SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 31
NASSAU COUNTY

ANIBAL PONCE,

Plaintiff,

- against -

Index No.: 600397/10
Motion Seq. No.: 02
Motion Dates: 11/28/11

WILLIAM M. GRAVEN, MTA LONG ISLAND BUS, MTA BUS COMPANY and METROPOLITAN TRANSPORTATION AUTHORITY,

Defendants.

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition and Exhibit	2
Reply Affirmation and Exhibit	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiff moves, pursuant to CPLR § 3212, for an order granting partial summary judgment against defendants on the issue of liability. Defendants oppose the motion.

This action arises from a motor vehicle accident which occurred on February 11, 2010, at approximately 12:10 p.m., at the intersection of N. Franklin Street and W. Columbia Street, Hempstead, County of Nassau, State of New York. The accident involved two vehicles, a 1999 Ford Suburban operated by plaintiff and an MTA Long Island Bus operated by defendant William M. Graven ("Graven") and owned by defendants MTA Long Island Bus, MTA Bus Company and Metropolitan Transportation Authority (collectively the "MTA Long Island Bus

defendants"). Plaintiff commenced the action by the filing and service of a Summons and Verified Complaint on or about June 1, 2010. Issue was joined on or about July 16, 2010.

Briefly, it is plaintiff's contention that the accident occurred when, while his vehicle was stopped at a red light, it was struck in the rear by the MTA Long Island Bus defendants' vehicle. Plaintiff submits that, at the Examination Before Trial ("EBT") of defendant Graven, he testified that he rear-ended plaintiff's vehicle when it was stopped in front of his vehicle at a red light. He stated that his vehicle slid because of the alleged ice on the pavement and, as a result, he was unable to stop or otherwise prevent rear-ending plaintiff's vehicle. *See* Plaintiff's Affirmation in Support Exhibit E.

Plaintiff claims that defendant Graven was the negligent party in that he failed to maintain a safe distance behind plaintiff's vehicle, as well as failed his duty to exercise reasonable care under the circumstances to avoid an accident. Plaintiff additionally claims that the MTA Long Island Bus defendants cannot come up with a non-negligent explanation for striking plaintiff's vehicle in the rear, nor any conduct that would constitute any comparative negligence on plaintiff's part.

In opposition to the motion, the MTA Long Island Bus defendants first argue that plaintiff has not submitted any evidence in admissible form. With respect to the EBT transcripts of plaintiff and defendant Graven submitted by plaintiff in support of his motion, the MTA Long Island Bus defendants submit that both transcripts are unsigned by the respective deponents and plaintiff has failed to indicate that said transcripts were ever forwarded to the deposed witnesses for their review and that said witnesses failed to sign and return the transcripts within sixty days pursuant to CPLR § 3116(a). The MTA Long Island Bus defendants therefore contend that the EBT transcripts annexed to plaintiff's motion are not in admissible form and their contents

cannot be considered by the Court.

The MTA Long Island Bus defendants further argue that plaintiff's own Affidavit, submitted as Exhibit F in his motion, is facially defective and inadmissible. The MTA Long Island Bus defendants state that CPLR § 2101(b) requires affidavits of non-English speaking witnesses be accompanied by a translator's affidavit or verification setting forth the translator's qualifications and the accuracy of the English version submitted to the Court. Plaintiff's Affidavit is prepared in English and signed by plaintiff who only speaks, writes and understands Spanish. Said Affidavit was translated by plaintiff's attorney who speaks both Spanish and English. The MTA Long Island Bus defendants contend that plaintiff's Affidavit must be accompanied by an affidavit or verification of a certified professional translator or Court Interpreter.

The MTA Long Island Bus defendants next argue that the uncertified copy of the Police Accident Report, offered by plaintiff as an exhibit to his motion, is inadmissible for use in a summary judgment motion. They claim that the uncertified Police Accident Report is inadmissible to indicate a party's liability because the police officer who prepared said report was not an eyewitness to the subject accident and, thus, said report constitutes hearsay.

