SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY
Present:
HON. ANTHONY L. PARGA
Justice

----------X **PART 6**

BERNARD C. CALICA,

INDEX NO. 19381/09

Plaintiff,

-against-

MOTION DATE: 03/19/12
SEQUENCE NO: 001

DAVID K. FELDMAN,

Defendant.

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DAVID K. FELDMAN

Third-Party Plaintiff,

-against-

JULIUS CALICA,

Third-Party Defendant.

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Notice of Motion, Aff & Exs..... 1
Affirmation in Opposition..... 2
Reply Affirmation..... 3

Upon the foregoing papers, third-party defendant Julius Calica's motion for summary judgment on the issue of liability, pursuant to CPLR §3212, is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff as a result of a rear-end motor vehicle accident which occurred on March 28, 2007, on Hempstead Turnpike, at or near its intersection with Elmont Road, in the County of Nassau, New York.

Third-party defendant, Julius Calica, contends that his vehicle was stopped on Hempstead Turnpike for a red traffic light at the time it was hit in the rear by defendant/third-party plaintiff David K. Feldman's vehicle. In support of his motion, third-party defendant Calica submits the deposition transcripts of all parties.

Third-party defendant Calica testified at his deposition that he was traveling in the right lane when he noticed a red traffic light ahead of him from a distance of approximately 50 feet. He brought his vehicle to a slow stop at the traffic light, and his vehicle was struck from behind. He testified that his vehicle was pushed into the intersection as a result of the impact.

Plaintiff, Bernarda C. Calica testified that she was a passenger in a vehicle driven by her son, Julius Calica, at the time of the accident. Their vehicle had been stopped at a red light for a few seconds when she felt an impact to the rear of their vehicle. She testified that their vehicle was propelled forward as a result of the impact and that the back window of their vehicle broke.

Defendant/third-party plaintiff David K. Feldman testified at his deposition that traffic was heavy on the date of the accident. He testified that he was traveling in the left lane prior to the accident and then changed lanes into the right lane. He also testified that the Calica vehicle had been traveling in the left lane behind him, but then passed him when he moved to the right lane. The Calica vehicle then changed lanes into the right lane in front of him. When the Calica vehicle changed lanes from the left lane to the right lane, it was approximately thirty to forty feet in front of him. He also testified that less than one minute passed from the time the Calica vehicle changed into the right lane ahead of him to the time of the accident, although he also testified that the Calica vehicle had been traveling in front of him in the right lane for "about a minute, maybe two minutes" prior to the accident occurring. He observed the Calica vehicle decrease speed and the distance between their two vehicles decrease, but he maintained his speed, only taking his foot off of the accelerator. Defendant/third-party plaintiff Feldman testified that the Calica vehicle came to a stop one second prior to impact. He pressed the brake of his vehicle with "medium" pressure prior to the impact. At the time of the contact between the vehicles, Mr. Feldman testified that the front bumper and grill of his vehicle came into contact with the rear quarter panel to center rear of the Calica vehicle. Defendant/third-party plaintiff Feldman did not see the color of the traffic light at the time of the impact.

Third-party plaintiff Julius Calica has demonstrated a prima facie showing of entitlement to summary judgment on liability grounds. 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, and imposes a duty on the operator of the rearmost vehicle to come forward with an

