SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

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KEVIN LINNIHAN and MARY KATE LINNIHAN, Index No.: 707863/2019

Plaintiffs, Motion Date: 1/27/22

- against - Motion No.: 15

JOSE E. RODRIGUEZ, JR., Motion Seq.: 2

Defendant.

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The following electronically filed documents read on this motion by defendants for an Order pursuant to CPLR 3126(3), dismissing plaintiffs' complaint for plaintiffs' willful failure and refusal to respond to defendant's post deposition demand and for plaintiff Kevin Linnihan's willful failure and refusal to comply with the examining doctor's instructions when he appeared for his independent medical examination on October 11, 2021, or, alternatively, an Order pursuant to CPLR 3126(2), precluding plaintiffs from offering any testimony or evidence at trial in support of their claims of liability and damages in this action; and on this cross-motion by plaintiffs for an Order pursuant to CPLR 3212, granting plaintiffs partial summary judgment and striking defendant's fourth, fifth, eighth, ninth, tenth, and eleventh affirmative defenses:

	Papers Numbered
Notice of Motion-Affirmations-Exhibits.....EF	15 - 25
Affirmation in Opposition-Exhibits.....EF	42 - 46
Affirmation in Reply.....EF	48
Notice of Cross-Motion-Affirmation- Exhibits.....EF	27 - 41
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This is an action to recover damages for personal injuries allegedly sustained by plaintiff Kevin Linnihan as a result of a motor vehicle accident that occurred on December 20, 2018 at or near the intersection of Broadway and 46th Street, in Queens County, New York. Plaintiff Mary Kate Linnihan asserted a derivative claim.

This action was commenced by the filing of a summons and complaint on May 3, 2019. Defendant joined issue by service of an answer on September 17, 2019. Defendant now moves to dismiss this action. Plaintiffs cross-move for summary judgment on the issue of liability.

Regarding the motion, defendant served a post deposition demand on August 17, 2021. While plaintiffs have now provided a response to the demand, defendant contends that the response is deficient in that plaintiffs failed to provide an authorization for the non-privileged portion of plaintiff Kevin Linnihan's legal file for his worker's compensation claim and failed to provide plaintiff Kevin Linnihan's fare records from Uber. Here, defendant is entitled to the non-privileged portion of plaintiff's legal file for his worker's compensation claim arising out of this subject accident. However, since plaintiff has not asserted a claim for lost earnings, defendant is not entitled to plaintiff's salary records. Defendant is entitled to any records pertaining to the hours plaintiff has worked since the subject accident.

Additionally, defendant contends that while Mr. Linnihan did appear for an IME before Regina Hillsman, M.D. on October 11, 2021, the IME did not go forward because plaintiff refused to take off his shirt during the examination. It appears that Mr. Linnihan is willing to appear for an IME.

As plaintiffs have provided a response, provided a reason for Mr. Linnihan's failure to comply with Dr. Hillsman's directives at the IME, and have agreed to appear for an IME, this Court finds that defendant has not demonstrated that plaintiffs' failure to comply with court-ordered discovery was willful and contumacious (see Argo v Queens Surface Corp., 58 AD3d 656 [2d Dept. 2009]; Paca v City of New York, 51 AD3d 991 [2d Dept. 2008]; Maignan v Nahar, 37 AD3d 557 [2d Dept. 2007]). Thus, the complaint will not be dismissed.

In support of the cross-motion, Mr. Linnihan submits an affidavit, affirming that at the time of the accident, he was traveling eastbound on Broadway, approaching a traffic light controlling eastbound traffic on Broadway at its intersection with 46th Street. The light was red. He slowed down and stopped. About thirty seconds after he came to a stop for the light, defendant's vehicle hit the back of his vehicle.

Plaintiffs also submit a certified copy of the Police Accident Report (MV-104AN). In the accident description portion, the responding officer notes, in relevant part:

AT T/P/O DRIVER VEHICLE ONE (Mr. Linnihan) STATES HE WAS TRAVELING EASTBOUND BROADWAY STOPPED AT RIGHT LIGHT FOR INTERSECTION OF 46 STREET WHEN VEHICLE TWO TRAVELING EASTBOUND BROADWAY DID DRIVE INTO THE REAR OF HIS VEHICLE CAUSING DAMAGE TO REAR TRUNK AND BUMPER. VEHICLE TWO DID LEAVE SCENE WITHOUT EXCHANGING INFORMATION WITH DRIVER OF VEHICLE ONE.

