SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA **PART** IAS MOTION 22

Justice

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ANTHONY MCDONALD,

Plaintiff,

- V -

JASON PERLMAN, FEDERAL EXPRESS CORPORATION

Defendant.

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INDEX NO. 159606/2016

MOTION DATE 12/20/2018

MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 26, 27, 28, 29, 30, 31, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is for ORDERED that plaintiff's motion for summary judgment, pursuant to CPLR 3212, on the issue of liability against defendants and to dismiss defendants' affirmative defenses alleging comparative negligence, contributory negligence and culpable conduct of plaintiff is granted.

Plaintiff Anthony R. Mcdonald's motion, which contends that on May 27, 2018, he was stopped at a red light at an exit ramp on southbound 440 Expressway at the intersection of Victory Boulevard in the County of Richmond, City, and State of New York when it was struck from behind by a vehicle operated by defendant Jason A. Perlman and owned by Federal Express Corporation, has made out a prima facie case of negligence, and the burden shifts to defendant to raise a triable issue of fact (*See Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]; *see also Zuckerman v City of New York*, 49 NY2d 557, 560 (1980).

"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" (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure ... to do [so]" (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

"A rear-end collision with a stopped vehicle, or a vehicle slowing down, establishes a prima facie case of negligence on the part of the operator of the rear-ending vehicle, which may be rebutted if that driver can provide a non-negligent explanation for the accident" (*Baez v MM Truck and Body Repair, Inc.*, 151 AD3d 473, 476 [1st Dep't 2017]). Summary judgment in favor of the plaintiff is warranted where the defendant's own conduct inculpates him (*Uragrizza v Schmieder*, 46 NY2d 471 [1979]).

Here, it is undisputed that plaintiff's stopped vehicle was struck in the rear by defendants' vehicle. Plaintiff attaches his deposition in support of this assertion (Mot, Exh 2 at 16-17, 29, 35-41, & 46-48). Plaintiff testified at deposition that at the time of the accident he was wearing a seat belt (Mot, Exh 2 at 37). Thus, plaintiff has made a prima facie showing of entitlement to summary judgment on the issue of liability and the burden shifts to defendants to raise an issue of fact or non-negligent explanation for the accident.

In opposition, defendants claim that there is a non-negligent excuse for the collision at issue. Defendants aver that defendants' vehicle "slipped on an unexpected patch of slush and/or ice on the roadway" (Aff in Op, ¶ 7). In support, defendants attach the deposition of defendant Jason A. Perlman who testified that he attempted to slow down his vehicle when he was at least 50 feet behind plaintiff's vehicle but that his vehicle slid on ice or slushy snow which caused defendants' vehicle to strike plaintiff's vehicle (Aff in Op, Exh A at 50, 52, & 53). The Court

does not find the alleged road conditions to be a valid non-negligent excuse. It is well settled law that rear end due to ice on the road does not raise an issue of fact and does not constitute a nonnegligent excuse (*Williams v Kadri* 112 Ad3d 142 [1st Dept 2013] [finding that defendant should have left enough room between vehicles considering the weather conditions]). Accordingly, plaintiff is entitled to summary judgment on the issue of liability.

The branch of plaintiff's motion seeking to dismiss defendants' affirmative defenses alleging comparative negligence, contributory negligence and culpable conduct of plaintiff is granted. While pursuant to *Rodriguez v City of New York*, 31 NY3d 312, 330 [2018], a plaintiff is not obliged to demonstrate whether or not it was comparatively negligent in order to be entitled to partial summary judgment on the issue of defendant's liability, plaintiff's comparative negligence may be determined in a motion for summary judgment when plaintiff has moved for summary judgment to dismiss a defendants' affirmative defense of comparative negligence. Defendants have failed to proffer any evidence as to plaintiff's alleged negligence. Here, plaintiff has met his burden and demonstrated that, as the seat-belted driver, of a stopped vehicle, he was free from any contributory negligence and in no way caused the accident. Defendants' speculative assertion that plaintiff could have been contributorily negligent for the accident at issue insufficient to raise a triable issue of fact. Thus, the affirmative defenses alleging comparative negligence, contributory negligence and culpable conduct of plaintiff are dismissed.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment on the issue of is granted; and it is further

ORDERED that the branch of plaintiff's motion to dismiss defendants' affirmative defenses alleging comparative negligence, contributory negligence and culpable conduct of plaintiff is granted; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this Decision/Order upon defendants with notice of entry.

This constitutes the Decision/Order of the Court.

5/9/2019
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED		[X]	NON-FINAL DISPOSITION		
	[X]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE