SHORT FORM ORDER **INDEX NO.: 620450/2018**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

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JOSE PINEDA,

Plaintiff,

-against-

LOUMIDIS FOODS INC & JOSE J. PEGUERO-PARRA,

Defendants.

---x

Motion Submit Date: 09/19/19
Mot Seq 002 MG

PLAINTIFF'S COUNSEL:
Schulman & Hill PLLC
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Brooklyn, New York 11242

DEFENDANTS' COUNSEL:
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In this electronically filed motor vehicle accident negligence action, on plaintiff's opposed motion for partial summary judgment on liability pursuant to CPLR 3212, this Court considered the following: NYSCEF Docs. Nos. 19 – 24; and upon due deliberation and full consideration of all of the above, it is

ORDERED that plaintiff's motion seeking partial summary judgment as to liability pursuant to CPLR 3212 against defendants is **granted** as follows; and it is further

ORDERED that plaintiff's counsel is hereby directed to serve a copy of this decision and order with notice of entry via electronic filing and electronic mail upon defendant's counsel forthwith; and it is further

ORDERED that, if applicable, within 30 days of the entry of this decision and order, that defendant's counsel is also hereby directed to give notice to the Suffolk County Clerk as required by CPLR 8019(c) with a copy of this decision and order and pay any fees should any be required.

BACKGROUND & POSTURE

Plaintiff commenced this personal injury negligence action against defendants arising out of a motor vehicle collision which occurred on June 6, 2018. By the pleadings filed, plaintiff seeks damages for personal injury premised on defendants negligence as a proximate cause of the underlying motor vehicle collision and attendant alleged serious injuries. Presently, plaintiff moves for an award of partial summary judgment on liability against the defendant.

In support of the application, plaintiff submits a copy of the pleadings, his affidavit, and a

certified copy of the police accident investigation report.

Plaintiff's Testimony

In brief fashion, by his affidavit dated March 24, 2019, plaintiff testifies that on June 6, 2018 at approximately 5:00 p.m. he was operating his vehicle travelling on Sunrise Highway, State Highway 27 in dry and clear weather when he was rear-ended by a vehicle owned and operated by defendant Peguero-Parra.

The Police Accident Investigation Report

In support of his application for judgment as a matter of law on liability, plaintiff also submits a certified copy of the police accident investigation report dated June 6, 2018. Therein, a police officer who responded to the incident scene reports that a vehicle operated by a non-party to this action stated that he was stopped in traffic when his vehicle was struck by plaintiff's vehicle. Plaintiff reported to the officer that he was slowing his vehicle in traffic when he was stuck in turn by defendant and pushed into the non-party's vehicle, not being able to stop his vehicle in time to avoid a collision.

Plaintiff's Argument in Support of Summary Judgment

Relying on the above testimony and evidence, plaintiff seeks partial summary judgment on liability arguing that defendants are liable to him as the proximate cause for the incident having initiated a rear-end collision with her vehicle stopped in traffic. This motion is unopposed.

STANDARDS OF REVIEW

The motion court's role on review of a motion for summary judgment is issue finding, not issue determination (***Trio Asbestos Removal Corp. v Gabriel & Sciacca Certified Pub. Accountants, LLP***, 164 AD3d 864, 865, 82 NYS3d 127, 129 [2d Dept 2018]). The court should refrain from making credibility determinations (***Gniewek v Consol. Edison Co.***, 271 AD2d 643, 643, 707 NYS2d 871 [2d Dept 2000]).

It is well settled that summary judgment is a drastic remedy which should not be granted when there is doubt as to the existence of a triable issue of fact. Where, however, one seeking summary judgment tenders evidentiary proof in admissible form establishing its defense sufficiently to warrant the court as a matter of law in directing judgment in its favor, the burden falls upon the opposing party to show, also by evidentiary proof in admissible form, that there is a material issue of fact requiring a trial of the matter (*see* ***Zuckerman v. City of New York,*** 49 NY2d 557, 562, 427 NYS2d 595 [1980]). The evidence presented on a motion for summary judgment must be scrutinized in the light most favorable to the party opposing the motion (*see* ***Goldstein v. Monroe County,*** 77 AD2d 232, 236, 432 NYS2d 966 [1980]).

