SHORT FORM ORDER **INDEX NO. 609409/2020**

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:
Hon. Paul J. Baisley, Jr., J.S.C.

DINO BACELIC,

Plaintiff,

-against-

EDWARD W. GORDON and MAX A. GORDON,

Defendants.

ORIG. RETURN DATE: November 9, 2020
FINAL RETURN DATE: January 19, 2021
MOT. SEQ. #: 001 MotD

ORIG. RETURN DATE: January 19, 2021
FINAL RETURN DATE: January 19, 2021
MOT. SEQ. #: 002 MotD

PLTF'S ATTORNEY:
OGEN & SEDAGHATI, P.C.
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NEW YORK, NY 10016

DEFTS' ATTORNEY:
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Upon the following papers read on these e-filed motions for summary judgment and to consolidate: Notice of Motion/ Order to Show Cause and supporting papers by plaintiff, filed October 22, 2020; by defendants, filed December 7, 2020; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers by defendants, filed December 4, 2020; by plaintiff, filed January 12, 2021; Replying Affidavits and supporting papers by defendants, filed January 14, 2021; by plaintiff, filed January 18, 2021; Other _____; it is

ORDERED that the motion (001) by plaintiff Dino Bacelic and the motion (002) by defendants Edward Gordon and Max Gordon are consolidated for the purpose of this determination; and it is further

ORDERED that the motion by plaintiff for, inter alia, summary judgment in his favor on the issue of defendants' liability is granted in part and denied in part; and it is further

ORDERED that the motion by defendants for an order consolidating this action with the action pending in this Court entitled *GEICO General Insurance Company, a/s/o Dino Bacelic, plaintiff, against Edward W. Gordon and Max Gordon, defendants*, assigned index number 605959/2020, or, in the alternative, for an order joining the two actions for trial is granted to the extent set forth herein, and is otherwise denied; and it is further

ORDERED that a separate note of issue and bill of costs shall be filed in each action, and that separate court fees shall be paid for each action; and it is further

ORDERED that a preliminary conference shall be held on March 2, 2021.

Plaintiff Dino Bacelic commenced this action to recover damages for personal injuries he allegedly sustained as a result of a motor vehicle accident that occurred on East Jericho Turnpike, near State Place, in Suffolk County, New York, on January 18, 2018. The complaint, filed on July 22, 2020, alleges that a vehicle owned by defendant Edward Gordon, and operated by defendant Max Gordon, collided with plaintiff's vehicle. Prior to the commencement of this action, on May 28, 2020, GEICO General Insurance Company ("GEICO"), as subrogee of Dino Bacelic, commenced a separate action in this Court, assigned index number 605959/2020, to recover payment it made to its insured for damages allegedly caused by defendants as a result of the same motor vehicle accident.

Plaintiff now moves for, inter alia, summary judgment in his favor on the issue of defendants' liability, and an order directing an immediate trial for the assessment of damages. Plaintiff also seeks, in effect, dismissal of defendants' first affirmative defense of culpable conduct and seventh affirmative defense of assumption of risk. In support of his motion, plaintiff submits, among other things, his affidavit and an uncertified police accident report. In opposition, defendants contend, in part, that plaintiff's motion was premature, and that the police accident reported submitted by plaintiff is not in admissible form. In support of their opposition, defendants submit the affirmation of their attorney.

Defendants also move to consolidate this action with the action pending in this Court entitled *GEICO General Insurance Company, a/s/o Dino Bacelic, plaintiff, against Edward W. Gordon and Max Gordon, defendants*, assigned index number 605959/2020, or, in the alternative, to join the two actions for trial. They argue, among other things, that the two actions arise out of the same motor vehicle accident, and involve common question of law and fact. Defendants also seek to amend the caption for this action. In support of their motion, defendants submit, among other things, a copy of the pleadings for the two actions. In opposition, plaintiff argues, in part, that both actions do not involve common questions of law and fact, and that consolidation would unduly prejudice plaintiff. Plaintiff also claims that GEICO was improperly served with defendants' motion papers by email. In reply, defendants argue, among other things, that GEICO's counsel confirmed service and receipt of their motion, and had no objection to it. Defendants submit emails between their counsel and GEICO's counsel.

