SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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JEFFREY P. CHARTIER,

Index No.: 67928/2018

Plaintiff,

MOTION FOR SUMMARY JUDGMENT

-against-

DECISION and ORDER

JULIA DYCKMAN ANDRUS MEMORIAL, INC., and DENISE F. JENKINS,

Motion Seq. #1

Defendants.

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Hubert, J.S.C.

On the motion before the Court, Plaintiff seeks an order pursuant to CPLR § 3212 granting summary judgment on the issue of liability and striking Defendants' first affirmative defense alleging that Plaintiff's culpable conduct caused or contributed to the accident. For the reasons set forth below, Plaintiff's motion is granted.

The complaint alleges that on July 15, 2018, on or about 9:50 a.m., Plaintiff Jeffrey Chartier sustained serious physical injury when the motor vehicle he was operating was hit and rear ended while stopped at the intersection of Young Avenue and Fort Hill Avenue in the City of Yonkers, County of Westchester, State of New York, by a van driven by Defendant Denise Jenkins and owned by Julia Dyckman Andrus Memorial, Inc. (the Andrus Defendant). At the time and place of the accident, the Andrus Defendant vehicle was being operated by the Defendant Jenkins during her employment hours with the knowledge and permission of the Andrus Defendant (Jenkins deposition at pp. 9-10). Plaintiff commenced this action against the Defendant and the presumed owner of the vehicle, Andrus Defendant, on October 25, 2018.

In order to prevail on a motion for summary judgment, the movant must make a *prima facie* showing of entitlement to judgment as a matter of law, through admissible evidence,

eliminating all material issues of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). "A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries." *Tejada v. Cedeno*, 173 A.D.3d 808, 99 N.Y.S.3d 686 (2d Dep't 2019).

In the deposition of the Plaintiff on September 11, 2019, he states that before the accident his car was fully stopped on Fort Hill Avenue in the left turn lane at the traffic signal controlling the intersection of Young Avenue and Fort Hill Avenue. The light was red. When it turned green the Plaintiff states he moved forward and stopped again waiting for oncoming traffic to clear so that he could turn left onto Young Avenue. Three to five seconds after stopping, the rear end of his car was struck by the Defendants' van and was pushed into the intersection as a result of the impact (Plaintiff deposition at pp. 19-20).

The Defendant Jenkins stated at her deposition on September 16, 2019, that when she approached the intersection at Young Avenue and Fort Hill Avenue, the Plaintiff's car was in front of her in the left lane (Jenkins deposition at p. 27). She estimated that her speed approaching the intersection was no more than fifteen miles per hour. When she saw the light, the distance between Plaintiff's car and her van was about fifteen feet and she was moving "up to ten miles per hour" (Jenkins deposition at pp. 28-29). She further stated that she saw the Plaintiff's car stopped at the intersection's red light and she stopped behind his vehicle. When the light turned green, his vehicle moved forward and she did as well. She was close enough to see his license plate (Jenkins deposition at p. 39).

The accident, she stated, occurred in the middle of the intersection. The Defendant

further stated she did not see his vehicle slow down, that everything happened at once, that she saw him stop causing her to she step on her brake and she hit him (Jenkins deposition at pp. 34-39). However, the Defendant also stated that when she hit the rear of the Plaintiff's vehicle, Plaintiff's vehicle was not stopped and was unsure whether or not she saw Plaintiff's brake lights go on. Further in her testimony she stated that she never saw Plaintiff's vehicle slow down (Jenkins deposition at p. 34). She further stated that she was moving at ten miles per hour before impact (Jenkins deposition at pp. 29-30).

Both parties agree that when the accident occurred, it was daylight, the weather did not obstruct vision, and the road surface was dry and level. Immediately post accident, the parties moved their respective vehicles to the side of the road. According to Plaintiff, just prior to moving the vehicles he approached her and she stated spontaneously "I'm so sorry, I'm so sorry."

"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." *Clements v. Giatas*, 2019 N.Y. App. Div. LEXIS 9078, 2019 N.Y. Slip. Op. 08987 (2d Dep't 2019), *citing, inter alia, Tutrani v. County of Suffolk*, 10 N.Y.3d 906, 908, 861 N.Y.S.2d 610 (2008). This is because "[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." *Nsiah-Ababio v. Hunter*, 78 A.D.3d 672, 672, 913 N.Y.S.2d 659 (2d Dep't 2010); *see, also* VTL § 1129 (a).

The depositions of both parties establish the Plaintiff's *prima facie* entitlement to judgment as a matter of law on the issue of the Defendants' liability. Defendant Jenkins'

testimony established that although she started moving when the light turned green, she did not see Plaintiff slow down. She stated that she was driving approximately ten miles per hour when she struck Plaintiff's vehicle and had applied the brakes to her car only when she saw the Plaintiff stop and as she collided with the rear of his car. These facts cannot be said to rebut the inference of negligence. *See Leak v. Hybrid Cars, Ltd.*, 132 A.D.3d 958, 19 N.Y.S.3d 534 (2d Dep't 2015)("defendant's contention in opposition, that she was traveling at 15-20 miles per hour approximately two car lengths behind the plaintiff when the plaintiff suddenly stopped, did not rebut the inference of negligence by providing a non-negligent explanation for the collision").

"A nonnegligent explanation may include evidence of a mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on wet pavement, or any other reasonable cause." *Ortiz v. Hub Truck Rental Corp.*, 82 A.D.3d 725, 726, 918 N.Y.S.2d 156 (2d Dep't 2011)(internal citation omitted). However, a defendant's assertion that the plaintiff's vehicle stopped, when standing alone, is generally insufficient to raise a triable issue of fact as to whether there was a nonnegligent explanation for the accident. *See Byrne v. Calogero*, 96 A.D.3d 704, 945 N.Y.S.2d 737 (2d Dep't 2012).

The Defendant's sworn testimony at her deposition cannot be said to have averred that the Plaintiff's car stopped suddenly. As previously stated, the Defendant testified at her deposition that Plaintiff's vehicle was not stopped when she hit the rear of the Plaintiff's vehicle (Jenkins deposition at pp. 29-30) and that she never saw his vehicle stop again after the light at the intersection of Young Avenue and Fort Hill Avenue turned green (Jenkins deposition at p. 39). At best it can be inferred only that the Defendant was not watching the Plaintiff's car's movement until immediately before impact, which was too late.

With respect to the issue of comparative negligence, the Court notes that a plaintiff is not required to establish his or her absence of comparative fault. As courts have stated, ". . . the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where . . . the plaintiff moved for summary judgment dismissing a defendant's affirmative defense of comparative negligence." *Wray v. Galella*, 172 A.D.3d 1446, 1447, 101 N.Y.S.3d 401 (2d Dep't 2019). With respect to Defendants' argument that Plaintiff is not entitled to summary judgment as to his lack of comparative liability, the Court notes that under *Rodriguez v. City of New York*, 31 N.Y.3d 312, 76 N.Y.S.3d 898 (2018), a plaintiff's comparative fault, if any, pertains to damages, not the defendant's liability.

> When a defendant's liability is established as a matter of law before trial, the jury must still determine whether the plaintiff was negligent and whether such negligence was a substantial factor in causing plaintiff's injuries. If so, the comparative fault of each party is then apportioned by the jury. Therefore, the jury is still tasked with considering the plaintiff's and defendant's culpability together." *Supra*, at 324.

Moreover, where a party claims diminution of damages because of the culpable conduct of the injured party, such claim shall be an affirmative defense pleaded and proved by the party asserting the defense. *Supra* at 318. "[C]omparative negligence is not a defense to the cause of action of negligence, because it is not a defense to any element (duty, breach, causation) of plaintiff's prima facie cause of action for negligence."*Supra* at 320.

In opposition to Plaintiff's *prima facie* showing, Defendants have failed to raise any triable issues of fact as to whether Plaintiff was comparatively negligent. *See Huang v. Franco*, 149 A.D.3d 703, 51 N.Y.S.3d 188 (2d Dep't 2017)(summary judgment proper where defendant driver failed to yield right of way to decedent, who was within the crosswalk with the "walk"

signal in her favor, defendant admitted he did not see decedent, and the parties raised no issue of triable fact as to decedent's comparative negligence); *Poon v. Nisanov*, 162 A.D.3d 804, 808, 79 N.Y.S.3d 227, (2nd Dep't 2018)(the Supreme Court's determination to grant branch of plaintiff's motion which was for summary judgment dismissing the affirmative defense of the Nisanov defendants which alleged that the plaintiff was comparatively negligent affirmed); *Chen v. Heart Transit , Inc.*, 143 A.D.3d 945, 39 N.Y.S.3d 504 (2nd Dep't 2016)(defendants' conclusory and speculative assertions concerning the plaintiff's speed and possible negligence were insufficient to raise a triable issue of fact).

Accordingly, it is hereby:

ORDERED, that Plaintiff's motion for an order granting summary judgment to Plaintiff on the issue of liability against Defendant Denise F. Jenkins is granted; and it is further

ORDERED, that Defendant's first affirmative defense alleging Plaintiff's comparative negligence and culpable conduct is dismissed; and it is further

ORDERED, that this matter is referred to the Settlement Conference Part, Courtroom 1600, at 9:15 a.m. on Tuesday, March 17, 2020, for Pre-Trial Conference.

Dated: White Plains, New York
February 28, 2020

James W. Hubert
Supreme Court Justice