The proponent on a motion of summary judgment 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 Hosp.***, 68 NY2d 320, 508 NYS2d 923

[1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985];]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

If the moving party fails in meeting this burden, the motion must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see* ***Zuckerman***, *supra*). The function of the court in determining a motion for summary judgment is issue finding, not issue determination (***Pantote Big Alpha Foods, Inc. v Schefman,*** 121 AD2d 295, 503 NYS2d 58 [1st Dept. 1986]).

The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289AD2d 557, 735 NYS2d 197 [2d Dept. 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept. 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept. 1987]). The law is well-established that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see* ***Andre v Pomeroy,*** 35 NY2d 361, 362 NYS2d 131 [1974]; ***Benincasa v Garrubo,*** 141 AD2d 636, 529 NYS2d 797 [2d Dept. 1988]).

However, whereas here, the non-movant fails to oppose a motion for summary judgment, there is, in effect, a concession that no question of fact exists, and the facts as alleged in the moving papers may be deemed admitted (***Kuehne & Nagel v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]).

DISCUSSION

The plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, *prima facie*, that the defendants breached a duty owed to the plaintiff and that the defendants' negligence was a proximate cause of the alleged injuries (***Montalvo v Cedeno***, 170 AD3d 1166 [2d Dept 2019]; *accord* ***Buchanan v Keller***, 169 AD3d 989, 991, 95 NYS3d 252, 254 [2d Dept 2019][holding that plaintiff-movant seeking summary judgment on liability is no longer required to show freedom from comparative fault in order to establish prima facie entitlement to judgment as a matter of law]. Stated another way, "[t]o be entitled to partial summary judgment a plaintiff does not bear the ... burden of establishing ... the absence of his or her own comparative fault" (***Balladares v City of New York***, 2018-11929, 2019 WL 6334162, at *2 [2d Dept Nov. 27, 2019]; *quoting* ***Rodriguez v. City of New York***,31 NY3d 312 [2018]).

A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the moving vehicle and imposes a duty on the operator to rebut the inference of negligence by providing a non-negligent explanation for the collision" (***Mulhern v Gregory***, 161 AD3d 881, 883, 75 NYS3d 592, 594 [2d Dept 2018]; ***Comas-Bourne v City of New York***, 146 AD3d 855, 856, 45 NYS3d 182, 183 [2d Dept 2017]; ***Whelan v Sutherland***, 128 AD3d 1055, 1056, 9 NYS3d 639, 640 [2d Dept 2015]; ***Tutrani v. County of Suffolk***, 10 NY3d 906, 908; ***Gutierrez v. Trillium USA, LLC***, 111 AD3d 669, 670–671, 974 NYS2d 563; ***Pollard v. Independent Beauty & Barber Supply Co.***, 94 AD3d 845, 846, 942 NYS2d 360; ***Perez v Roberts***, 91 AD3d 620, 621, 936 NYS2d 259, 260 [2d Dept 2012]; ***Le Grand v Silberstein***, 123 AD3d 773, 774, 999 NYS2d 96, 97 [2d Dept 2014]).

The claim that the lead vehicle made a sudden stop, standing alone, is insufficient to

rebut the presumption of negligence on the part of the following vehicle (*see* ***Zdenek v Safety Consultants, Inc.***, 63 AD3d 918, 918, 883 NYS2d 57, 58 [2d Dept 2009]; ***Kastritsios v. Marcello***, 84 AD3d 1174, 923 NYS2d 863; ***Franco v. Breceus***, 70 AD3d 767, 895 NYS2d 152; ***Mallen v. Su***, 67 AD3d 974, 890 NYS2d 79; ***Rainford v. Han***, 18 AD3d 638, 795 NYS2d 645; ***Russ v. Investech Secs.***, 6 AD3d 602, 775 NYS2d 867; ***Xian Hong Pan v Buglione***, 101 AD3d 706, 707, 955 NYS2d 375, 377 [2d Dept 2012]). However, "[i]f the operator cannot come forward with any evidence to rebut the inference of negligence, the plaintiff may properly be awarded judgment as a matter of law" (***Barile v. Lazzarini***, 222 AD2d 635, 636, 635 NYS2d 694; ***D'Agostino v YRC, Inc.***, 120 AD3d 1291, 1292, 992 NYS2d 358, 359 [2d Dept 2014]).

