At a term of the IAS Part of the Supreme Court of the State of New York, held in and for the County of Orange, at 285 Main Street Goshen, New York 10924 on the 21 day of February, 2020.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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, on all parties.

EDWARD R. TAMBURO,

PLAINTIFF,

-AGAINST-

ANDREA SANNELLA, JENNIFER S. YOUNG and JEAN M. ARMSTRONG,

DEFENDANTS.

DECISION & ORDER
INDEX #EF004841/2019
Motion date: 12/10/19
Motion Seq.#1 & 2

VAZQUEZ-DOLES, J.S.C.

The following papers numbered 1 - 12 were read on the motion by defendants, JENNIFER S. YOUNG and JEAN M. ARMSTRONG, to sever plaintiff's action as against them (Mot. Seq. #1) and on plaintiff's cross-motion for partial summary judgment on the issue of liability as to both motor vehicle accidents (Mot. Seq. #2):

Notice of Motion(denied)/Affirmation (Baron)/ Exhibits A, B ..... 1 - 3
Notice of Cross-Motion(granted)/Affirmation (Owen)/
Supporting Affidavit (Tamburo)/Exhibits 1-3 ..... 4 - 7
Affirmation in Opposition (Atwell)/Affidavit (Sannella) ..... 8 - 9
Affirmation in Opposition (Munro)/Affidavit (Young) 10-11
Reply Affirmation (Owen) 12

In this action, plaintiff seeks to recover damages for personal injuries he allegedly sustained as a result of **two** independent rear-end motor vehicle accidents that occurred on **April 7, 2017**, and **August 3, 2017.** The first occurred while Plaintiff was traveling on State Route 17 in Goshen, New York in stop-and-go traffic, plaintiff's vehicle was struck in the rear by a vehicle owned and operated by defendant, Andrea Sannella. Plaintiff is also seeking to recover damages

for personal injuries he allegedly sustained in a second accident, as a result of a rear-end motor vehicle accident that occurred on **August 3, 2017.** While traveling on Route 302 in Crawford, New York, plaintiff's vehicle was stopped at a traffic light when he was struck in the rear by a vehicle being operated by defendant, Jennifer S. Young and owned by defendant Jean M. Armstrong.

Defendants, Young and Armstrong, move to sever the action insofar asserted against them. Defendants argue that the only nexus between the two accidents is the plaintiff's involvement and thus should be severed to avoid confusion and prejudice to all defendants.

"The grant or denial of a request for severance is a matter of judicial discretion, which should not be disturbed on appeal absent a showing of prejudice to a substantial right of the party seeking severance" (*Chiarello v. Rio*, 101 A.D.3d 793, 797 [2d Dept 2012]; *see Quiroz v. Beitia*, 68 A.D.3d 957, 960 [2d Dept 2009]; *Naylor v. Knoll Farms of Suffolk County, Inc.*, 31 A.D.3d 726, 727 [2d Dept 2006]). "[T]his discretion should be exercised sparingly" (*Shanley v. Callanan Indus.*, 54 N.Y.2d 52, 57 [1981]). Severance is inappropriate where, as here, there are common factual and legal issues involved in two causes of action, and the interests of judicial economy and consistency of verdicts will be served by having a single trial (*see Naylor v. Knoll Farms of Suffolk County, Inc.*, 31 A.D.3d at 727).

In his opposition, plaintiff submits the affirmed report of independent medical examiner, Sunitha Polepalle, MD, who indicates that plaintiff's injuries overlap. Plaintiff claims additional injuries, as well as an exacerbation of his prior injuries sustained in the first accident. Further, defendants, Young and Armstrong have asserted a cross-claim against defendant, Sannella, in their Verified Answer. They allege that all of plaintiff's injuries were caused in whole or in part by the co-defendant which serves to weaken defendants' argument for severance. The causes of action asserted against all of the defendants present common factual and legal issues, and the

defendants have failed to establish that a single trial would result in any jury confusion or suffering prejudice to a substantial right (*see Mothersil v. Town Sports Intl.*, 24 A.D.3d 424, 425 [2d Dept 2005]).

In his cross-motion, plaintiff asserts that he is entitled to summary judgment on liability for both causes of action as rear-end collisions establish a *prima facie* case of negligence on the part of the defendants.

