To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY
P R E S E N T: HON. SAM D. WALKER, J.S.C.

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CAROL TRISHA JAGMAHON,

Plaintiff,

DECISION & ORDER
Index No. 50206/2016
Seq. 1 & 2

-against-

VICTORIA C. ZEFI and FRANCO ZEFI,

Defendants.

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VICTORIA C. ZEFI and FRANCO ZEFI,

Third-Party Plaintiffs,

-against-

AUBREY C. PHILLIBERT,

Third-Party Defendant.

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The following papers were read on a motion for summary judgment on the issue of liability and a motion to dismiss the third-party action:

PAPERS	NUMBERED
Notice of Motion/Affirmation/Exhibits 1-11	1-13
Memorandum of Law in Support	14
Notice of Motion/Affirmation/Exhibits A-F	15-22
Reply Affirmation	23

Upon the foregoing papers it is ordered that both motions are GRANTED.

FACTUAL AND PROCEDURAL BACKGROUND

This action arises from a motor vehicle accident.Plaintiff, Carol Trisha Jagmohan ("Jagmohan") alleges that on June 6, 2015 she was a front seat passenger in the vehicle being operated by Third-Party Defendant, Aubrey C. Phillibert ("Phillibert"), while that vehicle was traveling northbound on the Hutchinson River Parkway and was struck in the rear by a vehicle owned by Defendant Franco Zefi and operated by Defendant, Victoria C. Zefi[1] ("Zefi" collectively "the Zefis") .

Jagmohan commenced this action on January 8, 2016, by filing a Summons and Complaint and the Zefis served an Answer, joining issue. Then on March 23, 2016, the Zefis filed a Third-Party Summons and Complaint against Phillibert, who also served and filed an Answer. The parties completed discovery, the Court (Leftkowitz, J.) issued a Trial Readiness Order and Plaintiff filed a Note of Issue. Jagmohan now seeks summary judgment on the issue of liability, against the Zefis. Third-Party Defendant, Phillibert, also seeks dismissal of the Zefis' Third-Party Complaint. The Zefis submitted opposition on both motions.

DISCUSSION

A party on a motion for summary judgment must assemble affirmative proof to establish his entitlement to judgment as a matter of law, *Zuckerman v. City of N.Y.*, 49 N.Y.2d 557, 427 N.Y.S.2d 595, 404 N.E.2d 718(1980). "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of

[1] Victoria Zefi is the daughter of Franco Zefi.

fact." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324(1986). Only when such a showing has been made must the opposing party set forth evidentiary proof establishing the existence of a material issue of fact, *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985).

Jagmohan seeks partial summary judgment. In support of her motion, Jagmohan submitted her own deposition testimony, and the deposition testimony of the Zefis and Phillibert, her attorney's affirmation, a copy of the police report and a copy of the pleadings. Phillibert seeks dismissal of the Complaint against him and in support of his motion, he submitted his own deposition and the deposition testimony of Zefi and Jagmohan, his attorney's affirmation, a certified police report and a copy of the pleadings.

A rear-end collision with a stopped vehicle creates a presumption that the operator of the moving vehicle was negligent, thus entitling the injured occupants of the front vehicle to summary judgment on liability unless the driver of the moving vehicle can proffer a non-negligent explanation for the collision, *Agramonte v City of New York*, 288 A.D.2d 75, 76 (2001); *Johnson v Phillips*, 261 A.D.2d 269, 271 (1999); *Danza v Longieliere*, 256 AD2d 434, 435 (1998), lv dismissed 93 NY2d 957 (1999). Furthermore, a rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the rear vehicle and imposes a duty on that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision, *Finney v. Morton*---N.Y.S.3d ----, 2015 WL 1916399 (2d Dept. 2015).

