To commence the statutory time period 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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KARINA HURTADO,

Plaintiff,

-against-

DECISION & ORDER
Index No. 52384/2018
Sequence No. 1

AUDILON BAZILE,

Defendant.

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WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Documents Numbers 20-36, were read in connection with defendant's motion for summary judgment dismissing the complaint, and also seeks leave to file and serve an amended answer.

Upon the foregoing papers, the motion is decided as follows:

This is an action for serious personal injuries arising out of an automobile accident that occurred on February 21, 2015, on northbound Interstate 95 (New England Thruway), in the vicinity of Exit 18 (Mamaroneck Avenue) exit. Each party gives significantly different accounts of the accident. Defendant claims that his motor vehicle was in the left lane, approximately a car length and a half behind plaintiff, whose vehicle was in the center lane, when plaintiff's vehicle crossed over into the left lane in a horizontal manner, stopping approximately twenty feet in front of defendant's vehicle blocking his pathway. Defendant contends that this loss of control created the emergency situation for defendant who had no

duty to expect this sudden obstruction of his lane. Defendant testified that he had about only two seconds to react but despite the fact that he kept both hands on the steering wheel and immediately applied the brake, his vehicle hit plaintiff's vehicle.

Plaintiff claims that prior to the accident, she was traveling in the center northbound lane and lost control of her vehicle. Prior to the impact with defendant's vehicle, plaintiff was able to bring her vehicle to a complete stop without any collision. When she brought her vehicle to a stop, it was positioned entirely within the left hand northbound lane facing south. Plaintiff's vehicle was still stopped in the left lane of northbound Interstate 95, when defendant's vehicle, while proceeding in the center lane, lost control and crossed partly into the left lane, striking plaintiff's vehicle. Plaintiff claims that she witnessed defendant's vehicle lose control in the center lane in the same area in which she lost control and crossed partly into the left hand lane and continued out of control until defendant's vehicle struck plaintiff's vehicle, which was still stopped in the left hand lane.

A proponent of a summary judgment motion must make a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]; Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Moreover, failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the motion papers (Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1986]; Jakabovics v Rosenberg, 49 AD3d 695 [2d Dept 2008]; Menzel v Plotkin, 202 AD2d 558, 558-559 [2d Dept 1994]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (Zuckerman v New York, 49 NY2d 557, 562

[1980]; Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). In deciding a motion for summary judgment, the court is "required to view the evidence presented in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v. Walters, 64 AD3d 762, 767 [2d Dept 2009]; Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). Summary judgment is a drastic remedy, not be granted where there is any doubt as to existence of a triable issue (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]).

Vehicle and Traffic Law §1129(a) imposes a duty on all drivers to drive at a safe speed and maintain a safe distance between vehicles, always compensating for any known adverse road conditions (Ortega v City of New York, 721 NYS2d 790 [2d Dept 2000]). "When a driver approaches another vehicle from the rear, he is bound to maintain a reasonably safe rate of speed and to maintain control of his vehicle and use reasonable care to avoid colliding with the other vehicle" (Young v City of New York, 113 AD2d 833, 834 [2d Dept 1985]). "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" (Fernandez v Babylon Mun. Solid Waste, 117 AD3d 678 [2d Dept 2014]). In other words, proof of a rear-end collision establishes a prima facie case of negligence on the part of the driver of the vehicle that strikes the forward vehicle and imposes a duty upon said offending vehicle to come forward with admissible proof to establish an adequate, non negligent explanation for a rear-end collision (Parise v Meltzer, 204 AD2d 295 [2d Dept 1994]; Moran v Singh, 10 AD3d 707, 708 [2d Dept 2004]); Cerda v Parsley, 273 AD2d 339 [2d Dept 2000]). In addition, where a vehicle is lawfully stopped, there is a duty imposed on the operators of vehicles traveling behind it in

the same direction to come to a timely halt (Carter v Castle Elec. Contr. Co., 26 AD2d 83 [2d Dept 1966]). The operator of the moving vehicle is required to rebut the inference of negligence created by an unexplained rear-end collision because he or she is in the best position to explain whether the collision was due to a reasonable, non-negligent cause (Carter v Castle Elec. Contr. Co., at 85).

