To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

DASHEYN AUSET,

Plaintiff,

-against-

BORIS LEWIN and JOHN DOE, [1]

Defendants.

BORIS LEWIN,

Defendant-Third-Party Plaintiff,

-against-

GABRIEL GONZALEZ and BROADWAY EXTERMINATING CO.,

Third-Party Defendants.

INDEX NO. 59700/2017

DECISION/ORDER

MOTION SEQS. 2, 3
Submitted: 04/03/19
04/17/19

ECKER, J. [2]

The following papers were considered on the motion of third-party defendants GABRIEL GONZALEZ and BROADWAY EXTERMINATING CO. ("Broadway"), made pursuant to CPLR 3212 [Mot. Seq. 2], for an order granting summary judgment dismissal of the third-party complaint, as against BORIS LEWIN ("defendant"), and the motion of DASHEYN AUSET ("plaintiff") [Mot. Seq. 3], made pursuant to CPLR 2221(d) and CPLR 3212, for an order granting renewal of the plaintiff's prior motion for summary judgment, and upon renewal, granting plaintiff partial summary judgment as to liability, as against defendant:

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[1] The parties have not indicated whether "John Doe" is still intended to be a place holder for a defendant to be added at a later date. Given that this action has been marked "trial ready", the court assumes there is no need to consider any party other than those named in the combined caption.

[2] This action had been assigned to Hon. Helen Blackwood, and has been re-assigned to this court. The rules of this court direct that plaintiff use numbered exhibit tabs and defendant(s) lettered exhibit tabs.

PAPERS
[Mot. Seq. 2]
Notice of Motion, Affirmation and Exhibits A-J
Affirmation in Support (plaintiff)
Affirmation in Opposition and Exhibits A-K
Affirmation in Reply

[Mot. Seq. 3]
Notice of Motion, Affirmation and Exhibits A-E
Affirmation in Opposition and Exhibits 1-5
Reply Affirmation

Upon consideration of the foregoing papers, the court determines as follows:

Plaintiff, an employee of Broadway, alleges he sustained physical injuries while a passenger in a vehicle owned by Broadway ("the Broadway vehicle") and operated by its employee Gonzalez. The Broadway vehicle was struck in the rear by the vehicle operated by defendant. The accident occurred in the Bronx on February 9, 2017, at or about 10:30 a.m., at the intersection of East Burnside Avenue and Creston Avenue, which is controlled by a signal light. It was a snowy day and the road conditions were icy. Plaintiff alleges he sustained physical injuries as a result of the rear-end impact.

Defendant testified in his deposition that he observed the Broadway vehicle at a full stop at the traffic light from a distance of 100 to 150 yards, and that he was operating his vehicle at 15 miles per hour. [NYSCEF No. 61]. Defendant testified that when he first observed the Broadway vehicle from distance of 100 to 150 yards, the Broadway vehicle was stopped at a green light, a fact that Gonzalez disputes. As defendant approached the stopped Broadway vehicle, after applying his brakes, defendant was still not able to bring his vehicle to a full stop, due to ice on the roadway. His vehicle then impacted the Broadway vehicle in the rear.

Plaintiff's prior motion for partial summary judgment was denied by Justice Blackwood, by Decision & Order dated March 1, 2019. [NYSCEF No. 82]. The court noted that pre-trial disclosure had not yet taken place. The court then concluded that:

> "The court finds that the defendant has sustained its burden in establishing that there are issues of fact as to whether the defendant was maintaining a safe distance from the vehicle in which the plaintiff was passenger at the time of the accident, as well as whether or not the weather conditions were the cause of the accident."

Broadway now moves, pursuant to CPLR 3212 [Mot. Seq. 2], for an order granting summary judgment dismissal of the third-party complaint. Plaintiff moves [Mot. Seq. 3], pursuant to CPLR 2221(d) and CPLR 3212, for an order granting renewal of plaintiff's prior motion for summary judgment, and upon renewal, granting plaintiff partial summary judgment as to liability, as against defendant. The court will consider plaintiff's motion to renew first and thereafter address the parties' motions for summary judgment.

Plaintiff's motion to renew [Mot. Seq. 3].

The court grants plaintiff's motion to renew. CPLR 2221 governs motions affecting prior orders and provides that a motion to renew[3] "shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR 2221[e][2]) and "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221[e][3]; *see Matter of Korman v Bellmore Pub. Schools*, 62 AD3d 882, 884 [2d Dept 2009]). Here, the initial motion was denied, in accordance with defendant's opposition, based on a finding that the motion was premature. At this point, the motion is ripe for review, and the court grants the motion to renew.

Plaintiff's and Broadway's motions for summary judgment [Mot. Seqs. 2 &3].

