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

MARYLOU CARRION,
Plaintiff,

- against -

MUHAMMAD SULEMAN and ONDER SARAK,
Defendants.

Index No.: 11196/2015

Motion Date: 1/22/18

Motion No.: 49

Motion Seq.: 2

- x

The following papers numbered 1 to 9 read on this motion by plaintiff for an order pursuant to CPLR 3212, granting plaintiff summary judgment on the issue of liability and setting this matter down for a trial on damages; and pursuant to CPLR 3126, striking defendants' answer and precluding defendants from testifying at any trial as to any matter:

	Papers Numbered
Notice of Motion-Affidavits-Exhibits	1 - 5
Affirmation in Opposition	6 - 7
Affirmation in Reply	8 - 9

In this negligence action, plaintiff seeks to recover damages for personal injuries allegedly sustained as a result of a motor vehicle accident that occurred on May 23, 2014 on Parsons Boulevard at or near 78th Avenue, in Queens County, New York.

Plaintiff commenced this action by filing a summons and complaint on September 14, 2015. Defendants joined issue by service of a verified answer dated March 9, 2016. Plaintiff now moves for an order pursuant to CPLR 3212, granting plaintiff summary judgment on the issue of liability on the grounds that defendants are the sole proximate cause of the accident. Plaintiff also seeks an Order striking defendants' answer and precluding defendants from testifying at any trial.

In support of the summary judgment motion, plaintiff submits a copy of the transcript of her examination before trial taken on

January 27, 2017. She affirms that at the time of the accident she was a passenger in a vehicle operated by Glover Leavitt. She was wearing a seatbelt. The road was dry, flat, and straight. The weather was dry. There were no unusual road conditions. Her vehicle was stopped at an intersection when defendants' vehicle rear-ended her vehicle.

Plaintiff also submits a copy of the Police Accident Report (MV-104AN). In the Accident Description portion of the Report, the responding officer notes:

> At t/p/o Driver of Veh #1 (Glover Leavitt) states he was slowing down in traffic when Veh #2 struck Veh #1 in the rear. Driver of Veh #2 (Muhammad Suleman) states he did not have time to stop in time.

Based on plaintiff's testimony and the Police Accident Report, plaintiff's counsel contends that the accident was caused solely by defendants' negligence in that defendant driver failed to avoid striking plaintiff's stopped vehicle in the rear, in violation of VTL 1129(a). Counsel contends, therefore, that plaintiff is entitled to partial summary judgment as to liability because defendants were solely responsible for causing the accident while plaintiff was free from culpable conduct.

In opposition to the motion, counsel for defendants contends that plaintiff's vehicle made a sudden stop, causing defendant driver to make contact with the rear of plaintiff's vehicle. Additionally, counsel contends that it is the jury's duty to assess the credibility of the parties.

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 that when a driver "approaches another vehicle from the rear, he is bound to maintain reasonably safe rate of speed, maintain control of his vehicle, and use reasonable care to avoid colliding with the other vehicle" (Barile v Lazzarini, 222 AD2d 635 [2d Dept. 1995]; see Williams v Spencer-Hall, 113 AD3d 759 [2d Dept. 2014]; Taing v Drewery, 100 AD3d 740 [2d Dept. 2012]).

Here, it is undisputed that defendants' vehicle struck plaintiff's vehicle in the rear. Having made the requisite prima facie showing of entitlement to summary judgment, the burden then shifted to the non-moving party to raise a triable issue of fact as to whether the moving party was also negligent, and if so, whether that negligence contributed to the happening of the accident (see Goemans v County of Suffolk, 57 AD3d 478 [2d Dept. 2007]).

In opposition, no evidence has been submitted demonstrating that plaintiff was in any way negligent. This Court finds that defendants, who did not submit an affidavit in opposition to the motion, failed to provide evidence of a non-negligent explanation for the accident sufficient to raise a triable question of fact (see Bernier v Torres, 79 AD3d 776 [2d Dept. 2010]; Lampkin v Chan, 68 AD3d 727 [2d Dept. 2009]; Cavitch v Mateo, 58 AD3d 592 [2d Dept. 2009]; Garner v Chevalier Transp. Corp, 58 AD3d 802 [2d Dept. 2009]; Kimyagarov v Nixon Taxi Corp, 45 AD3d 736 [2d Dept. 2007]; Gomez v Sammy's Transp., Inc., 19 AD3d 544 [2d Dept. 2005]). Defendants submit only an attorney's affirmation which is insufficient to defeat a summary judgment motion (see Zuckerman, 49 NY2d at 563).

Defendants' counsel's argument that plaintiff's vehicle suddenly stopped is merely speculative and, thus, insufficient to defeat the summary judgment motion (see Andre v Pomeroy, 35 NY2d 361 [1974]; Jacino v Sugerman, 10 AD3d 593 [2d Dept. 2004]). Additionally the argument that plaintiff's vehicle stopped suddenly, does not explain defendant driver's failure to maintain a safe distance from the vehicle in front of him (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]). A bare claim that the driver of the lead vehicle suddenly stopped, standing alone, is insufficient to rebut the presumption of negligence, especially where, as here, defendant driver fails to explain why he did not maintain a safe following distance (see Ramirez v Konstanzer, 61 AD3d 837 [2d Dept 2009]; Morgan v Browner, 138 AD3d 560 [1st Dept. 2016]; Malone v Morillo, 6 AD3d 324 [1st Dept. 2004]).

Turning to that branch of plaintiff's motion seeking to strike defendants' answer and preclude defendants' from testifying at trial, plaintiff contends that defendants have violated the Preliminary Conference Order dated June 8, 2016 which directed defendants to appear for depositions on September 7, 2016, the Compliance Conference Order dated December 14, 2016

which directed defendants to appear for depositions on January 27, 2017, and the So Ordered Stipulation dated May 1, 2017 which directed defendants to appear for depositions on or before June 21, 2017.

In opposition, counsel for defendants contends that his office has made and continues to make a diligent and good faith effort to produce defendants for deposition. Additionally, the law office has assigned in-house investigators to make contact with defendant driver and secure his cooperation and availability for a deposition. His office has sent letters and made phone calls, but have yet to receive a reply.

Pursuant to CPLR 3126(3), a court may issue "an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party." A court may invoke the drastic remedy of striking a pleading, however, only upon a clear showing that the failure to comply with court-ordered discovery was willful and contumacious (see Argo v Queens Surface Corp., 58 AD3d 656 [2d Dept. 2009]; Paca v City of New York, 51 AD3d 991 [2d Dept. 2008]; Maignan v Nahar, 37 AD3d 557 [2d Dept. 2007]). "Willful and contumacious conduct may be inferred from a party's repeated failure to comply with court-ordered discovery, coupled with inadequate explanations for the failures to comply" (see Friedman, Harfenist, Langer & Kraut v Rosenthal, 79 AD3d 798 [2d Dept. 2010]).

Based on defendants' counsel's efforts to produce defendants for deposition, and on the facts of this matter, this Court finds preclusion of defendants' testimony at trial to be an appropriate remedy if defendants fail to appear for a deposition.

Accordingly, and for the reasons stated above, it is hereby,

ORDERED, that the branch of plaintiff's motion seeking summary judgment on the issue of liability against defendants is granted; and it is further

ORDERED, that defendants shall appear for a deposition on or before February 28, 2018; and it is further

ORDERED, that the failure to appear for depositions shall result in defendants being precluded from testifying at the time of trial, without further Order of this Court; and it is further

ORDERED, that plaintiff shall serve a copy of this Order with Notice of Entry on all parties.

Dated: January 29, 2018
Long Island City, N.Y.

ROBERT J. McDONALD

J.S.C.