To commence the 30 day statutory time period 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 PUTNAM

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CHRISTOPHER CORRADO,

Plaintiff,

-against -

LOUISE A. FABI and DAVID E. FABI,

Defendants.

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DECISION & ORDER

Index No. 500264/2019
Sequence No. 1
Motion Date: 5/7/19

GROSSMAN, J.S.C.

The following papers, numbered 1 to 13, were considered in connection with Plaintiff's Notice of Motion, dated March 27, 2019, seeking partial summary judgment on the issue of liability.

PAPERS[1]	**NUMBERED**
Plaintiff's Notice of Motion/Affirmation/Exhs. A-F	1-8
Affirmation in Opposition/Exh. A	9-10
Reply Affirmation/Exhs. A-B	11-13

This is an action to recover damages for personal injuries, stemming from a 3-car chain-type of rear-end collision on the Cross County Parkway near the intersection of Columbus

[1]Counsel shall familiarize themselves with this Court's Part Rules, which can be found on the OCA website, as parts of this motion and the responsive papers fail to comply with those Rules, to the extent that Plaintiff shall designate exhibits by number, while Defendant shall designate exhibits by letter. The parties are reminded that exhibit lettering or numbering shall not begin anew for subsequent papers submitted by the same party. Any future motions that do not comply with this Court's Part Rules may be rejected or dismissed.

Avenue, Westchester County on April 28, 2016. At the time of the accident, Defendant David E. Fabi, while driving a 2006 Dodge vehicle owned by Defendant Louise A. Fabi, rear-ended Plaintiff Christopher Corrado's stopped 2003 Ford. The forward momentum from that collision caused Plaintiff's car to rear-end the stopped vehicle in front of him, owned and operated by William T. Woods. As a result of the accident, Plaintiff was injured and was unable to work for approximately five (5) months.

Plaintiff commenced this action on February 20, 2019. Defendants interposed their collective Verified Answer on March 22, 2019.

On March 27, 2019, Plaintiff filed this motion for summary judgment on the issue of liability. In support of his motion, Plaintiff submitted, inter alia: (1) Plaintiff's affidavit; (2) the police accident reports; and (3) Mr. Fabi's driving abstract (Notice of Motion, Exhs. A-F).

In opposition, Defendants argue that the motion is premature because there has been no discovery, and that the parties' conflicting affidavits should preclude summary judgment at this time.

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of facts are raised and cannot be resolved on conflicting affidavits. See Millerton Agway Coop. v. Briarcliff Farms, 17 N.Y.2d 57, 61 (1966); Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 (1957). Initially, "the proponent... 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 issue of fact." However, once a movant makes a sufficient showing, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material

issues of fact which require a trial of the action." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986). Where the moving papers are insufficient, the court need not consider the sufficiency of the opposing papers. Id.; see also Fabbricatore v. Lindenhurst Union Free School Dist., 259 A.D.2d 659 (2d Dept. 1999).

"'The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist.'" Bank of New York Mellon v. Gordon, 171 A.D.3d 197, 201 (2d Dept. 2019), quoting Kolivas v. Kirchoff, 14 A.D.3d 493 (2d Dept. 2005). "Accordingly, "'[t]he court may not weigh the credibility of the affiants on a motion for summary judgment unless it clearly appears that the issues are not genuine, but feigned.'" Bank of New York Mellon v. Gordon, supra, quoting Glick & Dolleck v. Tri-Pac Export Corp., 22 N.Y.2d 439, 441 (1968). "'[W]here credibility determinations are required, summary judgment must be denied.'" Bank of New York Mellon v. Gordon, supra at 201-02, quoting People ex rel. Cuomo v. Greenberg, 95 A.D.3d 474, 483 (1st Dept. 2012), aff'd 21 N.Y.3d 439 (2013).

"'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.'" Pomerantsev v. Kodinsky, 156 A.D.3d 656 (2d Dept. 2017), quoting Vehicle and Traffic Law §1129(a). "Hence, '[a] rear-end collision with a stopped vehicle creates a prima facie case of negligence against the operator of the moving vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision.'" Pomerantsev, supra, quoting Hauser v. Adamov, 74 A.D.3d 1024, 1025 (2d Dept. 2010). "'Evidence that a vehicle was struck in the rear and propelled into the

vehicle in front of it may provide a sufficient non-negligent explanation.'" Pomerantsev, supra, quoting Ortiz v. Haidar, 68 A.D.3d 953, 954 (2d Dept. 2009).

Here, Plaintiff states that at the time of the accident, he was at a complete stop due to traffic conditions on the Cross County Parkway, and had been stopped for several minutes (Corrado Affidavit at ¶¶3, 5). Plaintiff states that as a result of the impact, his car was forced forward into the rear of Woods' vehicle (Corrado Affidavit at ¶6). Plaintiff notes that his car was "completely within the right lane of travel with no portion of my vehicle being in any other lane," and at the time of impact, "my vehicle's tail lights and brake lights were properly functioning" (Corrado Affidavit at ¶¶7-8). Plaintiff also notes that Defendant David Fabi was issued multiple summons at the scene and was arrested for Driving While Intoxicated (Corrado Affidavit at ¶9), and that his license was subsequently revoked due to this accident (Notice of Motion, Exh. F; Reply Affirmation, Exh. A).

In response, Defendant David Fabi stated that at the time of the accident, he had just changed lanes from the center lane to the right-hand lane, and as he switched lanes, he saw a truck in front of him in the right lane about 25-30 feet away (Fabi Affidavit at ¶3). Mr. Fabi states that he was struck from behind by an unknown vehicle/driver, who did not remain on the scene, the impact of which forced him into the rear of a red pick-up truck (Fabi Affidavit at ¶¶4-5). After impact, he spoke with the occupants of that red truck – an African-American couple – and that the truck was undamaged (Fabi Affidavit at ¶5). Mr. Fabi does not believe that he struck Plaintiff's vehicle (Fabi Affidavit at ¶6). However, Mr. Fabi stated to the police on the scene that he struck Plaintiff's vehicle, which came to a sudden stop, as he was unable to stop in time (Notice of Motion, Exh. E). Mr. Fabi's affidavit is silent as to this inconsistency.

In light of this evidence, the Court finds that Mr. Fabi's affidavit is insufficient to raise a triable issue of fact. Based on the fact that he initially admitted to the police at the scene to striking Plaintiff's vehicle (see Scott v. Kass, 48 A.D.3d 785 [2d Dept. 2008][statements made to police officer who prepared report was acting in scope of his duty in recording defendant's statement and statement admissible as admission of party]), the Court views his affidavit, in which he now claims he struck a red pick-up truck and not Plaintiff's vehicle because he was rear-ended by another vehicle, as one that was generated to raise a disingenuous issues of fact. See Prunty v. Keltie's Bum Steer, 163 A.D.2d 595, 596 (2d Dept. 1990) ("If the issue claimed to exist is not genuine, but is feigned and there is nothing to be tried, then summary judgment should be granted").

And to the extent Defendants argue that this motion should be denied as premature, it is well-settled that "[t]o defeat a motion for summary judgment based on outstanding discovery, it is incumbent upon the opposing party to provide an evidentiary basis to suggest that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were in the exclusive knowledge and control of the moving party." Rodriguez v. Gutierrez, 138 A.D.3d 964, 968 (2d Dept. 2016). "The mere 'hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is an insufficient basis for denying the motion.'" Rodriguez v. Gutierrez, supra, quoting Suero-Sosa v. Cardona, 112 A.D.3d 706, 708 (2d Dept. 2013)(internal quotation marks omitted). Here, Defendants failed to demonstrate how further discovery may reveal or lead to additional relevant evidence.

Accordingly, it is hereby

ORDERED that Plaintiff's motion for partial summary judgment on the issue of liability is granted; and it is further

ORDERED that the parties and counsel are to appear before the undersigned on Tuesday, July 2, 2019 at 9:30 a.m. for a preliminary conference on the issue of damages.

The foregoing constitutes the Decision and Order of the Court.

Dated: Carmel, New York
June 19, 2019

HON. VICTOR G. GROSSMAN, J.S.C.

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