SHORT FORM ORDER

INDEX No. 607554/2019
CAL. No. 202100241MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 55 - SUFFOLK COUNTY

PRESENT:

Hon. GEORGE M. NOLAN
Justice of the Supreme Court

MOTION DATE 5/24/21 (002 & 003)
ADJ. DATE 5/27/21
Mot. Seq. # 002 MG
Mot. Seq. # 003 XMD

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PASQUALE CALIFANO,

Plaintiff,

- against -

LYNN A. WESTLEY,

Defendant.

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Upon the following papers read on these motions for partial summary judgment : Notice of Motion/ Order to Show Cause and supporting papers filed by defendant Lynn A. Westley, on April 23, 2021 ; Notice of Cross Motion and supporting papers filed by plaintiff in Action No. 2, Tonia L. Crawford, on April 29, 2021 ; Answering Affidavits and supporting papers ___; Replying Affidavits and supporting papers __; Other _; it is,

ORDERED that the unopposed motion by plaintiff Pasquale Califano for partial summary judgment in his favor on the issue of defendant Lynn A. Westley's liability, and to strike defendant's first and fourth affirmative defenses of culpable conduct and emergency doctrine, is granted; and it is further

ORDERED that the motion by Tonia L. Crawford for, in effect, partial summary judgment in her favor on the issue of defendant Lynn A. Wesley's liability, and to strike defendant's first and fourth affirmative defenses of culpable conduct and emergency doctrine, is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff Pasquale Califano as a result of a motor vehicle accident, which occurred on April 25, 2018, on the eastbound Long Island Expressway, at or near exit 59, in Ronkonkoma, New York. The accident allegedly occurred when Califano's vehicle was involved in a three-vehicle, rear-end collision with vehicles

owned and operated by defendant Lynn A. Westley and nonparty Tonia L. Crawford. Crawford operated the lead vehicle, Califano operated the middle vehicle, and Westley operated the rear vehicle. It is alleged that Califano brought his vehicle to a complete stop in traffic behind Crawford's vehicle, which was completely stopped, and that Westley's vehicle struck Califano's vehicle in the rear, which propelled it forward into Crawford's vehicle. Crawford commenced a separate action, entitled *Tonia L. Crawford v Lynn A. Westley and Pasquale P. Califano*, assigned index number 618291/2019 (Action No. 2). By motion dated April 29, 2021, filed in Action No. 2, Califano, as defendant, moved for summary judgment dismissing the complaint and cross claims against him. The undersigned granted Califano's motion on the merits, by order dated June 7, 2021.

Califano now moves for summary judgment in his favor on the issue of Westley's liability, arguing that Westley's negligence was the sole proximate cause of the accident. Califano alleges that Westley violated, inter alia, Vehicle and Traffic Law § 1129 (a) by following too closely. Califano also seeks to dismiss Westley's first and fourth affirmative defenses of culpable conduct and emergency doctrine. In support of his motion, Califano submits, inter alia, copies of the transcripts of the depositions of the parties, and Crawford. Westley does not oppose the motion.

The driver of a vehicle approaching another vehicle from the rear must maintain a reasonably safe rate of speed and control over his or her vehicle and exercise reasonable care to avoid colliding with the other vehicle (*see* ***Bloechle v Heritage Catering, Ltd.***, 172 AD3d 1294, 101 NYS3d 424 [2d Dept 2019]; ***Schmertzler v Lease Plan U.S.A., Inc.***, 137 AD3d 1101, 27 NYS3d 648 [2d Dept 2016]; ***Gallo v Jairath***, 122 AD3d 795, 996 NYS2d 682 [2d Dept 2014]). 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, and requires the operator of the rear vehicle to rebut the inference of negligence by providing a nonnegligent explanation for the collision (*see* ***Miller v Steinberg***, 164 AD3d 492, 82 NYS3d 597 [2d Dept 2018]; ***Edgerton v City of New York***, 160 AD3d 809, 74 NYS3d 617 [2d Dept 2018]). A nonnegligent explanation may include evidence of a mechanical failure, a sudden, unexplained stop of the lead vehicle, an unavoidable skidding on wet pavement, or any other reasonable cause (*see* ***Grant v Carrasco***, 165 AD3d 631, 84 NYS3d 235 [2d Dept 2018]; ***Binkowitz v Kolb***, 135 AD3d 884, 24 NYS3d 186 [2d Dept 2016]; ***Ortiz v Hub Truck Rental Corp.***, 82 AD3d 725, 918 NYS2d 156 [2d Dept 2011]).

To establish prima facie entitlement to judgment as a matter of law on the issue of liability, a plaintiff is no longer required to show freedom from comparative fault (***Rodriguez v City of New York***, 31 NY3d 312, 76 NYS3d 898 [2018]; ***Bloechle v Heritage Catering, Ltd.***, *supra*; ***Marks v Rieckhoff***, 172 AD3d 847, 101 NYS3d 63 [2d Dept 2019]; ***Auguste v Jeter***, 167 AD3d 560, 560, 88 NYS3d 509 [2d Dept 2018]). The issue of a plaintiff's comparative negligence may, however, be decided in the context of a summary judgment motion if the plaintiff moves for summary judgment dismissing a defendant's affirmative defense of comparative negligence (***Poon v Nisanov***, 162 AD3d 804, 79 NYS3d 227 [2d Dept 2018]).

