SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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Mary Cunningham

Plaintiff,

DECISION AND ORDER

Index No. 28692/2017E

-against-

Kimberly J. Hindle, and
Nicholas M. Hindle,

Defendants

Howard H. Sherman
JSC

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of motion and cross motion as indicated below.

Notice of Motion, Affirmation , Exhibits A-D	1
Affirmation in Opposition	2

In the above-entitled action plaintiff Mary Cunningham (Cunningham) moves for summary judgment on the issue of liability.

Defendants oppose the motion .

Cunningham commenced this action seeking damages for personal injuries alleged to have been sustained as a result of a rear-end collision that occurred on Pelham Parkway South in Bronx County on August 9, 2016 . At the time of the accident, plaintiff was the operator of a motor vehicle that was impacted in the rear by a motor vehicle owned by Kimberly J. Hindle then being operated by Nicholas M. Hindle (Hindle Defendants).

Issue was joined in October 2017 with the service of the answer of the moving defendants. They assert several affirmative defenses including plaintiff's causative culpable conduct.

In support of the motion, plaintiff submits copies of the summons and complaint [Exhibits B,C], an uncertified copy of the police accident report[1] [Exhibit A], and an affidavit of plaintiff [Exhibit D].

In pertinent part, Cunningham attests that she was traveling eastbound on Pelham Parkway when defendants' vehicle "made contact with the rear end of [her] vehicle " , which was stopped at the time [Affidavit of Mary Cunningham ¶ 7].

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). "To obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor (CPLR 3212, subd. [b]), and he must do so by tender of evidentiary proof in admissible form" (*Friends of Animals v Associate Fur Mfrs.*, 46 NY2d 1065, 1067-1068 [1979]). Once such a showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Alvarez v Prospect Hosp.*, 68 NY2d 320; *Zuckerman v City of New York*, 49 NY2d 557). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851).

When a driver approaches another vehicle from the rear, he or she is bound to maintain a reasonably safe rate of speed to maintain control of his or her vehicle, and to exercise

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[1]The uncertified copy of the police accident report is inadmissible here (see, Rivera v. GT Acquisition 1 Corp., 72 A.D.3d 525 [1st Dept. 2010]).

reasonable care to avoid colliding with the other vehicle (*see Passos v MTA Bus Co.*, 129 AD3d 481 [1st Dept 2015]). As a consequence, as here, the occurrence of a rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence on the part of the operator of the following vehicle and imposes a duty on that operator to come forward with a non-negligent explanation for the collision (*see Tutrani v. County of Suffolk, 10 N.Y.3d 906, 908, 861 N.Y.S.2d 610, 891 N.E.2d 726* [2008]; *Morgan v Browner*, 138 AD3d 560 [1st Dept 2016]; *Joplin v City of New York*, 116 AD3d 443 [1st Dept 2014]; *Cabrera v Rodriguez*, 72 AD3d 553 [1st Dept 2010]).

In opposition, in separate affidavits, defendants attest that they were traveling in the left-most of three eastbound lanes approaching a green traffic light at the White Plains Road intersection when they observed plaintiff's Jeep traveling in the middle lane less than a full car length ahead. A third vehicle , which had been traveling in the right lane , quickly and without warning, proceeded to cross over to the left lane in order to make a left turn at the intersection. In so doing , the third vehicle "cut off" the Jeep , causing it to swerve to the left into the left lane where plaintiff "slammed on her brakes" causing the Hindle BMW to strike it in the rear.

Upon consideration of the above as afforded all favorable inferences in favor of the non-moving party, the court finds that plaintiff is entitled to an award of partial summary judgment on the issue of liability. It is noted that "[t]o be entitled to partial summary judgment a plaintiff does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault" (Rodriguez v City of New York, 31 NY3d 312, 324-325, 101 N.E.3d 366 [2018]). It is clear that such issue , as here asserted, is more properly reserved for consideration on the assessment of damages.

Accordingly, it is

ORDERED that the motion for an award of partial summary judgment on the issue of liability is granted, and it is

ORDERED that upon the filing of the Note of Issue and the payment of the appropriate fee therefor, this matter be set down for an assessment of damages to include the issues of "serious injury" and proximate cause, as well as the issue of plaintiff's contributory negligence , if any.

This shall constitute the decision and order of this court.

Dated: October 9, 2018

Howard H. Sherman