Both Jagmohan and Phillibert have established their freedom from fault and have made out a prima facie showing of entitlement to summary judgment. The evidence submitted on both motions establishes entitlement to summary judgment as a matter of

law, thereby shifting the burden to the Zefis to demonstrate the existence of a factual issue requiring a trial. *Macauley v. Elrac, Inc.*, 6 A.D.3d 584, 585 (2d Dep't 2004)[Rear-end collision is sufficient to create a prima facie case of liability]. If the operator of the striking vehicle fails to rebut this presumption and the inference of negligence, the operator of the stopped vehicle is entitled to summary judgment on the issue of liability. *Leonard v. City of New York*. 273 A.D.2d 205 (2dDept. 2000); *Longhito v. Klein*. 273 AD2d 281(2d Dep't 2000); *Velasquez v. Quijada*. 269 AD2d 592 (2d Dept. 2000); *Brant v.Senatobia Operating Corp.*, 269A.D.2d 483 (2d Dep't 2000). In *Leal v. Wolf*. 224 A.D.2d 638 N.Y.S2d 110 (2d Dep't 1996), the Second Department held that "since the defendant was under a duty to keep a safe distance between his car and [the plaintiff's] car (see Vehicle and Traffic Law Section 1129[a]), his failure to do so in absence of a non negligent explanation construed negligence as a matter of law (See, *Silberman v. Surrey Cadillac Limousine Service,* 109 A.D.2d 883)".

The Zefis' attorney filed an affirmation in opposition, arguing that negligence matters generally do not lend themselves to resolution by summary judgment and that there are many circumstances under which a rear end impact has other causes besides negligence on the part of the driver. The attorney argues that there can be more than one proximate cause of an accident and that the testimony submitted could allow a trier of fact to determine that issues exist regarding Phillibert's liability. The attorney further argues that all reasonable inferences are to be drawn in favor of the non-moving party and triable issues of fact exist regarding Phillibert's fault.

However, the Court finds that the Zefi's opposition has not established any issues

of fact to rebut Jagmohan's entitlement to summary judgment as a matter of law and dismissal of the Complaint against Phillibert. New York Vehicle and Traffic Law § 1129 states in pertinent part that:

> The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway. NY VTL § 1129 (a)

In *Leal v. Wolf.* 224 A.D.2d 638 N.Y.S2d 110 (2d Dep't 1996), the Second Department held that "since the defendant was under a duty to keep a safe distance between his car and [the plaintiff]'s car (see Vehicle and Traffic Law Section 1129[a]), his failure to do so in absence of a non negligent explanation construed negligence as a matter of law (See, *Silberman v. Surrey Cadillac Limousine Service,* 109 A.D.2d 883)".

The Zefis did not provide this Court with any non negligent explanation as to why Zefi could not prevent the collisionif she was traveling at a safe distance behind Jagmohan. Zefi testified that she recalled the collision, but could not recall the speed of her vehicle when it collided with Phillibert's vehicle, nor could she recall if Phillibert did anything to cause the accident. It the Zefi's burden to come forward with a non-negligent explanation for the collision and the Zefis here have failed to proffer any such explanation.

Further, with regard to Jagmohan, "[t]he right of an innocent passenger to an award of summary judgment on the issue of liability against one driver is not barred or restricted by potential issues of comparative fault as between that driver and the driver of another vehicle involved in the accident" *Rodriguez v Farrell*, 115 A.D.3d 929, 983 N.Y.S.2d 68 (2d Dep't 2014). Therefore, both Jagmohan and Phillibert have made out a prima facie showing of entitlement to judgment as a matter of law and the Zefis have failed to rebut

such showing. There are no issues of fact with regard to liability.

Accordingly, it is

ORDERED that Jagmohan's motion for summary judgment on the issue of liability, is GRANTED; and it is further

ORDERED that Phillibert's motion seeking dismissal is GRANTED; and it is further

ORDERED that the third-party action against Phillibert is dismissed.

The parties in the first action are directed to appear before the Settlement Conference Part on July 18, 2017 at 9:15 a.m., to schedule a trial on the issue of damages.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
June 21, 2016

HON. SAM D. WALKER, J.S.C.