SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT : ORANGE COUNTY

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ALECIA TURNBULL,

Plaintiff,

-against-

BERTHENIA POWELL,

Defendant.

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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry,

Index No. 1468/2012
Motion Date: May 15, 2012

The following papers numbered 1 to 4 were read on this motion by plaintiff for summary judgment on liability pursuant to CPLR § 3212:

Notice of Motion-Affirmation-Exhibits.. 1-3

Affirmation in Opposition. 4

Reply Affirmation. 7

Upon the foregoing papers it is ORDERED that the motion is disposed of as follows:

Plaintiff moves this Court for summary judgment pursuant to CPLR § 3212 on this issue of defendant's liability. This is an action in personal injury stemming from a motor vehicle accident on November 2, 2011 on the eastbound ramp to Interstate 84 coming from Route 9W in the Town of Newburgh, New York. According to the plaintiff, at the time of the accident, she was on the ramp and obeying a yield sign and slowing to yield to oncoming traffic when the defendant's vehicle struck the rear of her vehicle. In addition to her affidavit, plaintiff submits a copy of the police accident report. The police accident report is inadmissible in its current form.

Admission into evidence of motor vehicle accident report prepared by non-eyewitness police officer for purpose of establishing cause of subject accident is prejudicial and reversible error in light of fact that sources of information for report are unclear as was source of information contained in report or whether he or she was under business duty to make it, or whether some other hearsay exception would have rendered statement admissible. *See, Murray v Donlan*, 77 AD2d 337 (2nd Dept. 1980). Furthermore, an accident report by a police officer who investigated but did not witness accident was inadmissible to prove main facts where it did not appear that whoever gave officer facts had business duty to do so. *See, Toll v State*, 32 AD2d 47 (3rd Dept.1969). In this case, there is nothing in the report to indicate that the police officer witnessed the accident and there is no admission by the defendant that she was responsible for the accident. As such, the report is inadmissible and will not be considered.

In opposition, defendant submits an affirmation from her attorney claiming that plaintiff's motion is premature and that there are questions of fact as to comparative negligence which need to be explored during depositions.

CPLR §3212(b) states in pertinent part that a motion for summary judgment "shall be granted if, upon all of papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party."

In *Andre v Pomeroy*, 35 NY2d 361, 364 (1974), the Court of Appeals held that:

> [s]ummary judgment is designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law . . . when there is no genuine issue to be resolved at trial, the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have

their claims promptly adjudicated.

Moreover, if summary judgment is granted, plaintiff is entitled to an immediate trial on the issue of damages pursuant to CPLR§ 3212(c), after completion of the outstanding discovery.

CPLR § 3212(c) states in pertinent part:

> Immediate trial. If it appears that the only triable issues of fact arising on a motion for summary judgment relate to the amount or extent of damages . . . the court may . . . order an immediate trial of such issues of fact raised by the motion, before a referee, before the court, or before the court and jury, whichever may be proper.

In *Ward v Clark*, 232 NY 195, 198, the Court of Appeals stated that "the supreme rule of the road is the rule of mutual forbearance." In other words, "[A] driver is negligent where an accident occurs because [he or she] has failed to see that which through the proper use of [his or her] senses [he or she] should have seen." *Ferrara v Castro*, 283 AD2d 392, 392 (2nd Dept. 2001) (quoting *Bolta v Lohan*, 242 AD2d 356, 356 (2nd Dept. 1997)).

NY Vehicle & Traffic Law §1129(a) states "The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway."

If a stopped car is struck in the rear, absent some excuse, it is negligence as a matter of law. *Leonard v City of New York*, 273 AD2d 205, 205-206 (2nd Dept. 2000); *Sheeler v Blade Contracting, Inc.,* 262 AD2d 632, 632-633 (2nd Dept. 1999); *Rich v O'Connor* 212 AD2d 767, 767 (2nd Dept. 1995); *Mead v Marino* 205 AD2d 669, 669 (2nd Dept. 1994); *Edney v MABSTOA* 178 AD2d 398, 399 (2nd Dept. 1991); *DeAngelis v Kirschner* 171 AD2d 593, 594 (1st Dept., 1991); *Crociata v Vasquez* 168 AD2d 410, 410 (2nd Dept. 1990); *Cohen v Terranella* 112 AD2d 264, 264 (2nd Dept. 1985); *Carter v Castle Elec. Contr.* 26 AD2d 83, 84-85 (2nd Dept., 1966).

The occurrence of a rear end collision is sufficient to create a prima facie case of liability

and even if defendant slid into plaintiff's vehicle due to wet roadway, such a showing would be insufficient to rebut the inference of negligence and raise a triable issue of fact. *Crociata,*168 AD2d at 410; *Benyarko v Avis,* 162 AD2d 572, 573 (2nd Dept.,1990). An explanation that the plaintiff's vehicle came to an abrupt or sudden stop is insufficient to raise a question of fact and rebut the presumption of negligence. *See, Lundy v Llatin*, 51 AD3d 877, 877-878 (2nd Dept. 2008); *Francisco v Schoepfer*, 30 AD3d 275, 276 (2nd Dept. 2006); *Rainford v Han*; 18 AD3d 638, 639 (2nd Dept. 2005); *Belitsis v Airborne Express Freight Corp.*, 306 AD2d 507, 508 (2nd Dept. 2003); *Dickie v Pei Xiang Shi*, 304 AD2d 786, 787 (2nd Dept. 2003); *Levine v Taylor*, 268 AD2d 566, 567 (2nd Dept. 2000).

In the instant case, plaintiff's affidavit notes that her vehicle was in the process of yielding to oncoming traffic as she was entering an interstate. Defendant's counsel fails to submit any affidavit from his client to contradict this evidence, nor did he submit any evidence whatsoever.

A party opposing a motion for summary judgment must lay bare his or her proof. *Del Giacco v Noteworthy Company,* 175 AD2d 516 (3rd Dept., 1991). Moreover, an opponent of summary judgment seeking further discovery must set forth a reason to believe additional discovery would reveal a relevant triable issue. *Bryan v City,* 206 AD2d 448 (2nd Dept., 1994); *Morales v P.S. Elevator,* 167 AD2d 520 (2nd Dept., 1990). In the absence of a showing that any additional evidence would assist in raising a factual issue, further discovery is not warranted. *Lowrey v Cumberland Farms,* 162 AD2d 777, 778-779 (3rd Dept. 1990). "The purported need to conduct discovery did not warrant denial of the motion. The opponents of the motion had personal knowledge of the relevant facts, and the lack of disclosure does not excuse the failure of two of the parties with personal knowledge to submit affidavits in opposition to the motion (*see*

Niyazov v. Bradford, supra at 502, 786 N.Y.S.2d 582; *Johnson v Phillips,* 261 A.D.2d 269, 272, 690 N.Y.S.2d 545)." *Rainford,* 18 AD3d at 639-640. In this case, the exclusive knowledge of the accident's occurrence is within the sole knowledge of the parties. Plaintiff submitted an affidavit and defendant failed to do anything other than submit an attorney's affirmation from one with no personal knowledge of the facts. The defendant, therefore, failed to raise any factual issue through the use of admissible evidence necessitating the granting of plaintiff's motion.

Plaintiff is entitled to an immediate trial on the issue of damages pursuant to CPLR§ 3212(c), after completion of the outstanding discovery on that issue alone.

CPLR § 3212(c) states in pertinent part:

> Immediate trial. If it appears that the only triable issues of fact arising on a motion for summary judgment relate to the amount or extent of damages . . . the court may . . . order an immediate trial of such issues of fact raised by the motion, before a referee, before the court, or before the court and jury, whichever may be proper.

The matter will proceed to trial on the issues of damages only.

It is further ordered that the parties are to appear on _____, 2012 at 9:00 a.m at Orange County Government Center, Courtroom #6 for a preliminary conference on this matter.

The foregoing constitutes the decision and order of the court.

Dated: May 17, 2012 E N T E R
Goshen, New York

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HON. CATHERINE M. BARTLETT,
A.J.S.C.