At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 17th day of September 2020.

PRESENT:

HON. LARA J. GENOVESI,
J.S.C.

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NINA LEYKIN,

Plaintiff,

-against-

ELIYAHU BREINER

Defendant.

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Index No.: 521254/2018

DECISION & ORDER

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	NYSCEF Doc. No.:
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed	33 - 39
Opposing Affidavits (Affirmations)	40 - 43
Reply Affidavits (Affirmations)	50

Introduction

Plaintiff, Nina Leykin, moves by notice of motion, sequence number two, pursuant to CPLR § 3212 for summary judgment on the issue of liability. Defendant, Eliyahu Breiner, opposes this application.

Background

Plaintiff allegedly sustained personal injuries on October 2, 2017, while driving eastbound on the Belt Parkway, when her vehicle was allegedly struck in the rear by a

vehicle operated by defendant. Plaintiff appeared at an examination before trial (EBT) on May 8, 2019 (*see generally,* NYSCEF Doc # 38). Plaintiff testified that she entered the East Bound Belt Parkway and travelled in the right lane until the accident occurred (*see id.* at 10). Her vehicle was moving at the time of the accident at a speed of 40 miles per hour (*see id.* at 11). She testified that traffic was light (*see id.*). She felt an impact and heard a loud bang come from the rear (*see id.* at 12). She testified that once she struck her head, she "for some short period of time lost consciousness. When I opened my eyes, my vehicle was stopped" (*id.* at 13).

Defendant testified at an EBT on August 23, 2019 (*see generally,* NYSCEF Doc # 39). When the accident occurred he was moving out of the right lane into the center lane on the eastbound Belt Parkway (*see id.* at 13). He testified that he is 85-90 percent sure he used his left turn signal prior to changing lanes (*see id.* at 15). He is not sure whether he looked in the mirrors or turned his head or both, but he is sure that when he changed lanes, he knew that nobody was behind him (*see id.* at 17). "I remember though there was no one coming from behind me. So, I either turned or looked in the mirrors to check" (*id.*). He "definitely" turned his head to the left and checked his blind spot and that is when the accident happened (*see id.* at 18). He does not recall exactly how long his head was turned but he guessed two or three seconds (*see id.* at 32).

Defendant did not complete his lane change. He testified that plaintiff's vehicle "stopped short" immediately prior to the impact (*id.* at 28). He "remember[s] seeing the car in front of me with brake lights on, but that may have been right after the impact or before the impact. I don't remember" (*id.* at 20). He testified that there was "ample

distance" between his vehicle and plaintiffs when he began to turn his head left to check his blind spot; one to two car lengths (*id.* at 21-22). However, when asked "[d]id you actually see the car stop short?" he answered "I saw it driving and I saw it stopped. I didn't see the process of it completely slowing down because I was turned." (*see id.* at 33). He believes that he was travelling 30 miles per hour (*see id.* at 22). Defendant described traffic conditions as "congested" and said he was not moving at full speed (*see id.* at 27). He does not recall speaking to the police after the accident occurred (*see id.* at 25). Defendant testified that front passenger side of his vehicle struck the rear driver's side of plaintiff's vehicle (*see id.* at 35). Defendant provided photographs of the damage to plaintiff's vehicle (*see* NYSCEF Doc. # 41).

According to the police report, "Vehicle 1 states she was traveling on the E/B Belt Pkwy in the right lane in heavy traffic coming from the accel. Ramp from Cropsey Ave when Vehicle#2 who was behind her collided into her. Vehicle#2 states he was entering highway and attempted to merge over when Vehicle#2 [*sic*] stopped suddenly leading to collision" (NYSCEF Doc. # 35).

Discussion

"[T]he 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 absence of any material issues of fact" (*Stonehill Capital Mgmt., LLC v. Bank of the W.*, 28 N.Y.3d 439, 68 N.E.3d 683 [2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 501 N.E.2d 572 [1986]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see*

Chiara v. Town of New Castle, 126 A.D.3d 111, 2 N.Y.S.3d 132 [2 Dept., 2015], citing *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 965 N.E.2d 240 [2012]; *see also Lee v. Nassau Health Care Corp.*, 162 A.D.3d 628, 78 N.Y.S.3d 239 [2 Dept., 2018]). Once a moving party has made a prima facie showing of its entitlement to summary judgment, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Fairlane Fin. Corp. v. Longspaugh*, 144 A.D.3d 858, 41 N.Y.S.3d 284 [2 Dept., 2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, *supra; see also Hoover v. New Holland N. Am., Inc.*, 23 N.Y.3d 41, 11 N.E.3d 693 [2014]).

"Defendants moving for summary judgment in a personal injury action must demonstrate, prima facie, that they did not proximately cause the plaintiff's injuries" (*Wilson v. Mazewski*, 175 A.D.3d 1352, 105 N.Y.S.3d 888 [2 Dept., 2019], quoting *Fargione v. Chance*, 154 A.D.3d 713, 62 N.Y.S.3d 444 [2 Dept., 2017]). "Since, however, there can be more than one proximate cause of a plaintiff's injuries, defendants do not carry their burden simply by establishing that another party's actions were a proximate cause; they must establish their own freedom from comparative fault" (*Fargione v. Chance*, 154 A.D.3d 713, 62 N.Y.S.3d 444 [2 Dept., 2017], citing *Bentick v. Gatchalian*, 147 A.D.3d 890, 48 N.Y.S.3d 171 [2 Dept., 2017]).

