SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 31

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DENYSE MCKENZIE and GARY MCKENZIE

Index №. 23719-2019E

-against-

Hon. VERONICA G. HUMMEL

MOHAMED JUBARTALLAH, HOWARD D. MASON, and QLR THREE INC.,

A.J.S.C.

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The following papers were read on the motion and cross-motion, Seq. No. 2, for **SUMMARY JUDGMENT DEFENDANT** noticed on March 5, 2021 and submitted on March 5, 2021.

Notice of Motion, Affirmation, and Exhibits Annexed	NYSCEF No(s). 28-36
Cross-Motion , Affirmation in Support	NYSCEF No(s). 37-38
Affidavit in opposition to motion and cross-motion	NYSCEF No(s). 40

Upon the foregoing papers, the motion of defendant MOHAMED JUBARTALLAH [Mot. Seq. 2] (the moving defendant), made pursuant to CPLR 3212, seeking an order granting the moving defendant summary judgment dismissing the complaint and cross-claims as against him, and the cross-motion of plaintiffs DENYSE MCKENZIE and GARY MCKENZIE (plaintiffs), made pursuant to CPLR 3212, for an order granting plaintiffs partial summary judgment on the issue of liability[1] as against defendants HOWARD D. MASON and QLR THREE, INC. (the QLR defendants or QLR Vehicle) or, in the alternative, against all defendants are decided as follows:

This personal injury litigation arises from a motor vehicle accident that occurred on September 11, 2018, at or near the intersection of Brooklyn Avenue and Pacific Street, in Kings County. On the motion, the moving defendant relies on the deposition transcript of plaintiff . Plaintiff does not oppose the moving defendant's motion and submits no additional exhibits or testimony on the cross-motion. The QLR defendants oppose the moving defendant's and plaintiff's motions without submitting any additional evidence.

It is undisputed that at the time of the Accident, plaintiff Denyse McKenzie (plaintiff) was a passenger in the vehicle being driven and owned by the moving defendant. Plaintiff testified that the moving defendant's vehicle came to a stop at a red light. The vehicle was stopped for a few seconds at the red light when it was rear-ended by the QLR Vehicle. After the collision, the driver of the QLR Vehicle apologized to plaintiff and admitted that he had been driving all night and fell asleep at the wheel.

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[1] The Court notes that plaintiff seeks, among other things, "summary judgment to plaintiffs on the issue of liability against defendants." The notice of motion does not specifically seek summary judgment on the issue of plaintiffs' lack of comparative negligence or striking of any related affirmative defenses, and, therefore, the issue of any such affirmative defense is not before the Court (*Marte v Lee*, 2021 WL 1733236 [Sup. Ct. Bronx County 2021]).

The 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 eliminate any material issues of fact . . ." (*Winegrad v New York Univ. Med Ctr.*, 64 NY2d 851 [1985]). The moving party is entitled to summary judgment only if it tenders evidence sufficient to eliminate all material issues of fact from the case (*Winegrad v New York University Medical Center*, *supra; Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]) If a party makes a *prima facie* showing of its entitlement to summary judgment, the opposing party bears the burden of establishing the existence of a triable issue of fact (*Zuckerman v City of New York*, *supra*). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Casper v Cushman & Wakefield*, 74 AD3d 669 [1st Dept 2010]; *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227 [1st Dept (2006)]).

The moving defendant's motion.

Since there can be more than one proximate cause of an accident, a defendant moving for summary judgment is required to make a *prima facie* showing that he or she is free from fault (*see Harrigan v Sow*, 165 AD3d 463 [1st Dept 2018]; *Hilago v Vasquez*, 187 AD3d 683 [1st Dept 2020]). In order for a defendant driver to establish entitlement to summary judgment on the issue of liability in a motor vehicle collision case, therefore, the driver must demonstrate, *prima facie*, that he or she kept the proper lookout, or that his or her alleged negligence, if any, did not contribute to the accident (*see Harrigan v Sow*, *supra; Hilago v Vasquez*, *supra*).

It is well settled that a rear-end collision with a stopped or stopping vehicle establishes a *prima facie* case of negligence on the part of the driver of the rear vehicle, and imposes a duty on the part of the operator of the moving vehicle to come forward with an adequate non-negligent explanation for the accident (*see Cabrera v Rodriguez*, 72 AD3d 553 [1st Dept 2010]; *Tutrani v County of Suffolk*, 10 NY3d 906, 908 [2008]; *Agramonte v City of New York*, 288 AD2d 75, 76 [1st Dept 2001]). Hence, a rear-end collision with a stationary vehicle creates a *prima facie* case of negligence requiring judgment in favor of the stationary vehicle unless the non-movant party proffers a non-neglect explanation for the failure to maintain a safe distance (*Matos v Sanchez*, 147 AD3d 585 [1st Dept 2017]; *see Perdomo v Llanos*, 158 AD3d 580 [1st Dept 2018]).

A driver is expected to drive at a sufficiently safe speed and to maintain enough distance between himself and cars ahead of him as to avoid collisions with stopped vehicles taking into account weather and road conditions (*La Masa v Bachman*, 56 AD3d 340 [1st Dept 2008]; *see Smyth v Murphy*, 177 AD3d 492 [1st Dept 2019]). The happening of a rear-end collision with a vehicle is itself a *prima facie* case of negligence of the rearmost driver (*Chang v Rodriguez*, 57 AD3d 295 [1st Dept 2008]; *Vasquez v Chimborazo*, 155 AD3d 432 [1st Dept 2017]; *see Smyth v Murphy*, *supra*; *Corrigan v Porter Cab Corp.*, 101 AD3d 471 [1st Dept 2012]).

