SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. J. MACHELLE SWEETING** **PART** **62**

Justice

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LAURA C. SIMPSON,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF TRANSPORTATION, JESSICA L. COLAIZZI,

Defendants.

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INDEX NO. 157768/2017

MOTION DATE 09/08/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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THE CITY OF NEW YORK, JESSICA L. COLAIZZI

Plaintiffs,

-against-

SAYED CHOWDHURY, NOTIL CAB CORP

Defendants.

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Third-Party
Index No. 595818/2023

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37

were read on this motion to/for JUDGMENT - SUMMARY.

In the underlying action, plaintiff Laura Simpson claims she was injured in a two-car accident that took place on September 16, 2016 on the FDR Drive in New York, NY. The car in which plaintiff was a passenger was allegedly owned by third-party defendant Notil Cab Corp. and operated by third-party defendant Sayed Chowdhury (collectively, the "Taxi"). The other car was allegedly owned by defendant The City of New York and / or defendant New York City Department Of Transportation, and operated by defendant Jessica L. Colaizzi (collectively, the "City").

Pending before the court is a motion where the Taxi seeks an order pursuant to Civil Practice Law and Rules 3212 for summary judgement and dismissing the third-party Complaint against the Taxi.

Standard for Summary Judgment

The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [Sup. Ct. App. Div. 1st Dept. 1985]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [Sup. Ct. App. Div. 1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]).

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 demonstrate the absence of any material issues of fact, and failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has

been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320 [N.Y. Ct. of Appeals 1986]).

Further, pursuant to the New York Court of Appeals, "We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (Zuckerman v City of New York, 49 NY2d 557 [N.Y. Ct. of Appeals 1980]).

Arguments Made by the Parties

The Taxi argues that there is no question that the City vehicle rear-ended the stopped Taxi vehicle, thus entitling the Taxi defendants to summary judgment. The Taxi argues that it is hornbook law that when a driver approaches another vehicle from the rear, he or she is bound to maintain a reasonably safe rate of speed, maintain control of his vehicle, and use reasonable care to avoid colliding with the other vehicle, and that here, the failure of the City driver to do so constituted negligence as a matter of law. In support if their argument, the Taxi attaches, *inter alia*, a copy of the police report (NYSCEF Doc. No. 26), a copy of the deposition transcript of the City driver (NYSCEF Doc. No. 27), a copy of the MV-104 (New York State Department of Motor Vehicle Report of Motor Vehicle Accident) report filled out by the City driver (NYSCEF Doc. No. 28), and a copy of the deposition transcript of plaintiff (NYSCEF Doc. No. 30).

In opposition, the City argues, first, that this motion is premature, as it was made only one day after the filing of the third-party Complaint, and the City has not yet had the opportunity to depose the Taxi defendants. Second, the City argues that it is well-settled that summary judgment should be denied if there is evidence that the driver of a vehicle suddenly slowed down or stopped without giving proper signals in compliance with Vehicle and Traffic Law ("VTL") 1163. Accordingly, the City argues, because the Taxi defendants have not appeared for their EBT, there remain questions of fact as to whether the Taxi drivers were in violation of the VTL.

Conclusions of Law

It is a well-established principle that a rear-end collision is sufficient to create a *prima facie* case of liability and imposes a duty of explanation with respect to the operator of the offending vehicle. *See e.g.* Rodriguez v. Sharma, 178 A.D.3d 508 (Sup. Ct. App. Div. 1st Dept. 2019) (holding that a rear-end collision with a stopped vehicle creates a *prima facie* case of negligence on the part of the operator of the moving vehicle unless the operator presents evidence sufficient to rebut the inference of negligence).

Here, however, the third-party complaint against the Taxi defendants (NYSCEF Doc. No. 16) alleges:

> (9) Third Party defendant Notil Cab Corp was negligent for the happenings of a motor vehicle accident on September 16, 2016 at FDR Drive and East 42nd Street, New York, New York.
>
> (10) The Third party defendant Sayed Chowdhury was negligent for the happenings of a motor vehicle accident on September 16, 2016 at FDR Drive and East 42nd Street, New York, New York.
>
> […]
>
> (13) That if the plaintiff was caused to sustain damages at the time and place as alleged in the complaint of the plaintiff through any negligence or want of due care […], then said damages were sustained by reason of the negligence and want of due care, by acts of commission or omission on the part of third-party defendants, their agents, servants and/or employees […].

In its opposition papers, the City argues that summary judgment should be denied if there is evidence that a driver suddenly slowed down or stopped without giving proper signals. They also argue that here, the City driver's testimony established that the Taxi in front of her quickly applied the brake and decelerated rapidly, so the Taxi's negligence may have contributed to the accident.

Here, it is undisputed that the third-party Complaint was filed on September 7, 2023, and the instant motion by third-party defendants (the "Taxi") was filed the next day, on September 8, 2023. Further, neither Taxi defendant has appeared for an EBT at the time the City filed their opposition papers. Given this, the court finds that this motion is premature, as the City should be allowed to explore their allegations as against the Taxi, including whether the Taxi driver may have violated the VTL and caused the accident, in whole or in part.

See also Belziti v. Langford, 105 A.D.3d 649 (Sup. Ct. App. Div, 1st Dept. 2013) ("Green's motion for summary judgment was properly denied as premature, since limited discovery has taken place and Green himself has not yet been deposed in this matter"); Weinstein v. WB/Stellar IP Owner, LLC, 125 A.D.3d 526 (Sup. Ct. App. Div, 1st Dept. 2015) ("Plaintiff opposed the motion on the ground that it was premature since 'facts essential to justify opposition may exist but cannot then be stated' […] Stellar's motion should have been denied as premature, since plaintiff had no opportunity to depose Stellar, codefendant Friends, or nonparty EDC concerning, among other things, the project and maintenance of the extended sidewalk area following its completion").

Conclusion

Therefore, it is hereby:

ORDERED that the Taxi's motion is **DENIED** without prejudice as premature; and

ORDERED that the Taxi defendants may, at their election, file another motion for summary judgment after relevant discovery has been completed.

10/17/2023
DATE

J. MACHELLE SWEETING, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE