SHORT FORM ORDER **INDEX NO.: 601677/2017**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PUBLISH

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

Motion Submit Date: 01/18/18
Motion Seq 001 MD

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DIANE TORRES,

Plaintiff,

-against-

CECILIA MEJIA, ALEJANDRO MEJIA, ALEXIS GILLEY & GREGORY GILLEY, JR.,

Defendants.

Upon the reading and filing of the following papers on defendant's motion seeking summary judgment as to liability pursuant to CPLR 3212: (1) Notice of Motion and Affirmation in Support dated November 2, 2017 and supporting papers; (2) Affirmation in Opposition dated January 11, 2018 and other opposing papers; (3) Reply Affirmation in Further Support dated January 16, 2018; and upon due deliberation and full consideration, now it is

ORDERED that defendants Alexis Gilley and Gregory Gilley, Jr.'s motion seeking summary judgment as to liability pursuant to CPLR 3212 dismissing the complaint as against them and father dismissing co-defendants' cross-claims is **denied** as follows; and it is further

ORDERED that movants' counsel is hereby directed to serve a copy of this decision and order with notice of entry on counsel for all parties by overnight mail, return receipt requested forthwith.

Factual Background

Plaintiff Diane Torres brought this personal injury negligence action against defendants Alexis Gilley, Gregory Gilley, Jr., Cecilia Mejia and Alejandro Mejia arising out of a motor vehicle accident which occurred on July 27, 2014 at or near the intersection of Route 231 with Ellsworth Avenue in Babylon, Suffolk County, New York. Plaintiff seeks recovery of money damages for alleged serious personal injuries which he argues were premised upon defendants' negligence.

Procedural History

The action commenced with plaintiff's electronic filing of a summons and complaint on January 27, 2017. The Gilley defendants joined issue filing their answer with cross-claims dated March 16, 2017. The Mejia defendants joined issue answering the complaint on April 7, 2017. Discovery in this matter is well underway, with the parties having entered into a Preliminary Conference Order on May 9, 2017. This case has appeared on this Court's discovery compliance conference calendar on several occasions. It is unclear whether the parties have appeared for or given sworn testimony at examinations before trial.

Summary of the Arguments

Defendants and movants herein the Gilleys now seek summary judgment on liability dismissing plaintiff's complaint against them, as well as co-defendant Mejias' cross-claims, arguing that based upon the rear-end collision and contact in this case supports a determination as a matter of law that the Gilleys were not liable for incident plaintiff alleges as proximate cause for her injuries and damages. In support of their application, movants submit an affidavit sworn on October 17, 2017 by Alexis Gilley, as well as an uncertified Suffolk County Police Department accident investigation report.

By her affidavit, Gilley swears that on the date, time and location of the incident, she operated a 2006 Audi Suburban, owned by Gregory Gilley, Jr. She further states that she was travelling northbound on Route 231, and that as she approached the intersection with Ellsworth Avenue, she gradually brought the vehicle to a stop at the red light controlling the intersection. Gilley testifies that she was stopped in traffic with not vehicle in front of her for approximately 30 second when she was impacted to the rear of her vehicle by a 2005 Toyota sedan owned by defendant Alejandro Mejia, and operated by defendant Cecilia Mejia. Gilley further testifies that at the time of the incident her brake lights were in good working condition or otherwise fully functioning.

Premised on this, the Gilleys argue they cannot be held liable to plaintiff or to the co-defendants as having caused or contributed to the incident forming the basis of plaintiff's claim since they were rear-ended.

Co-defendants the Mejias oppose this motion. The first argue that the application is premature since at the time of its making no party depositions had occurred, thereby preventing any examination on whether Alexis Gilley was a cause or contributor to the incident. The Mejias further argue that movants' reliance on the uncertified police accident investigation is misplaced as it is not certified and thus not in admissible form. Lastly, the Mejias contend that triable issues of fact exist warranting denial of the motion. Specifically, relying on an affidavit submitted by Cecilia Mejia sworn January 9, 2018, they argue that Gilley was indeed the cause or a contributor to the incident.

More particularly, by her affidavit, Mejia testifies that on the date, time and location of the occurrence, she was operated a 2005 Toyota sedan travelling northbound on Route 231 in dry clear weather, but dark road conditions. In fact, Mejia states that approaching the intersection with Ellsworth Avenue, the road was not sufficiently lit. This is significant in this matter and the resolution of the instant application, since Mejia claims that as she approached the

intersection she observed what she has since learned was the Gilley's Audi vehicle stopped in the rightmost northbound lane of travel. Mejia describes the vehicle as appearing in a "shut off" condition with no functioning lights of any kind, including brake, head, hazard or running lights. On her observation of Gilley's vehicle, Mejia states she applied heavy pressure to her brake, but was unable to avoid a moderate to heavy rear-end collision. Immediately thereafter, Mejia testifies that she too was rear-ended, but had sufficient control of her vehicle to avoid a secondary impact with Gilley's vehicle in front of her.

With these starkly contrasting accounts, the Court now weighs whether the Gilleys are entitled to judgment as a matter of law dismissing them from the action.

Standard of Review

It is well settled that summary judgment is a drastic remedy which should not be granted when there is doubt as to the existence of a triable issue of fact. Where, however, one seeking summary judgment tenders evidentiary proof in admissible form establishing its defense sufficiently to warrant the court as a matter of law in directing judgment in its favor, the burden falls upon the opposing party to show, also by evidentiary proof in admissible form, that there is a material issue of fact requiring a trial of the matter (*see* ***Zuckerman v. City of New York,*** 49 NY2d 557, 562, 427 NYS2d 595 [1980]). The evidence presented on a motion for summary judgment must be scrutinized in the light most favorable to the party opposing the motion (*see* ***Goldstein v. Monroe County,*** 77 AD2d 232, 236, 432 NYS2d 966 [1980]).

The proponent on a motion of summary judgment 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 fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985];]; ***Zuckerman v City of New York,*** 49 NY2d 557, 427 NYS2d 595 [1980]).

If the moving party fails in meeting this burden, the motion must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see* ***Zuckerman,*** *supra*). The function of the court in determining a motion for summary judgment is issue finding, not issue determination (***Pantote Big Alpha Foods, Inc. v Schefman,*** 121 AD2d 295, 503 NYS2d 58 [1st Dept. 1986]).

The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289AD2d 557, 735 NYS2d 197 [2d Dept. 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept. 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept. 1987]). The law is well-established that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see* ***Andre v Pomeroy,*** 35 NY2d 361, 362 NYS2d 131 [1974]; ***Benincasa v Garrubo,*** 141 AD2d 636, 529 NYS2d 797 [2d Dept. 1988]).

Discussion

A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence against the operator of the rear vehicle, thereby requiring that operator to rebut the

inference of negligence by providing a nonnegligent explanation for the collision (***Comas-Bourne v City of New York***, 146 AD3d 855, 856, 45 NYS3d 182, 183 [2d Dept 2017]; ***Whelan v Sutherland***, 128 AD3d 1055, 1056, 9 NYS3d 639, 640 [2d Dept 2015]; ***Tutrani v. County of Suffolk***, 10 NY3d 906, 908; ***Gutierrez v. Trillium USA, LLC***, 111 AD3d 669, 670–671, 974 NYS2d 563; ***Pollard v. Independent Beauty & Barber Supply Co.***, 94 AD3d 845, 846, 942 NYS2d 360; ***Perez v Roberts***, 91 AD3d 620, 621, 936 NYS2d 259, 260 [2d Dept 2012]; ***Le Grand v Silberstein***, 123 AD3d 773, 774, 999 NYS2d 96, 97 [2d Dept 2014]).

The claim that the lead vehicle made a sudden stop, standing alone, is insufficient to rebut the presumption of negligence on the part of the following vehicle (*see* ***Zdenek v Safety Consultants, Inc.***, 63 AD3d 918, 918, 883 NYS2d 57, 58 [2d Dept 2009]; ***Kastritsios v. Marcello***, 84 AD3d 1174, 923 NYS2d 863; ***Franco v. Breceus***, 70 AD3d 767, 895 NYS2d 152; ***Mallen v. Su***, 67 AD3d 974, 890 NYS2d 79; ***Rainford v. Han***, 18 AD3d 638, 795 NYS2d 645; ***Russ v. Investech Secs.***, 6 AD3d 602, 775 NYS2d 867; ***Xian Hong Pan v Buglione***, 101 AD3d 706, 707, 955 NYS2d 375, 377 [2d Dept 2012]). However, "[i]f the operator cannot come forward with any evidence to rebut the inference of negligence, the plaintiff may properly be awarded judgment as a matter of law" (***Barile v. Lazzarini***, 222 AD2d 635, 636, 635 NYS2d 694; ***D'Agostino v YRC, Inc.***, 120 AD3d 1291, 1292, 992 NYS2d 358, 359 [2d Dept 2014]).

