SHORT FORM ORDER

INDEX No. 605708/2015
CAL No. _____

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 7-15-16
SUBMIT DATE 9-15-16
Mot. Seq. # 01 - MG

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GEORGE KATRIS and JACLYN KATRIS,

Plaintiffs,

- against -

ZHAO CAI,

Defendant.

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Upon the following papers numbered 1 to 15 read on this motion for summary judgment; Order to Show Cause and supporting papers 1 - 10; ~~Notice of Cross Motion and supporting papers ~~; Answering Affidavits and supporting papers 11 - 13; Replying Affidavits and supporting papers 14 - 15; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

Plaintiffs move for an order granting summary judgment on the issue of liability. Defendant opposes the motion.

The plaintiffs commenced this action to recover damages for personal injuries sustained as a result of a rear-end collision that occurred on March 20, 2015. Plaintiff, George Katris, alleges that he was operating a 2015 Subaru Forester, owner by plaintiff Jaclyn Katris. He states that he was traveling westbound on the Long Island Expressway near exit 42 at approximately forty (40) miles per hour when defendant, Zhao Cai, struck the plaintiff's vehicle in the rear. In opposition the defendant argues that the plaintiff has failed to eliminate an issue of fact as to whether the plaintiff failed to act reasonably under the circumstances.

The 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 eliminate any material issues of fact from the case (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" CPLR3212 [b]; ***Gilbert Frank Corp. v Federal Insurance Co.***, 70 NY2d 966, 525 NYS2d 793, 520 NE2d 512 [1988]; ***Zuckerman v City of New York***,

49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]). Furthermore, the evidence submitted in connection with a motion for summary judgment should be viewed in the light most favorable to the party opposing the motion (***Robinson v Strong Memorial Hospital,*** 98 AD2d 976, 470 NYS2d 239 [4th Dept 1983]).

On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue (*see* ***S.J. Capelin Associates v Globe Mfg. Corp.,*** 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [1974]). However, the court must also determine whether the factual issues presented are genuine or unsubstantiated (***Prunty v Keltie's Bum Steer,*** 163 AD2d 595, 559 NYS2d 354 [2d Dept 1990]). If the issue claimed to exist is not genuine but is feigned and there is nothing to be tried, then summary judgment should be granted (***Prunty v Keltie's Bum Steer,*** *supra*, citing ***Glick & Dolleck v Tri-Pac Export Corp.,*** 22 NY2d 439, 293 NYS2d 93, 239 NE2d 725 [1968]; ***Columbus Trust Co. v Campolo,*** 110 AD2d 616, 487 NYS2d 105 [2d Dept 1985], *affd,* 66 NY2d 701, 496 NYS2d 425, 487 NE2d 282).

In support of motion, plaintiff has submitted, inter alia, an attorney's affirmation; copies of the summons and verified complaint; copies of the verified answer by defendant; copies of the verified bill of particulars; copies of the preliminary conference stipulation and order; copies of the transcript from the examination before trial of Zhao Cai; and copies of the transcript from the examination before trial of George Katris.

At his examination before trial the plaintiff George Katris testified that on March 20, 2015 he was struck from behind while driving on the Long Island Expressway. He further testified that his vehicle was struck by the defendants vehicle and that he was wearing his seat belt at the time of the accident.

In opposition, the defendant has submitted, inter alia, an attorney's affirmation. The defendant contends that "the plaintiff has failed to eliminate an issue of fact as to whether the plaintiff failed to act reasonably under the circumstances" and failed to see that which should have been seen.

In ***Leal v Wolff***, 224 AD2d 392, 393 [2nd Dept 1996], the Court held

> A rear-end collision with a stopped automobile establishes a prima facie case of negligence on the part of the operator of the moving vehicle and imposes a duty on the operator of the moving vehicle to explain how the accident occurred (see, ***Gambino v City of New York***, 205 AD2d 583; ***Starace v Inner Circle Qonexions***, 198 AD2d 493; ***Edney v Metropolitan Suburban Bus Auth.***, 178 AD2d 398; ***Benyarko v Avis Rent A Car Sys.***, 162 AD2d 572, 573). The operator of the moving vehicle is required to rebut the inference of negligence created by an unexplained rear-end

> collision (see, ***Pfaffenbach v White Plains Express Corp.***, 17 NY2d 132, 135) because he or she is in the best position to explain whether the collision was due to a mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on a wet pavement, or some other reasonable cause (see, ***Carter v Castle Elec. Contr. Co.***, 26 AD2d 83, 85). If the operator of the moving vehicle cannot come forward with any evidence to rebut the inference of negligence, the plaintiff may properly be awarded judgment as a matter of law (see, ***Starace v Inner Circle Qonexions***, supra, at 493; ***Young v City of New York***, 113 AD2d 833, 834).

Drivers must maintain safe distances between their cars and cars in front of them (Vehicle and Traffic Law § 1129 [a]) and this rule imposes on them a duty to be aware of traffic conditions, including vehicle stoppages, to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident (*see* ***Johnson v Phillips,*** 261 AD2d 269, 271, 690 NYS2d 545 [1st Dept 1999]). The defendant is under a duty to maintain a safe distance between his car and plaintiffs' car and his failure to do so, in the absence of a nonnegligent explanation, constitutes negligence as a matter of law (***Leal v Wolff***, *supra* at 393-394; see also, Vehicle and Traffic Law § 1129 [a]; ***Silberman v Surrey Cadillac Limousine Serv.***, 109 AD2d 833).

CPLR §3212(b) states that a motion for summary judgment "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission." If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion by summary judgment (***Olan v. Farrell Lines, Inc.***, 105 AD 2d 653, 481 NYS 2d 370 (1st Dept., 1984; aff'd 64 NY 2d 1092, 489 NYS 2d 884 (1985); ***Spearman v. Times Square Stores Corp.***, 96 AD 2d 552, 465 NYS 2d 230 (2nd Dept., 1983); Weinstein-Korn-Miller, ***New York Civil Practice*** Sec. 3212.09)).

At his examination before trial, the defendant testified that "there is a exit, like entering exiting exit, right next to my firm, so I just got on the LIE there... and that's, um, pretty much about it before I just ran into the other car." He also testified that the first time he saw the plaintiff's vehicle "should be seconds ago, before I just ran – rear enter – yeah, rear-ended that vehicle" and states he was driving between 60 to 65 miles per hour right before the accident. He also stated that he applied the brake "after the hit... and then I hit the brake". When the defendant was questioned about what he told the police at the scene, he stated "I rear-ended into another vehicle... nothing more than that because it is simple."

Here, the plaintiff established a prima facie entitlement to judgment as a matter of law. The defendant was then required to proffer evidence in admissible form to show facts sufficient to require a trial of any issue of fact. In opposition to the motion, defendant failed to rebut the prima facie showing and did not submit an affidavit in opposition from the defendant, Zhao Cai, or a witness with personal knowledge of the events giving rise to the cause of action or defense.

This motion by the plaintiff's for an order awarding summary judgment in their favor on the issue of liability is granted; and it is further

ORDERED that the attorneys for the parties shall proceed to discovery on the issue of damages; and it is further

ORDERED that counsel for plaintiffs shall serve a copy of this order upon opposing counsel and upon the Calendar Clerk of this court within twenty (20) days from the date of this order; and it is further

ORDERED that upon the completion of discovery and the filing of a Note of Issue, this action shall proceed to trial on the issue of damages.

The foregoing constitutes the decision and Order of the Court.

Dated: September 23, 2016

HON. JOSEPH A. SANTORELLI
J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**