On this motion, the moving defendant establishes his *prima facie* entitlement to judgment as a matter of law by submitting the uncontradicted testimony that the moving defendant brought his vehicle safely to a stop at a red light before being struck in the rear by the co-defendants' vehicle (*Vasquez v Chimborazo, supra; Smyth v Murphy*, *supra*; *Corrigan v Porter Cab Corp*., *supra; LaMasa v Bachman*, *supra*; *see Martinez v Kuhl*, 165 AD3d 774 [2d Dept 2018]). Furthermore, the unrebutted testimony of the plaintiff that the driver of the QLR Vehicle admitted that he had fallen asleep is further proof that the QLR defendants were solely responsible for the accident *(see, Herte v. Breen*, 115 AD2d 590 [2d Dept 1985]). Plaintiff does not oppose the motion.

In opposition, the QLR defendants fail to generate an issue of fact warranting the denial of the motion. The QLR defendants fail to submit any affidavit or other evidence concerning how the accident occurred that would generate an issue of fact as to whether the moving defendant driver was negligent in the operation of the vehicle (*see Steigelman v Transervice Lease Corp*., 145 AD3d 439 [1st Dept 2016]). The affirmation in opposition submitted by defendants' attorney is not based on personal knowledge, and therefore fails to generate an issue of fact as to the cause of the accident as the affirmation has no probative value (*Thompson v Pizzaro*, 155 AD3d 423 [1st Dept 2017]; *Vasquez v Chimborazo, supra*). Nor do they set forth an evidentiary basis for denying the motion as premature as the information as to why the defendants' vehicle struck other vehicle is within defendants' own knowledge (*Rodriguez v Garcia*, 154 AD3d 581 [1st Dept 2017]; *see Castaneda v DO & CO New York Catering, Inc*., 144 AD3d 407 [1st Dept 2016]). Depositions are unnecessary where defendants have personal knowledge of the facts, yet fail to meet their obligation of laying bare their proof and presenting evidence sufficient to raise a triable issue of fact (*Thompson v Pizzaro, supra*). The mere hope or speculation that evidence may be uncovered during the discovery process is insufficient to deny the motion and, as such, the QLR defendants' contention here that the motion was premature is without merit (see CPLR 3212[f]; *Rodriguez v Beal*, 191 AD3d 617 [1st Dept 2021]; *Sapienz v Harrison*, 191 AD3d 1028 [2d Dept 2021]).

The final argument raised in opposition to the motion is similarly without merit. Defendants' counsel merely sets forth the broad legal standards governing the burdens of proof on a motion for summary judgment under *Winegrad v. New York University Medical Center*, 64 NY2d851, 853 [1985] and other leading cases. As, while reciting these boilerplate arguments, defense counsel fails to submit any evidence to oppose plaintiff's *prima facie s*howing, defendants fail to demonstrate the existence of a material issue of fact warranting the denial of the motion.

The cross-motion of plaintiff for summary judgment against the QRL Defendants.

Plaintiff, as an innocent passenger, sets forth *prima facie* showing of entitlement to summary judgment. . In *Garcia v. Tri-County Ambulette Service, Inc.*, 282 A.D.2d 206 [1st Dept. 2001], the court ruled that "Plaintiff, as an innocent rear-seat passenger in one of the vehicles who cannot possibly be found at fault under either

defendant's version of the accident is entitled to partial summary judgment." *Id.* at 207. As set forth above, defendant submissions are insufficient to generate an issue of fact as to the circumstance of the accident and the QLR defendants' negligence and, therefore, plaintiff's motion for partial summary judgment in her favor on the issue of liability is granted.

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motion of defendant MOHAMED JUBARTALLAH [Mot. Seq. 2] (the moving defendant), made pursuant to CPLR 3212, seeking an order granting the moving defendant summary judgment dismissing the complaint and cross-claims as against him is granted; and it is further

ORDERED that the cross-motion of plaintiffs DENYSE MCKENZIE and GARY MCKENZIE (plaintiffs), made pursuant to CPLR 3212, for an order granting plaintiffs partial summary judgment on the issue of liability as against defendants HOWARD D. MASON and QLR THREE, INC. is granted; and it is further

ORDERED that the Clerk shall enter judgment dismissing the complaint and all cross-claims alleged against defendant Mohamed Jubartallah and severing the remaining action; and it is

ORDERED that the caption in this action shall henceforth read as:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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DENYSE MCKENZIE and GARY MCKENZIE,
Plaintiffs, Index No. 23719/2019e
-against-
HOWARD D. MASON and QLR THREE INC.,
Defendants.
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This constitutes the decision and order of the court.

Dated: June 25, 2021 **Hon.** *Hon. Veronica G. Hummel/signed 06/25/2021*

VERONICA G. HUMMEL, A.J.S.C.

1. CHECK ONE.....	☐ CASE DISPOSED IN ITS ENTIRETY X CASE STILL ACTIVE
2. MOTION IS.....	X GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE.....	☐ SETTLE ORDER ☐ SUBMIT ORDER SCHEDULE APPEARANCE
	☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT