Index No.: 603498-17

SUPREME COURT - STATE OF NEW YORK
I.A.S. Part 39 - SUFFOLK COUNTY

PRESENT:
Hon. **DENISE F. MOLIA,**
Justice

NERY J. ORTIZ,

Plaintiff,

- against -

STEVEN R. WITTHUHN and GREGORY S. WITTHUHN,

Defendants.

CASE DISPOSED: YES
MOTION R/D: 2/28/18
SUBMISSION DATE: 6/29/18
MOTION SEQUENCE NO.: 001 MG

ATTORNEY FOR PLAINTIFF
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Upon the following papers filed and considered relative to this matter:

Notice of Motion dated January 22, 2018; Affirmation in Support dated January 22, 2018; Exhibits A through G annexed thereto; Affirmation in Opposition dated May 1, 2018; Affidavit in Opposition dated May 10, 2018; Reply Affirmation dated May 31, 2018; Exhibits A through C annexed thereto; and upon due deliberation; it is

ORDERED, that the motion by plaintiff, pursuant to CPLR 3212, for an Order directing the entry of summary judgment in favor of plaintiff and against the defendants on the issue of liability, is granted.

The instant action was commenced to recover damages for personal injuries allegedly sustained by the plaintiff in a four vehicle rear end chain collision which occurred on May 7, 2016, in which the defendant Gregory Witthuhn was the operator of the fourth vehicle in the chain. In support of her motion for summary judgment, Nery J. Ortiz, the operator of the third vehicle in the chain has submitted an affidavit dated January 22, 2018, which states in pertinent part:

> "On May 7th, 2016, at approximately 11:50 a.m., I was a seat belted driver, operating my 2012 Honda northbound on Larkfield Drive, in the Town of Huntington, County of Suffolk, and State of New York.
>
> At the above date, time and place, my vehicle was at a complete stop in traffic on Larkfield Drive for approximately two minutes, when I

was struck from behind by pickup truck operated by defendant, Gregory S. Witthuhn, and owned by defendant, Steven R. Witthuhn. As a direct result of defendant Gregory S. Witthuhn's impact to the rear of my stopped vehicle, my vehicle was forced into the rear of the stopped vehicle in front of me, operator Maureen Rukin, who was then forced into the stopped vehicle in front of her, operator Maryann Avella.

At the time of the collision, my vehicle had properly functioning brake lights and tail lights. It was not raining, and the roads were dry.

Prior to the collision, the defendant, Gregory S. Witthuhn, "quickly looked down" inside his vehicle, and failed to observe my vehicle completely stopped in traffic. When defendant looked back up at the road, he could not stop his vehicle before striking me, causing the defendant to collide with the rear of my vehicle.

Defendant, Gregory S. Witthuhn, offered the above information about looking down and taking his eyes off the road to the responding police officer. Defendant was then cited for "driver inattention/distraction" and "unsafe speed" in the Certified Police Report by the responding officer."

The certified MV-104A Report prepared by Police Officer Luis Abreu dated May 7, 2016, confirms that the drivers of the first three vehicles all stated that they had been stopped in traffic when the plaintiff's vehicle (third in line) was struck in the rear by the vehicle operated by defendant Gregory S. Witthuhn. The Report also reported said defendant's statement that "he quickly looked down and when he looked up he struck V#3."

In opposition to the motion, the defendant Gregory S. Witthuhn has submitted an affidavit in which he now directly contradicts the prior statements and admissions he made to Police Officer Abreu at the time of the accident. In his affidavit dated May 10, 2018 Witthuhn states, in pertinent part:

"Immediately prior to the happening of the accident, I observed a certain 2007 Chrysler motor vehicle stopped ahead of me in the northbound lane of travel on Larkfield Road. It is my understanding that this vehicle was attempting to make a right turn into a parking lot.

I then observed a certain 2015 Mercedes, travelling immediately behind the aforementioned 2007 Chrysler, in the same lane of travel. Suddenly, and without warning, this vehicle came to an abrupt stop and struck the 2007 Chrysler.

Suddenly thereafter, and without warning, a certain 2012 Hondo motor vehicle, travelling immediately behind the aforementioned 2015 Mercedes, and immediately in front of my own vehicle, was caused to come to an abrupt stop and strike the rear of the 2015 Mercedes.

> It is my understanding that the Plaintiff in this action was the operator of the aforementioned 2012 Honda motor vehicle. Immediately prior to the happening of the accident, I was traveling approximately ten (10) miles per hour while maintaining a safe distance behind the Plaintiff's vehicle.
>
> As a result of the Plaintiff's abrupt stop, however, I was unable to avoid contact between the front end of my vehicle and the rear end of the Plaintiff's vehicle."

The defendant has not addressed the disparity between the content of the statement that he gave to the Suffolk County Police contemporaneously with the accident and the content of his affidavit which was crafted two years post-accident. Neither does the defendant deny that he was cited for "driver inattention/distraction" and "unsafe speed" at the accident scene.

