SUPREME COURT OF THE STATE OF NEW YORK
KINGS COUNTY

PRESENT: HON. PAUL WOOTEN **PART** 97
Justice

RODRIGO FERNANDEZ,

Plaintiff,

- against -

MARGARET M. MCLAUGHLIN, JOHN E. VINESKI and FRANCIS L. RUSSO,

Defendants.

INDEX NO. 523928/2017

SEQ. NO. 3

In accordance with CPLR 2219(a), the following papers were read on this motion by plaintiff for partial summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1
Answering Affidavits — Exhibits (Memo)	2
Replying Affidavits (Reply Memo)	
Transcript	

This is an action commenced by Rodrigo Fernandez (plaintiff) to recover damages for personal injuries allegedly sustained by plaintiff in a motor vehicle accident that occurred on March 30, 2017 on the Long Island Expressway (LIE) at or near its intersection with the Grand Central Parkway in Queens, New York. The motor vehicle accident was a three-car collision between the vehicles driven by plaintiff, defendant Francis L. Russo (Russo), and a vehicle owned by defendant Margaret M. McLaughlin (McLaughlin) and operated by John E. Vineski (Vineski). At the time of the accident, the parties were driving in the left lane and Vineski was driving the lead vehicle, plaintiff was driving the second vehicle behind Vineski, and Russo was

the third and last vehicle. It is alleged that while traveling on the LIE, plaintiff's vehicle was hit in the rear suddenly by Russo's vehicle, which then propelled him into the rear of Vineski's vehicle.

Before the Court is a motion by plaintiff[1], pursuant to CPLR 3212, for an Order granting him partial summary judgment on the issue of liability as against the defendants.[2] In support of his motion, plaintiff submits an attorney affirmation; a copy of the pleadings; a copy of the MV-104 police accident report; and plaintiff's affidavit. In opposition, Russo submits an attorney affirmation.

SUMMARY JUDGMENT STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]; *Winegrad v NY Univ. Medical Cntr.*, 64 NY2d 851, 853 [1985]). The party moving for summary judgment must make a prima facie case showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Alvarez*, 68 NY2d at 324; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Qlisanr, LLC v Hollis Park Manor Nursing Home, Inc.*, 51 AD3d 651, 652 [2d Dept 2008]; *Greenberg v Manlon Realty*, 43 AD2d 968, 969 [2d Dept 1974]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material

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[1] Plaintiff's prior motion, under motion sequence 1, for the identical relief as requested herein was previously marked off the Court's calendar and not considered on the merits.

[2] Plaintiff discontinued this action as against McLaughlin and Vineski on May 16, 2019. Accordingly, the only issue that remains for the Court to consider is whether plaintiff is entitled to summary judgment on liability as against Russo.

issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of NY*, 49 NY2d 557, 562 [1980]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]; *Boyd v Rome Realty Leasing Ltd. Partnership*, 21 AD3d 920, 921 [2d Dept 2005]; *Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY 2d 223, 231 [1978]; CPLR 3212[b]).

DISCUSSION

"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" (*Williams v Spencer-Hall*, 113 AD3d 759, 759-760 [2d Dept 2014]; *see Taing v Drewery*, 100 AD3d 740 [2d Dept 2012]; see also Vehicle and Traffic Law § 1129[a]). "In addition, Vehicle and Traffic Law § 1129 (a) requires a driver to maintain a safe distance between vehicles: '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 and the condition of the highway'" (*Filippazzo v Santiago*, 277 AD2d 419, 419-420 [2d Dept 2000]). "Drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident" (*Williams*, 113 AD3d at 760; *see Maragos v Sakurai*, 92 AD3d 922, 923 [2d Dept 2012]; *Balducci v Velasquez*, 92 AD3d 626, 628 [2d Dept 2012]).

"A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence against the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision" (*Cajas-Romero v Ward*, 106 AD3d 850, 851 [2d Dept 2013]; *see Xian Hong Pan v Buglione*, 101 AD3d 706 [2d Dept 2012]; *Volpe v Limoncelli*, 74 AD3d 795, 795 [2d Dept 2010]; *see also Gambino v City of New York*, 205 AD2d 583 [2d Dept 1994]).

Upon a review of the papers submitted herein, the Court finds that plaintiff met his prima facie establishing his entitlement to summary judgment on the issue of liability through the submission of his affidavit in which he averred that he was driving on the LIE in moderate traffic with the roads dry and clear, when was suddenly and without warning hit in the rear by Russo's vehicle (*see Lopez v Dobbins*, 164 AD3d 776 [2d Dept 2018]). Russo fails to raise a triable issue of fact in opposition or offer a non-negligent explanation for the rear-end collision (*see Tsyganash v Auto Mall Fleet Management, Inc.*, 163 AD3d 1033 [2d Dept 2018]; *Montalvo v Cedeno*, 170 AD3d 1166 [2d Dept 2019]; *Argiro v Norfolk Contract Carrier*, 275 AD2d 384 [2d Dept 2000] [finding defendants failed to raise a triable issue of fact in opposition to the plaintiff's showing that his vehicle was traveling in the same lane in front of Russo's vehicle before the impact]). Specifically, the Court notes that Russo failed to submit his affidavit, but rather only submit the affirmation of counsel, which is insufficient to raise a triable issue of fact (*see Pierre v Demoura*, 148 AD3d 736 [2d Dept 2017]; *Onewest Bank, FSB v Michel*, 143 AD3d 869 [2d Dept 2016]).

Furthermore, the Court finds unpersuasive Russo's argument that summary judgment should be denied as premature as he fails to demonstrate "that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant" (*Williams*, 113 AD3d at 760; *see* CPLR 3212[f]). "The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment

may be uncovered during the discovery process is insufficient to deny the motion" (*Lopez v WS Distribution, Inc.*, 34 AD3d 759, 760 [2d Dept 2006]; *see Westport Ins. Co. v Altertec Energy Conservation, LLC*, 82 AD3d 1207, 1212 [2d Dept 2011]; *Boorstein v 1261 48th St. Condominium*, 96 AD3d 703 [2d Dept 2012]). As such, plaintiff's motion for partial summary judgment on the issue of liability as to the only remaining defendant Russo is granted.

CONCLUSION

Based upon the foregoing, it is hereby

ORDERED that plaintiff's motion, pursuant to CPLR 3212, for an Order granting plaintiff partial summary judgment on the issue of liability is granted as to the only remaining defendant Francis L. Russo; and it is further,

ORDERED that counsel for the plaintiff shall serve a copy of this Order with Notice of Entry upon all parties.

This constitutes the Decision and Order of the Court.

KINGS COUNTY CLERK
FILED
2019 OCT 18 AM 8:10

Dated: 10/9/19

PAUL WOOTEN *J.S.C.*