SHORT FORM ORDER **INDEX NO.: 2912/2016**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

Motions Submit Date: 07/11/19
Mot Seq: 001 - MG
Mot Seq: 002 - MD

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JAMES RAM,

Plaintiff,

-against-

GOOD SAMARITAN HOSPITAL,
JOHN MANZI & JESSICA STRAUMAN,

Defendant.

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PLAINTIFF'S COUNSEL:
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DEFENDANTS' COUNSEL:
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On plaintiff's motion and improperly denominated cross-motion, for partial summary judgment on liability pursuant to CPLR 3212, the following papers were considered:

1. Notice of Motion, Affirmation in Support and other supporting papers;
2. Notice of Cross-Motion, Affirmation in Support and other supporting papers;
3. Affirmation in Opposition and other opposing papers;
4. Reply Affirmation in Further Support; and upon due deliberation and full consideration of all of the same; it is

ORDERED that motion sequence 001, plaintiff's motion seeking partial summary judgment as to liability pursuant to CPLR 3212 against defendants is **granted** as follows; and it is further

ORDERED that motion sequence 002, plaintiff's motion improperly denominated as a cross-motion, is hereby **denied** as moot given this Court's prior determination awarding plaintiff's summary judgment as against all defendants; and it is further

ORDERED that plaintiff's counsel is hereby directed to serve a copy of this decision and order with notice of entry on defense counsel electronically and via email; and it is further

ORDERED that, if applicable, within 30 days of the entry of this decision and order, that defendant's counsel is also hereby directed to give notice to the Suffolk County Clerk as required by CPLR 8019(c) with a copy of this decision and order and pay any fees should any be required.

BACKGROUND & POSTURE

Plaintiff commenced this personal injury negligence action against defendants arising out of a motor vehicle collision which occurred on May 16, 2013 on Route 27A at or near its intersection with Beach Drive in West Islip, Suffolk County, New York. By the pleadings filed, plaintiff seeks damages for personal injury premised on defendants negligence as a proximate cause of the underlying motor vehicle collision and attendant alleged serious injuries. Issue has joined and discovery has completed with this matter having been marked certified as ready for trial, with the next appearance before the Calendar Control Part. Presently, plaintiff moves for an award of partial summary judgment on liability against the defendants.

In support of the application, plaintiff submits a copy of the pleadings, a certified transcript of plaintiff's examination before trial1, and a certified copy of the police accident investigation report .

The Parties' Testimony

By his deposition testimony at an examination before trial held on August 6, 2018, plaintiff testified that on May 16, 2013 he operated a 2008 Honda Accord owned by his wife at approximately 3:00 p.m. traveling eastbound on Montauk Highway within the vicinity of Good Samaritan Hospital in West Islip, New York in clear, dry and sunny weather in medium traffic. While stopped as the first car in traffic at a red light controlling the intersection at or near Beach Drive for approximately 10 seconds, plaintiff observed an impact to the rear of his vehicle which he characterized as heavy. After the collision, plaintiff observed the vehicle which rear-ended him was a green van operated by a woman with a company car with Good Samaritan Hospital insignia immediately behind her.

Defendant Manzi testified at his deposition held on February 1, 2019 that on May 16, 2013 he was employed by defendant Good Samaritan Hospital as a security officer. He recalled being involved in a 3-vehicle collision on that date while operating a 4-door sedan owned by his employer on Montauk Highway in front of Good Samaritan Hospital at approximately 3:00 p.m. On that date and time, he recalled the weather as sunny with dry roads. The incident occurred near a driveway entrance for the hospital at an intersection controlled by a traffic light. Immediately prior to the collision, Manzi stated he was traveling from the hospital with his intended destination being St. Catherine's Hospital in Smithtown, New York on a work errand. He made a right-hand turn exiting the hospital parking lot onto Montauk Highway, and traveled eastbound to stopped traffic at the red light controlling the intersection of Montauk Highway and Beach Drive. Manzi recalled that in traffic directly ahead of him stopped at the red light was a green minivan. Eventually, he recalled the light turning to green and Manzi brought his vehicle into motion from a stop and collided with the minivan directly in front of his vehicle having a low impact with it in its rear end at approximately 10 miles per hour. After the collision, Manzi exited his vehicle and spoke with the operator of the minivan who he observed to be a woman. Police responded to the scene after the collision and Manzi spoke with an officer giving his statement. In sum and substance, he recalled stating that he observed the traffic light turn green and he brought his vehicle into motion and collided with the vehicle in front of him in traffic.