The sudden stop of a lead car is one of the non-negligent explanations of a rear-end collision, because the operator of that car has a duty to avoid stopping suddenly without properly signaling to avoid a collision "when there is opportunity to give such signal" (Vehicle and Traffic Law §1163; *see id.;* Colonna v Suarez, 278 AD2d 355 [2d Dept 2000]) ; Taveras v Amir, 24 AD3d 655, 656 [2d Dept 2005]). Moreover, under VTL §1163, it is incumbent upon a driver to turn on the signal when making a left turn, and the failure to do so has been found to be sufficient to preclude the granting of summary judgment to a plaintiff on an argument that a rear ending collision is negligence against the rearward operator (Klochpin v. Masri, 45 AD3d 737 [2d Dept 2006]). But if defendant cannot come forward with any evidence to rebut the inference of negligence, plaintiffs may properly be awarded judgment as a matter of law on the issue of liability (Lopez v Minot, 258 AD2d 564 [2d Dept 1999]).

VTL §1128 states in pertinent part: "Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules … shall apply: (a) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety."

Here, the conflicting versions of the accident, including which lane each party was in at the time of the accident, precludes summary judgment. There are factors present in this case, including the conflicting deposition testimony regarding the facts surrounding the accident,

submitted by defendant in support of his summary judgment motion, which failed to establish a prima facie case for judgment as a matter of law.

In light of defendant's failure to satisfy his prima facie burden, the court need not consider the sufficiency of plaintiff's opposition papers (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, [1985]).

Turning next to the branch of defendant's motion to amend its answer to allege the emergency doctrine as an affirmative defense. Defendant has submitted a proposed amended answer asserting the emergency doctrine as the fifth affirmative defense. The proposed answer states that "That the defendant was suddenly confronted with and was called upon to act in an emergency situation not created by his own acts" (NYSCEF Doc No. 27).

It is well-settled that "leave to amend a complaint should be freely granted where the proposed amendment is not palpably insufficient or patently devoid of merit and will not result in surprise or prejudice to the opposing party" (Old World Custom Homes, Inc. v Crane, 33 AD3d 600 [2d Dept 2006]; Lucido v Mancuso, 49 AD3d 220 [2d Dept 2008]). In exercising its discretion, the court will consider how long the party seeking amendment was aware of the facts upon which the motion was based and whether a reasonable excuse for the delay was offered (Slavet v Horton Memorial Hospital, 227 A.D.2d 465 [1996]).

Under the emergency doctrine, "when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context" (Freder v Costello Indus., Inc., 162 AD3d 984, 985–86, [2d Dept 2018]). Here, defendant contends that because of plaintiff losing control

of her vehicle, defendant was faced with an emergency situation and did not have an opportunity to avoid defendant's vehicle. Under these circumstances, defendant will be permitted to amend his answer to assert the affirmative defense of medical emergency, as the defense was meritorious and the plaintiff failed to establish prejudice or surprise (Ficorilli v Thomsen, 262 AD2d 602, 603, [2d Dept 1999]).

NOW, therefore for the above stated reasons, it is hereby

ORDERED, that the branch of defendant's motion for summary judgment is **denied**; and it is further

ORDERED, that defendant is hereby granted leave to serve an amended answer as herein permitted if served within twenty days of the date of this Decision & Order; and, it is further

ORDERED, that the parties are directed to appear in the Settlement Conference Part on April 28, 2020 at 9:15 A.M. in Courtroom 1600 of the Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Blvd., White Plains, New York 10601.

All matters not herein decided are denied. This constitutes the Decision and Order of the court.

Dated: March 5, 2020
White Plains, New York 10601

HONORABLE CHARLES D. WOOD
Justice of the Supreme Court

TO: ALL PARTIES' COUNSEL BY NYSCEF