SHORT FORM ORDER

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

SALVATORE SPUCCES and ROSANNA SPUCCES,

Plaintiffs,

- against -

WEI LIM KOK and ZHI JUN TONG,

Defendants.

- x

Index No.: 703541/2014

Motion Date: 7/19/16

Motion No.: 155

Motion Seq.: 5

The following papers numbered read on this motion by defendant WEI LIM KOK for an order pursuant to CPLR 3212, granting defendant WEI LIM KOK summary judgment, dismissing the complaint and any and all claims against him on the basis that he was not negligent, is not liable, and did not breach any duty owed:

	Papers Numbered
Notice of Motion-Affirmation-Memo. of Law-Exhibit...	1 - 5
Plaintiffs' Affirmation in Opposition-Exhibits.....	EF 52 - 54
Zhi Jun Tong's Affirmation in Opposition.....	EF 56
Affirmations in Reply (2).....	6 - 9

In this negligence action, plaintiffs seek to recover damages for personal injuries they allegedly sustained as a result of a motor vehicle accident involving three vehicles that occurred on April 16, 2013, at or near the intersection of Cumberland Street and Flushing Avenue in Queens County, New York.

Plaintiffs commenced this action on or about May 22, 2014 by filing a summons and complaint. Issue was joined by defendant Wei Lim Kok (defendant) via service of his answer with cross claim dated July 23, 2014. Co-defendant Zhi Jun Tong (co-defendant)

joined issue via service of his answer dated June 23, 2014. Defendant now timely moves for an order pursuant to CPLR 3212(b), granting him summary judgment and dismissing the complaint and any and all cross claims.

In support of the motion, defendant submits an affirmation from counsel, Katie A. Walsh, Esq.; a memorandum of law; a copy of the pleadings; a copy of the note of issue; a copy of the Police Accident Report (MV-104); a copy of the transcript of the examination before trial of defendant taken on July 1, 2015; a copy of the transcript of the examination before trial of plaintiff Salvatore Spucces taken on July 1, 2015; and a copy of the transcript of the examination before trial of plaintiff Rosanna Spucces taken on July 1, 2015.

At his deposition, defendant testified that he was involved in a motor vehicle accident on April 16, 2013. There were three vehicles involved in the accident. There was a vehicle in front of his vehicle and a bus behind his vehicle. His vehicle and plaintiffs' vehicle were stopped for a red traffic light at the time of impact. Co-defendant's bus struck the rear of his vehicle, pushing his vehicle forward into the rear of plaintiffs' vehicle.

Plaintiff driver, Salvatore Spucces, testified that he was involved in an accident on April 16, 2013. His daughter, plaintiff Rosanna Spucces, was a front seated passenger in his vehicle at the time of the accident. His vehicle was stopped for a red light for about ten seconds before he felt an impact to the rear of his vehicle. He testified that after the accident, he understood that the bus hit defendant's vehicle, and then defendant's vehicle hit his vehicle. He was not sure whether he felt one or two impacts, but the impact was heavy.

Plaintiff Rosanna Spucces testified that at the time of the accident the vehicle she was a passenger in was stopped at a red light. There was one impact to the rear of her vehicle. She heard another impact moments before the impact involving her vehicle.

In the accident description portion of the police accident report, the responding officer notes:

> "At TPO driver of Veh #3 (co-defendant) states he got distracted by a sick passenger on his bus and turned to look at her, then hit Veh #2 (defendant) causing Veh #2 (defendant) to hit Veh #1 (plaintiffs), causing damage to Vehs #1 (plaintiffs) & 2 (defendant). All Vehs driving W/B Flushing Ave. Stopping at red light."

Defendant's counsel contends that the accident was caused solely by the negligence of co-defendant in that co-defendant failed to maintain a safe speed, failed to maintain a safe distance between his vehicle and the vehicle in front of him in violation of VTL § 1129(a), and failed to avoid striking plaintiff's vehicle in the rear. Counsel also argues that where the operator of one of the middle vehicles in a multi-vehicle chain reaction collision is propelled into the lead vehicle due to the negligence of the operator of a vehicle that was approaching from the rear, the operator of the middle vehicle is entitled to summary judgment, as he could not have been the proximate cause of, or contributing factor to, the subject accident (citing Ner v Celis, 245 AD2d 278 [2d Dept. 1997]; Chamberlin v Suffolk County Labor Dept., 221 AD2d 580 [2d Dept. 1995]; Acampora v Davis, 203 AD2d 399 [2d Dept. 1994]).

In opposition, plaintiffs submit an affirmation from counsel, Jed Kirsch, Esq., contending that there are issues of fact as to whether defendant was completely stopped at the time of the accident. Counsel further contends that defendant failed to leave sufficient space between his vehicle and plaintiffs' vehicle, and thus, defendant contributed to the happening of the accident.

Co-defendant also submits an affirmation in opposition from counsel, Sean M. Broderick, Esq., contending that the police accident report is inadmissible and there are issues of fact since there is contradictory testimony regarding the number of impacts to the rear of plaintiffs' vehicle

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 or her position (see Zuckerman v City of New York, 49 NY2d 557[1980]).

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 Auth., 299 AD2 330 [2d Dept. 2002]; Velazquez v Denton Limo, Inc., 7 AD3d787 [2d Dept. 2004].

Here, defendant testified that his vehicle was stopped at a red light when co-defendant's bus struck his vehicle in the rear causing the chain reaction accident. "The rearmost driver in a chain-reaction collision bears a presumption of responsibility" (Ferguson v Honda Lease Trust, 34 AD3d 356 [1st Dept. 2006], quoting De La Cruz v Ock Wee Leong, 16 AD3d 199 [1st Dept. 2005]). Evidence that a vehicle was rear-ended and propelled into the stopped vehicle in front of it may provide a sufficient non-negligent explanation (see Franco v. Breceus,70 AD3d 767 [2d Dept. 2010]; Katz v Masada II Car & Limo Serv., Inc., 43 AD3d 876 [2d Dept. 2007]). In multiple-car, chain-reaction accidents the courts have recognized that the operator of a vehicle which has come to a complete stop and is propelled into the vehicle in front of it, as a result of being struck from behind, is not negligent inasmuch as the operator's actions cannot be said to be the proximate cause of the injuries resulting from the collision (see Mohamed v Town of Niskayuna, 267 AD2d 909 [3d Dept. 1999]). Here, defendant, who was stopped at the time of the impact, demonstrated that his conduct was not a proximate cause of the rear-end collision between his vehicle and plaintiffs' vehicle in front of him (see Abrahamian v Tak Chan, 33 AD3d 947 [2d Dept. 2006]; Calabrese v Kennedy, 8 AD3d 505 [2d Dept. 2006]; Ratner v Petruso, 274 AD2d 566 [2d Dept. 2000]). Thus, defendant satisfied his prima facie burden of establishing entitlement to judgment as a matter of law by demonstrating that his vehicle was completely stopped at the time it was struck in the rear and propelled into plaintiffs' vehicle in a chain reaction which was commenced by co-defendant.

Having made the requisite prima facie showing of his entitlement to summary judgment, the burden then shifted to the non-moving parties to raise a non-negligent explanation for the rear end collision or a triable issue of fact as to whether the movant was also negligent, and if so, whether that negligence contributed to the happening of the accident (see Gambians v County of Suffolk,57 AD3d 478 [2d Dept. 2007]).

In opposition, neither plaintiffs nor co-defendant submitted 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]; Lampkin v Chan, 68 AD3d 727 [2d Dept. 2009]; Gomez v Sammy's Transp., Inc., 19 AD3d 544 [2d Dept. 2005]). Although co-defendant and plaintiffs contend that an issue of fact exists as to whether defendant was stopped or moving at the time of the impact, no cited testimony leads to such a conclusion. Even if defendant was moving, summary judgment is warranted when defendant was stopped, stopping, or slowing at the time of the accident (see Billis v Tunjian, 120 AD3d 1168 [2d Dept. 2014]). Moreover, such, along with the speculation

regarding the number of impacts to plaintiffs' vehicle, fails to explain co-defendant's failure to maintain a safe distance from the vehicle in front of his bus or to safely stop prior to rear-ending defendant's vehicle (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]).

Additionally, the police accident report submitted by defendant was prepared by a police officer who was acting within the scope of his duty in recording co-defendant's statement, and the statement by co-defendant is admissible as a party admission (see Scott v Kass, 48 AD3d 785 [2d Dept. 2008]; Guevara v Zaharakis, 303 AD2d 555 [2d Dept. 2003]; Ferrara v Poranski, 88 AD2d 904 [2d Dept. 1982]).

Accordingly, it is hereby,

ORDERED, that defendant WEI LIM KOK's motion for summary judgment is granted, the complaint and any and all cross claims are dismissed as against defendant WEI LIM KOK, and the Clerk of the Court shall enter judgment accordingly.

Dated: July 28, 2016
Long Island City, N.Y.

ROBERT J. McDONALD
J.S.C.