The MTA Long Island Bus defendants further contend that, "[i]f this Court decides that plaintiff has established a prima facie entitlement to summary judgment by virtue of the attached items of evidence in plaintiff's motion, it is respectfully submitted that the existence of triable issues of fact preclude summary judgment." The MTA Long Island Bus defendants submit that defendant Graves explains that he properly stepped on the brake within a reasonable distance behind plaintiff's vehicle and would have come to a complete and full stop behind plaintiff's vehicle, but was nonetheless caused to strike the rear of plaintiff's vehicle because his bus slid on

ice that had unexpectedly formed on the roadway. *See* Plaintiff's Affirmation in Support Exhibit E.

The MTA Long Island Bus defendants argue that the courts have routinely denied summary judgment to moving plaintiffs when unexpected ice causes brake failure and that courts throughout the State of New York have consistently upheld jury decisions which hold a motorist as "not negligent" for skidding on ice and causing motor vehicle accidents.

The MTA Long Island Bus defendants submit that defendant Graven's encounter with unexpected ice, which caused his bus to slide into the rear of plaintiff's vehicle, is a non-negligent explanation which courts have held sufficient to warrant denial of summary judgment and the issue as to whether or not they should still be held negligent is properly left for the trier of fact.

In reply to the MTA Long Island Bus defendants' opposition, with respect to the argument as to the admissibility of the EBT transcripts, plaintiff submits that CPLR § 3116(a) states in part that "[i]f the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed. No changes to the transcript may be made by the witness more than sixty days after submission to the witness for examination." Plaintiff claims that, on August 26, 2010, the MTA Long Island Bus defendants submitted to plaintiff, for review and signature pursuant to CPLR § 3116(a), a copy of plaintiff's 50-H hearing transcript and, on July 23, 2011, the MTA Long Island Bus defendants submitted to plaintiff, for review and signature pursuant to CPLR § 3116(a), a copy of plaintiff's EBT transcript. Since plaintiff did not sign and return the EBT transcript within sixty days, it may be adduced that plaintiff did not want to change any of his testimony and thus his transcripts may be used as though as fully signed.

Plaintiff submitted a copy of defendant Graven's EBT transcript to the MTA Long Island Bus defendants pursuant to CPLR § 3116(a) and a signed copy was not returned within sixty

days and therefore said EBT transcript may be used as though as fully signed. Plaintiff further argues that "irrespective of the signature, or lack thereof, the Defendant's transcript is admissible because it both qualified as an admission against interest, and, because Defendant himself used portions of his testimony in support of his Opposing papers."

With respect to the MTA Long Island Bus defendants' argument as to the admissibility of plaintiff's Affidavit because the accompanying "Affidavit of Translation" was prepared by plaintiff's own attorney, plaintiff argues that nowhere in CPLR § 2010(b) does it indicate that the interpreter must be legally qualified to serve as a court interpreter for legal proceedings. Plaintiff submits that plaintiff's Affidavit in his instant motion is accompanied by a translator's attestation and said translator is a qualified professional - an attorney who speaks English and Spanish fluently. Said attorney's qualifications and the accuracy of her translation were attested to in her testator's attestation.

With respect to the MTA Long Island Bus defendants' argument as to the admissibility of the Police Accident Report, plaintiff argues that the police received their information from defendant Graven therefore the report constitutes a party admission.

Finally, plaintiff argues that the MTA Long Island Bus defendants' argument that defendant Graven's encounter with unexpected ice, which caused his bus to slide into the rear of plaintiff's vehicle, is a non-negligent explanation is not, in fact, a non-negligent explanation.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To

obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the Court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989). It is the existence of an issue, not its relative strength that is the critical and controlling consideration. *See Barrett v. Jacobs*, 255 N.Y. 520 (1931); *Cross v. Cross*, 112 A.D.2d 62, 491 N.Y.S.2d 353 (1st Dept. 1985). The evidence should be construed in a light most favorable to the party moved against. *See Weiss v. Garfield*, 21 A.D.2d 156, 249 N.Y.S.2d 458 (3d Dept. 1964).

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 pursuant to New York State Vehicle and Traffic Law ("VTL") § 1129(a). *See Krakowska v. Niksa*, 298 A.D.2d 561, 749 N.Y.S.2d 55 (2d Dept. 2002); *Bucceri v. Frazer*, 297 A.D.2d 304, 746 N.Y.S.2d 185 (2d Dept. 2002).