Plaintiff argues that defendant, Sannella's purported non-negligent explanation, that plaintiff suddenly came to a stop, is insufficient to raise a triable issue of fact, based upon the Vehicle & Traffic Law which requires a driver to maintain a safe distance between his vehicle and the vehicle in front of him (McKinney's Veh. & Traffic Law §1129). In fact, Sannella's failure to refute plaintiff's showing that he was stopping for traffic because of a red traffic signal is sufficient to disavow any non-negligent explanation for the collision. Similarly, defendant, Young's, purported non-negligent explanation of being distracted by a bee that flew into her car, is insufficient to raise a triable issue of fact. Young admits to applying pressure to her brake in order to stop for the red light immediately prior to being distracted.

Defendants assert that there are bona fide issues of fact regarding their own liability and plaintiff's comparative negligence. Summary judgment is a drastic remedy, and is appropriate only when there is a clear demonstration of the absence of any triable issue of fact (*Piccirillo v. Piccirillo*, 156 AD2d 748 [2d Dept 1989], citing *Andre v. Pomeroy*, 35 NY2d 361 [1974]). The function of the Court on such a motion is issue finding, and not issue determination. *(Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]) The Court is not to engage in the weighing of evidence; rather, the Court's function is to determine whether "by no rational process could the trier of facts find for the non-moving party." (*Jastrzebski v. N. Shore Sch. Dist.*, 232 AD2d 677, 678 [2d Dept 1996])

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, requiring that operator to come forward with evidence of a non-negligent explanation for the collision in order to rebut the inference of negligence (*see Tutrani v. County of Suffolk*, 10 N.Y.3d 906, 908 [2008]; *Theo v Vasquez*, 136 AD3d 795 [2d Dept 2016]).

Here, plaintiff has established his entitlement to judgment as a matter of law by demonstrating that his vehicle was stopped when he was struck in the rear by Sanella's vehicle on April 7, 2017, and then by Young's vehicle on August 3, 2017 (*see Prosen v Mabella*, 107 AD3d 870, 871 [2d Dept 2013]; *Strickland v. Tirino*, 99 A.D.3d 888, 890 [2d Dept 2012]). Defendants have failed to proffer any non-negligent explanation for either collision. In fact, neither Sannella nor Young refute the facts as presented in plaintiff's motion and therefore has admitted to their negligence.

Further, the Court of Appeals has recently held that a plaintiff does not bear the burden of establishing the absence of her own comparative negligence in order to obtain partial summary judgment in a comparative negligence case. (*Rodriguez v. City of New York*, 31 NY3d 312 [2018]).

In *Rodriguez*, the Court of Appeals reversed the finding of the Appellate Division, First Department, that affirmed the denial of plaintiff's motion for partial summary judgment, on the basis that plaintiff failed to make a *prima facie* showing that he was free of comparative negligence. (*See, Rodriguez v. City of New York*, 142 AD3d 778 [1st Dept 2016])

The Court of Appeals held that Article 14-A of the Civil Practice Law & Rules provides that comparative negligence does not *bar* recovery, but can act to diminish the amount of damages otherwise recoverable, in the proportion of the claimant's culpable conduct. Civ. Prac. Law & Rules §1411. Moreover, §1412 provides that such culpable conduct shall be an

affirmative defense to be pleaded and proved by the party asserting the same.

The majority thus reasoned that to place the burden on the plaintiff to show an absence of comparative fault is inconsistent with the language of §1412. *(See Rodriguez* at 318). "Comparative fault 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...but rather a diminishment of the amount of damages." *Rodriguez* at 320.

The defendants' remaining contentions are without merit.

In light of the above, it is hereby

ORDERED that the motion by defendants, Jennifer S. Young and Jean M. Armstrong, to sever the plaintiff's claim as against them is denied; and it is further

ORDERED that plaintiff's motion for partial summary judgment on the issue of liability as against the defendants, Andrea Sannella and Jennifer S. Young, is granted; and it is further

ORDERED that all parties are directed to appear for a status conference on March 25, 2020 at 9:15 a.m.

The foregoing constitutes the Decision and Order of this Court.

Dated: February 21, 2020
Goshen, New York

ENTER:

HON. MARIA S. VAZQUEZ-DOLES, J.S.C.

TO: Counsel of record via NYSCEF