Based on the evidence submitted, plaintiffs contend that as their vehicle was at a complete stop when struck in the rear, they are entitled to summary judgment because defendant violated, inter alia, Vehicle and Traffic Law 1129 by failing to maintain a reasonably safe rate of speed and control over his vehicle, failing to exercise his duty to see what should be seen, and by failing to exercise his reasonable duty to avoid striking the vehicle ahead of him in the rear.

In opposition, defendant contends that the motion must be dismissed as premature and as issues of fact regarding any comparative negligence preclude summary judgment.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form, eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his or her position (see Zuckerman v City of New York, 49 NY2d 557 [1980]).

"When the driver of an automobile approaches another automobile from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle" (Macauley v ELRAC, Inc., 6 AD3d 584 [2d Dept. 2003]). It is well established law that a rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence on the part of the driver of the rearmost vehicle, requiring the operator of that vehicle to proffer an adequate, non-negligent explanation for the accident (see Delgado v Bang, 120 AD3d 608 [2d Dept. 2014]; Kertesz v Jason Transp. Corp., 102 AD3d 658 [2d Dept. 2013]; Ramos v TC Paratransit, 96 AD3d 924 [2d Dept. 2012]; Pollard v Independent Beauty & Barber Supply Co., 94 AD3d 845 [2d Dept. 2012]; Klopchin v Masri, 45 AD3d 737 [2d Dept. 2007]).

Here, it is undisputed that defendant's vehicle rear ended the plaintiffs' stopped vehicle.

Having made the requisite prima facie showing of entitlement to summary judgment as against defendant, the burden then shifted to the non-moving party to raise a triable issue of fact (see Goemans v County of Suffolk, 57 AD3d 478 [2d Dept. 2007]).

In opposition, defendant, who did not submit an affidavit in opposition to the motion, failed to provide evidence of a non-negligent explanation for the accident sufficient to raise a triable question of fact (see Bernier v Torres, 79 AD3d 776 [2d Dept. 2010]; Lampkin v Chan, 68 AD3d 727 [2d Dept. 2009]; Cavitch v Mateo, 58 AD3d 592 [2d Dept. 2009]; Garner v Chevalier Transp. Corp, 58 AD3d 802 [2d Dept. 2009]; Kimyagarov v Nixon Taxi Corp, 45 AD3d 736 [2d Dept. 2007]; Gomez v Sammy's Transp., Inc., 19 AD3d 544 [2d Dept. 2005]). Defendant submits only an attorney's affirmation which is insufficient to defeat a summary judgment motion (see Zuckerman, 49 NY2d at 563).

Additionally, defendant's contention that this motion for summary judgment is premature is without merit. Defendant failed to offer any evidentiary basis to suggest that discovery may lead to relevant evidence. The mere hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery is an insufficient basis upon which to deny the motion (see CPLR 3212[f]; Medina v Rodriguez, 92 AD3d 850 [2d Dept. 2012]; Hanover Ins. Co. v Prakin,81 AD3d 778 [2d Dept. 2011]; Essex Ins. Co. v Michael Cunningham Carpentry, 74 AD3d 733 [2d Dept. 2010]; Peerless Ins. Co. v Micro Fibertek, Inc., 67 AD3d 978 [2d Dept. 2009]; Gross v Marc, 2 AD3d 681 [2d Dept. 2003]).

Accordingly, and based on the above reasons, it is hereby,

ORDERED, that the motion is granted only to the extent that on or before **February 28, 2022**, plaintiffs shall serve defendant with:

(1) an authorization for the non-privileged portions of plaintiff's worker's compensation lawyer; and

(2) copies of plaintiff's hours worked records from Uber from the date of the subject accident to the present. If plaintiff is not in possession of such records, plaintiff shall provide an affidavit indicating such; and it is further

ORDERED, that plaintiff Kevin Linnihan shall appear for an IME on January 31, 2022 or at another mutually agreeable date on or before **April 29, 2022**; and it is further

ORDERED, that the cross-motion by plaintiffs is granted to the extent that plaintiffs shall have partial summary judgment against defendant on the issue of liability, and defendant's fourth, fifth, eighth, ninth, tenth, and eleventh affirmative defenses are stricken; and it is further

ORDERED, that upon completion of discovery on the issue of damages, filing a Note of Issue, and compliance with all the rules of the court, this action shall be placed on the trial calendar of the court for a trial on serious injury and damages, only.

Dated: January 27, 2022
Long Island City, N.Y

FILED
1/28/2022
COUNTY CLERK
QUEENS COUNTY

Robert J. McDonald

ROBERT J. MCDONALD
J.S.C.