SHORT FORM ORDER INDEX NO. 600967/2020

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

JANINE M. HERNANDEZ,

Plaintiff,

-against-

LOUIS G. FAVA, CHRISTOPHER FAVA, RICHARD DENNING and CAROLYN M. DENNING,

Defendants.

ORIG. RETURN DATE: NOVEMBER 5, 2020
FINAL SUBMISSION DATE: NOVEMBER 5, 2020
MTN. SEQ. #: 001
MOTION: MG

PLAINTIFF'S ATTORNEY:
HARMON, LINDER & ROGOWSKY, ESQS.
3 PARK AVENUE - SUITE 2300
NEW YORK, NEW YORK 10016
212-732-3665

ATTORNEY FOR DEFENDANTS LOUIS G. FAVA AND CHRISTOPER FAVA:
GENTILE & TAMBASCO
115 BROAD HOLLOW ROAD - SUITE 300
MELVILLE, NEW YORK 11747
631-760-0900

ATTORNEY FOR DEFENDANTS RICHARD DENNING AND CAROLYN M. DENNING:
JAMES F. BUTLER & ASSOCIATES
P.O. BOX 9040
300 JERICHO QUADRANGLE - SUITE 260
JERICHO, NEW YORK 11753
516-229-6000

Upon the following papers numbered 1 to 5 read on this motion FOR PARTIAL SUMMARY JUDGMENT.
Notice of Motion and supporting papers 1-3; Affirmation in Opposition 4; Reply Affirmation 5; it is,

ORDERED that this motion by defendants RICHARD DENNING and CAROLYN M. DENNING (collectively "defendants") for an Order, pursuant to CPLR 3212, granting summary judgment to defendants and dismissing the

complaint and all claims against them, on the ground that the record contains no facts upon which defendants can be found liable for the accident that gave rise to this action, therefore, the claims against them are dismissible as a matter of law, is hereby **GRANTED** as set forth hereinafter. The Court has received an affirmation of counsel for defendants LOUIS G. FAVA and CHRISTOPHER FAVA in opposition to this motion.

This action stems from a three-vehicle, rear-end collision that occurred on June 13, 2019, on Montauk Highway at or near its intersection with Cobb Road in the Town of Southampton, County of Suffolk, State of New York. At the time of the accident, defendant CAROLYN M. DENNING was operating a 2013 Fiat owned by defendant RICHARD DENNING. The plaintiff, JANINE M. HERNANDEZ, was operating a 2017 Hyundai owned by non-party Robert Kennedy. Defendant CHRISTOPHER FAVA was operating a 2014 Mercedes Benz which was owned by defendant LOUIS G. FAVA. Defendants indicate that this accident occurred when the Fava vehicle rear-ended defendants' vehicle which propelled defendants' vehicle into the rear of plaintiff's vehicle. Defendants allege that both plaintiff's vehicle and defendants' vehicle were completely stopped when Fava rear-ended defendants' vehicle.

Defendants have now filed the instant motion for summary judgment to dismiss the complaint and all cross-claims against them. On a motion for summary judgment the Court's function is to determine whether issues of fact exist not to resolve issues of fact or to determine matters of credibility (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Tunison v D.J. Stapleton, Inc.*, 43 AD3d 910 [2007]; *Kolivas v Kirchoff*, 14 AD3d 493 [2005]). Therefore, in determining the motion for summary judgment, the facts alleged by the nonmoving party and all inferences that may be drawn are to be accepted as true (*see Doize v Holiday Inn Ronkonkoma*, 6 AD3d 573 [2004]; *Roth v Barreto*, 289 AD2d 557 [2001]; *Mosheyev v Pilevsky*, 283 AD2d 469 [2001]). The failure of the moving party to make such a *prima facie* showing requires denial of the motion regardless of the insufficiency of the opposing papers (*see Dykeman v Heht*, 52 AD3d 767 [2008]; *Sheppard- Mobley v King*, 10 AD3d 70 [2004]; *Celardo v Bell*, 222 AD2d 547 [1995]). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v New York*, 49 NY2d 557 [1980]). However, mere allegations, unsubstantiated conclusions, expressions of

hope or assertions are insufficient to defeat a motion for summary judgment (*see Zuckerman v City of New York*, *supra*; *Blake v Guardino*, 35 AD2d 1022 [1970]).

When the driver of an automobile approaches another vehicle from behind, it is the duty of the driver of the rear vehicle to maintain a reasonably safe rate of speed and control over his or her vehicle, to maintain a safe distance between his vehicle and the other vehicle, and to exercise reasonable care so as to avoid colliding with the other vehicle (*see* Vehicle and Traffic Law § 1129 [a]; *Klopchin v Masri*, 45 AD3d 737 [2007]; *Gaeta v Carter*, 6 AD3d 576 [2004]; *Chepel v Meyers*, 306 AD2d 235 [2003]). A rear-end collision creates a *prima facie* case of negligence on behalf of the operator of the rear-most vehicle, and imposes a duty on that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision (*see Niyazov v Bradford*, 13 AD3d 501 [2004]; *Stalikas v United Material*, 306 AD2d 810 [2003], *aff'd* 100 NY2d 626 [2003]; *Ruzycki v Baker*, 301 AD2d 48 [2002]; *Niemiec v Jones*, 237 AD2d 267 [1997]).

Based upon the adduced evidence, the Court finds that defendants have established *prima facie* that they are entitled to judgment as a matter of law dismissing all claims against them (*see Winegrad v New York Univ. Med. Ctr.*, *supra*; *Vaden v Rose*, 4 AD3d 468 [2004]; *McNulty v DePetro*, 298 AD2d 566 [2002]). As discussed, defendants contend that their vehicle was struck in the rear by the co-defendants' vehicle while completely stopped, and co-defendants have not proffered a non-negligent explanation for the happening of the accident. Co-defendants' counsel's affirmation, made without personal knowledge of the facts, is without any evidentiary value and is insufficient to defeat a motion for summary judgment (*see S. J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]; *Moran v Man-Dell Food Stores, Inc.*, 293 AD2d 723 [2002]; *Hoffman v Eastern Long Island Transp. Enter.*, 266 AD2d 509 [1999]; *Cataldo v Waldbaum, Inc.*, 244 AD2d 446 [1997]). Moreover, counsel's argument that the motion should be denied as premature is rejected absent any showing that discovery might lead to relevant evidence or that facts essential to opposing the instant motion are exclusively within the movant's knowledge and control (*see Le Grand v Silberstein*, 123 AD3d 773 [2014]; *Raimondo v Plunkitt*, 102 AD3d 851 [2013]; *Buchinger v Jazz Leasing Corp.*, 95 AD3d 1053 [2012]). "The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion" (*Lopez v WS Distrib., Inc.*, 34 AD3d 759, 760 [2006]; *Ordonez v Levy*, 19 AD3d 385 [2005]).

Accordingly, defendants' motion for summary judgment is **GRANTED** to the extent that plaintiff's complaint and all cross-claims against defendants are hereby dismissed.

The foregoing constitutes the decision and Order of the Court.

Dated: November 30, 2020

HON. JOSEPH FARNETI
Acting Justice Supreme Court

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**