SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 35
NASSAU COUNTY

STEVE S. KIM and CHRISTINA KIM,

Plaintiffs,

- against -

STEVEN ROSENBLATT, FREDY Y. MALDONADO and ARROW TRANSFER AND STORAGE, INC.,

Defendants.

Index No.: 608736/16
Motion Seq. No.: 01
Motion Date: 04/24/17

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition and Exhibit	2
Affirmation in Opposition and Exhibits	3
Reply Affirmation and Exhibit	4

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

Defendant Steven Rosenblatt ("Rosenblatt") moves, pursuant to CPLR §§ 3212 and 3211(a)(7), for an order granting summary judgment dismissing the Verified Complaint as against him, and any and all cross-claims and counterclaims as against him. Plaintiffs oppose the motion. Defendants Fredy Y. Maldonado ("Maldonado") and Arrow Transfer and Storage, Inc. ("Arrow") also oppose the motion.

The instant action arises from personal injuries allegedly sustained by plaintiffs as a result of a motor vehicle accident that occurred on June 23, 2016, at approximately 2:53 p.m., on

Hempstead Turnpike, at or near its intersection with Marvin Avenue, Uniondale, County of Nassau, State of New York. The subject accident involved three (3) vehicles - a 2016 Lexus, owned and operated by plaintiff, in which plaintiff Christina Kim was a passenger, a 2016 Ford, owned and operated by defendant Rosenblatt, and a 2007 Ford Van, owned by defendant Arrow and operated by defendant Maldonado. *See* Defendant Rosenblatt's Affirmation in Support Exhibit A.

Plaintiffs commenced the action with the filing and service of a Summons and Verified Complaint on or about November 10, 2016. *See* Defendant Rosenblatt's Affirmation in Support Exhibit B. Issue was joined by defendants Maldonado and Arrow on or about December 15, 2016. *See* Defendant Rosenblatt's Affirmation in Support Exhibit C. Issue was joined by defendant Rosenblatt on or about December 27, 2016. *See id.*

Defendant Rosenblatt submits his own Affidavit in support of the instant motion. *See* Defendant Rosenblatt's Affirmation in Support Exhibit D. Defendant Rosenblatt states that, "[o]n June 23, 2016, I was the operator of a 2016 Ford, bearing license plate GGT9140. I was involved in an accident on that day. The accident took place on Hempstead Turnpike, in the Town of Hempstead. At the moment of impact, the vehicle I was operating had been fully stopped in traffic for 5 seconds. My vehicle was stopped because there was a vehicle ahead of mine that was also stopped. While my vehicle was stopped, it was struck in the rear and it was pushed into the vehicle ahead of me that was also stopped. I did not change lanes within one (1) mile of the accident and I did not make a sudden stop. There was nothing I could have done to avoid the happening of the accident." *See id.*

Counsel for defendant Rosenblatt contends that, "ROSENBLATT's statement corroborates the statement on the police report which states the 'MV1 was in a collision with MV2 causing MV2 to be in collision with MV3'.... The police report and defendant ROSENBLATT's affidavit clearly indicate that ROSENBLATT's vehicle came to a complete stop before the vehicle operated by MALDONADO started a chain reaction of rear-end collisions." *See* Defendant Rosenblatt's Affirmation in Support Exhibits A and D.

Counsel for defendant Rosenblatt argues that "[a]s mandated by VTL § 1129(a), which states that '[t]he driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon the condition of the highway', MALDONADO was clearly under a duty to maintain a safe distance from the rear of the vehicle in front of him. No evidentiary facts tending to raise any triable issues exist concerning ROSENBLATT's alleged negligence; and therefore, he is entitled to summary judgment."

In opposition to the motion, counsel for plaintiffs contends, "[a]s a threshold matter, summary judgment to the moving defendant must be denied since this motion is premature. In fact, discovery for this case has not started yet, and no parties' deposition was held."

Counsel for plaintiffs submits that, "[i]t is unrefuted that the vehicle owned and operated by moving defendant rear-ended plaintiffs' vehicle when the plaintiff's (*sic*) vehicle was stopped. The plaintiff STEVE S. KIM stated in his Affidavit that 'as a result of the accident, my vehicle was struck twice in the rear.'... The plaintiffs did not know whether the moving defendant's vehicle rear-ended their vehicle first and then was impacted again by the co-defendants FREDY Y. MALDONADO and ARROW TRANSFER AND STORAGE, INC.'s vehicle, causing the

plaintiffs to experience two impacts. Since this a chain car accident, it is impossible for the plaintiffs to know the order by which vehicles behind the plaintiffs' vehicle struck one another. However, what is very clear is that if the moving defendant's vehicle was rear ended once causing their vehicle to move forward and impact the plaintiffs' vehicle, then it is certain that the plaintiff should have felt only one impact. That is not the case here, The plaintiff operator STEVE S. KIM clearly stated in the Affidavit that he felt two impacts to his vehicle as a result of the chain car accident." *See* Plaintiffs' Affirmation in Opposition Exhibit A.