The Second Department has consistently held that a rear-end collision with a stopped or stopping vehicle imposes a duty on the operator of the moving vehicle to explain how the accident occurred. Leal v. Wolff, 224 A.D.2d 392, 638 N.Y.S.2d 100; Mendiolaza v. Novinski, 268 A.D.2d 462, 703 N.Y.S.2d 49; Young v. City of New York, 113 A.D.2d 833, 493 N.Y.S.2d 585; Starace v. Qonexions, 198 A.D.2d 493, 604 N.Y.S.2d 179. Such "a rear-end collision with a stopped vehicle establishes a prima facie case of negligence on the part of the driver of the moving vehicle, requiring the operator of that vehicle to come forward with a non-negligent explanation for the accident." Dhamah v. Richmond County Ambulance Service, Inc., 279 A.D.2d 564 at 565, 719 N.Y.S.2d 287. It is well established in this jurisdiction that in a rear-end collision with a stopped or stopping vehicle, a prima facie case of negligence is established against the operator of the moving vehicle. Filippazzo v. Santiago, 277 A.D.2d 419, 716 N.Y.S.2d 710; Arigro v. Norfolk Contract Carrier, Inc., 275 A.D.2d 384, 712 N.Y.S.2d 599; Power v. Hupart, 260 A.D.2d 458, 688 N.Y.S.2d 194.

Additionally, in a rear-end collision situation, the driver to the rear bears the duty to maintain a safe distance between his or her vehicle and the vehicle in front, and the failure to do so will establish a prima facie case of negligence, as a matter of law, against the operator of the vehicle to the rear. Lifshits v. Variety Poly Bags, 278 A.D.2d 372, 717 N.Y.S.2d 630; Pena v. Allen, 272 A.D.2d 311, 707 N.Y.S.2d 643; Hernandez v. Burkitt, 271 A.D.2d 648, 706 N.Y.S.2d 456. "[V]ehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her car and the car ahead." Shamah v. Richmond County Ambulance Service, 279 A.D.2d 564, 719 N.Y.S.2d 287, 288.

Here, the plaintiff has met her burden by establishing through pleadings and other documentary evidence that the vehicle she was operating was stopped in traffic when the defendant ran into the rear of the Ortiz vehicle. Daliendo v. Johnson, 147 A.D.2d 312, 543 N.Y.S.2d 987; Ribowsky v. Kashinsky, 234 A.D.2d 353, 651 N.Y.S.2d 886. In opposition to the motion, the defendant has submitted an affidavit in which he states for the first time that the plaintiff's vehicle came to an abrupt stop as a result of the actions of the vehicle directly in front of her. The defendant has failed to explain why his allegation of an abrupt stop by plaintiff was not conveyed to the police at the time of the accident. Neither has he denied that he was cited for violation of the Vehicle and Traffic Law as a result of his striking the rear of the plaintiff's

vehicle.

"A claim that the driver of the lead vehicle made a sudden stop, standing alone, is insufficient to rebut the presumption of negligence" Jumandeo v. Franks, 56 A.D.3d 614, 867 N.Y.S.2d 541, citing Russ v. Investech Sec., 6 A.D.3d 602; see also, Arias v. Rosario, 52 A.D.3d 551, 552; Johnston v. Spoto, 47 A.D.3d 888; Campbell v. City of Yonkers, 37 A.D.3d 750, 751; Neidereger v. Misuraca, 27 A.D.3d 537; Ayach v. Ghazal, 25 A.D.3d 742. The Appellate Division, Second Department has consistently held that liability in a rear-end collision can attach to the rear vehicle regardless of whether the lead vehicle (1) is stopped at a red traffic signal, (Benyarko v. Avis Rent A Car System, Inc., 162 A.D.2d 572, 556 N.Y.S.2d 761); (2) stops suddenly in stop-and-go-traffic, (Barba v. Best Security Corporation, 235 A.D.2d 381, 652 N.Y.S.2d 71); (3) stops suddenly at a red traffic signal, (Hurley v. Cavitolo, 239 A.D.2d 559, 658 N.Y.S.2d 90); or (4) stops suddenly in ordinary traffic, (Bando-Twomey v. Richheimer, 229 A.D.2d 554, 646 N.Y.S.2d 155).

Where, as here, the defendant fails to offer a non-negligent explanation for the happening of the accident, a finding of fault against said defendant is mandated as a matter of law. Leal v. Wolff, 224 A.D.2d 392, 638 N.Y.S.2d 110. Under the present circumstances, where there is no demonstration that additional discovery will uncover triable issues of fact, it is proper to grant summary judgment in favor of the defendants and against the plaintiff on the issue of liability. See, Saunders v. Baker, 285 A.D.2d 497, 727 N.Y.S.2d 169; Rodgers v. Yale University, 283 A.D.2d 415, 723 N.Y.S.2d 866; Drug Guild Distributors v. 3-9 Drugs, Inc., 277 A.D.2d 197, 715 N.Y.S.2d 442; Moriello v. Stormville Airport Antique Show & Flea Market, Inc., 271 A.D.2d 664, 706 N.Y.S.2d 463.

The foregoing constitutes the Order of this Court.

Dated: August 22, 2018

HON. DENISE F. MOLIA A.J.S.C.