A possible non-negligent explanation for a rear-end collision could be the sudden stop of the lead vehicle," however, it is equally true that "vehicle 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 Serv.***, 279 A.D.2d 564, 565, 719 N.Y.S.2d 287; *see* ***Gutierrez v Trillium USA, LLC***, 111 AD3d 669, 671, 974 NYS2d 563, 566 [2d Dept 2013]; ; ***Robayo v. Aghaabdul,*** 109 A.D.3d 892, 893, 971 N.Y.S.2d 317). Even assuming that a lead vehicle stopped short or suddenly, following vehicles should not escape liability for an assumed failure to maintain a proper or safe following distance under the presented circumstances, where the record presents a scenario with triable questions of fact ripe for jury determination, rather than summary determination on the law (*see e.g.* ***Romero v Al Haag & Son Plumbing & Heating, Inc.***, 113 AD3d 746, 747, 978 NYS2d 895, 896 [2d Dept 2014][even assuming that the defendant driver failed to maintain a reasonably safe distance and rate of speed while traveling behind the plaintiff's vehicle under Vehicle and Traffic Law § 1129[a], defendant's deposition testimony relied upon by plaintiff, itself raised a triable issue of fact on whether the plaintiff contributed to the accident by driving in an erratic manner]; *accord* ***Fernandez v Babylon Mun. Solid Waste***, 117 AD3d 678, 679, 985 NYS2d 289, 290 [2d Dept 2014][under circumstances where plaintiff came to an abrupt stop for no apparent reason resulting in a collision, a triable issue of fact exists]; ***Sokolowska v Song***, 123 AD3d 1004, 1004, 999 NYS2d 847, 848 [2d Dept 2014]).

This burden is placed on the driver of the offending vehicle, as 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, unavoidable skidding on wet pavement, or some other reasonable cause (*see* ***Abbott v Picture Cars E., Inc.***, 78 A.D.3d 869, 911 N.Y.S.2d 449 [2d Dept 2010]; ***DeLouise v S.K.I. Wholesale Beer Corp.***, 75 A.D.3d 489, 904 N.Y.S.2d 761 [2d Dept 2010]; ***Moran v Singh***, 10 A.D.3d 707, 782 N.Y.S.2d 284 [2d Dept 2004]).

Our courts have held that a movant establishes a *prima facie* entitlement to judgment as a

matter of law on the issue of liability, based on an affidavit testimony stating that plaintiff's vehicle was stopped in traffic when it was struck in the rear by the defendants' vehicle, thus shifting the burden to the defendants to come forward with a non-negligent explanation for the accident (***Oguzturk v. Gen. Elec. Co.***, 65 AD3d 1110, 1110, 885 NYS2d 343, 344 [2d Dept 2009]).

Most importantly, the New York Court of Appeals has recently clarified plaintiff-movant's burden on a motion such as that *sub judice*. The Court has reaffirmed and reminded motion courts that "a plaintiff is no longer required to show freedom from comparative fault in establishing his or her prima facie case (*see* ***Edgerton v City of New York***, 160 AD3d 809, - - - NYS3d - - - [2d Dept 2018]; *quoting* ***Rodriguez v. City of New York***, - - - N.Y.3d - - -, - - - N.Y.S.3d - - - 2018 N.Y. Slip Op. 02287, 2018 WL 1595658 [Apr. 3, 2018]).

I. The Police Accident Investigation Report

The Court will not consider the police accident investigation report in connection with movants' application as it is not in admissible form, and cannot for the basis for a determination as a matter of law that defendants the Gilleys were not liable for plaintiff's accident.

To the extent that either party has submitted or relies upon the police accident investigation report as substantive evidence, this Court is in agreement with the general proposition that it cannot be considered on the issue of liability or causation of the collision *sub judice*. The Second Department has clearly held that conclusory statements as to how the accident occurred constitute inadmissible hearsay (*see* ***Cheul Soo Kang v. Violante***, 60 A.D.3d 991, 992, 877 N.Y.S.2d 354; ***Quaglio v. Tomaselli***, 99 A.D.2d 487, 488, 470 N.Y.S.2d 427; ***Sanchez v. Steenson***, 101 AD3d 982, 983, 957 NYS2d 239, 240 [2d Dept 2012]).

