SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
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BRUCE L. LEWIS,

Plaintiff,

-against-

LEE R. CONKLIN, "JOHN DOE", LARRY B. WEINSTEIN and KEVIN L. WILLIAMS

Defendant.
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DECISION & ORDER

Index No.: 30394/2017

(Motions# 1 and #2)

Sherri L. Eisenpress, A.J.S.C.

The following papers, numbered 1 through 7, were considered in connection with (i) Defendants Larry Weinstein and Kevin Williams' Notice of Motion for an Order, pursuant to *Civil Practice Law and Rules* § 3212, granting summary judgment and dismissal of Plaintiff's Complaint and all cross-claims against them (Motion #1), and (ii) Defendant Lee R. Conklin's Notice of Cross-Motion for summary judgment and dismissal of Plaintiff's Complaint, pursuant to *Civil Practice Law and Rules* § 3212, on the ground that he bears no liability for the subject accident as his vehicle was stolen and not operated with his permission and control at the time of the accident (Motion #2):

PAPERS	**NUMBERED**
NOTICE OF MOTION/AFFIRMATION IN SUPPORT/AFFIDAVIT OF KEVIN WILLIAMS/EXHIBITS (A-G)	1-3
NOTICE OF CROSS-MOTION/AFFIRMATION IN SUPPORT OF CROSS-MOTION AND IN PARTIAL OPPOSITION TO MOTION/AFFIDAVIT OF LEE CONKLIN/ EXHIBITS (A-B)	4-6
AFFIRMATION IN REPLY	7

Upon a careful and detailed review of the foregoing papers, the Court now rules as follows:

This action was commenced by Plaintiff on January 20, 2017, with the filing of the

Summons and Complaint through the NYSCEF system. Issue was joined as to Defendants Larry B. Weinstein and Kevin L. Williams with the filing of Defendants' Answer through the NYSCEF system on April 11, 2017. Issue was joined with respect to Defendant Lee R. Conklin, by the filing of Defendant's Answer through the NYSCEF system on April 14, 2017.

The action arises from an accident which occurred on August 21, 2015, on Northbound I-87, on the Tappan Zee Bridge, in Nyack, New York, when the rear of vehicle operated by Defendant Williams and owned by Defendant Weinstein, was struck by a four door sedan, while stopped in heavy, "stop and go traffic" on the Tappan Zee Bridge. Plaintiff was a passenger in the vehicle operated by Defendant Williams. Following the accident, the four door sedan which had struck the Williams' vehicle fled the scene of the occurrence. One of the passengers in the Williams vehicle took the license plate number down before it fled. Williams observed that the vehicle which fled was being operated by a Hispanic or Caucasian man. Williams averred that approximately five minutes prior to impact, he saw the vehicle being driven erratically behind him through his rear view mirror, and noted that it was bumping into other cars and kept changing lanes. Defendant Williams and Weinstein move for summary judgment on the ground that their vehicle was struck in the rear when stopped. Plaintiff does not oppose the summary judgment motion of these defendants. Co-defendant Conklin partially opposes the motion on the ground that it is premature and discovery should take place.

Defendant Conklin cross-moves for summary judgment on the ground that he is not liable for the subject accident since his vehicle was stolen at the time of the occurrence and he did not give the driver permission or consent to operate the vehicle. He states that he was unaware that his vehicle was stolen at the time of the occurrence, as it is his secondary vehicle which he parks in his condominium complex, and infrequently uses. It is his practice to always keep the vehicle locked when not in use and parked in the parking spot. Upon learning of the accident from a state trooper, he reported the vehicle stolen. Neither Plaintiff nor co-Defendant oppose the summary judgment cross-motion.

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. *Giuffrida v. Citibank Corp., et al.*, 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. *Lacagnino v. Gonzalez*, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. *Gonzalez v. 98 Mag Leasing Corp.*, 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), citing *Alvarez*, *supra*, and *Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 508 N.Y.S.2d 923 (1985). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980), 427 N.Y.S.2d 595.

It is well-settled that a rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability with respect to the operator of the moving vehicle, unless the operator of the moving vehicle can come forward with an adequate, non-negligent explanation for the accident. *See Smith v. Seskin,* 49 A.D.3d 628, 854 N.Y.S.2d 420 (2d Dept. 2008); *Harris v. Ryder*, 292 A.D.2d 499, 739 N.Y.S.2d 195 (2d Dept. 2002)]. Further, when the driver of an automobile approaches another 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. *VTL* § 1129(a) ("The 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."); *Taing v. Drewery*, 100 A.D.3d 740, 954 N.Y.S.2d 175 (2d Dept. 2012). Drivers must maintain safe distances between their cars and cars in front of them and this rule imposes on them a duty to be aware

of traffic conditions, including vehicle stoppages. *Johnson v. Phillips*, 261 A.D.2d 269, 271, 690 N.Y.S.2d 545 (1st Dept. 1999).

Defendants Weinstein and Williams established their *prima facie* entitlement to summary judgment in their favor. Plaintiff and co-defendant have failed to demonstrate a triable issue of fact as to any negligence on the part of defendants Weinstein and Williams which caused or contributed to the accident. Nor is there any merit to co-defendant's argument that the motion should be denied on the ground that discovery has not yet taken place. The party asserting such argument must demonstrate that additional discovery might lead to relevant evidence or that the facts essential to oppose the motion are exclusively within the knowledge and control of the movant. *See Emil Norsic & Son, Inc. V. LP. Transp. Inc.*, 30 A.D.3d 368, 815 N.Y.S.2d 736 (2d Dept. 2006); *Rodriguez v. Farrell*, 115 A.D.3d 929, 983 N.Y.S.2d 68 (2d Dept. 2014). No such showing has been made here and moving defendants are entitled to summary judgment in their favor.

Defendant Lee Conklin's unopposed cross-motion for summary judgment must also be granted. Although there is a strong presumption of permissive use, Defendant has offered substantial evidence that consensual operation of the vehicle did not occur at the time of the accident. *See Adamson v. Evans*, 282 A.D.2d 527, 724 N.Y.S.2d 760 (2d Dept. 2001)(presumption of permissive use rebutted by substantial evidence through affidavit and documentary evidence that the motor vehicle in question was stolen at the time of the accident.); *Britt v. Pharmacologic PET Servs. Inc.*, 36 A.D.3d 1039, 828 N.Y.S.2d 630 (3d Dept. 2007). No party has demonstrated a triable issue of fact as to whether the unidentified operator of Conklin's vehicle operated it with his permission or consent at the time of the subject occurrence.

Accordingly, it is hereby

ORDERED that Defendants Larry Weinstein and Kevin Williams' Notice of Motion (Motion #1) for Summary Judgment and dismissal of the Complaint and cross-claims is granted

in its entirety; and it is further

ORDERED that Defendant Lee R. Conklin's Notice of Cross-Motion (Motion #2) for Summary Judgment and dismissal fo the Complaint is granted in its entirety; and it is further

ORDERED that the above captioned action is marked disposed.

The foregoing constitutes the Decision and Order of this Court on Motions # 1 and #2.

Dated: New City, New York
April 26, 2018

HON. SHERRI L. EISENPRESS
Acting Justice of the Supreme Court

To: (via -NYSCEF-)

Harmon, Linder & Rogowsky, Esqs.
For Plaintiff

Martyn Toher Martyn & Rossi
For Defendant Williams and Weinstein

Saretsky Katz & Dranoff, LLP
For Defendant Conklin