Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 19
Justice

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Aysha Naheem,

Plaintiff,

-against-

Y. Ron Taxi, Inc., Ali Rasheed, Shirley Jenkins, Rowana Husband, Naeem Hussain and Ameinder Singh,

Defendants.

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Index No.: 700571/11
Motion Date: 5/21/13
Motion Cal. No.: 79
Motion Seq. No.: 5

The following papers numbered 1 to 13 read on this motion for an order granting the defendants Shirley Jenkins and Rowana Husband summary judgment pursuant to CPLR §3212 dismissing the complaint and all cross-claims against them on the basis that the defendants didn't breach any duty owed.

	PAPERS NUMBERED
Notice of Motion - Affidavits-Exhibits.....	1 - 4
Affirmation in Opposition.....	5 - 8
Affirmation in Opposition.....	9 - 11
Reply Affirmation.....	12 - 13

Upon the foregoing papers, it is hereby ordered that the motion is resolved as follows:

Defendants Shirley Jenkins ("Jenkins") and Rowana Husband ("Husband") move for an order pursuant to CPLR 3212 dismissing plaintiff's complaint and all cross-claims as against them.

Facts

On April 10, 2009, the vehicle operated by Husband and owned by Jenkins was stopped in the right lane of the entrance ramp to the Long Island Expressway due to a flat tire when it was

allegedly struck in the rear by a vehicle driven by co-defendant Ameinder Singh ("Singh"). Plaintiff Aysha Naeem ("Naeem") was a passenger in the Singh vehicle.

Husband testified that she was forced to pull over to the right lane because of a flat tire. Husband also testified that there was no emergency lane or shoulder for her to safely move into. Husband also testified that she put her hazard lights on. Husband also testified that she was stopped for approximately five minutes before getting struck in the rear and that during the five minutes leading up to the accident she observed traffic moving passed her vehicle on the right.

Naeem testified that Singh was stopped at the time of the accident and, while stopped, a taxi struck Singh in the rear, the force of which pushed the Singh vehicle into the rear of the Husband vehicle. Naeem also testified that after the accident Singh left the scene of the accident before the police could arrive.

Defendant Ali Rasheed ("Rasheed") testified at his deposition that he was entering the entrance ramp when he first saw the Singh vehicle five lengths ahead. Rasheed claims that he immediately applied his brakes and noticed that the Singh vehicle was backing up. Rasheed contends that the Singh vehicle then backed up and struck the front of his taxi. Rasheed states that he did not see any contact between the Singh and the Husband vehicles.

None of the parties dispute Husband's contention that she was stopped prior to the accident.

Discussion

It is well established that summary judgment should be granted when there is no doubt as to the absence of triable issues. (*See Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 [1978].) As such, the function of the court on the instant motion is issue finding and not issue determination. (*See S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.,* 34 N.Y.2d 338, 341 [1974].) The party

moving for summary judgment must tender admissible evidentiary proof that eliminates any material issues of fact from the case. (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980].) If the movant succeeds, the burden shifts to the party opposing the motion, who must show issues of material facts sufficient to require a trial. (*Id.*)

"A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the moving vehicle and imposes a duty on that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision." (Emphasis added) (*Xian Hong Pan v. Buglione*, 955 N.Y.S.2d 375, 377 [2nd Dept 2012]; *Kastritsios v. Marcello*, 84 A.D.3d 1174, 1174 [2nd Dept. 2011]; *Plummer v. Nourddine,* 82 A.D.3d 1069, 1069 [2nd Dept. 2011]; *Ortiz v. Hub Truck Rental Corp.*, 82 A.D.3d 725, 726 [2nd Dept. 2011].) "A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle." (*Scheker v. Brown*, 85 A.D.3d 1007 [2nd Dept 2012].) If the driver of the offending vehicle cannot provide a non-negligent excuse to rebut the inference of negligence, then the driver of the lead vehicle may be awarded summary judgment on the issue of liability. (*Staton v. Ilic,* 69 A.D.3d 606 [2nd Dept. 2010]; *and see Lundy v. Llatin,* 51 A.D.3d 877 [2nd Dept. 2008]; *Leal v. Wolff,* 224 A.D.2d 392 [2nd Dept. 1996].) Any conclusory allegations brought up by the defendant do not raise a triable issue of fact and are insufficient to rebut the inference of negligence against him. (*Benyarko v. Avis Rent A Car Sys. Inc.*, 162 A.D.2d 572, 573 [2nd Dept. 1990]; *Young v. City of New York,* 113 A.D.2d 833, 833-34 [2nd Dept. 1985]; *see also O'Callaghan v. Flitter,* 112 A.D.2d 1030 [2nd Dept. 1985].) If there is any conflict at all in the evidence then the plaintiff will not be entitled to summary judgment. (*See Young v. City of New York,* 113 A.D.2d 833 [2nd Dept. 1985]; *Andre v. Pomeroy,* 35

N.Y.2d 361, 365 [1974].)

Here, the moving defendants properly met their prima facie burden through the submission of deposition testimony of Husband, Naeem and Singh which established that Husband was stopped prior to being struck in the rear. It is well established, that summary judgment should be granted in a rear-end collision to a car that was lawfully stopped. (*See Xian Hong Pan v. Buglione*, 955 N.Y.S.2d 375, 377 [2nd Dept 2012]; *Kastritsios v. Marcello*, 84 A.D.3d 1174 [2nd Dept. 2011]; *Plummer v. Nourddine,* 82 A.D.3d 1069, 1070 [2nd Dept. 2011].) Husband presented sufficient evidence, in the form of her deposition testimony, to meet her prima facie burden by showing that her vehicle was lawfully stopped prior to the collision. (*See Viggiano v. Camara,* 250 A.D.2d 836, 837 [2nd Dept. 1998]; *Cofrancesco v. Murino*, 225 A.D.2d 648 [2nd Dept. 1996].)

In opposition, co-defendants Rasheed and Y. Ron Taxi Inc and co-defendants Hussain and Singh separately contend that there are issues of fact as to whether Husband's actions, coming to a complete stop in a moving lane of traffic, constitutes contributory negligence.

Although Husband's vehicle was stopped in a moving lane of traffic, Husband established that this was due to mechanical failure and not the result of any fault on her part. (*Prosen v. Mabella*, 107 A.D.3d 870 [2nd Dept 2013]; *Blasso v. Parente*, 79 A.D.3d 923 [2nd Dept 2010].)

As in *Blasso*, the parties herein concede that the weather was clear and that the roads were dry. (*Blasso v. Parente*, supra.) The within action is also analogous to *Vespe v Kazi*, 62 A.D.3d 408 (2nd Dept 2009), wherein the Second Department ruled that it was sufficient for the movant to submit evidence that the vehicle was stopped "with no other place to go, due to the mechanical failure of his vehicle." (Id. at 408-409 see also *Cuccio v. Ciotkosz*, 43 A.D.3d 850 [2nd Dept 2007].) Husband testified that she had a flat tire and that there was no emergency lane or shoulder for her to park her

vehicle. Under these circumstances, the sole proximate cause of the accident was the negligent failure of Rasheed and Singh to see what there was to be seen and to maintain a safe distance behind the Husband vehicle.

Co-defendants also contend that there is an issue of fact with respect to whether Husband had her hazard lights on. Husband testified that as soon as her vehicle became disabled she put her hazard lights on. Naeem testified that she did not recall if Husband's lights were on. Rasheed was asked, at his deposition, whether there were any lights illumintaed on the Husband vehicle and Rasheed responded "[n]o, I did not see any lights." However, Rasheed's version of events includes a contention that the Singh vehicle, which was the vehicle immediately behind the Husband vehicle, caused the accident by backing up. Clearly, Rasheed's attention while entering the entrance ramp would have been on the car backing up into him and not the lights on Husband's vehicle. In addition, Rasheed's testimony is vague in that he does not affirmatively state that he saw Husband's vehicle prior to the accident and that the lights were not on. It is possible to construe Rasheed's statement to mean that he did not see, one way or the other, whether Husband's hazard lights were illuminated. Accordingly, the testimony of Rasheed and Naeem failed to adequately rebut Husband's contention that her hazard lights were illuminated. (See *Macauley v Elrac, Inc.*, 6 A.D.3d 584 [2nd Dept 2004].)

Co-defendants Hussain and Singh also contend that the transcript of Husband is inadmissible as against them because said deposition was taken on July 26, 2010, relating to an action brought by Husband[1] and before the within action was commenced. A second deposition of Husband was held on February 9, 2012 but said transcript was not attached to the moving papers. However, Co-defendants Hussain and Singh fail to set forth the basis for the rejection of a deposition taken prior

[1]The Husband matter has since settled.

to the commencement of the within action and fail to set forth the prejudice that would be caused by the court accepting the July 26, 2010 deposition testimony of Husband. Furthermore, if the testimony of Husband on February 9, 2012, had contradicted his July 26, 2010 testimony, the opposing parties were able to submit the newer deposition to highlight those contradictions.

Conclusion

Defendants Jenkins and Husband's motion for an order pursuant to CPLR §3212 dismissing plaintiff's complaint and all cross-claims as against them is granted.

Dated: August 19, 2013

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Bernice D. Siegal, J. S. C.