SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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HUMBERTO TLAYACAC BRAVO,

Plaintiff,

-against-

JOHN TOMAS ANTKOWIAK and J. GIBSON MCILVAIN COMPANY,

Defendants.

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VIRGINIA E. MORDIGLIA and CLAIRE A. ZEPPIERI,

Plaintiff,

-against-

J. GIBSON MCILVAIN COMPANY and JOHN THOMAS ANTKOWIAK,

Defendants.

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RICHARD LODGE,

Plaintiff,

-against-

J. GIBSON MCILVAIN COMPANY and JOHN THOMAS ANTKOWIAK,

Defendants

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DECISION & ORDER

Action #1
Index No.: 035554/2017

(Motion # 1)

Action #2
Index No.: 031456/2017

Action #3
Index No.: 035615/2016

Sherri L. Eisenpress, A.J.S.C.

The following papers, numbered 1 through 4, were considered in connection with Plaintiff Humberto Tlayacac Bravo's Notice of Motion for an Order, pursuant to *Civil Practice Law and Rules* § 3212, granting partial summary judgment in favor of Plaintiff against Defendant on the issue of liability and striking Defendants' First, Second, Fifth and Seventh affirmative defenses:

PAPERS	**NUMBERED**
NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXHIBITS 1-11	1-2

AFFIRMATION IN OPPOSITION/EXHIBITS A 3

AFFIRMATION IN REPLY 4

Upon a careful and detailed review of the foregoing papers, the Court now rules as follows:

This action was commenced by Plaintiff on March 13, 2017, with the filing of the Summons and Complaint through the NYSCEF system. Issue was joined as to Defendants JOHN THOMAS ANTKOWIAK and J. GIBSON MCILVAIN COMPANY with the filing of Defendant's Answer through the NYSCEF system on March 13, 2017. Discovery proceeded and this summary judgment motion was timely filed.

This personal injury action arises out of a multi-vehicle accident on November 3, 2016. At the time of the occurrence, Plaintiff was the operator of a motor vehicle which was stopped on the east-bound Exit #4 ramp off of Interstate Route 287, in Greenburgh, New York. Plaintiff, who was wearing his seatbelt at the time of the occurrence, had been stopped for twenty seconds when his vehicle was struck in the rear by a tractor trailer operated by the Defendant John Thomas Antkowiak. Defendant Antkowiak admitted that Plaintiff's vehicle was stopped when he struck it and that he was traveling 25-30 mph on the exit ramp.

Plaintiff moves for summary judgment with respect to liability based upon the fact that he was stopped at the time his vehicle was struck in the rear. He also moves to strike several affirmative defenses including (i) the First Affirmative Defense of comparative negligence; (ii) the Second Affirmative Defense of Assumption of Risk; (iii) the Fifth Affirmative Defense alleging that Plaintiff failed to mitigate his damages; and (iv) the Seventh Affirmative Defense that Plaintiff failed to wear his seatbelt.

In opposition to the motion, Defendants assert that there are triable issues of fact as to whether Plaintiff was negligent in following too closely because he was only five feet behind the stopped vehicle in front of him and because he observed the tractor behind him for five

seconds before it struck him but took no evasive action to prevent the accident. With respect to the affirmative defenses, Defendants allege that the foregoing facts raise triable issues of fact as to whether Plaintiff was comparatively negligent and assumed the risk. As to mitigation of damages, Defendants argue that Plaintiff recently underwent surgery and that it is too early to assess what post-accident actions and choices Plaintiff made that may have worsened his damages. Lastly, while Defendants concede Plaintiff was wearing a seatbelt at the time of the accident, they argue that there are triable issues of fact as to whether the seatbelt was properly utilized.

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. *Giuffrida v. Citibank Corp., et al.*, 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. *Lacagnino v. Gonzalez*, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. *Gonzalez v. 98 Mag Leasing Corp.*, 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), citing *Alvarez*, *supra*, and *Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 508 N.Y.S.2d 923 (1985). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980), 427 N.Y.S.2d 595. Most recently, the Court of Appeals in *Rodriguez v. City of New York*, 31 N.Y.3d 312, 2018 N.Y.Slip Op 02287 (2018), has held 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."

It is well-settled that a rear-end collision with a stopped or stopping vehicle

creates a *prima facie* case of liability with respect to the operator of the moving vehicle, unless the operator of the moving vehicle can come forward with an adequate, non-negligent explanation for the accident. See Smith v. Seskin, 49 A.D.3d 628, 854 N.Y.S.2d 420 (2d Dept. 2008); Harris v. Ryder, 292 A.D.2d 499, 739 N.Y.S.2d 195 (2d Dept. 2002)]. Further, when the driver of an automobile approaches another from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle. VTL § 1129(a) ("The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon the condition of the highway."); Taing v. Drewery, 100 A.D.3d 740, 954 N.Y.S.2d 175 (2d Dept. 2012). Drivers must maintain safe distances between their cars and cars in front of them and this rule imposes on them a duty to be aware of traffic conditions, including vehicle stoppages. Johnson v. Phillips, 261 A.D.2d 269, 271, 690 N.Y.S.2d 545 (1st Dept. 1999).

In the instant matter, Plaintiff has met his burden upon summary judgment since his vehicle was at a complete stop when it was struck in the rear by Defendants' vehicle. In opposition thereto, Defendants have not raised a triable issue of fact. Defendants have failed to offer any explanation, let alone a non-negligent one, for striking the rear of Plaintiff's stopped vehicle. Additionally, Plaintiff has demonstrated that he is free from any comparative negligence, that he did not assume the risk of Defendants striking the rear of his vehicle, and that he was wearing a seatbelt at the time of the occurrence. As such, Defendant's First (comparative negligence); Second (assumption of risk) and Seventh (seatbelt defense) affirmative defenses are stricken. However, Plaintiff has not met his burden on summary judgment with respect to the Fifth Affirmative Defense alleging failure to mitigate his damages, as he has offered no medical evidence or testimony on this issue whatsoever. As Plaintiff failed to meet demonstrate his prima facie entitlement to summary judgment as to this affirmative defense, the Court need not consider the adequacy of Defendants' opposition thereto.

Accordingly, it is hereby

ORDERED that Plaintiff Humberto Tlayacac Bravo's Notice of Motion for Summary Judgment on the issue of liability against Defendants in Action #1 is GRANTED in its entirety; and it is further

ORDERED that Defendants' First, Second and Seventh Affirmative Defenses are hereby stricken; and it is further

ORDERED that counsel for the parties shall appear in the Trial Assignment Part for a conference on **WEDNESDAY, AUGUST 14, 2019, at 9:30 a.m.**

The foregoing constitutes the Decision and Order of this Court on Motion # 1.

Dated: New City, New York
July 19, 2019

HON. SHERRI L. EISENPRESS
Acting Justice of the Supreme Court

To:

All parties via NYSCEF