SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

SAMIDE DAOUTI,

Plaintiff,

- against -

FUAT MAMO, DITURIJE MAMO, EMMA L. BERMAN AND MELISSA CHEFEC,

Defendants.

- x

Index No.: 710396/2019

Motion Date: 10/10/19

Motion No.: 10

Motion Seq.: 1

The following electronically filed documents read on this motion by defendants FUAT MAMO and DITURIJE MAMO for an Order pursuant to CPLR 3212, granting summary judgment in favor of defendants FUAT MAMO and DITURIJE MAMO, dismissing the complaint and all cross-claims:

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	EF 8 - 15
Affirmation in Opposition	EF 17 - 19
Reply Affirmation	EF 20

This is an action for personal injuries allegedly sustained by plaintiff as a result of a motor vehicle accident that occurred on September 9, 2018 on the Whitestone Expressway at or near 3rd Avenue.

This action was commenced by the filing of a summons and complaint on June 14, 2019. Issue was joined by defendants Fuat Mamo and Diturije Mamo (collectively hereinafter defendants) serving an answer on August 1, 2019. Issue was joined by co-defendants Emma L. Berman and Melissa Chefec (collectively hereinafter co-defendants) serving an answer on July 16, 2019. Defendants now move for summary judgment.

In support of the motion, defendant Fuat Mamo submits an affidavit dated August 7, 2019 stating that at the time of the accident, plaintiff was in the back seat of his vehicle next to

his wife, Diturije Mamo. The accident occurred in the left lane of the Whitestone Expressway in the southbound direction. He had just crossed over the Whitestone Bridge when the accident occurred. Traffic was moving well. He was traveling in the left lane at 45 to 50 miles per hour when his vehicle was struck in the rear by the vehicle operated by co-defendant Emma L. Berman. He did not observe co-defendants' vehicle prior to the impact with the rear of his vehicle. He bears no responsibility for the accident.

Defendants also submit a copy of the Police Accident Report (MV-104AN). In the accident description portion of the Police Accident Report, the responding officer notes, in relevant part:

> AT TPO DRIVER 1 (Fuat Mamo) STATES WHILE TRAVELING SOUTH ON THE WHITESTONE EXPRESSWAY IN THE LEFT LANE HE WAS REAR ENDED BY VEHICLE 2. DRIVER 2 (Emma L. Berman) STATES WHILE TRAVELING SOUTH IN THE LEFT LANE, SHE LOOKED AT HER GPS ON HER CELL PHONE THEN LOOKED UP AND REAR ENDED VEHICLE 1.

Based on the submitted evidence, defendants' counsel contends that co-defendant driver, Emma L. Berman, violated Vehicle and Traffic Law 1129(a) by striking defendants' stopped vehicle in the rear. Additionally, co-defendant driver was following too closely and was distracted. Thus, co-defendants are negligent as a matter of law, and defendants are entitled to summary judgment.

In opposition, co-defendants' counsel contends, inter alia, the motion is premature as depositions have not been held. Additionally, counsel contends that the Police Accident Report is uncertified and, thus, inadmissible. Lastly, counsel contends that Fuat Mamo's affidavit is unsworn and, thus, inadmissible.

Contrary to co-defendants' arguments, Fuat Mamo's affidavit is sworn to, and thus, will be considered herein. Moreover, the Police Accident Report submitted by defendants was prepared by a police officer who was acting within the scope of his duty in recording co-defendant driver's statement, and the statement is admissible as a party admission (see Scott v Kass, 48 AD3d 785 [2d Dept. 2008]; Guevara v Zaharakis, 303 AD2d 555 [2d Dept. 2003]; Ferrara v Poranski, 88 AD2d 904 [2d Dept. 1982]).

The proponent of a summary judgment motion must tender evidentiary proof in admissible form, eliminating any material issues of fact from the case. If the proponent succeeds, the

burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his or her position (see Zuckerman v City of New York, 49 NY2d 557 [1980]).

"When the driver of an automobile approaches another automobile 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" (Macauley v ELRAC, Inc., 6 AD3d 584 [2d Dept. 2003]). It is well established law that a rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence on the part of the driver of the rearmost vehicle, requiring the operator of that vehicle to proffer an adequate, non-negligent explanation for the accident (see Delgado v Bang, 120 AD3d 608 [2d Dept. 2014]; Kertesz v Jason Transp. Corp., 102 AD3d 658 [2d Dept. 2013]; Ramos v TC Paratransit, 96 AD3d 924 [2d Dept. 2012]; Pollard v Independent Beauty & Barber Supply Co., 94 AD3d 845 [2d Dept. 2012]; Klopchin v Masri, 45 AD3d 737 [2d Dept. 2007]).

Here, defendants satisfied their prima facie burden of establishing entitlement to summary judgment as a matter of law by affirming that their vehicle was rear-ended by defendants' vehicle (see Volpe v Limoncelli,74 AD3d 795 [2d Dept. 2010]; Vavoulis v Adler, 43 AD3d 1154 [2d Dept. 2007]; Levine v Taylor, 268 AD2d 566 [2d Dept. 2000]).

In opposition, no evidence has been submitted disputing that defendants' vehicle was struck in the rear by co-defendants' vehicle. Co-defendant driver, who has relevant knowledge of the facts and did not submit an affidavit in opposition to the motion, failed to provide evidence of a non-negligent explanation for the accident sufficient to raise a triable question of fact (see Bernier v Torres, 79 AD3d 776 [2d Dept. 2010]; Lampkin v Chan, 68 AD3d 727 [2d Dept. 2009]; Cavitch v Mateo, 58 AD3d 592 [2d Dept. 2009]; Garner v Chevalier Transp. Corp, 58 AD3d 802 [2d Dept. 2009]; Kimyagarov v Nixon Taxi Corp, 45 AD3d 736 [2d Dept. 2007]; Gomez v Sammy's Transp., Inc., 19 AD3d 544 [2d Dept. 2005]). Co-defendants submit only an attorney's affirmation which is insufficient to defeat a summary judgment motion (see Zuckerman, 49 NY2d at 563).

Additionally, co-defendants' counsel's contention that this motion for summary judgment is premature is without merit. Co-defendants failed to offer any evidentiary basis to suggest that discovery may lead to relevant evidence. The mere hope and speculation that evidence sufficient to defeat the motion might

be uncovered during discovery is an insufficient basis upon which to deny the motion (see CPLR 3212[f]; Medina v Rodriguez, 92 AD3d 850[2d Dept. 2012]; Hanover Ins. Co. v Prakin,81 AD3d 778 [2d Dept. 2011]; Essex Ins. Co. v Michael Cunningham Carpentry, 74 AD3d 733 [2d Dept. 2010]; Peerless Ins. Co. v Micro Fibertek, Inc., 67 AD3d 978 [2d Dept. 2009]; Gross v Marc, 2 AD3d 681 [2d Dept. 2003]).

Accordingly, and for the reasons stated above, it is hereby

ORDERED, that defendants FUAT MAMO and DITURIJE MAMO's motion for summary judgment is granted, the complaint and all cross-claims are dismissed as against defendants FUAT MAMO and DITURIJE MAMO, and the Clerk of the Court shall enter judgment accordingly.

Dated: October 10, 2019
Long Island City, N.Y

ROBERT J. MCDONALD
J.S.C.

FILED
OCT 18 2019
COUNTY CLERK
QUEENS COUNTY