A driver of a vehicle approaching another vehicle from the rear must maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle (*see* Vehicle and Traffic Law § 1129 [a]; *Capuozzo v Miller*, 188 AD3d 1137, 2020 NY Slip Op 07026 [2d Dept 2020]; *Newman v Apollo Tech Iron Work Corp.*, 188 AD3d 902, 135 NYS3d 133 [2d Dept 2020]; *Yassin v Blackman*, 188 AD3d 62, 131 NYS3d 53 [2d Dept 2020]). 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 thereby requires that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision (*see Dolores v Grandpa's Bus Co.*, 189 AD3d 1539, 135 NYS3d 295 [2d Dept 2020]; *Capuozzo v Miller*, *supra*; *Newman v Apollo Tech Iron Work Corp.*, 188 AD3d 902, 135 NYS3d 133 [2d Dept 2020]). A nonnegligent explanation may include evidence of a mechanical failure, a sudden, unexplained stop of the leading vehicle, an unavoidable skidding on wet pavement, or any other reasonable cause (*see Clements v Giatas*, 178 AD3d 894, 112 NYS3d 539 [2d Dept 2019]; *Grant v Carrasco*, 165 AD3d 631, 84 NYS3d 235 [2d Dept 2018]; *Tumminello v City of New York*, 148 AD3d 1084, 49 NYS3d 739 [2d Dept 2017]). However, a driver who follows another vehicle must anticipate that the leading vehicle may stop, even suddenly and frequently, based on

prevailing traffic conditions (*see Perez v Persad*, 183 AD3d 771, 123 NYS3d 683 [2d Dept 2020]; *Fang Xia v Saft*, 177 AD3d 823, 113 NYS3d 249 [2d Dept 2019]; *Catanzaro v Edery*, 172 AD3d 995, 101 NYS3d 170 [2d Dept 2019]). Although a plaintiff is no longer required to show the absence of his or her comparative fault to establish prima facie entitlement to summary judgment on the issue of a defendant's liability, (*see Rodriguez v City of New York*, 31 NY3d 312, 76 NYS3d 898 [2018]; *Dolores v Grandpa's Bus Co.*, 189 AD3d 1539, 135 NYS3d 295 [2d Dept 2020]; *Abtey v Trivigno*, 188 AD3d 629, 134 NYS3d 401 [2d Dept 2020]), the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where the plaintiff seeks summary judgment dismissing an affirmative defense alleging comparative negligence (*see Maliakel v Morio*, 185 AD3d 1014, 126 NYS3d 369 [2d Dept 2020]; *Balladares v City of New York*, 177 AD3d 942, 114 NYS3d 448 [2d Dept 2019]; *Poon v Nisanov*, 162 AD3d 804, 79 NYS3d 227 [2d Dept 2018]).

Plaintiff established his prima facie entitlement to summary judgment in his favor on the issue of defendant driver's liability (*see Newman v Apollo Tech Iron Work Corp.*, *supra*; *Hall v Powell*, 183 AD3d 576, 121 NYS3d 632 [2d Dept 2020]; *Rosenblum v Schloss*, 175 AD3d 1339, 105 NYS3d 894 [2d Dept 2019]). Although the police accident report submitted by plaintiff and its contents constitute inadmissible hearsay, since the police accident report has not been certified, and a foundation for its admissibility has not been laid by some other method (*see Yassin v Blackman*, 188 AD3d 62, 131 NYS3d 53 [2d Dept 2020]), plaintiff's affidavit was sufficient to make a prima facie case of entitlement to summary judgment on the issue of defendant driver's negligence. By his affidavit, plaintiff avers that his vehicle was stopped for traffic for approximately three seconds when it was struck in the rear by a vehicle operated by defendant driver (*see Newman v Apollo Tech Iron Work Corp.*, *supra*; *Hall v Powell*, *supra*; *Rosenblum v Schloss*, *supra*). In opposition, defendants failed to raise a triable issue of fact as to whether there was a nonnegligent explanation for the accident (*see Hall v Powell*, *supra*; *Gelo v Meehan*, 177 AD3d 707, 110 NYS3d 333 [2d Dept 2019]; *Montalvo v Cedeno*, 170 AD3d 1166, 96 NYS3d 638 [2d Dept 2019]). Defendants proffered only their attorney's affirmation, which, standing alone, was insufficient to raise a triable issue of fact (*see* CPLR 3212 [b]; *Liu v Lowe*, 173 AD3d 946, 102 NYS3d 713 [2d Dept 2019]; *Morales v Amar*, 145 AD3d 1000, 44 NYS3d 184 [2d Dept 2016]).

