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

SANG GYUN NOH and EUN SOOK NOH,

Plaintiffs,

- against -

DIANA OCHOA and LUIS G. GOMEZ,

Defendants.

- x

Index No.: 14589/2010

Motion Date: 06/14/12

Motion No.: 28

Motion Seq.: 1

The following papers numbered 1 to 12 were read on this motion by Sang Gyun Noh, plaintiff on the counterclaim, for an order, pursuant to CPLR 3212(b), granting plaintiff on the counterclaim leave to file a late motion for summary judgment and for an order granting summary judgment dismissing the defendants' counterclaim:

	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 plaintiff, Sang Gyun Noh, age 71, seeks to recover damages for personal injuries he sustained as a result of a motor vehicle accident that occurred on May 10, 2010, between the plaintiff's vehicle and the vehicle owned by defendant Luis G. Gomez and operated by defendant Diana Ochoa. The accident took place at Mill Road and Sunrise Highway, Nassau County, New York. At the time of the accident, plaintiff's vehicle was allegedly hit in the rear by the vehicle being operated by defendant Diana Ochoa. The plaintiff was allegedly injured as a result of the impact.

The plaintiff commenced this action by filing a summons and complaint on June 8, 2010. Issue was joined by service of defendants' verified answer with counterclaim against Sang Gyun Noh dated July 26, 2011. Plaintiff on the counterclaim served a reply to the counterclaim dated March 9, 2011. Plaintiff on the counterclaim now moves for an order pursuant to CPLR 3212(b), granting summary judgment on the issue of liability and dismissing the counterclaim.

In support of the motion, plaintiff on the counterclaim submits an affirmation from counsel, Donald M. Munson, Esq., a copy of the pleadings, and certified copies of the transcripts of the examinations before trial of plaintiff Sang Gyun Noh and defendant Diana Ochoa.

In his examination before trial taken on July 14, 2011, plaintiff, Sang Gyun Noh, testified that he had stopped at a red light for approximately 10 seconds at the intersection where the accident occurred. When the light turned green he proceeded into the intersection at a rate of 15 - 20 miles per hour. After he proceeded about one car length into the intersection his vehicle was struck in the rear by the vehicle driven by defendant Ochoa. His vehicle was moving at the time it was struck.

Defendant Diana Ochoa, age 45, testified at her examination before trial, taken on February 27, 2012, that at the time of the accident she was proceeding on Mill Road. The intersection of Mill Road and Sunrise Highway is controlled by a traffic signal. She stated that as she approached the intersection where the accident took place she observed that the light was green. She testified that she did not remember her speed at the time and she doesn't remember the time from when she saw the green light until the accident. She stated that when she first observed the plaintiff's vehicle directly in front of her it was moving in the intersection. She did not remember if her foot was on the gas or the brake prior to the impact. She does not know if the plaintiff's vehicle had brake lights on. She does not remember if she observed the vehicle prior to the accident and she did not remember which way she was looking prior to striking the vehicle in front of her. She testified that when the police arrived at the scene she told them that the vehicle in front of her stopped suddenly and she hit him from the back. She then testified that she was traveling at 25 - 30 miles per hour at the time of the accident and that the plaintiff's vehicle was stopped when she struck the vehicle.

Counsel for the plaintiff on the counterclaim contends that the accident was caused solely by the negligence of defendant Ochoa in that she failed to safely stop her vehicle prior to rear-ending the plaintiffs' vehicle. Counsel contends, therefore, that the plaintiff is entitled to summary judgment dismissing the counterclaim because the defendant driver was solely responsible for causing the accident while the plaintiff driver was free from culpable conduct.

In opposition to the motion, defendants' counsel, J. Calvin Flores, Esq. argues both that the motion for summary judgment is untimely and that there is a question of fact regarding the negligence of the parties.

TIMELINESS OF THE MOTION

Defendant argues that the motion is untimely as it was made returnable more than eight months after the note of issue was filed in September, 2011 and was therefore filed beyond the 120 day time frame provided for by CPLR 3212. Defendant argues that the plaintiffs did not make a demand or demonstrate that they made any effort to hold a deposition of the defendant since the time the counterclaim was served in March 2011. In response, the plaintiff on the counterclaim states that the defendants failed to appear for an examination before trial on the date required by the preliminary conference order and also failed to appear on the date set forth in the court's compliance conference order.

In the absence of a court order or rule to the contrary, CPLR 3212 (a) requires summary judgment motions to "be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown" (see Miceli v State Farm Mut. Auto. Ins. Co., 3 NY3d 725[2004]; Brill v City of New York, 2 NY3d 648[2004]).

Here, it is undisputed that the motion for summary judgment was filed beyond 120 days from the filing of the note of issue. However, this court finds that the plaintiff's application for leave to file a late motion for summary judgment is granted as the plaintiff on the counterclaim has proffered good cause for the delay. Here, the defendant's deposition was not concluded until February 27, 2012, and the motion served within a short time after receipt of the transcript (see Parker v LIJMC-Satellite Dialysis Facility, 92 AD3d 740 [2d Dept 2012]; Grochowski v Ben Rubins, LLC, 81 AD3d 589 [2d Dept 2011]; Richardson v JAL Diversified Management, 73 AD3d 1012 [2d Dept 2010]; Kung v Zheng, 73 AD3d 862 [2d Dept 2010]; McArdle v 123 Jackpot, Inc., 51 AD3d 743 [2d Dept 2008]; Sclafani v Washington

Mutual, 36 AD3d 682 [2d Dept 2007]; Smith v Nameth, 25 AD3d 599 [2d Dept 2006]).

SUMMARY JUDGMENT

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 testified that his vehicle had stopped at a red traffic signal. After the light turned green, as he was proceeding through the intersection his vehicle was suddenly struck from behind by defendants' vehicle. Thus, the plaintiff satisfied his 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]; Jumandeo v Franks, 56 AD3d 614 [2d Dept. 2008]; Arias v Rosario 52 AD3d 551 [2d Dept. 2008]). This Court finds that the defendant, who testified that she struck the plaintiff's vehicle in the rear in the intersection stated that she does not remember where she was looking prior to the impact, doesn't remember if her foot was on the brake or the gas prior to the impact and doesn't remember her speed when she struck the rear of the plaintiff's vehicle. She testified at one point that

plaintiff's vehicle was moving when she struck it and at another time she testified that he stopped short. In this regard, a claim that the driver of the lead vehicle made a sudden stop, standing alone, is insufficient to rebut the presumption of negligence (see Jumandeo v Franks, 56 AD3d 615 [2d Dept. 2008]; Russ v Investech Secs., 6 AD3d 602 [2d Dept. 2004]). The defendant's contention, that the plaintiff proceeded once the traffic light turned green but then suddenly stopped, did not rebut the inference of negligence by providing a non-negligent explanation for the collision (see Ramirez v. Konstanzer, 61 AD3d 837 [2d Dept. 2009]). Therefore, the defendant has failed to provide evidence as to a non-negligent explanation for the accident sufficient to raise a triable 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]).

As the evidence in the record demonstrates that the defendant 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 motion by plaintiff on the counterclaim for summary judgment is granted; the counterclaim contained in the defendants' verified answer is hereby dismissed; and the Clerk of Court is authorized to enter judgment accordingly.

Dated: August 30, 2012
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.