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

BRIAN P. WILLSEN and DONNA WILLSEN,

Plaintiffs,

- against -

AMANDA M. BELLES and SCOTT E. MOORE,

Defendants.

- x

Index No.: 18562/2008

Motion Date: 09/29/11

Motion No.: 17

Motion Seq.: 2

The following papers numbered 1 to 10 were read on this motion by plaintiffs, BRIAN P. WILLSEN and DONNA WILLSEN (1)for an order pursuant to CPLR 3212(b) granting plaintiffs partial summary judgment on the issue of liability; (2)for an order pursuant to CPLR 3126 striking the answer of the defendants for willfully refusing to appear for a court ordered deposition and/or(3)for an order pursuant to CPLR 3126 prohibiting the defendants from offering evidence in support of their position at the time of trial:

	Papers Numbered
Notice of Motion-Affidavits-Exhibits	1 - 6
Defendant's Affirmation in Opposition-Affidavits	7 - 8
Plaintiff's Reply Affirmation	9 - 10

In this negligence action, the plaintiff, BRIAN P. WILLSEN, seeks to recover damages for personal injuries he sustained as a result of a motor vehicle accident that occurred on August 30, 2007 between the plaintiffs' vehicle and the vehicle owned by defendant SCOTT E. MOORE and operated by defendant AMANDA M. BELLES. The accident took place on State Route 22 approximately 50 feet from its intersection with State Route 344, Town of

Copake, Columbia County, New York. At the time of the accident, plaintiff, Brian Willsen, was operating his vehicle southbound on Route 22 in West Copake New York. His wife, plaintiff Donna Willsen, was a passenger in the front seat. As the plaintiffs' vehicle slowed down behind another vehicle that was waiting to make a left turn onto Route 344, the plaintiffs vehicle was struck in the rear by the vehicle operated by defendant Amanda Belles. Plaintiff Brian Willsen was allegedly injured as a result of the impact. His wife brought a derivative cause of action.

The plaintiff commenced this action by filing a summons and complaint on July 25, 2008. Issue was joined by service of defendants' verified answer dated November 21, 2008. Plaintiff now moves for an order pursuant to CPLR 3212(b), granting partial summary judgment on the issue of liability and setting this matter down for assessment of damages.

In support of the motion, the plaintiff submits an affidavit from counsel, John Zervopoulos, Esq., a copy of the pleadings, plaintiffs' bill of particulars; a copy of the plaintiffs' deposition testimony; and a copy of the police accident report (MV-104).

In the accident description section of the police report, the officer describes the accident as follows:

"OP of V-1 (plaintiff) stopped in the Southbound lane awaiting uninvolved vehicle to make a left turn onto SR 344. OP of V-2(defendant) also southbound on SR-22 unable to stop in time strikes the rear of V-1."

The police report indicates that the defendant driver was issued two summonses at the scene, one for speeding and the other for operating a vehicle without a license.

In his examination before trial taken on July 12, 2010, plaintiff Brain Willsen, stated that on August 30, 2007, he was operating his vehicle southbound on Route 22 in West Copake, New York traveling with his wife from a supermarket in Hillsdale to his mobile home. He stated that Route 22 is a two lane road, with one lane in each direction, located in a rural farmland area. As he approached the intersection of Route 344, a vehicle which was not involved in the accident was stopped in front of him waiting to make a left turn on Route 344. When he first observed the stopped vehicle he gradually slowed his vehicle down. His vehicle was stopped or just about to stop 50 - 75 feet from the vehicle in front when his vehicle was struck in the rear by the vehicle being operated by defendant Amanda M. Belles. He testified that

as a result of the impact he sustained an injury to his left shoulder for which he underwent arthroscopic surgery in April, 2008. Plaintiff contends that the defendant driver was negligent in the operation of her vehicle in striking his vehicle in the rear.

Plaintiffs' counsel contends that the accident was caused solely by the negligence of the defendant in that her vehicle was traveling too closely in violation of VTL § 1129, that the defendant was speeding in violation of VTL § 1180 and that the defendant driver failed to safely stop her vehicle prior to rear-ending the plaintiffs' vehicle. Counsel contends, therefore, that the plaintiffs are entitled to partial summary judgment as to liability because the defendant driver was solely responsible for causing the accident while the plaintiff driver was free from culpable conduct.

In addition, counsel moves for an order striking the defendants' answer pursuant to CPLR 3126 on the ground that defendants failed to appear for depositions on seven scheduled dates including three court-ordered deposition dates.

In opposition to the motion, defendants' counsel Michelle F. Vlosky, Esq., did not submit an affidavit from the defendant nor has she proffered any allegations of fact which would contradict the plaintiff's version of the accident. She does state, however, that there has been no willful default on the part of the defendant who they have not been able to contact. Counsel requests a conditional order of preclusion whereby if defendant is not produced for deposition at least 60 days prior to trial she would be precluded from testifying at the time of trial.

That branch of defendant's motion for an order striking the defendant's answer for willful failure to appear on numerous occasions for a court ordered deposition is granted (see Matone v Sycamore Realty Corp., 2011 NY Slip Op 6825 [2d Dept. 2011] [willful and contumacious conduct may be inferred from a party's repeated failure to comply with court-ordered discovery, coupled with inadequate explanations for the failures to comply]; Romeo v Barrella, 82 AD3d 1071 [2d Dept. 2011]; Savin v. Brooklyn Mar. Park Dev. Corp., 61 AD2d 954 [2d Dept. 2009]; Duncan v Hebb, 47 AD3d 871 2d Dept. 2008]; Prappas v Papadatos, 38 AD3d 871 [2d Dept. 2007]). In Duncan, supra., the court held that an attorney's explanation that she was unable to contact her client was an insufficient explanation for failure to appear on several court-ordered deposition dates. Here, the defendant failed to comply with court-ordered depositions for an extended period of

time with no explanation provided other than counsel's explanation that she could not contact her client.

The defendant shall, however, be entitled to present testimony and evidence, and to cross-examine the plaintiffs' witnesses at the inquest on damages (see Tamburello v Bensonhurst Car & Limo Serv., 305 AD2d 664 [2d Dept. 2003]).

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, who then must show the existence of material issues of fact by producing 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, plaintiff stated in his affidavit that his vehicle was slowing down while waiting for the vehicle in front of him to make a left turn when it was suddenly struck from behind by defendants' vehicle. 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 defendant 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]). This court finds that the defendant, who did not submit an affidavit in opposition to the motion, failed to provide evidence as to a non-negligent explanation for the accident sufficient to raise a triable question of fact (see

Bernier v Torres, 79 AD3d 776 [2d Dept. 2010]; 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]).

Thus, as the evidence in the record demonstrates that there are no triable issues of fact as to whether plaintiff may have borne comparative fault for the causation of the accident, and based on the foregoing, it is

ORDERED, that the plaintiffs' motion is granted, and the plaintiffs BRIAN P. WILLSEN and DONNA WILLSEN, shall have partial summary judgment on the issue of liability against the defendants, AMANDA M. BELLES and SCOTT E. MOORE, and the Clerk of Court is authorized to enter judgment accordingly; and it is further,

ORDERED, that the defendants' answer is stricken, and it is further,

ORDERED, that upon compliance with all the rules of the Court, this action shall be placed on the trial calendar of the Court for an assessment of damages.

Dated: October 4, 2011
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.