The Appellate Division has artfully summarized the state of evidentiary law concerning police accident reports thusly:

> Pursuant to CPLR 4518(a), a police accident report is admissible as a business record so long as the report is made based upon the officer's personal observations and while carrying out police duties … If information contained in a police accident report was not based upon the police officer's personal observations, it may nevertheless be admissible as a business record "if the person giving the police officer the information contained in the report was under a business duty to relate the facts to him [or her]" … .
>
> [However] If the person giving the police officer the information was not under a business duty to give the statement to the police officer, such information "may be proved by a business record only if the statement qualifies [under some other] hearsay exception, such as an admission" ….
>
> In other words, "each participant in the chain producing the record, from the initial declarant to the final entrant, must be acting within the course of regular business conduct or the declaration must meet the test of some

other hearsay exception" … "The proponent of hearsay evidence must establish the applicability of a hearsay-rule exception"

Memenza v. Cole, 131 AD3d 1020, 1021–22, 16 NYS3d 287, 289 [2d Dept 2015][holding that where police officer had no personal recollection of his accident investigation and was unable to testify as to the source of the information contained in the accident report, report is inadmissible because the source of the information contained therein was unidentifiable and thus unauthenticated: it could not be established whether the source of the information had a duty to make the statement or whether some other hearsay exception applied]; *see also* ***Hazzard v Burrowes***, 95 AD3d 829, 831, 943 NYS2d 213, 214–15 [2d Dept 2012][police accident report was inadmissible, as it was not certified as a business record and the statements by both parties were self-serving, did not fall within any exception to the hearsay rule, and bore upon the ultimate issues of fact to be decided by the jury]; ***Noakes v. Rosa***, 54 AD3d 317, 318, 862 NYS2d 573; ***Casey v. Tierno***, 127 AD2d 727, 728, 512 NYS2d 123).

II. Premature Application Under CPLR 3212(f)

For reasons more fully articulated below, the branch of the Mejias' opposition on the grounds of prematurity as a basis precluding summary judgment here must be **denied.**

Defendants essentially argue that the Gilleys' motion is premature in time prior to the conclusion of summary judgment (*see e.g.* ***Adrianis v Fox***, 30 AD3d 550, 550–51, 817 NYS2d 374, 375 [2d Dept 2006][Second Department holding that motion court properly denied, as premature, partial liability summary judgment motion as defendant's deposition was still outstanding and the parties had previously stipulated to hold that deposition only seven days after the motion was made]). Put somewhat differently, the Mejias therefore argue that they have been unfairly deprived the opportunity to fully test the merits of the Gilleys' claim by conducting full, complete or thorough pretrial disclosure, to include party depositions (*see* ***Amico v Melville Volunteer Fire Co., Inc.***, 39 AD3d 784, 785, 832 NYS2d 813 [2d Dept 2007][resolving that a party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment]).

However, the Second Department is clear that defendants' mere hope or speculation that additional discovery might lead to or create a triable fact issue is insufficient to preclude the entry of summary judgment on liability in this negligence motor vehicle action (*see e.g.* ***Rodriguez v Farrell***, 115 AD3d 929, 931, 983 NYS2d 68, 70 [2d Dept 2014][appellate court determining that summary judgment not premature where defendant failed to demonstrate that discovery would lead to relevant evidence or that facts essential to justify opposition to the motions were exclusively within the knowledge and control of the plaintiffs]; ***Medina v Rodriguez***, 92 AD3d 850, 851, 939 NYS2d 514, 515 [2d Dept 2012]; ***Kimyagarov v Nixon Taxi Corp.***, 45 AD3d 736, 737, 846 NYS2d 309, 310–11 [2d Dept 2007]; ***Hill v Ackall***, 71 AD3d 829, 829–30, 895 NYS2d 837, 838 [2d Dept 2010]).

