To commence the 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 WESTCHESTER

----------x

STACEY SHIRLEY,

Plaintiff,

-against-

FRANCO BATTISTA and CRISTINA BATTISTA

Defendants.

----------x

DECISION AND ORDER

Index No. 57892/2018
(Action 1)

DEAN SMITH,

Plaintiff,

-against-

FRANCO BATTISTA and CRISTINA BATTISTA

Defendants.

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Index No. 63227/2018
(Action 2)

COLANGELO, J.

The following papers were read on Plaintiff's motions to join the above matters for discovery and trial, and for partial Summary Judgment on the issue of liability as against Defendants pursuant to CPLR §3212:

Notice of Motion-Affirmation- Exhibits 1-7	NYSCEF 19-27
Affirmation in Opposition-Exhibit A	NYSCEF 28
Reply	NYSCEF 32

Upon the foregoing papers it is ORDERED that the motion is disposed of as follows:

Joinder of Cases for Discovery and Trial

Plaintiff Stacey Shirley ("Plaintiff") moves this court for an Order pursuant to CPLR §602(a), joining the above-captioned actions for the purposes of discovery and trial. Defendants Franco Battista and Cristina Battista (Defendants) do not oppose Plaintiff's request, and accordingly, actions one and two shall be joined for purposes of discovery and trial.

Defendants do not oppose Plaintiff's motion for summary judgment, solely to the extent she seeks an Order that, as a passenger in the vehicle operated by Dean Smith, she bears no liability for the accident. (Opp. ¶3).

In support of Plaintiff's motion for summary judgment, Plaintiff has submitted, *inter alia*, the Affirmation of Moshe Borukh, Esq., her own Affidavit (Pl. Exh. 6), the Police Accident Report (Pl. Exh. 1) and the Affidavit of Dean Smith (Pl. Exh. 7). According to Plaintiff, on October 29, 2017 at approximately 9:30 PM, she was a passenger in a vehicle bearing license plate HBT6787 being operated by Dean Smith on the southbound Hutchinson River Parkway. A vehicle owned by Defendant Franco Battista and operated by Defendant Cristina Battista rear-ended the vehicle she was riding in as the vehicle she was riding in slowed down for oncoming traffic. (Pl. Exh. 6 ¶¶3-4). The Police Accident Report contains a statement of the operator of vehicle 2, Defendant Cristina Battista, that "vehicle one came to a complete stop in the left lane and she was unable to avoid striking the vehicle."

Defendants oppose the instant motion and argue that the question of Dean Smith's liability is very much at issue, as well as the applicability of the emergency doctrine. A photograph of the road conditions taken by Defendant Cristina Battista after the accident occurred is submitted in support of Defendants' opposition and annexed to her Affidavit (Def.

Exh. A). Defendant Cristina Battista states that due to heavy winds and rain, there was widespread flooding, and traffic condition were very slow. ((Pl. Exh. A ¶6).

The photograph depicts a very dark and severely flooded roadway, as well as a maintenance vehicle with an amber light that is blocking the right travel lane, and a worker who is leaning over the guardrail, using a broom to sweep water into the drain. (*Id.*¶7).

According to Defendant Cristina Battista, left lane travel was light and moving steadily. She noticed Plaintiff's vehicle ahead of her in the left lane, still moving. Her headlights and windshield wipers were on. Shortly after first noticing Plaintiff's vehicle, another vehicle that was passing in the opposite direction splashed a large volume of water over the median and directly onto her windshield and prevented her from seeing anything. Though she braked in response to the splash, she was unable to see that Plaintiff's vehicle had come to a complete stop and the accident occurred. (*Id.* ¶8).

CPLR 3212(b) states in pertinent part that a motion for summary judgement "shall be granted" if, upon all of papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgement in favor of any party"

In *Andre v Pomeroy*, 35 N.Y.2d 361, 364 (1974), the Court of Appeals stated: "[s]ummary judgement is designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law…when there is no genuine issue to be resolved at trial, the case should be summarily decided, and an unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated."

The proponent of a summary judgement motion must make a prima facie showing of entitlement to judgement as a matter of law by tendering sufficient evidence to demonstrate the absence of material issues of fact. *Weingrad v. New York Medical Center*, 64 N.Y.2d 851, 853 (1986). Once such showing has been made, the burden shifts to the party opposing the motion to produce admissible evidentiary proof sufficient to establish the existence of material issues of fact that require a trial of the action. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986). No opposition has been submitted by Defendant to the motion.

It is well-established that "[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 non-negligent explanation for the collision." *Williams v. Spencer-Hall* , 113 A.D.3d 759 (2d Dept. 2014); *Volpe v. Limoncelli*, 74 A.D.3d 795 (2d Dept. 2010); *Klopchin v. Masri*, 45 A.D.3d 737 (2d Dept. 2007); *Chepel v. Meyers*, 306 A.D.2d 235 (2d Dept. 2003); *Tutrani v. County of Suffolk*, 10 N.Y.3d 906, 908 (2008); *Clarke v. Phillips*, 112 A.D.3d 872 (2d Dept. 2013). Where, in opposition to a *prima facie* case of negligence based upon a rear-end collision, the rear most driver failed to raise a triable issue of fact as to whether there was a non-negligent explanation for the happening of the accident or whether the emergency doctrine applied to the circumstances of the accident, summary judgment was properly granted. *See McLaughlin v. Lunn*, 137 A.D.3d 757, 758 (2d Dept. 2016). However, as the Supreme Court, Appellate Division Second Department has stated, "[T]he emergency doctrine acknowledges that when an actor is confronted with a sudden and unanticipated situation which leaves little or no time for deliberation and requires him to make a speedy decision without weighing alternative courses of conduct, the actor may not be

liable for negligence if the actions taken are reasonable and prudent when evaluated in the context of the emergency conditions." *Wu Kai Ming v. Grossman*, 133 A.D.3d 742 (2d Dept. 2015); (see *Rivera v. New York City Tr. Auth.*, 77 N.Y.2d 322, 327 (1991).

In the present case, Defendants have raised a triable issue of fact as to whether the emergency doctrine applied in this case so as to relieve Defendants of liability for the happening of the accident.

Accordingly, Plaintiff's motion is granted to the extent that, as a passenger in the vehicle operated by Dean Smith, she bears no liability for the accident . In all other respects, the motion is denied; and it is hereby

ORDERED that the actions are joined for the purpose of discovery and trial; and it is further

ORDERED that Plaintiff's motion is granted to the extent that, as a passenger in the vehicle operated by Dean Smith, she bears no liability for the accident; and it is further

ORDERED that the parties and counsel are directed to appear in the Settlement Conference Part, courtroom 1600 on July 30, 2019.

The foregoing constitutes the Decision and Order of the Court.

Dated: June 19, 2019
White Plains, New York

HONORABLE JOHN P. COLANGELO, J.S.C.