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1 Plaintiff also supplies and relies upon uncertified copies of defendants' deposition transcript testimony pursuant to CPLR 3116(a). Defendants have made no objection or opposition to their consideration by defendants, thus they were considered by the Court in reaching its determination.

By her deposition testimony taken on February 1, 2019, defendant Strauman testified that she was involved in a motor vehicle collision on the afternoon of May 16, 2013. She recalled the weather as sunny and clear with dry roads on that date and time. On the date of the incident, Strauman operated her green Town & Country minivan. The collision occurred on the eastbound lane of Montauk Highway in front of Good Samaritan Hospital. Immediately prior to the incident, Strauman testified that she was traveling from the hospital intended to go home. The collision occurred at the T-typed, traffic light-controlled intersection of Beach Drive and Montauk Highway. At the moment of impact, Strauman stated that her vehicle was stopped in traffic at a red light behind two other vehicles ahead of her. She recalled observing the first impact at the rear of her vehicle while she was stopped at the red light for approximately 10-15 seconds after the traffic light had already turned green for about 5 seconds. Strauman had not brought her vehicle into motion at that time because traffic ahead of her was still stopped. She characterized the first impact as "forceful." She observed a white SUV type vehicle stopped behind her prior to impact. As a result of the rear end collision, Strauman stated her vehicle was propelled forward impacting the vehicle directly ahead of her causing a second impact and collision with the front of her vehicle rear-ending the vehicle ahead of her. She characterized that impact as light contact. Prior to the collisions, Strauman stated her right foot was hovering over her vehicle's brake pedal, but after the first impact, she applied her brakes.

The Parties' Arguments

Relying on the above testimony and evidence, plaintiff seeks partial summary judgment on liability arguing that defendants' are liable as the proximate cause for the incident having initiated a rear-end collision with his vehicle stopped at a red light.

For its part, the hospital defendant opposes entry of summary judgment arguing that a triable question of fact exists precluding judgment as a matter of law and necessitating a trial on liability based on its perception of a discrepancy between codefendant Strauman's testimony that prior to the first impact her foot "hovered" over the brake pedal, but the brakes were not yet applied while she was stopped in traffic after the traffic light had turned green. Defendant contends that open and unresolved questions exists of whether Strauman violated sections of the VTL and thus independently caused or contributed the incident forming the basis of plaintiff's action. Thus, distilled to its essence, the hospital defendant argues triable questions of fact concerning comparative fault preclude summary judgment at this juncture. The Court has received no opposition from the other defendants. The parties' respective arguments are addressed below.

STANDARDS OF REVIEW

The motion court's role on review of a motion for summary judgment is issue finding, not issue determination (***Trio Asbestos Removal Corp. v Gabriel & Sciacca Certified Pub. Accountants, LLP***, 164 AD3d 864, 865, 82 NYS3d 127, 129 [2d Dept 2018]). The court should refrain from making credibility determinations (***Gniewek v Consol. Edison Co.***, 271 AD2d 643, 643, 707 NYS2d 871 [2d Dept 2000]).

It is well settled that summary judgment is a drastic remedy which should not be granted when there is doubt as to the existence of a triable issue of fact. Where, however, one seeking summary judgment tenders evidentiary proof in admissible form establishing its defense sufficiently to warrant the court as a matter of law in directing judgment in its favor, the burden

falls upon the opposing party to show, also by evidentiary proof in admissible form, that there is a material issue of fact requiring a trial of the matter (*see* ***Zuckerman v. City of New York,*** 49 NY2d 557, 562, 427 NYS2d 595 [1980]). The evidence presented on a motion for summary judgment must be scrutinized in the light most favorable to the party opposing the motion (*see* ***Goldstein v. Monroe County,*** 77 AD2d 232, 236, 432 NYS2d 966 [1980]).

The proponent on a motion of summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985];]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

If the moving party fails in meeting this burden, the motion must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see* ***Zuckerman***, *supra*). The function of the court in determining a motion for summary judgment is issue finding, not issue determination (***Pantote Big Alpha Foods, Inc. v Schefman,*** 121 AD2d 295, 503 NYS2d 58 [1st Dept. 1986]).

