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

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ANTHONY VACCARO,

Plaintiff,

-against-

OMARLIN FRANCOLOPEZ, RYDER TRUCK RENTAL INC., ANHEUSER BUSCH d/b/a BUDWEISER and D. BERTOLINE & SONS INC.,

Defendants.

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DECISION and ORDER
Motion Sequence Nos. 1-3
Index No. 57032/2018

RUDERMAN, J.

The following papers were considered in connection with plaintiff's motion for summary judgment against defendants on the issue of liability (sequence 1), the cross-motion by defendant Anheuser-Busch, LLC s/h/a Anheuser Busch d/b/a Budweiser ("Anheuser-Busch") for summary judgment dismissing plaintiff's complaint and any cross-claims against it[1] (sequence 2), and the cross-motion by defendants Omarlin Francolopez, Ryder Truck Rental Inc. ("Ryder") and D. Bertoline & Sons, Inc., for summary judgment dismissing the complaint as against Ryder (sequence 3):

Papers	Numbered
Notice of Motion, Affirmation, Exhibits A - D	1
Anheuser-Busch Notice of Cross-Motion, Affirmation, Exhibits A - L	2
Ryder Truck Notice of Cross-Motion, Affirmation, Exhibit A	3
Plaintiff's Affidavit in Opposition to Anheuser-Busch Cross-Motion Exhibits A - B	4
Plaintiff's Reply Affirmation & Opposition to Ryder Cross-Motion	5

[1]The branch of Anheuser-Busch's cross-motion relating to discovery has been withdrawn (see NYSCEF Doc. 83).

Anheuser-Busch Reply Affirmation 6
Ryder Truck Reply Affirmation 7

This is an action for personal injuries allegedly sustained by plaintiff Anthony Vaccaro on July 25, 2017 as a result of a two-vehicle collision. Plaintiff asserts that he was driving westbound on Croton Avenue near the intersection of Clinton Avenue in Ossining, New York, slowing down for traffic in front of him, when his vehicle was struck in the rear by a vehicle owned by defendant Ryder Truck Rental, leased by defendant D. Bertoline & Sons Inc. and operated by defendant Omarlin Francolopez, who was allegedly employed by Anheuser-Busch.

This action was originally commenced in New York County Supreme Court in October 2017, but was transferred to this Court when a venue motion by defendant Anheuser Busch was granted on April 10, 2018. Discovery has proceeded, but no trial readiness order or note of issue have been filed as of yet.

Plaintiff now moves for summary judgment against all defendants on the issue of liability. Defendants Omarlin Francolopez, Ryder Truck Rental Inc., and D. Bertoline & Sons Inc. oppose summary judgment on liability as premature, and cross-move for summary judgment dismissal of the claims against Ryder. Defendant Anheuser-Busch also opposes plaintiff's motion as premature, and cross-moves for summary judgment dismissing the claims against it.

Analysis

Summary Judgment on Liability

Plaintiff has made a prima facie showing of a right to summary judgment on the issue of liability against the driver, possessor and owner of the vehicle that struck his vehicle from behind. This showing was made with a certified copy of the police accident report and plaintiff's affidavit describing the accident.

> "A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the moving vehicle and imposes a duty on that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision. A claim that the driver of the lead vehicle made a sudden stop, standing alone, is insufficient to rebut the presumption of negligence" (*Robayo v Aghaabdul*, 109 AD3d 892, 893 [2d Dept 2013] [internal quotation marks and citations omitted]).

In *Robayo*, "the plaintiff established his prima facie entitlement to judgment as a matter of law by submitting evidence that the defendant's vehicle struck his vehicle in the rear as the plaintiff's vehicle was slowing down for traffic in front of it" (*id.*). Similarly, here, plaintiff submitted his own affidavit describing how the Ryder vehicle struck him in the rear as he was slowing down, as well as a certified copy of a police report containing a statement made to the reporting officer by defendant Francolopez, to the effect that he "[w]as traveling westbound behind [plaintiff's vehicle] and attempted to reduce [his] speed, however the air brakes were not 'full' and did not respond immediately, causing the collision." Plaintiff's evidence suffices to create a prima facie showing of Francolopez's negligence and defendants have not submitted evidence establishing a non-negligent explanation.

