SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

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

MUSTAFA KARAKAS,

Plaintiff,

- against -

GREGORY P. RINALDI,

Defendant.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 21459/10
Motion Seq. No.: 01
Motion Date: 10/17/11

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affidavit, Affirmation and Exhibits and Memorandum of Law	1
Affirmation in Opposition and Exhibits	2

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 defendant on the issue of liability upon the ground that there are no triable issues of fact and that, as a matter of law, plaintiff is entitled to such judgment; and, upon granting summary judgment, for an order setting this matter down for an assessment of damages. Defendant opposes the motion.

This action arises from a motor vehicle accident which occurred on December 3, 2009, at approximately 6:40 a.m., at or near the intersection of Hempstead Turnpike and Lincoln Road, Franklin Square, County of Nassau, State of New York. The accident involved two vehicles, a 1998 Mercedes Benz owned and operated by plaintiff and a 1994 Ford Pick-Up

Truck owned and operated by defendant. Plaintiff commenced the action by the filing and service of a Summons and Verified Complaint on or about November 17, 2010. Issue was joined on or about March 15, 2011.

Briefly, it is plaintiff's contention that at the time of the accident his vehicle was stopped at a red light on Hempstead Turnpike, and had been so for approximately ten seconds, when it was violently struck in the rear by defendant's vehicle. In his Affidavit in Support of his motion, plaintiff states, "[t]here is nothing to my knowledge and belief that I could have done to avoid this accident. My actions of obeying the New York State Vehicle and Traffic Laws were obviously no factor in causing this accident. Based upon Defendant's conduct and the physical objective facts, it is clear that the Defendant's negligence was the sole cause of this accident and that the Defendant's conduct fell well below the standard of reasonable care that one should employ and utilize when operating a motor vehicle within the State of New York." Plaintiff argues that there are no questions of fact to be determined by a jury in connection with the issue of liability in this matter.

Defendant first argues that plaintiff's summary judgment motion should be denied as premature because the Examinations Before Trial have not yet been conducted. In opposition to plaintiff's motion, defendant submits his own Affidavit in which he claims that he has a non-negligent reason for not being able to stop and thus there are issues of fact in this matter. *See* Defendant's Affirmation in Opposition Exhibit A. Defendant states " [o]n Thursday, December 3, 2009, at 6:40 a.m., I was traveling about 25 m.p.h. westbound on Hempstead Turnpike, approaching Lincoln Road in Hempstead, New York. It was a windy, rainy morning. When I was about 80' from the intersection there was a small yellow school bus in the left of the two west bound lanes. I then began to apply my brakes and started to slow down. I turned on the right directional signal to go into the right lane, with my foot still on the brake pedal. However,

after entering the right lane, the brakes were no longer slowing down my vehicle. The front of my vehicle struck the rear of plaintiff's vehicle. After the accident I exited my vehicle and saw a white plastic garbage bag and other garbage including empty egg cartons, papers and cardboard on the roadway under my tires, which was the cause of my being unable to stop or turn the vehicle to avoid the impact. The garbage placed at the curb for garbage pick up apparently was blown into the street by the weather....Police responded to the scene and I advised the police officer of the garbage that caused the accident. The police officer confirmed the garbage as the cause of the accident. I had not experienced any problems with the brakes or steering prior to the accident. I did not experience any problems with the brakes or steering after the accident. I drove my vehicle away from the accident scene without any problems with the steering or braking." *See id.*

Defendant also submits the Police Accident Report in support of his opposition, in which the responding officer wrote in the Accident Description/Officer's Notes section, "MV1 and MV2 were in (*sic*) collision. MV1 OP stated that he tried to stop but due to debris in the road and slippery pavement his vehicle skidded and struck MV2. Findings of investigation revealed the cause." *See* Defendant's Affirmation in Opposition Exhibit C.

Defendant therefore argues that issues of fact exist with respect to the allegations of his negligence.

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 § 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).

As noted, 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, thereby requiring the operator 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).

Plaintiff, in his motion, has demonstrated *prima facie* entitlement to summary judgment

on the issue of liability against defendant. Therefore, the burden shifts to defendant 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 defendant has demonstrated an issue of fact which precludes summary judgment by providing a non-negligent explanation for the collision, specifically the alleged condition of the debris on the road which caused his car to skid and strike plaintiff's vehicle. As discussed above, said condition was confirmed in the Police Accident Report.

Therefore, plaintiff's motion, pursuant to CPLR § 3212, for an order granting partial summary judgment against defendant on the issue of liability upon the ground that there are no triable issues of fact and that, as a matter of law, plaintiff is entitled to such judgment; and, upon granting summary judgment, for an order setting this matter down for an assessment of damages is hereby **DENIED**.

All parties shall appear for a Compliance Conference in Nassau County Supreme Court, IAS Part 32, on March 6, 2012, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:

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

Dated: Mineola, New York
December 2, 2011