"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" (*Hai Ying Xiao v. Martinez*, 185 A.D.3d 1014, 126 N.Y.S.3d 369 [2 Dept.,

2020], quoting *Tsyganash v. Auto Fleet Mall Mgt., Inc.*, 163 A.D.3d 1033, 83 N.Y.S.3d 74 [2 Dept., 2018]). "To be entitled to partial summary judgment a plaintiff does not bear the ... burden of establishing ... the absence of his or her own comparative fault" (*Hai Ying Xiao v. Martinez*, 185 A.D.3d 1014, *supra,* quoting *Rodriguez v. City of New York*, 31 N.Y.3d 312, 76 N.Y.S.3d 898 [2018]). "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" (*Batashvili v. Veliz-Palacios*, 170 A.D.3d 791, 96 N.Y.S.3d 146 [2 Dept., 2019], quoting *Nsiah–Ababio v. Hunter,* 78 A.D.3d 672, 913 N.Y.S.2d 659 [2 Dept., 2010]).

"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 rebut the inference of negligence by providing a nonnegligent explanation for the collision" (*Bloechle v. Heritage Catering, Ltd.*, 172 A.D.3d 1294, 101 N.Y.S.3d 424 [2 Dept., 2019], citing *Tutrani v. County of Suffolk,* 10 N.Y.3d 906, 861 N.Y.S.2d 610 [2008]).

> A nonnegligent explanation for a rear-end collision may include evidence of a sudden stop of the lead vehicle… However, "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" … Moreover, " [a] conclusory assertion by the operator of the following vehicle that the sudden stop of the vehicle caused the accident is insufficient, in and of itself, to provide a nonnegligent explanation" …

(*Bros. v. Bartling*, 130 A.D.3d 554, 13 N.Y.S.3d 202 [2 Dept., 2015] [internal citations omitted]).

In the instant case, plaintiff meet her burden and establish entitlement to summary judgment as a matter of law. Plaintiff raises numerous arguments in support of her motion. Plaintiff contends that contends that defendant violated VTL § 1129(a) by failing to maintain a safe distance between the two vehicles (*see* NYSCEF Doc. # 34, Affirmation in Support at ¶ 8), defendant had a duty to operate his vehicle at a safe rate of speed (*see id.* at ¶ 18) and defendant had a duty to see what there is to be seen (*see id.* at ¶ 9). Plaintiff also cites to the general rear end standard that a rear-end with a stopped or stopping vehicle creates a presumption of negligence on the part of the rear vehicle. Plaintiff provided the deposition transcripts of both parties and the police report.

In the instant case, the evidence submitted demonstrates that the front of defendant's vehicle struck the rear plaintiff's vehicle while the defendant attempted to change lanes on the Belt Parkway. "When a defendant operates a vehicle that strikes another vehicle in the rear, the defendant is subject to a presumption that he or she was negligent in failing to keep a safe distance between the vehicles, although such presumption may be overcome by the presentation of evidence sufficient to rebut the inference of negligence" (*Abramov v. Campbell*, 303 A.D.2d 697, 757 N.Y.S.2d 100 [2 Dept., 2003], citing *Karakostas v. Avis Rent A Car Sys.*, 301 A.D.2d 632, 756 N.Y.S.2d 61 [2 Dept., 2003]). Accordingly, plaintiff met her prima facie burden for summary judgment.

Defendant, in opposition, failed to raise a triable issue of fact. Even according full credit to the defendants' version of the accident, it is insufficient to raise a triable issue of fact, in light of the circumstances of the accident. Defendant testified that the Belt

Parkway was congested at the time of the accident and that plaintiff made a sudden stop. " [A] conclusory assertion by the operator of the following vehicle that the sudden stop of the vehicle caused the accident is insufficient, in and of itself, to provide a nonnegligent explanation" (*Bros. v. Bartling*, 130 A.D.3d 554, 13 N.Y.S.3d 202 [2 Dept., 2015] [citations omitted]). This Court notes that although the defendant claims that the plaintiff made a sudden stop, he also testified that he did not see the plaintiff's vehicle come to a stop. Although there are conflicting versions of certain facts, those conflicts are not material to the determination of this motion. In determining the motion, the evidence must be viewed in the light most favorable to the nonmoving party. The evidence in this case, viewed in the light most favorable to the defendant, was sufficient to make out a prima facie case of negligence against the defendant. The defendant was under a duty to maintain a safe distance between his vehicle and the vehicle in front of him (*see* Vehicle and Traffic Law § 1129 [a]). His conclusory and speculative claim that plaintiff suddenly stopped in what the defendant describes as congested traffic is simply insufficient to raise a triable issue of fact.

Conclusion

Accordingly, the plaintiff's motion for summary judgment on the issue of liability is granted. The foregoing constitutes the decision and order of this Court.

ENTER:

Hon. Lara J. Genovesi
J.S.C.