A party opposing summary judgment is entitled to obtain further discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated." ***Chmelovsky v. Country Club Homes, Inc.***, 106 AD3d 684, 964 NYS2d 245, 246 [2d Dept 2013]; ***Martinez v. 305 W. 52 Condo.***, 128 AD3d 912, 914, 9 NYS3d 375, 377 [2d Dept 2015]["A party should be afforded a reasonable opportunity to conduct discovery prior to the

determination of a motion for summary judgment"]). The non-movant should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment (*see* ***Video Voice, Inc. v. Local T.V., Inc.,*** 114 AD3d 935, 980 NYS2d 828; ***Bank of Am., N.A. v. Hillside Cycles, Inc.,*** 89 AD3d 653, 932 NYS2d 128; ***Venables v. Sagona,*** 46 AD3d 672, 673, 848 NYS2d 238). Further, non-movant is also entitled to obtain further discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated (*see* CPLR 3212[f]; ***Nicholson v. Bader,*** 83 AD3d 802, 920 NYS2d 682; ***Family–Friendly Media, Inc. v. Recorder Tel. Network,*** 74 AD3d 738, 739, 903 NYS2d 80; ***Juseinoski v. New York Hosp. Med. Ctr. of Queens,*** 29 AD3d 636, 637, 815 NYS2d 183). ***Malester v. Rampil***, 118 A.D.3d 855, 856, 988 N.Y.S.2d 226, 227-28 [2d Dept 2014]).

Under CPLR 3212(f), "where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant, summary judgment may be denied.... This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion" (***Juseinoski v. New York Hosp. Med. Ctr. of Queens***, 29 AD3d 636, 637, 815 NYS2d 183, 184-85 [2d Dept 2006]; ***Baron v. Inc. Vil. of Freeport,*** 143 AD2d 792, 92-93; 533 NYS2d 143, 148 [2d Dept 1998]).

As explained below, defendants Mejias are correct that additional discovery is likely necessary for the ultimate resolution of the parties' dispute in this matter. However, the Mejias have not carried their burden of demonstrating that this application cannot be resolved absent party depositions. Rather, given the sharply contrasting descriptions of the occurrence, this Court well positioned to determine that sufficient triable issues of fact predominate weighing against awarding judgment as a matter of law to any party. Thus, this aspect of the Mejias' opposition is also **denied.**

III. Triable Issues of Fact Warrant Denial of Summary Judgment

At the outset, on the Court's review of movants' submissions, this Court finds that the Gilleys' have met their *prima facie* their burden for entitlement to summary judgment, having submitted a sworn affidavit establishing a *prima facie* case of negligence against the defendants the Mejias. However, the analysis does not end there.

The Mejias have in opposition raised a non-negligent explanation for the rear-end collision, and also highlighted the existence of trial issues of fact warranting submission to a rational factfinder at trial. Thus, movants application for summary judgment dismissing the complaint and cross-claims are **denied.**

In sum, the parties supporting and opposing papers present a scenario which brings into sharp focus a relevant and material factual dispute warranting submission to a trial on liability. Movants argue that they were hit in the rear while lawfully stopped in traffic for a red light for no more than a 30 second duration. They also submit that their vehicle's brake lights were fully functioning at the time of the incident. Disputing that account, the Mejias argue that movants vehicle appeared off with no illuminated or working lights of any kind at the time prior to impact. Additionally, the Mejias emphasize that the section of roadway comprising the accident scene was dimly or inadequately lit, thus highlighting, if true, the negligent nature of the Gilley's vehicle lacking lit or fully function lights at the time of the incident. Thus, given this framing of the issue, the matter is ripe for determination by a jury as the parties are reminded that this

Court's role on a motion for summary judgment is "issue finding rather than issue determination." (***In re Corfian Enterprises, Ltd.***, 52 AD3d 828, 829, 861 NYS2d 392, 393 [2d Dept 2008]; ***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 404, [1957]). Bearing that in mind then, movants' application for judgment as a matter of law dismissing the complaint and cross-claims pursuant to CPLR 3212 is hereby **denied.**

Accordingly, in view of all of the foregoing, it is

ORDERED that defendants Alexis Gilly and Gregory Gilly, Jr.'s motion pursuant to CPLR 3212 for summary judgment as to liability dismissing the complaint and crossclaims is **denied** due to the existence of triable issues warranting trial.

The foregoing constitutes the decision and order of this Court.

Dated: June 4, 2018
Riverhead, New York

WILLIAM G. FORD, J.S.C.

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