Also in opposition to the motion, counsel for defendants Maldonado and Arrow argues, "the affidavit of FREDY Y. MALDONADO contradicts the version of the accident provided by STEVEN ROSENBLATT and clear raises a question of fact as to whether the vehicle operated by STEVEN ROSENBLATT struck the vehicle owned and occupied by the KIM's (*sic*) *prior to* being struck by the vehicle operated by FREDY Y. MALDONADO.... These factual discrepancies thus raise an issue of fact as to STEVEN ROSENBLATT's credibility also requiring an Examination Before Trial to be allowed before summary judgment can be considered.... Mr. Maldonado's affidavit also creates questions of fact as to whether the injuries allegedly sustained by plaintiff occurred with relation to the differing versions of the accident and thus differing impact of impacts to the KIM's (*sic*) vehicle.... [I]t is submitted that FREDY Y. MALDONADO's affidavit indicating (*sic*) the STEVEN ROSENBLATT's vehicle rear-ended the plaintiffs' vehicle before it itself was rear-ended, creates a non-negligent excuse for the happening of the accident and also creates a causal issue as to which contact between the three vehicles may have or may not have caused the injuries to the plaintiff's (*sic*)." *See* Defendants Maldonado and Arrow's Affirmation in Opposition Exhibit A.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York, supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century-Fox Film Corp., supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the Court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues

exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989). It is the existence of an issue, not its relative strength that is the critical and controlling consideration. *See Barrett v. Jacobs*, 255 N.Y. 520 (1931); *Cross v. Cross*, 112 A.D.2d 62, 491 N.Y.S.2d 353 (1st Dept. 1985). The evidence should be construed in a light most favorable to the party moved against. *See Weiss v. Garfield*, 21 A.D.2d 156, 249 N.Y.S.2d 458 (3d Dept. 1964).

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 pursuant to New York State Vehicle and Traffic Law ("VTL") § 1129(a). *See Krakowska v. Niksa*, 298 A.D.2d 561, 749 N.Y.S.2d 55 (2d Dept. 2002); *Bucceri v. Frazer*, 297 A.D.2d 304, 746 N.Y.S.2d 185 (2d Dept. 2002).

A rear end collision with a vehicle establishes a *prima facie* case of negligence on the part of the operator of the offending vehicle. *See Tutrani v. County of Suffolk*, 10 N.Y.3d 906, 861 N.Y.S.2d 610 (2008). Such a collision imposes a duty of explanation on the operator. *See Hughes v. Cai*, 55 A.D.3d 675, 866 N.Y.S.2d 253 (2d Dept. 2008); *Gregson v. Terry*, 35 A.D.3d 358, 827 N.Y.S.2d 181 (2d Dept. 2006); *Belitsis v. Airborne Express Freight Corp.*, 306 A.D.2d 507, 761 N.Y.S.2d 329 (2d Dept. 2003).

As noted, a rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of liability with respect to the operator of the rearmost vehicle, thereby requiring the operator to rebut the inference of negligence by providing a non-negligent explanation for the collision. *See Francisco v. Schoepfer*, 30 A.D.3d 275, 817 N.Y.S.2d 52 (1st Dept. 2006); *McGregor v. Manzo*, 295 A.D.2d 487, 744 N.Y.S.2d 467 (2d Dept. 2002).

Vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since the following driver is under a duty to maintain a safe distance between his or her car and the car ahead. *See Shamah v. Richmond County Ambulance Service, Inc.*, 279 A.D.2d 564, 719 N.Y.S.2d 287 (2d Dept. 2001).

Drivers must maintain safe distances between their cars and the cars in front of them and this rule imposes on them a duty to be aware of traffic conditions including stopped vehicles. *See* VTL § 1129(a); *Johnson v. Phillips*, 261 A.D.2d 269, 690 N.Y.S.2d 545 (1st Dept. 1999).

Drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident. *See Filippazzo v. Santiago*, 277 A.D.2d 419, 716 N.Y.S.2d 710 (2d Dept. 2000).

Summary judgment is rarely appropriate in negligence actions (*see Ugarriza v. Schmeider*, 46 N.Y.2d 471, 414 N.Y.S.2d 304 (1979)), even where the salient facts are conceded, since the issue of whether the defendant or the plaintiff acted reasonably under the circumstances is generally a question for jury determination. *See Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974); *Davis v. Federated Department Stores, Inc.*, 227 A.D.2d 514, 642 N.Y.S.2d 707 (2d Dept. 1996); *John v. Leyba*, 38 A.D.3d 496, 831 N.Y.S.2d 488 (2d Dept. 2007).