"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 vehicle, and to exercise reasonable care to avoid colliding with the other vehicle" (***Comas-Bourne v City of New York***, 146 AD3d 855, 856, 45 NYS3d 182, 183 [2d Dept 2017]). Drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident (***Williams v Spencer-Hall***, 113 AD3d 759, 760, 979 NYS2d 157, 159 [2d Dept 2014]). a rear-end collision with a stopped vehicle creates a prima facie case of liability with respect to the operator of the rearmost vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision (***Sayyed v Murray***, 109 AD3d 464, 464, 970 NYS2d 279, 281 [2d Dept 2013]).

A possible non-negligent explanation for a rear-end collision could be the sudden stop of the lead vehicle," however, it is equally true that "vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her car and the car ahead" (***Tumminello v City of New York***, 148 AD3d 1084, 1085, 49 NYS3d 739, 741 [2d Dept 2017]; ***Shamah v. Richmond County Ambulance Serv.***, 279 A.D.2d 564, 565, 719 N.Y.S.2d 287; *see* ***Gutierrez v Trillium USA, LLC***, 111 AD3d 669, 671, 974 NYS2d 563, 566 [2d Dept 2013]; ***Robayo v. Aghaabdul,*** 109 A.D.3d 892, 893, 971 N.Y.S.2d 317). Even assuming that a lead vehicle stopped short or suddenly, following vehicles should not escape liability for an assumed failure to maintain a proper or safe following distance under the presented circumstances, where the record presents a scenario with triable questions of fact ripe for jury determination, rather than summary determination on the law (*see e.g.* ***Romero v Al Haag & Son Plumbing & Heating, Inc.***, 113 AD3d 746, 747, 978 NYS2d 895, 896 [2d Dept 2014][even assuming that the defendant driver failed to maintain a reasonably safe distance and rate of speed while traveling behind the plaintiff's vehicle under Vehicle and Traffic Law § 1129[a], defendant's deposition testimony relied upon by plaintiff, itself raised a triable issue of fact on whether the plaintiff contributed to the accident by driving in an erratic manner]; *accord* ***Fernandez v Babylon Mun. Solid Waste***, 117 AD3d 678, 679, 985 NYS2d 289, 290 [2d Dept 2014][under circumstances where plaintiff came to an abrupt stop for no apparent reason resulting in a collision, a triable issue of fact exists]; ***Sokolowska v Song***, 123 AD3d 1004, 1004, 999 NYS2d 847, 848 [2d Dept 2014]).

Thus, the burden is placed on the driver of the offending vehicle, as he or she is in the best position to explain whether the collision was due to a mechanical failure, a sudden stop of the vehicle ahead, unavoidable skidding on wet pavement, or some other reasonable cause (*see* ***Abbott v Picture Cars E., Inc.***, 78 A.D.3d 869, 911 N.Y.S.2d 449 [2d Dept 2010]; ***DeLouise v S.K.I. Wholesale Beer Corp.***, 75 A.D.3d 489, 904 N.Y.S.2d 761 [2d Dept 2010]; ***Moran v***

Singh, 10 A.D.3d 707, 782 N.Y.S.2d 284 [2d Dept 2004]).

Here, on review of the moving papers, the Court finds that plaintiff has dispensed with the requisite burden entitling him to judgment as a matter of law regarding liability with submission of her deposition testimony and the certified police accident investigation report. All taken together, the Court finds plaintiff's papers demonstrate a *prima facie* case of negligence against the defendants. Accordingly, the burden shifts to defendants to come forward with a non-negligent explanation for the incident. There being no opposition to plaintiff's application, this Court **grants** plaintiff's motion for summary judgment.

Defendants having submitted no opposition to plaintiff's summary judgment motion, have thus failed to come forward with competent and admissible proof demonstrating triable issues of fact or non-negligent explanations for the rear-end collision here, necessitating a trial on their liability and thereby conceded the issue. Thus, having not raised a triable issue of fact warranting trial on the question of liability, this Court accordingly, **grants** plaintiff's unopposed motion and enters judgment as a matter of law on liability for the plaintiff.

The foregoing constitutes the decision and order of this Court.

Dated: February 4, 2020
Riverhead, New York

WILLIAM G. FORD, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**