A rear end collision with a stopped vehicle establishes a *prima facie* case of negligence on the part of the operator of the offending vehicle. *See Tutrani v. County of Suffolk*, 10 N.Y.3d 906, 861 N.Y.S.2d 610 (2008). Such a collision imposes a duty of explanation on the operator. *See Hughes v. Cai*, 55 A.D.3d 675, 866 N.Y.S.2d 253 (2d Dept. 2008); *Gregson v. Terry,* 35 A.D.3d 358, 827 N.Y.S.2d 181 (2d Dept. 2006); *Belitsis v. Airborne Express Freight Corp.*, 306 A.D.2d 507, 761 N.Y.S.2d 329 (2d Dept. 2003).

Since a rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of liability with respect to the operator of the rearmost vehicle, the operator is therefore required to rebut the inference of negligence by providing a non-negligent explanation for the collision. *See Francisco v. Schoepfer*, 30 A.D.3d 275, 817 N.Y.S.2d 52 (1st Dept. 2006); *McGregor v. Manzo*, 295 A.D.2d 487, 744 N.Y.S.2d 467 (2d Dept. 2002).

Vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since the following driver is under a duty to maintain a safe distance between his or her car and the car ahead. *See Shamah v. Richmond County Ambulance Service, Inc.*, 279 A.D.2d 564, 719 N.Y.S.2d 287 (2d Dept. 2001).

Drivers must maintain safe distances between their cars and the cars in front of them and this rule imposes on them a duty to be aware of traffic conditions including stopped vehicles. *See* VTL § 1129(a); *Johnson v. Phillips*, 261 A.D.2d 269, 690 N.Y.S.2d 545 (1st Dept. 1999).

Drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident. *See Filippazzo v. Santiago*, 277 A.D.2d 419, 716 N.Y.S.2d 710 (2d Dept. 2000).

The Court finds that the transcripts from plaintiff's and defendant Graven's EBT testimony and plaintiff's Affidavit, with its accompanying translation, are admissible evidence and that plaintiff, in his motion, has demonstrated *prima facie* entitlement to summary judgment on the issue of liability against the MTA Long Island Bus defendants. Therefore, the burden shifts to the MTA Long Island Bus defendants to demonstrate an issue of fact which precludes summary judgment. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

After applying the law to the facts in this case, the Court finds that the MTA Long Island Bus defendants have met their burden and demonstrated an issue of fact which precludes summary judgment. A genuine issue of material fact exists as to the surface conditions of the roadway at the place and time of the subject accident and the role said conditions played in the accident. As previously stated as a general rule, a rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of negligence with respect to the operator of the rearmost vehicle, imposing a duty of explanation on that operator to excuse the collision either through mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on a wet pavement or any other reasonable cause. *See DeLouise v. S.K.I. Wholesale Beer Corp.*, 75 A.D.3d 489, 904 N.Y.S.2d 761 (2d Dept. 2010) (holding that a genuine issue of material fact as to actual conditions of a parking garage floor during a snowstorm, and whether truck driver was driving slowly and cautiously at time of accident, precluded summary judgment in automobile driver's action against truck driver for personal injuries he sustained from rear-end collision in parking ramp). The MTA Long Island Bus defendants' argue that defendant Graven's EBT

testimony details the fact that he properly stepped on the brake within a reasonable distance behind plaintiff's vehicle and would have come to a complete and full stop behind plaintiff's vehicle, but was nonetheless caused to strike the rear of plaintiff's vehicle because his bus slid on ice that had unexpectedly formed on the roadway. The Court finds that defendant Graven's encounter with unexpected ice, which caused his bus to slide into the rear of plaintiff's vehicle, is a non-negligent explanation sufficient to warrant denial of summary judgment and the issue as to whether or not the MTA Long Island Bus defendants should still be held negligent is properly left for the trier of fact. *See also Briceno v. Milbry*, 16 A.D.3d 448, 791 N.Y.S.2d 662 (2d Dept. 2005); *Simpson v. Eastman*, 300 A.D.2d 647, 753 N.Y.S.2d 104 (2d Dept. 2002); *Atris v. Jamaica Buses*, 262 A.D.2d 511, 693 N.Y.S.2d 607 (2d Dept. 1999); *Ebanks v. Triboro Coach Corp.*, 304 A.D.2d 406, 757 N.Y.S.2d 296 (1st Dept. 2003).

Accordingly, plaintiff's motion, pursuant to CPLR § 3212, for an order granting partial summary judgment against defendant on the issue of liability is hereby **DENIED**.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
February 3, 2012