Plaintiff also demonstrated his prima facie entitlement to summary judgment in his favor on the issue of defendant owner's liability (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). Vehicle and Traffic Law § 388 (1) provides that the owner of a motor vehicle is liable for damages resulting from the negligence of one who uses or operates that vehicle with the permission, express or implied, of such owner (*see Matter of Allstate Ins. Co. v Jae Kan Shim*, 185 AD3d 919, 128 NYS3d 49 [2d Dept 2020]; *Kelly v Starr*, 181 AD3d 799, 120 NYS3d 373 [2d Dept 2020]). To impose liability pursuant to Vehicle and Traffic Law § 388 (1), the plaintiff must demonstrate "negligence in the use or operation of the vehicle, and that the negligence was a cause of the injury" (*Gray v Air Excel Serv. Corp.*, 171 AD3d 1026, 1028, 98 NYS3d 259 [2d Dept 2019], quoting *Ciminello v Sullivan*, 65 AD3d 1002, 1003, 885 NYS2d 118 [2d Dept 2009]). The strong presumption of permissive use afforded by Vehicle and Traffic Law § 388 can only be rebutted by substantial evidence demonstrating that the driver of the vehicle was not operating the vehicle with the owner's consent (*see Matter of Allstate Ins. Co. v Jae Kan Shim*, *supra*; *Blassberger v Varela*, 129 AD3d 756, 11 NYS3d 238 [2d Dept 2015]; *Han v BJ Laura & Son, Inc.*, 122 AD3d 591, 996 NYS2d 132 [2d Dept 2014]). By their verified answer, defendants admit that the vehicle operated by defendant driver was owned by defendant owner (*see*

CPLR 3018 [a]). Thus, defendant driver's negligence can be imputed to defendant owner, through the presumption that defendant driver was operating the vehicle with its express or implied consent (*see* Vehicle and Traffic Law § 388 [1]; *Edwards v J&D Express Serv. Corp.*, 180 AD3d 871, 116 NYS3d 597 [2d Dept 2020]). In opposition, defendants failed to raise a triable issue of fact with respect to defendant owner's liability (*see Abtey v Trivigno*, *supra*; *Edwards v J&D Express Serv. Corp.*, *supra*).

As to the branch of plaintiff's motion seeking to dismiss defendants' 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 because it either does not apply under the factual circumstances of the case, or it fails to state a defense (*see Lewis v US Bank N.A.*, 186 AD3d 694, 130 NYS3d 22 [2d Dept 2020]; *Shah v Mitra*, 171 AD3d 971, 98 NYS3d 197 [2d Dept 2019]; *Wells Fargo Bank, N.A. v. Rios*, 160 AD3d 912, 74 NYS3d 321 [2d Dept 2018]). In the context of a motion to dismiss an affirmative defense, if there is any doubt as to the availability of an affirmative defense, it should not be dismissed (*see Lewis v US Bank N.A.*, *supra*; *LG Funding, LLC v United Senior Props. of Olathe, LLC*, 181 AD3d 664, 122 NYS3d 309 [2d Dept 2020]; *Shah v Mitra*, *supra*).

Plaintiff's submissions were also sufficient to make a prima facie case that he was free from comparative fault (*see Lopez v Dobbins*, 164 AD3d 776, 79 NYS3d 566 [2d Dept 2018]; *Poon v Nisanov*, *supra*; *Figueroa v MTLR Corp.*, 157 AD3d 861, 69 NYS3d 359 [2d Dept 2018]). In opposition, defendants failed to raise a triable issue of fact as to plaintiff's comparative fault (*see Lopez v Dobbins*, *supra*; *Poon v Nisanov*, *supra*). Plaintiff also demonstrated that the assumption of risk doctrine is not applicable under the circumstances of this action (*see Custodi v Town of Amherst*, 20 NY3d 83, 957 NYS2d 268 [2012]; *Trupia v Lake George Cent. School Dist.*, 14 NY3d 392, 901 NYS2d 127 [2010]). Thus, plaintiff's application to dismiss defendants' first and seventh affirmative defenses is granted.

Contrary to defendants' contention, plaintiff's motion was not premature, as defendants failed to demonstrate how further discovery might reveal or lead to relevant evidence, or that facts essential to oppose the motion were exclusively within plaintiff's control (*see Ordonez v Lee*, 177 AD3d 756, 110 NYS3d 339 [2d Dept 2019]; *Gonzalez v Goudiaby*, 177 AD3d 656, 109 NYS3d 890 [2d Dept 2019]; *Romain v City of New York*, 177 AD3d 590, 112 NYS3d 162 [2d Dept 2019]). As defendant driver has personal knowledge of the relevant facts underlying the accident, the purported need to conduct discovery does not warrant denial of the motion (*see Pierre v Demoura*, 148 AD3d 736, 48 NYS3d 260 [2d Dept 2017]; *Turner v Butler*, 139 AD3d 715, 32 NYS3d 174 [2d Dept 2016]). The "mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered" by further discovery is an insufficient basis for denying the motion (*Lopez v WS Distrib. Inc.*, 34 AD3d 759, 760, 825 NYS2d 516, 517 [2d Dept 2006]; *see Jobson v SM Livery, Inc.*, 175 AD3d 1510, 109 NYS3d 376 [2d Dept 2019]; *Skura v Wojtlowski*, 165 AD3d 1196, 87 NYS3d 100 [2d Dept 2018]). Plaintiff's application to set the matter down for an immediate trial for the assessment of damages, however, is denied.

The Court now turns to defendants' motion for consolidation, or, in the alternative, for a joint trial. The determination to grant a motion to consolidate or for a joint trial pursuant to CPLR 602 rests with the sound discretion of the trial court (*see Robinson v 47 Thames Realty, LLC*, 158 AD3d 780, 68

NYS3d 758 [2d Dept 2018]; *Scotto v Kodsi*, 102 AD3d 947, 958 NYS2d 740 [2d Dept 2013]). Absent a showing of prejudice to a substantial right by party opposing the motion, a motion to consolidate or for a joint trial should be granted when common questions of law or fact exist (*see Robinson v 47 Thames Realty, LLC*, *supra*; *Longo v Fogg*, 150 AD3d 724, 55 NYS3d 61 [2d Dept 2017]; *Bruno v Capetola*, 101 AD3d 785, 957 NYS2d 156 [2d Dept 2012]). The interests of justice and judicial economy are better served by consolidation or a joint trial in those actions sharing material questions of law or fact (*see Lombardi v Lombardi*, 164 AD3d 665, 83 NYS3d 232 [2d Dept 2018]; *Bruno v Capetola*, *supra*). However, a motion to consolidate or for a joint trial may be denied when the actions are at markedly different procedural stages (*see Cromwell v CRP 482 Riverdale Ave., LLC*, 163 AD3d 626, 80 NYS3d 423 [2d Dept 2018]; *Skelly v Sachem Cent. Sch. Dist.*, 309 AD2d 917, 766 NYS2d 108 [2d Dept 2003]; *Cont. Bldg. Co. v Town of N. Salem*, 150 AD2d 518, 541 NYS2d 112 [2d Dept 1989]).

Here, a joint trial of the two actions is appropriate, as they arise out of same motor vehicle accident, and involve common questions of law and fact (*see Oboku v New York City Tr. Auth.*, 141 AD3d 708, 35 NYS3d 710 [2d Dept 2016]; *Whiteman v Parsons Transp. Group of N.Y., Inc.*, 72 AD3d 677, 900 NYS2d 87 [2d Dept 2010]; *Mas-Edwards v Ultimate Servs., Inc.*, 45 AD3d 540, 845 NYS2d 414 [2d Dept 2007]). A joint trial will avoid unnecessary duplication of proceedings, save unnecessary costs and expenses, and prevent the injustice which would result from divergent determinations based on the same facts (*see Oboku v New York City Tr. Auth.*, *supra*; *Mas-Edwards v Ultimate Servs., Inc.*, *supra*). Although defendants moved for consolidation of the actions, the more appropriate method of achieving that purpose is a joint trial, particularly since the actions involve different plaintiffs (*see Whiteman v Parsons Transp. Group of N.Y., Inc.*, *supra*; *Mas-Edwards v Ultimate Servs., Inc.*, *supra*). Moreover, plaintiff, in opposing the motion, failed to demonstrate prejudice to a substantial right if the actions are tried jointly (*see Mas-Edwards v Ultimate Servs., Inc.*, *supra*). Plaintiff's argument that GEICO was improperly served with defendants' motion is unavailing. Defendants have submitted an email by GEICO's counsel confirming receipt of their motion and memorializing that there was no opposition to it. Thus, the two actions will be joined for trial. In light of the Court's determination, defendants' application to amend the caption as proposed is denied.

Accordingly, the motion by plaintiff and the motion by defendants are granted in part and denied in part.

Dated: 2/9/21

HON. PAUL J. BAISLEY, JR., J.S.C.