accident in which taxi struck stopped limousine from the rear. A driver is expected to maintain enough distance between himself and cars ahead of him so as to avoid collisions with stopped vehicles, taking into account weather and road condition); Profita v. Diaz, 954 N.Y.S.2d 40 (1st Dept. 2012)(Plaintiff driver's testimony that defendants' vehicle stopped suddenly and then struck defendants' vehicle is insufficient to raise a triable issue of fact. Indeed, plaintiff driver failed to explain why he did not maintain a safe distance between his vehicle and defendants' vehicle).

With respect to the permissive use issue raised, Vehicle and Traffic Law §388(1) provides that the owner of a motor vehicle shall be liable for the negligence of one who operates the vehicle with the owner's express or implied consent. The statute creates a presumption that the driver was using the vehicle with the owner's express or implied permission, which only may be rebutted by substantial evidence sufficient to show that the vehicle was not operated with the owner's consent. Murzda v. Zimmerman, 99 N.Y.2d 375 (2003). The uncontradicted testimony of a vehicle owner that the vehicle was operated without his permission, does not, by itself, overcome the presumption of permissive use. Matter of State Farm Mut. Auto. Ins. Co. v. Ellington, 810 N.Y.S.2d 356 (2d Dept. 2006)

The statute has been liberally construed to expand an owner's derivative liability and it expresses concern that one injured by the negligent operation of a vehicle should have recourse against a financially responsible defendant. The owner of the vehicle has been found to be the obvious candidate for he can most easily rely on carrier insurance to cover the risk. Hardeman v. Mendon Leasing Corp., 450 N.Y.S.2d 808 (1st Dept. 1982). Although evidence that a vehicle was stolen at the time of the accident, will rebut the presumption of permissive use, Courts have still held the owner responsible where the vehicle appears to have been stolen. See, Matter of State Farm Mut. Auto. Ins. Co. v. Fernandez, 805 N.Y.S.2d 599 (2d Dept. 2005)(Vehicle owner admitted that she left the car keys in the vehicle at the time of the theft which raised a triable issue of fact of whether there was permissive use); Cherry v. Tucker, 773 N.Y.S.2d 405(2d Dept. 2004)(Genuine issues of material fact, regarding whether motor vehicle's owner consented for security guard of its car rental lot to use its vehicle, precluded summary judgment for owner in action by passengers for personal injuries sustained when guard crashed into fence; evidence, including deposition transcript of owner's manager who testified that security guards were not allowed to drive vehicles unless instructed to do so by manager, that guard was last person who handled vehicle and that owner learned days later that vehicle was not in its inventory, failed to rebut presumption pursuant to statute of owner's consent to guard's use of vehicle); Roness v. Hertz Corp.,724 N.Y.S.2d 195 (2d Dept. 2001)(Defendant Debbie Machade contended that the vehicle was being driven by her daughter who had stolen the vehicle and drove it without her mother's permission. Court affirmed Supreme Court's denial of defendants' summary judgment motion on the grounds that VTL §388(1) gave rise to a presumption that the vehicle was being operated with defendants' consent and defendants failed to rebut the presumption); Lopes v. Bain, 920 N.Y.S.2d 972 (3rd Dept. 2011)(Allegations that driver had owner's implied

consent to drive car based on past conduct were sufficient to state claim for owner's vicarious liability for passenger's death, in conjunction with statutory presumption that driver had owner's consent, despite driver's statement during plea allocution for vehicular manslaughter that he did not have permission from owner, his uncle, to drive car, and in fact had stolen it).

The testimony here shows that there is no viable permissive argument that would preclude summary judgment. Notwithstanding, defendant Key's contention that defendant Mayo did not have his permission to use his vehicle, the evidence shows that Key's sister had his car for over one year and Key did nothing to retrieve his vehicle from her. Key admitted at his deposition that he allowed his sister to drive the car, he knew that she had the car and it was in her possession for approximately one year before the accident. He never reported the vehicle stolen.

Accordingly, the motion for summary judgment is granted.

This constitutes the decision and Order of this Court.

Dated: 1/7/16

Hon. Alison Y. Tuitt