adequate non-negligent explanation for the accident. (*Carman v. Arthur J. Edwards Mason Contracting Co.*, Inc., 71 A.D.3d 813 (2d Dep't 2010)(emphasis added); *Maynard v. Vandyke*, 69 A.D.3d 515 (2d Dep't 2010); *Trombetta v. Cathone*, 59 A.D.3d 526 (2d Dep't 2009); *Ramirez v. Konstanzer*, 61 A.D.3d 837 (2d Dep't 2009); *Garner v. Chevalier Transportation Corp.*, 58 A.D.3d 802 (2d Dep't 2009); *Jumandeo v. Franks*, 56 A.D.3d 614 (2d Dep't 2008); *Johnston v. Spoto*, 47 A.D.3d 888 (2d Dep't 2008); *Harrington v. Kern*, 52 A.D.3d 473 (2d Dep't 2008); *Woods v. Johnson*, 44 A.D.3d 1201 (2d Dep't 2007)). A driver traveling behind another driver has a duty to maintain a safe distance behind the front vehicle, whether it is moving or stopped, to avoid a rear end collision in the event the front vehicle slows down or stops, even suddenly. (N.Y. Veh. & Traf. Law (VTL) §1129(a); *Dicturel v. Dukureh*, 71 A.D. 3d 588 (1st Dep't 2010); *Woodley v. Ramirez*, 25 A.D.3d 451 (1st Dep't 2006); *Arias v. Rosario*, 52 A.D. 3d 551 (2d Dep't 2008); *Jumandeo v. Franks*, 56 A.D.3d 614 (2d Dep't 2008)). This includes the "duty to see what should be seen and to exercise reasonable care under the circumstance to avoid an accident." (*DeAngelis v. Kirschner*, 171 A.D.2d 593, 595, 567 N.Y.S.2d 457, 458-59 (1st Dep't 1991); *Kachuba v. A & G Cleaning Service, Inc.*, 273 A.D.2d 277 (2d Dep't 2000)). Further, the operator of a motor vehicle does not have a duty to anticipate a rear-end collision due to the negligence of another. *(See, Fiscella v. Gibbs*, 261 A.D.2d 572, 690 N.Y.S.2d 713 (2d Dept. 1999); *Murphy v. Spickler*, 224 A.D.2d 814, 638 N.Y.S.2d 188 (3d Dept. 1996)).

The proponent of a summary judgement 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." (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986)). Once the movant has demonstrated a prima facie showing of entitlement to judgement, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of a fact which require a trial of the action. (*Zuckerman v. City of New York,* 49 N.Y.2d 557 (1980)).

In opposition, defendant/third-party plaintiff Feldman contends that there is a question of fact with respect to the liability and conduct of both Feldman and Julius Calica which warrants the denial of the instant motion. Defendant/third party plaintiff contends that the deposition testimony of the two drivers leads to questions of fact as to the manner in which the third-party

defendant stopped in front of the defendant/third-party plaintiff prior to the collision and that the "actions of the third party defendant bringing his vehicle to an abrupt stop or being stopped are issues which constitutes [sic] 'a reasonable excuse' for a failure of the third-party plaitniff in this matter to bring his vehicle to a stop."

There is no evidence in the deposition testimonies before this Court that third-party defendant Calica made a sudden stop prior to the accident happening. Mr. Feldman, himself, testified that the Calica vehicle changed into the right lane thirty to forty feet ahead of him and traveled in said lane for one to two minutes prior to the impact. As such, even defendant/third-party plaintiff's own testimony does not indicate that there was a sudden stop by the third-party defendant Calica. Further, the sudden stopping by the front driver is an insufficient explanation to rebut the inference of negligence against the operator of the rear-most vehicle. (*Volpe v. Limoncelli*, 74 A.D.3d 795 (2d Dep't 2010)(court found driver of rearmost vehicle negligent where the front vehicle made an abrupt stop and rearmost driver was unable to stop due to a wet roadway); *Ramirez v. Konstanzer*, 61 A.D.3d 837 (2d Dep't 2009)(defendant's contention that plaintiff proceeded at a green light then suddenly stopped did not rebut the inference of negligence); *Johnston v. Spoto*, 47 A.D.3d 888 (2d Dep't 2008)(defendant driver's explanation that plaintiff's vehicle stopped short was insufficient to raise a triable issue of fact).

Defendant/third-party plaintiff David K. Feldman has not submitted a non-negligent explanation for the happening of the accident and has failed to raise a triable issue of fact sufficient to defeat third-party plaintiff's prima facie showing of entitlement to summary judgment on liability grounds. (*See, Hakakian v. McCabe*, 38 A.D.3d 493, 833 N.Y.S.2d 106 (2d Dept. 2007); *David v. New York City Bd. of Education*, 19 A.D.3d 639, 797 N.Y.S.2d 294 (2d Dept. 2005)). Accordingly, third-party defendant Julius Calica's motion for summary judgment on the issue of liability is granted, and the third party plaintiff's action is hereby dismissed in its entirety.

Dated: May 11, 2012

Anthony L. Parga, J.S.C.

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