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

HONG SUK LEE and HEE JUNG LEE,

Plaintiffs,

- against -

PHILIP BITON and YONE BITON,

Defendants.

- x

Index No.: 700334/2011

Motion Date: 02/04/13

Motion No.: 58

Motion Seq.: 4

The following papers numbered 1 to 20 were read on this motion by plaintiffs, for an order pursuant to CPLR 3212(b) granting plaintiffs partial summary judgment on the issue of liability and setting the matter down for a trial on damages, or in the alternative for an order pursuant to CPLR 3126 striking defendants' answer for wilfully failing to appear for an examination before trial; and the cross-motion of plaintiff on the counterclaim granting summary judgment to plaintiff on the counterclaim Hong Suk Lee and for an order striking the defendants' answer for willful failure and refusal to appear for a court-ordered examination before trial:

	Papers Numbered
Plaintiffs' Notice of Motion	1 - 6
Defendants' Affirmation in Opposition	7 - 9
Plaintiff on Counterclaim's Cross-Motion	10 - 14
Plaintiffs' Reply Affirmation	15 - 17
Plaintiff on Counterclaim's Reply Affirmation	18 - 20

In this action for negligence, the plaintiffs, seek to recover damages for personal injuries they each sustained as a result of a motor vehicle accident that occurred on March 18, 2011, on Horace Harding Expressway at or near the intersection with 173rd Street, Queens County, New York. At the time of the accident, plaintiff HONG SUK LEE was operating a 2006 Honda in

which the plaintiff HEE JUNG LEE was a front seat passenger when it was allegedly struck in the rear by a motor vehicle owned by defendant YONE BITON and operated by defendant PHILIP BITON.

This action was commenced by the plaintiffs by the service of a summons and complaint dated June 22, 2011. Issue was joined by service of defendants' verified answer with counterclaim dated July 25, 2011. 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 a trial on serious injury and damages. Plaintiffs move in the alternative for an order striking the defendants' answer for willful failure and refusal to appear for a court-ordered deposition. Plaintiff on the counterclaim, Hong Suk Lee, cross-moves for summary judgment dismissing the counterclaim on the ground that he is not liable for the subject accident.

In support of the motion, the plaintiffs submit an affirmation from counsel, David J. Lawrence, Esq; a copy of the pleadings; an affidavit of merit from the plaintiff, Hong Suk Lee; and copies of the preliminary conference and compliance conference orders setting dates for examinations before trial.

In his affidavit, dated December 18, 2012, plaintiff states:

"On March 18, 2011, at approximately 5:40 p.m., I was driving on Horace Harding at or near its intersection with 173rd Street, in the County of Queens, State of New York, when a vehicle owned by defendant, YONE BITON and operated by defendant PHILIP BITON, struck my vehicle in the rear. At the time of the impact, I was completely stopped at a red light behind two or three other vehicles. As a result of the impact I sustained injuries to my neck, lower back and right knee. Surgery on my right knee was performed in June of 2011."

The plaintiffs contend that the defendant driver, Philip Biton, was negligent in the operation of his vehicle in striking the plaintiffs' vehicle in the rear. Plaintiffs' counsel contends that the accident was caused solely by the negligence of the defendant driver in that his vehicle was traveling too closely in violation of VTL § 1129(a) and that the driver failed to safely stop his vehicle prior to rear-ending the plaintiff's vehicle. Counsel contends, therefore, that the plaintiffs are entitled to partial summary judgment as to liability because the defendant was solely responsible for causing the accident while the plaintiff was free from culpable conduct.

With respect to the branch of the motion to strike the defendants' answer, plaintiffs' counsel states that the defendants failed to appear on eight occasions because the defendants' counsel was not able to get in contact with their clients.

Plaintiff on the counterclaim, Hong Suk Lee, cross-moves to dismiss the defendants' counterclaim on the ground that as Lee's vehicle was hit in the rear by the defendants' vehicle he is not liable for the injuries sustained by the plaintiffs in this action. Counsel for plaintiff on the counterclaim, Barbie McAleavey, Esq., states that for purposes of judicial economy she adopts and incorporates the facts, legal arguments, exhibits and procedural history set forth in the plaintiffs' motion for partial summary judgment

In opposition, defendants' counsel, Sean M. Broderick Esq. states that the motion to strike defendants' answer for failure to appear for depositions is untimely as the plaintiff has filed a note of issue deeming discovery complete and thereby waiving the defendants' deposition. Defendants' counsel did not discuss the branch of the plaintiffs' motion for summary judgment on liability and has not provided a factual affirmation from the defendant driver.

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 with a stopped or stopping vehicle 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 AD2 330 [2d Dept. 2002]; Velazquez v Denton Limo, Inc., 7 AD3d787 [2d Dept. 2004].

Here, plaintiff presented an affidavit stating that his vehicle was completely stopped while waiting at a red light on Horace Harding Boulevard when it was struck from behind by defendants' motor vehicle. Thus, the plaintiff satisfied his prima facie burden of establishing entitlement to judgment as a matter of law on the issue of liability by demonstrating that his vehicle was stopped when it was struck in the rear by the vehicle operated by defendant Philip Briton(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 [2d Dept. 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 his 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-driver failed to submit an affidavit in opposition to the motion and failed to provide any other evidence as to any negligence on the part of plaintiff or to provide 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]; 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]). If the operator of the moving vehicle cannot come forward with evidence to rebut the inference of negligence, the occupants and owner of the stationary vehicle are entitled to summary judgment on the issue of liability (see Kimyagarov v. Nixon Taxi Corp., 45 AD3d 736 [2d Dept. 2007]). The evidence demonstrated that the plaintiff was in a stopped vehicle, and no evidence was presented to show that he contributed to the happening of the injury-producing event (see Aikens-Hobson v. Bruno, 97 AD3d 709 [2d Dept. 2012]; Daramboukas v Samlidis, 84 AD3d 719 [2d Dept. 2011]; Franco v Breceus, 70 AD3d 767[2d Dept. 2010]; Shirman v Lawal, 69 AD3d 838 [2d Dept. 2010]; Katz v Masada II Car & Limo Serv., Inc., 43 AD3d 876 [2d Dept. 2007]).

Accordingly, this court finds that in opposition to plaintiffs' motion, defendant failed to submit any evidence sufficient to raise a triable issue of fact (see Arias v Rosario, 52 AD3d 551 [2d Dept. 2008]; Smith v Seskin, 49 AD3d 628 [2d Dept.2008]; Campbell v City of Yonkers, 37 AD3d 750 [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 plaintiffs' motion is granted, and the plaintiffs HONG SUK LEE and HEE JUNG LEE, shall have partial summary judgment on the issue of liability against the defendants, PHILIP BITON and YONE BITON, and the Clerk of Court is authorized to enter judgment accordingly; and it is further,

ORDERED, that the motion for plaintiff on the counterclaim, HONG SUK LEE, for summary judgment is granted and the counterclaim of defendants PHILIP BITON and YONE BITON is hereby stricken; and it is further,

ORDERED, that the plaintiffs' motion for an order striking the defendants' answer for willful failure to appear for an examination before trial is denied as academic, and it is further,

ORDERED, that this action shall be placed on the trial calendar of the Court for a trial on serious injury and damages.

Dated: April 2, 2013
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.