The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289AD2d 557, 735 NYS2d 197 [2d Dept. 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept. 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept. 1987]). The law is well-established that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see* ***Andre v Pomeroy,*** 35 NY2d 361, 362 NYS2d 131 [1974]; ***Benincasa v Garrubo,*** 141 AD2d 636, 529 NYS2d 797 [2d Dept. 1988]).

However, whereas here, the non-movant fails to oppose a motion for summary judgment, there is, in effect, a concession that no question of fact exists, and the facts as alleged in the moving papers may be deemed admitted (***Kuehne & Nagel v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]).

DISCUSSION

The plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, *prima facie*, that the defendants breached a duty owed to the plaintiff and that the defendants' negligence was a proximate cause of the alleged injuries (***Montalvo v Cedeno***, 170 AD3d 1166 [2d Dept 2019]; *accord* ***Buchanan v Keller***, 169 AD3d 989, 991, 95 NYS3d 252, 254 [2d Dept 2019][holding that plaintiff-movant seeking summary judgment on liability is no longer required to show freedom from comparative fault in order to establish prima facie entitlement to judgment as a matter of law]. Stated another way, "[t]o be entitled to partial summary judgment a plaintiff does not bear the ... burden of establishing ... the absence of his or her own comparative fault" (***Balladares v City of New York***, 2018-11929, 2019 WL 6334162, at *2 [2d Dept Nov. 27, 2019]; *quoting* ***Rodriguez v. City of New York***,31 NY3d 312 [2018]).

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 non-negligent explanation for the collision" (***Mulhern v Gregory***, 161 AD3d 881, 883, 75 NYS3d 592, 594 [2d Dept 2018]; ***Comas-Bourne***

v City of New York, 146 AD3d 855, 856, 45 NYS3d 182, 183 [2d Dept 2017]; ***Whelan v Sutherland***, 128 AD3d 1055, 1056, 9 NYS3d 639, 640 [2d Dept 2015]; ***Tutrani v. County of Suffolk***, 10 NY3d 906, 908; ***Gutierrez v. Trillium USA, LLC***, 111 AD3d 669, 670–671, 974 NYS2d 563; ***Pollard v. Independent Beauty & Barber Supply Co.***, 94 AD3d 845, 846, 942 NYS2d 360; ***Perez v Roberts***, 91 AD3d 620, 621, 936 NYS2d 259, 260 [2d Dept 2012]; ***Le Grand v Silberstein***, 123 AD3d 773, 774, 999 NYS2d 96, 97 [2d Dept 2014]).

The claim that the lead vehicle made a sudden stop, standing alone, is insufficient to rebut the presumption of negligence on the part of the following vehicle (*see* ***Zdenek v Safety Consultants, Inc.***, 63 AD3d 918, 918, 883 NYS2d 57, 58 [2d Dept 2009]; ***Kastritsios v. Marcello***, 84 AD3d 1174, 923 NYS2d 863; ***Franco v. Breceus***, 70 AD3d 767, 895 NYS2d 152; ***Mallen v. Su***, 67 AD3d 974, 890 NYS2d 79; ***Rainford v. Han***, 18 AD3d 638, 795 NYS2d 645; ***Russ v. Investech Secs.***, 6 AD3d 602, 775 NYS2d 867; ***Xian Hong Pan v Buglione***, 101 AD3d 706, 707, 955 NYS2d 375, 377 [2d Dept 2012]). However, "[i]f the operator cannot come forward with any evidence to rebut the inference of negligence, the plaintiff may properly be awarded judgment as a matter of law" (***Barile v. Lazzarini***, 222 AD2d 635, 636, 635 NYS2d 694; ***D'Agostino v YRC, Inc.***, 120 AD3d 1291, 1292, 992 NYS2d 358, 359 [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 vehicle, and to exercise reasonable care to avoid colliding with the other vehicle" (***Comas-Bourne v City of New York***, 146 AD3d 855, 856, 45 NYS3d 182, 183 [2d Dept 2017]). Drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident (***Williams v Spencer-Hall***, 113 AD3d 759, 760, 979 NYS2d 157, 159 [2d Dept 2014]). a rear-end collision with a stopped vehicle creates a prima facie case of liability with respect to the operator of the rearmost vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision (***Sayyed v Murray***, 109 AD3d 464, 464, 970 NYS2d 279, 281 [2d Dept 2013]).