Califano has established, prima facie entitlement to summary judgment in his favor on the issue of negligence through his submissions (*see* ***Lopez v Dobbins***, 164 AD3d 776, 79 NYS3d 566 [2d Dept 2018]; ***Tsyganash v Auto Mall Fleet Mgt., Inc.***, 163 AD3d 1033, 83 NYS3d 74 [2d Dept 2018]; ***Niyazov v Hunter EMS, Inc.***, 154 AD3d 954, 63 NYS3d 457 [2d Dept 2017]). At his examination

before trial, Califano testified that on the date of the accident, he was traveling in the left land of the eastbound Long Island Expressway, near exit 59. He testified that he was completely stopped in traffic, behind Crawford's stopped vehicle, for approximately 30 seconds to one minute, when he was struck in the rear, and that the force of the collision propelled his vehicle forward into Crawford's vehicle. At her examination before trial, Crawford testified that she was operating her vehicle in the left lane of the eastbound Long Island Expressway, and that she stopped in traffic for approximately 30 seconds to one minute, when she was struck from behind by Califano's vehicle. Westley testified at an examination before trial that he was operating his vehicle eastbound on the Long Island Expressway, and that he took his eyes off the road to look down to scratch his arm. Westley testified that he did not know for how long he took his eye off the road, and that his vehicle struck Califano's vehicle in the rear.

Califano having established a prima facie case of entitlement to summary judgment, the burden now shifts to Westley to raise a triable issue of fact with respect to whether there was a non-negligent explanation for the accident (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Miller v Steinberg***, *supra*; *see generally* ***Rodriguez v City of New York***, *supra*). Westley fails to oppose the motion which, in effect, is a concession that no question of fact exists, and the facts as alleged in the moving papers may be deemed admitted (*see* ***Kuehne & Nagel v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]; ***114 Woodbury Realty, LLC v 10 Bethpage Rd., LLC***, 178 AD3d 757, 114 NYS3d 100 [2d Dept 2019]).

As to the branch of Califano's motion seeking to dismiss Westley's first and fourth affirmative defenses, when moving to dismiss an affirmative defense, the "plaintiff bears the burden of demonstrating that the affirmative defense is without merit as a matter of law" (***Bank of N.Y. v Penalver***, 125 AD3d 796, 797, 1 NYS3d 825 [2d Dept 2015]; *see* ***Jacob Marion, LLC v Jones***, 168 AD3d 1043, 93 NYS3d 120 [2d Dept 2019]). "In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference . . . [and] if there is any doubt as to the availability of a defense, it should not be dismissed" (***Fireman's Fund Ins. Co. v Farrell***, 57 AD3d 721, 723, 869 NYS2d 597 [2d Dept 2008]; *see* ***LG Funding, LLC v United Senior Props. of Olathe, LLC***, 181 AD3d 664, 122 NYS2d 309 [2d Dept 2020]).

Califano has established, prima facie, entitlement to the relief requested. With respect to the branch of the motion to dismiss Westley's first affirmative defense of culpable conduct, Califano has established through his submissions that he was completely stopped when Westley struck his vehicle in the rear (*see* ***McLaughlin v Lunn***, 137 AD3d 757, 26 NYS3d 338 [2d Dept 2016]). With respect to the branch of the motion to dismiss Westley's fourth affirmative defense of the emergency doctrine, this doctrine "recognizes that 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, provided the actor has not created the emergency" (***Lifson v City of Syracuse***, 17 NY3d 492, 497, 934 NYS2d 38 [2011], quoting ***Caristo v Sanzone***, 96 NY2d 172, 174, 726 NYS2d 334 [2001]; ***Levi v Benyaminova***, 128 AD3d 779, 9 NYS3d 123 [2d Dept 2015]). "[T]he existence of an emergency and the reasonableness of a party's response to it will ordinarily present questions of fact" (***Bello v Transit***

Auth. of N.Y. City, 12 AD3d 58, 60, 783 NYS2d 648 [2d Dept 2004]; *see* ***Flores v Metropolitan Transp. Auth., Long Is. Bus***, 122 AD3d 672, 996 NYS2d 184 [2d Dept 2014]). Califano has established that Westley was not faced with a sudden and unexpected circumstance which left little or no time for thought, deliberation, or consideration when he took his eyes off the road to look down, for an unknown length of time, at his arm to scratch it. As he fails to oppose this branch of Califano's motion, Westley fails to raise a triable issue of fact with respect to his affirmative defenses.

With respect to the cross motion, to the extent that Crawford's motion seeks relief concerning Action No. 2, such application is not properly before this court, and is denied (*see generally* ***Inspiration Enters. v Inland Credit Corp.***, 57 AD2d 800, 394 NYS2d 701 [1st Dept 1977]). A joint trial is not an organic consolidation, and the integrity of each action is preserved by the consolidation for the purpose of a joint trial, allowing each action to retain its separate identity (*see* CPLR 602 [b]; ***Whiteman v Parsons Transp. Group of N.Y., Inc.***, 72 AD3d 677, 900 NYS2d 87 [2d Dept 2010]; ***Import Alley of Mid-Is., Inc. v Mid-Island Shopping Plaza***, 103 AD2d 797, 798, 477 NYS2d 675; ***Champagne v Consolidated R. R. Corp.***, 94 AD2d 738, 462 NYS2d 491 [2d Dept 1983]). Any request for relief in a separate action must be made by motion filed in such action.

Dated: June 28, 2021

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION