SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

DIANA DIGANGI and GIOVANNI DIGANGI,

Plaintiffs,

- against -

CHERYL J. DONLON and MICHAEL DONLON,

Defendants.

- x

Index No.: 24250/11

Motion Date: 10/04/12

Motion No.: 9

Motion Seq.: 2

The following papers numbered 1 to 12 were read on this motion by plaintiffs for an order pursuant to CPLR 3212(a) granting plaintiffs summary judgment on the issue of liability and setting this matter down for a trial on damages:

	Papers Numbered
Notice of Motion-Affidavits-Exhibits	1 - 6
Defendant's Affirmation in Opposition	7 - 9
Reply Affirmation	10 - 12

In this negligence action, the Plaintiffs, Diana Digangi and Giovanni Digangi, seek to recover damages for personal injuries they each sustained as a result of a motor vehicle accident that occurred on May 31, 2011, between the plaintiffs' vehicle and the vehicle owned by Cheryl Donlon and operated by defendant Michael Donlon. The accident took place on Interstate 495 South near the intersection with Route #93 in the Town of Andover, State of Massachusetts. At the time of the accident, plaintiffs' vehicle was allegedly hit in the rear by the vehicle being operated by defendant Michael Donlon. The plaintiff driver, Giovanni Digangi, and his passenger, Diana Gigangi, were both allegedly injured as a result of the impact.

The plaintiff commenced this action by filing a summons and complaint on October 24, 2011. Issue was joined by service of defendants' verified answer dated March 14, 2012. Plaintiffs now move for an order pursuant to CPLR 3212(a), granting summary judgment on the issue of liability and setting the matter down for a trial on damages.

In support of the motion, plaintiffs submit an affirmation from counsel, George A. Constantine, Esq., a copy of the pleadings, affidavits from plaintiff, Diana Gigangi and plaintiff, Giovanni Gigangi, and a copy of the police accident report.

The police accident report, in the section entitled "crash narrative," states in pertinent part as follows:

"On May 31, 2011, at approximately 17:40 hours, Trooper Edward MacDonald was dispatched to a two car crash that occurred in the left lane of I-495 South at I-93 in the Town of Andover. When asked about the crash, Michael Donlon stated that he was looking down at his phone while traveling in the left lane and indicated that when he looked up, traffic had stopped and he crashed into the rear of [plaintiffs' vehicle]. Both occupants of [plaintiffs' vehicle] indicated that while traveling in the left lane in heavy traffic, they slowed and came to a stop due to traffic congestion and were subsequently struck from the rear by [defendants' vehicle]."

Plaintiff, Giovanni Digangi, states in his affidavit dated August 2, 2012, that, "on May 31, 201 at approximately 5:30 p.m., I was the driver/operator of a vehicle involved in a two-car accident. While operating the vehicle at the above-stated date and time, I was stopped in traffic, when the defendants' vehicle, bearing New Hampshire registration number 2834175, rear-ended and struck my vehicle in the rear, causing me personal injuries."

Plaintiff Diana Digangi, a passenger in the Digangi vehicle states in her affidavit, dated August 2, 2012, that on May 31, 2011, her vehicle was stopped in traffic when the vehicle operated by defendant Donlon rear-ended and struck her vehicle in the rear causing her personal injuries.

Plaintiffs' counsel contends that the accident was caused solely by the negligence of defendant Michael Donlon in that he failed to safely stop his vehicle prior to rear-ending the plaintiffs' stopped vehicle. Counsel contends, therefore, that the plaintiffs are entitled to summary judgment on the issue of liability because the defendant driver, who told the police

officer that he was looking down at his phone immediately prior to the accident, was solely responsible for causing the accident while the plaintiff driver was free from culpable conduct.

In opposition to the motion, defendants' counsel, Valerie Katsorhis, Esq. argues that issues of fact exist as to the negligence of the parties and the proximate cause of the accident in question. Counsel asserts that the plaintiffs' affidavits are insufficient as they do not discuss the lighting and weather conditions at the time of the accident, do not state how long their vehicle was stopped prior to the impact, do not state whether plaintiff saw defendant's vehicle prior to the collision or whether plaintiff took any evasive action to avoid the accident. Neither defendant submitted an affidavit in opposition to the motion. Defendants' counsel also argues that the motion for summary judgment is premature in that no witnesses have yet to be deposed in this matter.