A possible non-negligent explanation for a rear-end collision could be the sudden stop of the lead vehicle," however, it is equally true that "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" (***Tumminello v City of New York***, 148 AD3d 1084, 1085, 49 NYS3d 739, 741 [2d Dept 2017]; ***Shamah v. Richmond County Ambulance Serv.***, 279 AD2d 564, 565, 719 N.Y.S.2d 287; *see* ***Gutierrez v Trillium USA, LLC***, 111 AD3d 669, 671, 974 NYS2d 563, 566 [2d Dept 2013]; ***Robayo v. Aghaabdul,*** 109 AD3d 892, 893, 971 NYS 2d 317). Even assuming that a lead vehicle stopped short or suddenly, following vehicles should not escape liability for an assumed failure to maintain a proper or safe following distance under the presented circumstances, where the record presents a scenario with triable questions of fact ripe for jury determination, rather than summary determination on the law (*see e.g.* ***Romero v Al Haag & Son Plumbing & Heating, Inc.***, 113 AD3d 746, 747, 978 NYS2d 895, 896 [2d Dept 2014][even assuming that the defendant driver failed to maintain a reasonably safe distance and rate of speed while traveling behind the plaintiff's vehicle under Vehicle and Traffic Law § 1129[a], defendant's deposition testimony relied upon by plaintiff, itself raised a triable issue of fact on whether the plaintiff contributed to the accident by driving in an erratic manner]; *accord* ***Fernandez v Babylon Mun. Solid Waste***, 117 AD3d 678, 679, 985 NYS2d 289, 290 [2d Dept 2014][under circumstances where plaintiff came to an abrupt stop for no apparent reason resulting in a collision, a triable issue of fact exists]; ***Sokolowska v Song***, 123 AD3d 1004, 1004, 999 NYS2d 847, 848 [2d Dept 2014]).

Thus, the burden is placed on the driver of the offending vehicle, as he or she is in the best position to explain whether the collision was due to a mechanical failure, a sudden stop of the vehicle ahead, unavoidable skidding on wet pavement, or some other reasonable cause (*see* ***Abbott v Picture Cars E., Inc.***, 78 AD3d 869, 911 NYS2d 449 [2d Dept 2010]; ***DeLouise v S.K.I. Wholesale Beer Corp.***, 75 AD3d 489, 904 NYS2d 761 [2d Dept 2010]; ***Moran v Singh***, 10 AD3d 707, 782 NYS2d 284 [2d Dept 2004]).

Here, having reviewed his moving papers, the Court finds that plaintiff has met his *prima facie* burden for entitlement to summary judgment on liability based on the submission of the deposition testimony of all the participants involved in the subject incident which taken together demonstrate a *prima facie* case of negligence against the defendants. Thus, the burden has shifted to defendants to come forward with a non-negligent explanation for the incident.

Considering the hospital defendant's opposition the plaintiff's motion, the Court notes that it consists solely of her counsel's affirmation in opposition. The law in this regard is settled. Defendant's reliance on its attorney's affirmation, without further submission of sworn testimony by any competent witness with direct personal or firsthand knowledge of the facts and circumstances underlying the subject accident, is insufficient to establish triable issues of fact warranting denial of summary judgment. The Second Department has repeatedly cautioned counsel on this point (***Huerta v Longo***, 63 AD3d 684, 685, 881 NYS2d 132, 133 [2d Dept 2009]; ***Collins v Laro Serv. Sys. of New York, Inc.***, 36 AD3d 746, 746–47, 829 NYS2d 168, 169 [2d Dept 2007][attorney's affirmation, together with inadmissible hearsay documents insufficient to warrant denial of the motion]; ***Cordova v Vinueza***, 20 AD3d 445, 446, 798 NYS2d 519, 521 [2d Dept 2005][attorney's affirmation offering speculation unsupported by any evidence insufficient to raise a triable issue of fact]).

Thus, defendant fails to carry its shifted burden of rebutting plaintiff's *prima facie* case of negligence against her by competent or admissible proof raising a triable question of fact meriting a liability trial and precluding judgment as a matter of law on liability for the plaintiff.

Accordingly, since the hospital defendant has failed to come forward with competent and admissible proof demonstrating triable issues of fact or non-negligent explanations for the collision here, necessitating a trial on its liability, this Court **grants** plaintiffs partial summary judgment on liability against defendant Good Samaritan Hospital under CPLR 3212.

The foregoing constitutes the decision and order of this Court.

Dated: December 9, 2019
Riverhead, New York

WILLIAM G. FORD, J.S.C.

____ FINAL DISPOSITION **_X_ NON-FINAL DISPOSITION**