To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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AHMED HAMDAN and ALKYAM AHMAD,

Plaintiffs,

-against-

CHARLES J. BABCOCK, MATTHEW P. PAPAGEORGE and KION P. PAPAGEORGE,

Defendants.

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INDEX NO. 64086/2015

DECISION/ORDER

Submission Date: 5/17/17
Motion Seqs. 2, 3

ECKER, J.

The following papers numbered 1 through 20 were read on the motions of MATTHEW P. PAPAGEORGE and KION P. PAPAGEORGE [1] ("Papageorge" or "defendant") [Mot. Seq. 2], made pursuant to CPLR 3212, seeking summary judgment dismissing the complaint and all cross-claims against them, and on the cross-motion of AHMED HAMDAN and ALKYAM AHMAD ("plaintiff") [2] [Mot. Seq. 3], made pursuant to CPLR 3212, seeking summary judgment on the issue of liability as against defendant CHARLES J. BABCOCK ("Babcock"), or, in the alternative, in opposition to the Papageorge's motion:

PAPERS	**NUMBERED**
Notice of Motion, Affirmation, Exhibits A-I	1 - 11

[1] Co-defendant Matthew P. Papageorge was the driver of the vehicle. Co-defendant Kion P. Papageorge was the owner of the vehicle. For the purposes of this Decision /Order, references to "Papageorge" are to Matthew Papageorge, unless otherwise indicated.

[2] Co-plaintiff Ahmed Hamdan was the driver/operator, and co-plaintiff Alkyam Ahmad was the passenger in the vehicle. For the purposes of this Decision /Order, references to "plaintiff" are to Ahmed Hamdan, unless otherwise indicated.

Notice of Cross-Motion, Affirmation, Exhibits 1-4	12 - 17
Affirmation in Opposition, Exhibits A-B	18 - 20

Upon the foregoing papers, the court determines as follows:

Plaintiff alleges he sustained serious injuries as a result of a motor vehicle accident that occurred in Yonkers, New York on February 20, 2015. Plaintiff had exited the New York State Thruway/I-87 southbound at Exit 4/Central Park Avenue. His vehicle was in a line of traffic awaiting the traffic signal ahead to change to green when his vehicle was struck in the rear by the vehicle operated by Babcock. This impact caused plaintiff's vehicle to collide with the vehicle operated by Papageorge which was immediately in front of him. By Decision/Order, dated March 7, 2017 [Mot Seq. 1], the court granted plaintiff's unopposed motion, made pursuant to CPLR 3212, dismissing Babcock's counterclaim as against plaintiff. The court found plaintiff had established his prima facie entitlement to judgment as a matter of law in this multi-car, chain reaction, rear-end collision by demonstrating that his vehicle was propelled forward into the Papageorge vehicle after his vehicle was struck in the rear by Babcock's vehicle, and that plaintiff was not at fault in the happening of the accident. *Wooldridge-Solano v Dick,* 143 AD3d 698 [2d Dept 2016]; *Niosi v Jones*, 133 AD3d 578 [2d Dept 2015]. At the time of the accident, Babcock was cited for VTL § 1129(a) ["Following too closely"], a traffic infraction, to which he later pled guilty.

Papageorge moves for an order granting summary judgment and dismissing the complaint and all cross-claims against him. Plaintiff cross-moves for summary judgment on the issue of liability as against Babcock, or in the alternative, in opposition to the Papageorge's motion. Babcock opposes both motions.

In opposition to the motions, Babcock argues that summary judgment is inappropriate as there are nonnegligent explanations for the cause of the accident. Babcock avers the Papageorge drove around his car and plaintiff's vehicle before cutting off plaintiff's vehicle forcing plaintiff and Babcock to suddenly brake and collide. This claim is supported by Babcock's deposition testimony, and by the affidavit of Ellen J. Kleinelp, a friend of Babcock's and a witness to the accident, who happened to be the driver of the car immediately behind Babcock's car at the time of the accident. Babcock also avers that ice or snow on the exit ramp may have caused the accident. In support of this argument, Babcock submits the affidavit of Craig Babcock, his son, who has training in tactical driving and criminal investigation, and arrived at the scene of the accident 10-20 minutes following the accident. This argument, however, is belied by Babcock's own testimony in which he stated "No, not that I recall" when asked if there was snow on the ground.

The moving party is entitled to summary judgment only if it tenders evidence sufficient to eliminate all material issues of fact from the case. *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]. Failure to make such prima facie "showing requires denial of

the motion, regardless of the sufficiency of the opposing papers." *Pullman v Silverman*, 28 NY3d 1060 [2016]; *Winegrad v New York University Medical Center, supra.* Put another way, in order to obtain summary judgment, there must be no triable issue of fact presented...even the color of a triable issue of fact forecloses the remedy. *In re Cuttitto Family Trust*, 10 AD3d 656 [2d Dept 2004], *quoting LNL Constr. v MTF Indus.*, 190 AD2d 714, 715 [2d Dept 1993]. If a party makes a *prima facie* showing of its entitlement to summary judgment, the opposing party bears the burden of establishing the existence of a triable issue of fact. *Zuckerman, v City of New York, supra*; *Alvarez v Prospect Hosp.*, *supra.*

It is not the court's function on a motion for summary judgment to assess credibility. *Chimbo v Bolivar*, 142 AD3d 944 [2d Dept 2016]; *Garcia v Stewart*, 120 AD3d 1298, 1299 [2d Dept 2014], or to engage in the weighing of evidence. *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]. "Resolving questions of credibility, determining the accuracy of witnesses, and reconciling the testimony of witnesses are for the trier of fact. *Bykov v Brody*, 150 AD3d 808 [2d Dept 2017]; *Kahan v Spira*, 88 AD3d 964 [2d Dept 2011]. Thus a motion for summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" *Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010].

Further, a defendant moving for summary judgment in a negligence action has the burden of establishing prima facie, that he or she was not at fault in the happening of the subject accident. *Faust v Gerde,* 150 AD3d 1204 [2d Dept 2017]; *Boulos v Lerner-Harrington*, 124 AD3d 709 [2d Dept 2015]. A plaintiff in a personal injury action who moves for summary judgment on the issue of liability, in a multiple chain reaction collision, has the burden of establishing, prima facie, both that the defendant was negligent and that he or she was free from comparative fault. *McLaughlin v Lunn*, 137 AD3d 757 [2d Dept 2016]. There can be more than one proximate cause of an accident, and generally, it is for the trier of fact to determine the issue of proximate cause. *Swinton v Kamiyama,* 147 AD3d 803 [2d Dept 2017]. Further, while a violation of Vehicle and Traffic Law constitutes negligence as a matter of law, where there is evidence that a driver involved in an accident was negligent as a matter of law, the proponent of a summary judgment motion has the burden of establishing freedom from comparative negligence as a matter of law. *Desio v Cerebral Palsy Transport, Inc.,* 121 AD3d 1033 [2d Dept 2014].

"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." *Gaeta v Carter*, 6 AD3d 576 [2d Dept 2004]; VTL § 1129[a]; *Comas-Bourne v City of New York*, 146 AD3d 855 [2d Dept 2017]; *Williams v Spencer-Hall*, 113 AD3d 759, 759-760 [2d Dept 2014]. "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 the operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision," *Pyo v Tribino*, 141 AD3d 639 [2d Dept 2016], quoting *Delgado v Bang*, 120 AD3d 608, 609 [2d Dept 2014]. "A nonnegligent explanation may include a mechanical failure, a sudden, unexplained stop of the vehicle ahead, an unavoidable skidding on wet pavement, or any other reasonable cause. *Tumminello v City of New York,* 148 AD3d1064 [2d Dept 2017]. Vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her car and the car ahead." *Theo v Vasquez,* 136 AD3d 795 [2d Dept 2016], citing *Brothers v Bartling,* 130 AD3d 554 [2d Dept 2015]. Further, a conclusory assertion by the operator of a vehicle that the sudden stop of the vehicle caused the accident is insufficient on its own as a nonnegligent explanation. *Gutierrez v Trillium, USA, LLC*, 111 AD3d 669 [2d Dept 2013].

Here, in support of the motion for summary judgment on the issue of liability, Papageorge submitted, inter alia, the deposition testimony of Babcock which provided conflicting evidence as to the facts surrounding the accident, and thus failed to establish that he was not at fault in the happening of the accident. The assertion that Papageorge's vehicle suddenly cut off plaintiff's vehicle, causing the accident, which on its own is conclusory, is supported by the Kleinelp affidavit. Even though Babcock was ticketed and paid a fine for a violation of VTL § 1129(a), which constitutes negligence as a matter of law, nevertheless, Papageorge has failed to meet his burden that he is free from comparative fault. Given the conflicting testimony and other evidence as to how and why the accident occurred, the court finds that Babcock has successfully rebutted the inference of negligence with a nonnegligent explanation. As such, plaintiff has failed to eliminate all triable issues of fact as to who was at fault in the happening of the accident. Accordingly, plaintiff's cross-motion for summary judgment on the issue of liability as against Babcock is denied.

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motion of defendants MATTHEW P. PAPAGEORGE and KION P. PAPAGEORGE [Mot. Seq. 2], made pursuant to CPLR 3212, seeking summary judgment dismissing the complaint and all cross-claims against them, is denied; and it is further

ORDERED that the cross-motion of AHMED HAMDAN and ALKYAM AHMAD [Mot. Seq. 3] made pursuant to CPLR 3212, seeking summary judgment on the issue of liability as against defendant CHARLES J. BABCOCK ("Babcock"), and dismissing all claims against plaintiffs, is denied; and it is further

ORDERED that the parties shall appear at the Settlement Conference Part of the Court, Room 1600, on September 5, 2017 at 9:15 a.m.

The foregoing constitutes the Decision/Order of the court.

Dated: White Plains, New York
July 31, 2017

ENTER,

HON. LAWRENCE H. ECKER, J.S.C.

Appearances

Law Office of Jesse Barab
Attorneys for Plaintiff
Via NYSCEF

Martyn, Toher, Martyn and Rossi
Attorneys for Plaintiff on the Counterclaim
Via NYSCEF

Law Office of Thomas K. Moore
Attorneys for Defendants Papageorge
Via NYSCEF

Law Office of Stewart H. Friedman
Attorneys for Defendant Babcock
Via NYSCEF

To all other parties appearing by NYSCEF