This is not a situation in which summary judgment on the issue of liability must be denied because the motion is premature. "A party who contends that a summary judgment motion is premature is required to demonstrate that discovery might lead to relevant evidence" (*Cortes v Whelan*, 83 AD3d 763, 764 [2d Dept 2011] [citation omitted]). "The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion" (*id.*). "Before a party can defeat a motion for summary judgment claiming ignorance of facts due to unconducted discovery, he [or she] must show that he [or she] has made reasonable steps to discover these facts and that the facts sought would give rise to a triable issue" (*Gillinder v Hemmes*, 298 AD2d 493 [2d Dept

2002]). The record here fails to show that facts essential to justify opposition to the motion on the issue of defendants' liability may exist but cannot be stated as they are in the exclusive knowledge of the other party. Indeed, defendants have failed to show what additional facts regarding the sequence of events is not within their knowledge. Therefore, the fact that discovery is not complete does not alter plaintiff's entitlement to summary judgment on the issue of liability.

Ryder's Claim under the Graves Amendment

Ordinarily, the owner of a vehicle whose driver was negligent would be vicariously liable under Vehicle and Traffic Law § 388. However, Ryder contends that it is entitled to dismissal of the claim against it under the federal statute generally referred to as the Graves amendment, which creates an exception to an owner's vicarious liability where the vehicle owner is in the business of renting or leasing motor vehicles:

> "[The] owner of a motor vehicle that rents or leases the vehicle to a person . . . shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle . . ., for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if --
> (1) the owner . . . is engaged in the trade or business of renting or leasing motor vehicles; and
> (2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner)"

(49 USC § 30106; *see Graham v Dunkley*, 50 AD3d 55 [2d Dept 2008]).

Ryder has submitted sufficient evidence to establish prima facie that it is "engaged in the trade or business of renting or leasing motor vehicles" (*id.*). However, with regard to the second requirement for application of the Graves amendment, namely, that there was no negligence on the part of the vehicle's owner, Ryder's submissions "failed to conclusively establish that it was not negligent in the maintenance of the vehicle, as alleged" (*see Anglero v Hanif*, 140 AD3d 905,

906-907 [2d Dept 2016]). This is particularly so given Francolopez's statement, as reported in the police accident report, that he had a problem with the air brakes.

Moreover, plaintiff argues that facts essential to oppose this cross-motion for summary judgment are exclusively within the knowledge and control of defendants, and without their depositions, he cannot adequately respond to Ryder's claim of non-negligence in its maintenance of its truck. Unlike the issue of whether defendant had a non-negligent explanation for the rear-end collision, for which defendants could not claim a valid need for discovery, on the issue of Ryder's possible negligence, plaintiff has a viable basis to seek discovery from defendants before the court finally determines the merits of that issue.

Anheuser-Busch's Cross-Motion for Summary Judgment

Anheuser-Busch submits an affidavit by Kristi Byrne, its assistant general counsel, asserting that D. Bertoline & Sons Inc. is an independent distributor of Anheuser-Busch products, that Anheuser-Busch neither owned the subject vehicle nor employed Francolopez. However, on this issue as well, plaintiff protests that the motion is premature because facts essential to oppose Anheuser-Busch's claims are exclusively within the knowledge and control of Anheuser-Busch. He adds that some basis for maintaining the claim against Anheuser-Busch is presented by the answer filed by Ryder Truck Rental, Inc., in which it admitted the allegation of the complaint stating that Ryder leased the subject motor vehicle to Anheuser Busch d/b/a Budweiser. Furthermore, an additional basis for the claim is that in his affidavit, plaintiff asserted that the truck that rear-ended him had the Budweiser logo depicted on it.

When the evidence is viewed in the light most favorable to plaintiff, and every favorable inference is afforded to him (*see Gardella v Remizov*, 144 AD3d 977, 979 [2d Dept 2016]), Anheuser-Busch's motion for summary judgment dismissing the complaint as against it must be

denied without prejudice to renewal upon the completion of discovery.

Based upon the foregoing, it is hereby,

ORDERED that the motion by plaintiff for summary judgment on the issue of liability against defendants (sequence 1) is granted, with the proviso that defendants Ryder Truck Rental Inc and Anheuser Busch may again seek summary judgment dismissing the claims against them; and it is further

ORDERED that cross-motions sequence 2 and 3 are denied without prejudice to renewal following the completion of discovery, and it is further

ORDERED that the parties shall appear, *as previously directed*, on Tuesday, March 5, 2019 at 9:30 a.m. in the Compliance Part of the Westchester Supreme Court in the Courthouse located at 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York, 10601.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
February 1, 2019

HON. TERRY JANE RUDERMAN, J.S.C.