SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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MICHAEL FASCIGLIONE,

Plaintiff,

-against-

MARK MICHELI and 4L EQUIPMENT LEASING, LLC,

Defendants.

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IAS Part 21
Index No.: 610078/2016
Motion Seq. No. 001

DECISION AND ORDER

LEONARD D. STEINMAN, J.

The following papers, in addition to any memoranda of law, were reviewed in preparing this Decision and Order:

Plaintiff's Notice of Motion, Affirmation, Affidavit & Exhibits.....1
Defendants' Affirmation in Opposition & Exhibit.....2
Plaintiff's Reply Affirmation 3

The action, which was commenced on December 21, 2016, arises out of an accident that occurred on November 12, 2016, when the vehicle owned by plaintiff and operated by James Mariani was struck in the rear by the vehicle driven by Mark Micheli and owned by 4L Equipment Leasing, LLC. At the time of the accident plaintiff was a passenger in his vehicle. Plaintiff now seeks summary judgment pursuant to CPLR 3212 on the issue of liability. Defendants oppose the application.

It is undisputed that plaintiff was a passenger in a vehicle that was struck in the rear by Micheli. In support of his application, plaintiff has submitted his sworn affidavit in which he states that his vehicle was stopped at a red traffic light for approximately thirty seconds prior to impact.

It is the movant, here plaintiff, who has the burden to establish an entitlement to summary judgment as a matter of law. *Ferrante v. American Lung Assn.*, 90 N.Y.2d 623 (1997). "CPLR §3212(b) requires the proponent of a motion for summary judgment to demonstrate the absence of genuine issues of material facts on every relevant issue raised by the pleadings, including any affirmative defenses." *Stone v. Continental Ins. Co.*, 234 A.D.2d 282, 284 (2d Dept. 1996). Where the movant fails to meet its initial burden, the motion for summary judgment should be denied. *U.S. Bank N.A. v. Weinman*, 123 A.D.3d 1108 (2d Dept. 2014).

A passenger-plaintiff moving for summary judgment on the issue of liability must "meet the twofold burden of establishing that he or she was free from comparative fault and was, instead, an innocent passenger, and separately, that the operator of the rear vehicle was at fault. If the plaintiff fails to demonstrate, *prima facie*, that the operator of the offending vehicle was at fault, or if triable issues of fact are raised by the defendants in opposition…summary judgment on the issue of liability must be denied, even if the moving plaintiff was an innocent passenger." *Phillip v. D & D Carting Co., Inc.*, 136 A.D.3d 18, 23 (2d Dept. 2015).

Neither party denies or disputes that the front of the vehicle driven by Micheli struck the rear of the vehicle in which plaintiff was a passenger. "[A] rear-end collision establishes a *prima facie* case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision." *Gleason v. Villegas,* 81 A.D.3d 889 (2d Dept. 2011).

"When a 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." *Filippazzo v. Santiago*, 277 A.D.2d 419 (2d Dept. 2000); Vehicle and Traffic Law § 1129 (a). This rule imposes upon drivers the duty to be aware of traffic conditions, including vehicle stoppages. *Johnson v. Phillips*, 261 A.D.2d 269 (1st Dept. 1999). This obligation has even been applied to circumstances where the front vehicle stops suddenly. *See Mascitti v. Greene*, 250 A.D.2d 821 (2d Dept. 1998). "Drivers have a duty to see what should be seen and to exercise

reasonable care under the circumstances to avoid an accident." *Filippazzo v. Santiago*, 277 A.D.2d 419, 420 (2d Dept. 2000). Here, plaintiff established his entitlement to summary judgment as a matter of law on the issue of liability by demonstrating that he was not at fault for the accident and that the operator of the vehicle that struck him in the rear was at fault.

Defendants have failed to offer any explanation for the accident but instead oppose the application for summary judgment stating that there are questions of fact to be determined and that the deposition of the driver of plaintiff's vehicle is necessary. Defendants assert no facts raising a triable issue. Defendants failed to submit an affidavit or other evidence explaining the circumstances leading to the accident. When the operator of the moving vehicle cannot come forward with evidence to rebut the inference of negligence, the moving party may be awarded judgment. *Ortiz v. Fage USA Corp.*, 69 A.D.3d 914 (2d Dept. 2010); *Abramov v. Campbell*, 303 A.D.2d 697 (2d Dept. 2003). While defendants contend that there can be more than one proximate cause of an accident, this is not a non-negligent explanation sufficient to avoid summary judgment on liability; it is legal argument. The submission of an affirmation from an attorney who lacks knowledge of the facts is insufficient to defeat this application. *Lampkin v. Chan,* 68 A.D.3d 727 (2d Dept. 2009).

Equally unavailing is defendants' argument that the application is premature as discovery has not completed. *See Rungoo v. Leary*, 110 A.D.3d 781 (2d Dept. 2013). The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during discovery is insufficient to deny the motion. *Id.* The opposing parties must identify the information they hope to discover. *Id.* Defendants have failed to provide an evidentiary basis that suggests discovery may lead to relevant evidence or that the plaintiff has exclusive knowledge of facts essential to opposing the motion.

For the foregoing reasons, plaintiff's application for summary judgment, pursuant to CPLR §3212, on the issue of liability is granted.

The issue of damages is reserved for trial. Counsel for both parties are directed to appear before this court at 9:30 a.m. on January 11, 2018 at 9:30 a.m. for a Compliance Conference.

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of the court.

Dated: November 21, 2017
Mineola, New York

ENTER:

LEONARD D. STEINMAN, J.S.C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE