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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

MEI F. CHEOW and POW CHOO CHUNG,

Plaintiffs,

- against -

CHENG LIN JIN and SKYLINER TRAVEL,

Defendants.

- x

Index No.: 14942/2013

Motion Date: 01/27/14

Motion No.: 28

Motion Seq.: 1

The following papers numbered 1 to 14 were read on this motion by plaintiffs, MEI F. CHEOW and POW CHOO CHUNG, for an order pursuant to CPLR 3212, granting partial summary judgment in favor of plaintiffs and against the defendants on the issue of liability and setting the matter down for a trial on damages only:

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	1 - 6
Affirmation in Opposition- Affidavits	7 - 11
Affirmation in Reply	12 - 14

In this action for negligence, the plaintiffs, MEI F. CHEOW and POW CHOO CHUNG seek to recover damages for personal injuries they each allegedly sustained as a result of a motor vehicle accident that occurred on June 3, 2013, between the vehicle operated by plaintiff, POW CHOO CHUNG, and the bus owned by defendant SKYLINER TRAVEL and operated by defendant CHENG LIN JIN. The accident took place Woodhaven Boulevard at its intersection with Wetherole Street in Queens County, New York. Plaintiff, POW CHOO CHUNG and plaintiff, MEI F. CHEOW, a passenger in the Chung vehicle allege that they each sustained injuries when their vehicle was struck in the rear by the bus operated by CHENG LIN JIN.

This action was commenced by the plaintiffs by the service of a summons and complaint on August 6, 2013. Issue was joined by

service of defendants' verified answer dated October 10, 2013. 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 damages.

In support of the motion, the movants submit an affirmation from counsel, Eric D. Subin, Esq; a copy of the pleadings; and an affidavit from plaintiff, POW CHOO CHUNG, dated November 20, 2013. In her affidavit Chung states, "on June 3, 2013, I was stopped for approximately 10 to 15 seconds on Woodhaven Boulevard near its intersection with Wetherole Street in Queens, New York. While I was stopped I was struck from the rear by defendant CHENG LIN JIN. After the collision defendant, CHENG LIN JIN, apologized to me and stated that he did not see my vehicle before running into the back of it."

Plaintiff contends that defendant Jin was negligent in the operation of his vehicle in striking Chung's vehicle in the rear. Chung contends that the accident was caused solely by the negligence of Jin in that his vehicle was traveling too closely in violation of VTL § 1129(a), and that Jin failed to safely stop his vehicle prior to rear-ending Chung's stopped vehicle. Counsel contends, therefore, that said plaintiff is entitled to partial summary judgment on the issue of liability as defendant Jin was solely responsible for causing the accident while Chung, whose vehicle was stopped at the time of the impact, was free from culpable conduct.

Counsel for Jin, Heather C. Ragone, Esq. opposes the motion on the ground that there are questions of fact as to the proximate cause of the accident and whether the plaintiff is free from comparative negligence. Defendant Ji Cheng Lin submits an affidavit dated January 9, 2014, stating that on the date of the accident he was employed by Skyliner Travel and Tour Bus Corporation as a motor coach operator. He states that, on June 3, 2013, at approximately 4:25 p.m. he was traveling south on Woodhaven Boulevard towards the Long Island Expressway in route from The Resorts World Casino in South Ozone Park, Queens to Chinatown in Manhattan. He states, "as I approached the intersection of Woodhaven Boulevard and Wetherole Street, I noticed that the light was yellow and that there was a 2002 Hyundai in front of me. The driver of the Hyundai sped up to try to make the light but then stopped suddenly in the middle of the crosswalk. Although I hit the brakes immediately, I was unable to stop my vehicle in time and the head of my coach came into light contact with the rear of the Hyundai. At the moment of impact, plaintiff's vehicle was in the crosswalk and my vehicle was approaching the crosswalk. No part of my vehicle was in the

crosswalk at the time of the accident."

Counsel for defendant contends, that based on Jin's affidavit, that the traffic light was yellow for Ms. Cheung at the intersection and that Ms. Chung proceeded as if she was going to go through the intersection but then suddenly and unexpectedly stopped short while in the crosswalk. Thus, counsel claims that there is a question of the comparative negligence with regard to Chung's actions (see Gaeta v Carter, 6 AD3d 576 [2d Dept. 2006][the frontmost driver also has the duty not to stop suddenly or slow down without proper signaling so as to avoid a collision]; Chepel v Meyers, 306 AD2d 235 [2d Dept. 2003]) Niemiec v Jones, 237 Ad2d 267 [2d Dept. 1997]). Counsel argues that the plaintiff's vehicle improperly and suddenly stopped on a crosswalk instead of proceeding through the intersection as she had committed to, thereby causing the accident. Counsel claims that there was no justification for the plaintiff's unexpected stop.

In reply, plaintiff claims that the defendant's affidavit does not provide a non-negligent explanation for the accident. Counsel claims that the defendant's allegation that the plaintiff sped up and then made a sudden stop, standing alone, is not a sufficient non-negligent explanation for striking the plaintiff's vehicle in the rear citing Xian Hong Pan v Buglione, 101 AD3d 706 [2d Dept. 2012]; Jumandeo v Franks, 56 AD3d 614 [2d Dept. 2008]; Lundy v Llatin, 51 AD3d 877 [2d Dept. 2008]).

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 Raimondo v Plunkitt, 102 AD3d 851 [2d Dept. 2013]; 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, this Court finds that the plaintiff failed to make a prima facie case for summary judgment. Although Ms. Chung states she was stopped on Woodhaven Boulevard for 10 to 15 seconds before she was struck by the defendant's bus, she failed to supply any explanation whatsoever as to why she was stopped on Woodhaven Boulevard, such as whether there was traffic, whether there was a stop sign, whether she was at a traffic signal, if the traffic signal was green, red or yellow when she was stopped, what her actual location was on Woodhaven and any other circumstances surrounding her being stopped in the roadway.

In addition, the defendant states that plaintiff's vehicle appeared to be going through the intersection while the light was yellow but then stopped suddenly while in the crosswalk. In view of Jin's testimony that the plaintiff's vehicle started to proceed through the intersection then suddenly stopped, there is a triable issue of fact as to whether the plaintiff negligently caused or contributed to the accident and whether there is a nonnegligent explanation for the rear-end collision (see Kertesz v Jason Transp. Corp., 102 AD3d 658 [2d Dept. 2013]; Pollard v Independent Beauty & Barber Supply Co., 94 AD3d 845 [2d Dept. 2012]; Vargas v Luxury Family Corp., 77 AD3d 820 [2d Dept. 2010]; Delayhaye v Caledonia Limo & Car Serv., Inc., 49 AD3d 588 [2d Dept. 2008]; Klopchin v Masri, 45 AD3d 737 [2d Dept. 2007]).

Accordingly, the motion by the plaintiff for an order granting partial summary judgment on the issue of liability is denied.

Dated: January 30, 2014
Long Island City, N.Y

Hon. Robert J. McDonald
J.S.C.