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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

HAROLD D. BARR, JR.,

Plaintiff,

-against-

MUSTODEN M. MAIA and JORGE MAIA,

Defendants.

MOTION DATE: 3/8/12
MOTION SEQ. NO.: 001
INDEX NO.: 16977/11

The following papers read on this motion (numbered 1-3):

Notice of Motion.....1
Affirmation in Opposition.....2
Reply Affirmation.....3

Plaintiff moves pursuant to **CPLR §3212** for an Order granting summary judgment against defendants on the issue of liability only. Plaintiff also seeks what counsel refers to as a "special preference" pursuant to **CPLR §3212(c)**.

This is a personal injury action arising out of a motor vehicle accident that occurred on October 31, 2011 at Jericho Turnpike near Herricks Road, in Nassau County, New York. Plaintiff alleges that he was driving westbound on Jericho Turnpike in the right lane, and that he gradually slowed down to enter a mall parking lot, when his vehicle was hit in the rear by a vehicle owned by defendant JORGE MAIA and operated by defendant MUSTODEN M. MAIA. See Affidavit of HAROLD D. BARR, JR., sworn to on February 9, 2012 [Motion Exh. B], ¶2. In support of his motion, plaintiff also submits the Police Accident Report, which confirms that plaintiff's vehicle was hit in the rear by defendants' vehicle. [Motion Exh. A]

In opposition, defendant Minna Mustonen-Maia s/h/a MUSTODEN M. MAIA states that she was operating her vehicle "within the legal speed limit," that plaintiff's vehicle was traveling in front of her, and that "[s]uddenly the vehicle operated by plaintiff, Harold D. Barr, Jr., came to an abrupt stop to turn into a parking lot." Affidavit of Minna Mustonen-Maia, sworn to on February 27, 2012 ("Mustonen-Maia Affidavit")

[Opposition Exh. A], ¶¶ 4, 6. Defendants argue that the motion is premature because the parties have not had the opportunity to conduct depositions.

It is well settled that a rear-end collision with a stopped vehicle establishes a *prima facie* case of negligence against the operator of the rear vehicle, shifting the burden to that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision. **Napolitano v. Galletta,** 85 AD3d 881. **Franco v. Breceus**, 70 A.D.3d 767; **Eybers v. Silverman**, 37 A.D.3d 403. This rule extends to the situation where the lead vehicle was slowing at the time of the collision. **Dattilo v. Best Transp. Inc.**, 79 AD3d 432.

Less clear is whether, and in what circumstances, a sudden stop by the lead vehicle constitutes a sufficient explanation to defeat summary judgment. The Second Department has expressly stated that "[o]ne of several nonnegligent explanations for a rear-end collision is a sudden stop of the lead vehicle." **Klopchin v. Masri,** 45 AD3d 737; **Chepel v. Meyers,** 306 AD2d 235. *See* **Napolitano,** 85 AD3d at 882; **Carhuayano v. J&R Hacking,** 28 AD3d 413. *See also* **Vargas v. Luxury Family Corp.,** 77 AD3d 820; **Foti v. Fleetwood Ride, Inc.,** 57 AD3d 724. Although this seems to be a clear and simple statement of the law, a close examination of these and similar cases reveals additional factors that may have influenced the determination, such as the lead driver's failure to signal [**Klopchin**, 45 AD3d at 738; **Drake v. Drakoulis,** 304 AD2d 522], the lead driver's unexplained stop in moving traffic [**Vargas v. Luxury Family Corp.,** 77 AD3d at 821; **Foti,** 57 AD3d at 725; **Chepel,** 306 AD2d at 235], or the lead driver's sudden lane change before the stop [**Fajardo v. City of New York,** 2012 WL 1521808; **Briceno v. Milbry.** 16 AD3d 448]. Such examples of negligence on the part of the lead driver may rebut the inference of negligence on the part of the rear driver, or the inference that such negligence was the sole proximate cause of the accident.