In reply, plaintiff asserts that the affidavits of the plaintiffs stating that they were stopped in traffic when their vehicle was rear-ended by the defendants' vehicle are sufficient to demonstrate, prima facie, that the defendants were negligent as a matter of law. Counsel asserts that the defendants have not submitted an affidavit or evidence in opposition to the prima facie case and further that counsel's affirmation is insufficient by itself to raise a question of fact. Counsel asserts that Michael Donlon made an admission to the police officer at the scene that he struck the plaintiffs' vehicle in the rear and did not submit an affidavt to the contrary.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion to show the existence of material issues of fact by providing evidentiary proof in admissible form in support of his position (see Zuckerman v. City of New York, 49 NY2d 557[1980]).

"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" (Macauley v ELRAC, Inc., 6 AD3d 584 [2d Dept. 2003]). It is well established law that a rear-end collision creates a prima facie case of negligence on the part of the driver of the rearmost vehicle, requiring the operator of that vehicle to proffer an adequate, non-negligent explanation for the accident (see Klopchin v Masri, 45 AD3d 737 [2d Dept. 2007];

Hakakian v McCabe, 38 AD3d 493 [2d Dept. 2007]; Reed v New York City Transit Authority, 299 AD2d 330 [2d Dept. 2002]; Velazquez v Denton Limo, Inc., 7 AD3d 787 [2d Dept. 2004]).

Here, both plaintiffs submitted affidavits stating that their vehicle was stopped in traffic on Route I-95 in Massachusetts when their vehicle was suddenly struck from the rear by the vehicle operated by defendat Michael Donlon. Thus, the plaintiffs satisfied their prima facie burden of establishing entitlement to judgment as a matter of law on the issue of liability (see Volpe v Limoncelli,74 AD3d 795 [2d Dept. 2010]; Vavoulis v Adler, 43 AD3d 1154 [2d Dept. 2007]; Levine v Taylor, 268 AD2d 566 [2000]).

Having made the requisite prima facie showing of entitlement to summary judgment, the burden then shifted to defendants to raise a triable issue of fact as to whether plaintiff was also negligent, and if so, whether that negligence contributed to the happening of the accident (see Goemans v County of Suffolk,57 AD3d 478 [2d Dept. 2007]; Jumandeo v Franks, 56 AD3d 614 [2d Dept. 2008]; Arias v Rosario 52 AD3d 551 [2d Dept. 2008]).

This Court finds that the defendant, Michael Donlon, who admitted to the police officer at the scene that he looked down at his telephone immediately prior to the accident and when he looked up struck the rear of the plaintiffs' vehicle, and who did not submit any affidavit in opposition to the motion, failed to provide any admissible evidence as to a non-negligent explation for the accident sufficient to raise a question of fact(see Lampkin v Chan, 68 AD3d 727 [2d Dept. 2009]; Cavitch v Mateo, 58 AD3d 592 [2d Dept. 2009]; Garner v Chevalier Transp. Corp, 58 AD3d 802 [2d Dept. 2009]; Kimyagarov v Nixon Taxi Corp., 45 AD3d 736 [2d Dept. 2007]; Gomez v Sammy's Transp., Inc., 19 AD3d 544 [2d Dept. 2005][the defendants failed to raise a triable issue of fact by only interposing an affirmation of their attorney who lacked knowledge of the facts]).

The defendants' contention that the plaintiffs' motion for summary judgment is premature is without merit. The defendants failed to offer any evidentiary basis to suggest that discovery may lead to relevant evidence. The mere hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery is an insufficient basis upon which to deny the motion (see CPLR 3212[f]; Hanover Ins. Co. v Prakin,81 AD3d 778 [2d Dept. 2011]; Essex Ins. Co. v Michael Cunningham Carpentry, 74 AD3d 733 [2d Dept. 2010]]; Peerless Ins. Co. v Micro Fibertek, Inc., 67 AD3d 978 [2d Dept. 2009]; Gross v Marc, 2 AD3d 681 [2d Dept. 2003]). Further, the lack of disclosure does not excuse the

failure of the party with personal knowledge to submit an affidavit in opposition to the motion (see Rainford v Han, 18 AD3d 638 [2d Dept. 2005] citing Niyazov v Bradford, 13 AD3d 501 [2d Dept. 2004]).

Accordingly, as the evidence in the record demonstrates that the defendants failed to provide a non-negligent explanation for the collision, and as no triable issues of fact have been put forth as to whether plaintiff may have borne comparative fault for the causation of the accident, and based on the foregoing, it is hereby

ORDERED, that the plaintiffs' motion is granted, and the plaintiffs DIANA DIGANGI and GIOVANNI DIGANGI shall have summary judgment on the issue of liability against the defendants CHERYL J. DONLON and MICHAEL DONLON and the Clerk of Court is authorized to enter judgment accordingly; and it is further,

ORDERED, that upon completion of discovery on the issue of damages, filing a note of issue, and compliance with all the rules of the Court, this action shall be placed on the trial calendar of the Court for a trial on damages.

Dated: October 9, 2012
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.