It is well settled that there may be more than one proximate cause of a traffic accident (*see Steiner v. Dincesen*, 95 A.D.3d 877, 943 N.Y.S.2d 585 (2d Dept. 2012); *Gause v. Martinez*, 91 A.D.3d 595, 936 N.Y.S.2d 272 (2d Dept. 2012); *Lopez v. Reyes-Flores*, 52 A.D.3d 785, 861 N.Y.S.2d 389 (2d Dept. 2008)) and "the proponent of a summary judgment has the burden of establishing freedom from comparative negligence as a matter of law." *See Antaki v. Mateo*, 100 A.D.3d 579, 954 N.Y.S.2d 540 (2d Dept. 2012); *Simmons v. Canady*, 95 A.D.3d 1201, 945

N.Y.S.2d 138 (2d Dept. 2012); *Pollack v. Margolin*, 84 A.D.3d 1341, 924 N.Y.S.2d 282 (2d Dept. 2011). "The issue of comparative fault is generally a question for the trier of facts." *See Allen v. Echols*, 88 A.D.3d 926, 931 N.Y.S.2d 402 (2d Dept. 2011); *Gause v. Martinez*, *supra*.

Further, all drivers are required to "see that which through proper use of [his or her] senses [he or she] should have seen." *Steiner v. Dincesen*, *supra*, *quoting Vainer v. DiSalvo*, 79 A.D.3d 1023, 914 N.Y.S.2d 236 (2d Dept. 2010) *quoting Bongiovi v. Hoffman*, 18 A.D.3d 686, 795 N.Y.S.2d 354 (2d Dept. 2005).

Based upon the evidence presented in the papers before it, there are issues of fact as to the exact causes of the subject accident and which parties failed to act reasonably under the circumstances and failed to see that which they should have seen through the proper use of their senses. The Court finds that there are questions of fact as to the events which immediately preceded defendant Rosenblatt's vehicle's impact with plaintiffs' vehicle; the resolution of said fact intensive issues falling within the province of the finder of fact.

Additionally, the Court finds that the facts and circumstances surrounding the subject motor vehicle accident involve determining the credibility of the parties involved in said accident and, in rendering a decision on a summary judgment motion, the Court is not to determine matters of credibility. "Resolving questions of credibility, assessing the accuracy of witnesses, and reconciling conflicting statements are tasks entrusted to the trier of fact." *Bravo v. Vargas*, 113 A.D.3d 579, 978 N.Y.S.2d 307 (2d Dept. 2014). The record does not otherwise establish defendant Rosenblatt's entitlement to judgment as a matter of law. *See Williams v. City of New York*, 88 A.D.3d 989, 931 N.Y.S.2d 656 (2d Dept. 2011).

Lastly, it is apparent that little, if any, discovery had been completed prior to the making of defendant Rosenblatt's motion. It is settled that "[a] party should be afforded a reasonable

opportunity to conduct discovery prior to the determination of a motion for summary judgment." *See Valdivia v. Consolidated Resistance Co. of America, Inc.*, 54 A.D.3d 753, 863 N.Y.S.2d 720 (2d Dept. 2008); *Venables v. Sagona*, 46 A.D.3d 672, 848 N.Y.S.2d 238 (2d Dept. 2007). *See generally Gruenfeld v. City of New Rochelle*, 72 A.D.3d 1025, 2010 WL 1716148 (2d Dept. 2010); *Gonzalez v. Nutech Auto Sales*, 69 A.D.3d 792, 891 N.Y.S.2d 910 (2d Dept. 2010); *Elliot v. County of Nassau*, 53 A.D.3d 561, 862 N.Y.S.2d 90 (2d Dept. 2008); *Fazio v. Brandywine Realty Trust*, 29 A.D.3d 939, 815 N.Y.S.2d 470 (2d Dept. 2006).

Therefore, based upon the above, defendant Rosenblatt's motion, pursuant to CPLR §§ 3212 and 3211(a)(7), for an order granting summary judgment dismissing the Verified Complaint as against him, and any and all cross-claims and counterclaims as against him, is hereby **DENIED at this time**.

It is further ordered that the parties shall appear for a Preliminary Conference on July 31, 2017, at 9:30 a.m., at the Preliminary Conference Desk in the lower level of 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this Order shall be served on all parties and on the DCM Case Coordinator. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the Decision and Order of this Court.

ENTERED
JUN 14 2017
NASSAU COUNTY
COUNTY CLERK'S OFFICE

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
June 13, 2017