E-FILE

SHORT FORM ORDER **INDEX NO.: 15-606323**

SUPREME COURT - STATE OF NEW YORK
PART 6- SUFFOLK COUNTY

PRESENT:
Hon. Sanford Neil Berland, A.J.S.C.

JUNE KRINSKY,

Plaintiff,

-against-

SHERMAN SMITH, MARLENE PAGAN, REYES FREYTES, and RIDES UNLIMITED OF NEW YORK, INC.,

Defendants.

ORIG. RETURN DATE: July 9, 2018
FINAL RETURN DATE: February 5, 2019
MOT. SEQ. #: 004 **MG**

ORIG. RETURN DATE: July 9, 2018
FINAL RETURN DATE: February 5, 2019
MOT. SEQ. #: 005 **MG**

PLAINTIFF'S ATTORNEY:
EDELMAN KRASIN & JAYE, PLLC
7001 BRUSH HOLLOW RD, STE 100
WESTBURY, NY 11590

DEFENDANTS' ATTORNEYS:
SMITH MAZURE DIRECTOR WILKINS
111 JOHN STREET, 20TH FLR
NEW YORK, NY 10038

KAREN L. LAWRENCE, ESQ.
878 VETS MEM HWY, STE 100
HAUPPAUGE, NY 11788

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by defendants Sherman Smith and Marlene Pagan, filed May 7, 2018, and supporting papers; (2) Notice of Cross-Motion by plaintiff, filed May 23, 2018, and supporting papers; (3) Affirmation in Opposition by defendants Reyes Freytes and Rides Unlimited of New York, Inc., filed August 21, 2018, and supporting papers; and (4) Affirmation in Reply by plaintiff, filed August 27, 2018; it is

ORDERED that the motion for summary judgment pursuant to CPLR 3212 by defendants Sherman Smith and Marlene Pagan seeking an order dismissing the plaintiff's complaint as asserted against them and dismissing the cross-claims of defendants Rides Unlimited of New York, Inc. and Reyes Freytes is granted; and it is further

ORDERED that plaintiff's cross-motion for summary judgment pursuant to CPLR § 3212 on the issue of liability against defendants Rides Unlimited of New York, Inc. and Reyes Freytes is granted; and it is further

ORDERED that this matter shall proceed to trial on the issue of damages.

The instant action involves a motor vehicle accident, occurring on December 22, 2014, in which the motor vehicle owned by defendant Rides Unlimited of New York, Inc. ("Rides Unlimited") and operated by defendant Reyes Freytes struck the rear of a vehicle owned by defendant Marlene Pagan and operated by defendant Sherman Smith which, in turn, struck plaintiff's vehicle on Pulaski Road at or near its intersection with Bread and Cheese Road in the town of Smithtown. Both plaintiff and Smith contend that their vehicles were stopped at a red traffic light when the vehicle operated by Freytes struck Smiths' vehicle.

Defendants Smith and Pagan now move for summary judgment in their favor (motion sequence 004) pursuant to CPLR 3212, dismissing both the plaintiff's complaint as asserted against them and the cross-claims of defendants Rides Unlimited and Freytes on the grounds that no triable issue of fact exists and that they are entitled to judgment in their favor as a matter of law. In support their motion, Smith and Pagan proffer copies of the pleadings and copies of the transcripts of the depositions of Smith, Freytes and plaintiff. Plaintiff does not oppose the Smith and Pagan motion. Plaintiff cross-moves for an order granting summary judgment on the issue of liability (motion sequence 005) pursuant to CPLR 3212 against Freytes and Rides Unlimited on the grounds that they are responsible for initiating a chain-reaction three-car collision.

The defendants Freytes and Rides Unlimited, for their part, oppose both motions, on the grounds that the roadway was hazardous due to precipitation, that defendants Smith and Pagan stopped suddenly, that Freytes took reasonable steps in an attempt to avoid the accident, and that an issue of fact exists as to the accident's proximate cause.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Before summary judgment may be granted, it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; *see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn from them are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

It is well settled that when a driver of a motor vehicle approaches another automobile from the rear, he or she is bound to maintain a safe rate of speed and has the duty to keep control

over his or her vehicle and to exercise reasonable care to avoid colliding with the other vehicle (***Carhuayano v J & Rappaport Hacking***, 28 AD3d 413, 813 NYS2d 162 [2d Dept 2006]; ***Gaeta v Carter***, 6 AD3d 576, 775 NYS.2d 86 [2d Dept2004]; ***Chepel v Meyers***, 306 AD2d 235, 762 NYS2d 95 [2d Dept 2003]; ***Power v Hupart***, 260 AD2d 458, 688 NYS2d 194 [2d Dept 1999]; *see also* Vehicle and Traffic Law § 1129 [a]).

Moreover, a rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability regarding the operator of the moving vehicle and imposes a duty of explanation on the operator of the moving vehicle to excuse the collision by providing a non-negligent explanation, such as a mechanical failure, a sudden stop of the vehicle ahead or unavoidable skidding on a wet pavement or some other reasonable excuse (*see* ***Davidoff v Mullokandov***, 74 AD3d 862, 903 NYS2d 107 [2d Dept 2010]; ***Carhuayano v J & Rappaport Hacking***, *supra*; ***Rainford v Sung S. Han***, 18 AD3d 638; 795 NYS2d 645 [2d Dept 2005]; ***Thoman v Rivera***, 16 AD3d 667, 792 NYS2d 558 [2d Dept 2005]; ***Gaeta v Carter***, *supra*).

Here, defendants Smith and Pagan have established a prima facie case of entitlement to judgment as a matter of law by demonstrating, through their affidavits and deposition testimony, that they were stopped at a red light when the Freytes vehicle caused a chain of rear end collisions. Defendants Smith and Pagan corroborated their affidavits by submitting a police accident report they have submitted which states that "vehicles 1 & 2 stopped for traffic light . . . when veh[icle] 3 struck veh[icle] 2 from behind. Veh[icle] 2 strick veh[icle] 1" (*see* ***Gleason v Villegas***, 81 AD3d 889 [2d Dept 2011]; *see also* ***Santana v Danco***, 115 AD3d 560 [1st Dept 2014]).

Plaintiff's submissions establish a prima facie case of entitlement to judgment as a matter of law for substantially the same reasons. The burden, therefore, shifts to defendants Freytes and Rides Unlimited to raise a triable issue of fact (*see* ***Zuckerman v City of New York***., *supra.*).

In opposition, defendants Freytes and Rides Unlimited have failed to proffer a non-negligent explanation for the rear end collision. Freytes testified that he first saw the Smith vehicle less than a second before the accident - when the Smith vehicle's brake lights came on - and that he was "one car length or more" behind the Smith vehicle at the time. He claims that the Smith vehicle was moving, but both plaintiff and Smith testified that they were stopped at a red light, which is corroborated by the police report. Significantly, at his deposition, Freytes could not recall whether he had seen the red light. Clearly, Freytes was not paying proper attention and was following too closely behind the Smith vehicle. Accordingly, Freytes and Rides Unlimited are liable irrespective of whether the Smith vehicle was "stopped" or "stopping." Under these circumstances, defendants Freytes and Rides Unlimited have failed to raise any triable issue of fact with respect to liability.

Accordingly, the motion by defendants Smith and Pagan for summary judgment dismissing the plaintiff's complaint as asserted against them and dismissing the cross-claims of defendants Rides Unlimited of New York, Inc. and Reyes Freytes is granted and plaintiff's cross-motion for summary judgment on the issue of liability against defendants Rides Unlimited of New York, Inc. and Reyes Freytes is granted.

The foregoing constitutes the decision and Order of the court.

Dated: 2/8/2019
Riverhead, New York

HON. SANFORD NEIL BERLAND, A.J.S.C.