A plaintiff is no longer required to show freedom from comparative fault in order to establish her or his *prima facie* entitlement to judgment as a matter of law on the issue of liability (*Buchanan v Keller*, 169 AD3d 989 [2d Dept 2019]; *see Rodriguez v City of New York*, 31 NY3d 312 [2018]; *Merino v Tessel*, 166 AD3d 760 [2d Dept 2018]). A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle (*Buchanan v Keller*, *supra*; *Witonsky v New York City Tr. Auth.*, 145 AD3d 938, 939 [2d Dept 2016]; *Marks v Rieckhoff*, _AD3d_, 2019 N.Y. Slip Op. 03584 [2d Dept 2019]; *see* Vehicle and Traffic Law § 1129[a]). A rear-end collision with a stopped or stopping vehicle establishes a *prima facie* case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision (*Buchanan v Keller*, *supra*).

A non-negligent explanation may include a mechanical failure, a sudden, unexplained stop of the vehicle ahead, an unavoidable skidding on wet pavement, or any other reasonable cause (*Tumminello v City of New York*, 148 AD3d1084 [2d Dept 2017]). Although a sudden stop of the lead vehicle may constitute a nonnegligent explanation for a rear-end collision, vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver since he or she is under a duty to maintain a safe distance between his or her car and the car ahead (*Buchanan v Keller*, *supra*; *Theo v Vasquez*, 136 AD3d 795 [2d Dept 2016]; *see Mosquesr v Roach*, 151 AD3d 1056 [2d Dept 2017]). Further, a conclusory assertion by the operator of a vehicle that the sudden stop of the vehicle

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[3]A motion to reargue is addressed to this court's discretion and shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion (CPLR 2221 [d][2]; *Rodriguez v Gutierrez*, 138 AD3d 964 [2d Dept 2016]). As plaintiff does not allege that the court overlooked facts or misapprehended the law, this motion is a motion to renew only.

caused the accident is insufficient on its own as a non-negligent explanation (*Gutierrez v Trillium, USA, LLC.*, 111 AD3d 669 [2d Dept 2013]; *see Batashvili v W.I. Veliz-Palacios*, 170 AD3d 791 [2d Dept 2019]).

The court has the benefit of the depositions of defendant, plaintiff and Gonzalez. Upon applying the law, as set forth above, to the facts presented as now developed, the court finds that defendant fails to generate an issue of fact as to his sole liability for the accident. Given the prevailing weather, defendant was obligated to exercise extreme caution while driving on the known snowy road condition. Under the circumstances, including the distance of 100 to 150 yards between vehicles, the explanation that defendant applied the brakes but the vehicle was unable to stop because of snowy conditions is insufficient to rebut the inference of negligence caused by the rear-end collision (*Grimm v Baily*, 105 AD3d 703 [2d Dept 2013]; *Sayyed v Murray*, 109 AD3d 464 [2d Dept 2013]).

Importantly, defendant's testimony that the relevant light was green, even if accepted as accurate, does not alter this conclusion. It is possible that defendant mistakenly anticipated that, by the time his vehicle approached the intersection, the stopped vehicle would be in motion. In any event, in essence, this testimony amounts to a claim that the plaintiff's vehicle came to a sudden stop which, standing alone, is insufficient to rebut the presumption of negligence on the part of the defendant's vehicle (*Buchanan v Keller, supra).* As such, the testimony of defendant is inadequate under the facts presented to generate a question of fact as to his sole liability for the accident. The motions of plaintiff and Broadway for summary judgment are therefore appropriately granted.

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motion of plaintiff DASHYM AUSET [Mot. Seq. 3], made pursuant to CPLR 2221(d), for renewal of his prior motion for partial summary judgment as to liability, is granted; and it is further

ORDERED that upon the granting of renewal of the prior motion, the present motion of plaintiff DASHEYM AUSET, made pursuant to CPLR 3212 [Mot. Seq. 3], for partial summary judgment as to liability, as against defendant BORIS LEWIN is granted; and it is further

ORDERED the motion of third-party defendants GABRIEL GONZALEZ and BROADWAY EXTERMINATING CO., made pursuant to CPLR 3212 [Mot. Seq. 2], for an order granting summary judgment dismissal of the third-party complaint, as against defendant BORIS LEWIN is granted, and the third-party complaint is dismissed; and it is further

ORDERED that plaintiff DASHEYM AUSET and defendant BORIS LEWIN shall appear at the Settlement Conference Part of the Court, Room 1600, on July 9, 2019, at 9:15 a.m.

The foregoing constitutes the Decision/Order of the court.

Dated: White Plains, New York
May 17, 2019

ENTER,

HON. LAWRENCE H. ECKER, J.S.C.

Appearance

All parties appearing via NYSCEF