The Court will not strain to reconcile this branch of case law with Second Department (and other) cases holding the reverse; that is, that a sudden stop by the lead driver is *insufficient* to rebut the inference of negligence. *See, e.g.,* **Franco v. Breceus,** 70 AD3d 767; **LaMasa v. Bachman,** 56 AD3d 340; **Johnston v. Spoto,** 47 AD3d 888. Some of these cases hold that a sudden stop "standing alone" is insufficient, implying that the allegation of additional factors might render the explanation sufficient. *See, e.g.,* **Franco,** 70 AD3d at 768; **Johnston,** 47 AD3d at 889; **Baron v. Murray,** 268 AD2d 495. Others are predicated upon the statutory duty of a following driver to maintain a safe speed and distance between his or her vehicle and the vehicle ahead. *See* **Vehicle & Traffic Law § 1129(a).** In these cases, a sudden stop by the lead driver does not mitigate the rear driver's negligence, even in bad weather or slippery road conditions, unless the rear driver provides a non-negligent explanation -- not for the collision, but for the failure

to maintain a safe distance from the vehicle in front. *See* **LaMasa,** 56 AD3d at 340; **Pena v. Allen,** 272 AD2d 311; **Mitchell v. Gonzalez,** 269 AD2d 250; **Zakutny v. Gomez,** 258 AD2d 521.

In the case at bar, defendants offer no more than the bare allegation that plaintiff "came to an abrupt stop to turn into a parking lot." The Mustonen-Maia Affidavit provides no details or context. Did plaintiff signal that he was turning? Did the defendant driver see his brake lights? What was the distance between her vehicle and that of the plaintiff? Was there a reason that she could not maintain a safe speed and distance behind plaintiff's vehicle? The defendant driver claims that she was driving "within the legal speed limit," but doesn't specify her speed, and provides no information about the traffic, weather and road conditions, or other facts to support the inference that she was driving at a safe speed under the circumstances. The defendant driver claims that she "tried to avoid the accident" but does not specify what she did in furtherance of that aim.

The Court finds this insufficient to defeat summary judgment. To hold otherwise would be to allow the defendants' burden in a rear-end collision case to disappear upon the utterance of the magic words: "sudden stop." For the purpose of this summary judgment motion, the Court must accept as true defendants' claim that plaintiff's vehicle came to a sudden stop. In the absence of specific facts, however, suggesting negligence on the part of the plaintiff or non-negligence on the part of the defendant driver, the Court can only infer that the rear-end collision was caused by the defendant driver's breach of her duty to maintain a safe speed or distance behind the plaintiff's vehicle under the conditions existing at the time of the accident.

The Court does not find that summary judgment is premature. Defendants' have not shown that discovery may lead to relevant evidence or that facts necessary to oppose the motion were in the exclusive knowledge and control of the plaintiff. *See* **CPLR §3212(f); Hill v. Ackall,** 71 AD3d 829. The defendant driver herself is presumed to have sufficient knowledge of any facts mitigating her own negligence. **Maynard v. Vandyke,** 69 AD3d 515. In opposing summary judgment, the defendants had a duty to "lay bare their proof." **Avant v. Cepin,** 74 AD3d 533. "The belief that additional discovery might reveal something helpful to their case does not provide a basis pursuant to **CPLR §3212 (f)** for postponing a determination of summary judgment." **Morrisaint v. Raemar Corp.,** 271 AD2d 586.

The Court does find, however, that defendants are entitled to discovery on the issue of damages.

Based upon the foregoing, it is

ORDERED, that plaintiff's motion, to the extent that it seeks summary judgment pursuant to **CPLR §3212** on the issue of liability only, is **granted**. It is further

ORDERED, that plaintiff's motion, to the extent that it seeks an immediate trial pursuant to **CPLR §3212(c)** is **denied**. The parties shall proceed with discovery on the issue of damages, and shall appear for the regularly scheduled compliance conference on **July 24, 2012** at 9:30 a.m.

Dated: May 2, 2012

J.S.C.

ENTERED
JUN 04 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE