SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 21

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IGOR SHTULBERG,

Plaintiff,

Index No. 160089/2016

- against -

Mot. Seq. 1

METROPOLITAN TRANSPORTATION AUTHORITY, FRAN ANNICARO, JOHNNY MURILLO-CHAVEZ and CORINE MCLEAN,

DECISION AND ORDER

Defendants.

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered	NYSCEF #
Defendant McLeans's Motion/ Affirmations/Memo	1	24-34
Plaintiff's Cross-Motion / Affirmation	2	49-53
Defendant MTA & Annicaro Opposition	3	54-55
Defendant McLeans's Reply	4	58-59
Defendant Murillo-Chavez's Opposition	5	60-61
Plaintiff's Opposition	6	62-64
Defendant McLeans's Reply	7	68

LISA A. SOKOLOFF, J.:

This personal injury action arises out of a four-car motor vehicle accident that occurred on May 6, 2016 on the Whitestone Bridge in Queens County. In motion sequence no. 1, defendant Corine McLean (McLean) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and the cross claims asserted against her on the ground that she bears no liability for causing the subject accident. Plaintiff Igor Shtulberg cross-moves, pursuant to CPLR 3212, for partial summary judgment on: (1) the issue of the liability of defendants Metropolitan Transportation Authority (MTA), Frank Annicaro (Annicaro) (together, Annicaro) and Johnny Murillo-Chavez (Murillo-Chavez), for causing the accident, with the apportionment of fault between them to be determined at the time of trial, and (2) the issue of whether plaintiff was at fault for causing the subject motor vehicle accident.

Background

At his deposition, plaintiff testified that his was the first of the four cars involved in the accident. Although there was a medium-hard rain falling at the time of the accident, it was light out (NY St Cts Elec Filing [NYSCEF] Doc No. 33, affirmation of Patricia McDonagh [McDonagh], exhibit G at 12). He described the traffic conditions that day as "medium" (*id.* at 19). Plaintiff was traveling in the middle of the three southbound lanes on the Whitestone Bridge when he saw traffic ahead of him come to a stop, so he gradually came to a complete stop, as well (*id.* at 19, 21, 79 and 83). Plaintiff testified that while he was at a complete stop, he felt two rear end impacts, describing the first impact as "medium" and the second as "hard" (*id.* at 22-23). He expressed that before the initial impact, the other vehicle "was approaching fast because when I looked in the mirror I saw a dark car approaching" (*id.* at 35). Plaintiff also testified that he heard "sounds … sounds of damages" prior to the second rear end impact to his vehicle (*id.* at 85).

Murillo-Chavez, the owner and operator of the second vehicle in the chain, testified that he was traveling in the middle southbound lane of the Whitestone Bridge when the accident occurred (NYSCEF Doc No. 51, affirmation of William Hackwelder [Hackwelder], exhibit 1 at 18). There was "a lot of traffic," and it was raining heavily at the time (*id.* at 16, 18-19). Murillo-Chavez testified that when he saw the vehicle directly in front of him stop because of traffic, he, too, stopped his vehicle (*id.* at 22 and 25). Murillo-Chavez maintained that he was stopped two feet behind that first vehicle when he felt a hard contact or "blow" to the rear of his vehicle (*id.* at 24, 26 and 31). The impact caused his vehicle to move forward into the rear of the vehicle directly in front of him (*id.* at 31-32). Murillo-Chavez testified that he heard "[l]ike boom" or "a crash, blow" shortly before he felt the rear end impact (*id.* at 29).

McLean owned and operated the third vehicle in the chain. At her deposition, McLean testified that light rain was falling at the time of the accident, and that it was light out (NYSCEF

Doc No. 31, McDonagh affirmation, exhibit E at 12-13). She testified that she had been driving between 40 to 45 miles per hour in a southbound lane in "busy" traffic when "I noticed that those two cars in front of me were going to be in an accident. I slowed down as soon as I saw the back of the car" (*id.* at 20). McLean explained that she did not know why those two cars slowed down because there was no traffic directly in front of them (*id.* at 22). She then saw "[t]he car in front of me impacted with the first car" (*id.* at 20). McLean brought her vehicle to a complete stop approximately half a car length behind the second vehicle (*id.* at 22 and 25). She stated that she was at a complete stop for one to one and one-half minutes when she felt a heavy impact to the rear of her vehicle, which caused her vehicle to move forward (*id.* at 26). McLean testified that she was unaware that her vehicle struck the rear of Murillo-Chavez's vehicle until she arrived at her home after the accident, and noticed damage to the front end of her car (*id.* at 19).

Annicaro, an MTA employee and the rearmost driver in the chain, testified that he was traveling in moderate traffic on the Whitestone Bridge when the accident occurred, with other cars around him on both sides (NYSCEF Doc No. 32, McDonagh affirmation, exhibit F at 11 and 21). There were three lanes for southbound moving traffic on the Whitestone Bridge (*id.* at 12-13), and it was raining at the time (*id.* at 12). The accident occurred just after Annicaro had reached the "crest" of the bridge when he saw a Ford Focus approximately two and one-half car lengths in front of him, stating that the car then "made an abrupt move to the left… and it had no brake lights. It didn't even brake … as soon as that maneuver was finished, all I saw was the traffic ahead of me at a dead stop" (*id.* at 16 and 18). Annicaro testified that he was traveling approximately 40 to 45 miles per hour and "going definitely the speed limit, but going with the flow of traffic" (*id.* at 18). He stated, "[w]hen I noticed the maneuver and I saw the cars ahead of me at a dead stop, I applied the brakes hard and I just started sliding" (*id.* at 19). Annicaro testified that was unable to avoid striking the rear of the car directly in front of him (*id.*).

The "accident description" section of the MV-104AN police accident report submitted with the cross motion largely mirrors the parties' testimony describing how the accident occurred[1] (NYSCEF Doc No. 52, Hackwelder affirmation, exhibit 2 at 1 and 3).

Discussion

A party moving for summary judgment "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" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions and written admissions (*see* CPLR 3212 [b]). The movant's "failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013], citing *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

On this motion, McLean argues that she bears no liability because she brought her vehicle to a complete stop so as to avoid the collision between plaintiff's and Murillo-Chavez's vehicles. Annicaro then struck her stopped vehicle in the rear.

Plaintiff advances several arguments in support of his cross motion.[2] First, plaintiff contends that as an innocent driver, he may be awarded summary judgment on liability even

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[1] The report annexed to plaintiff's cross motion is not certified or authenticated (*see Sanchez v Taveraz*, 129 AD3d 506, 506 [1st Dept 2015]; *Coleman v Maclas*, 61 AD3d 569, 569 [1st Dept 2009] [stating that "[t]he motion court properly disregarded the uncertified police report and unauthenticated photographs as they were inadmissible hearsay"]). Nevertheless, no party has raised an issue as to its admissibility.

[2] The court notes that plaintiff's cross motion is technically improper under CPLR 2215 because a cross motion is "'an improper vehicle for seeking affirmative relief ... from a nonmoving party'" (*Asiedu v Lieberman*, 142 AD3d 858, 858 [1st Dept 2016], quoting *Mango v Long Is. Jewish-Hillside Med. Ctr.*, 123 AD2d 843, 844 [2d Dept 1986]). However, the court may disregard this "'technical' defect ... where the nonmovant does not object and it results in no prejudice to the nonmoving party" (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 88 [1st Dept 2013]), as is the case here.

though it is unclear which defendant is at fault for the happening of accident. Next, plaintiff argues that Annicaro is liable because he admitted that he was driving between 40 and 45 miles per hour when the speed limit at the accident location was only 30 miles per hour and that he was unable to avoid the collision with McLean's vehicle. As to Murillo-Chavez, plaintiff submits that a triable issue of fact exists as to Murillo-Chavez's liability. Therefore, Murillo-Chavez's liability together with the issue of the appointment of damages between him and Annicaro should be determined at the time of trial.

Annicaro opposes both applications. He concedes that a sudden stop of the lead vehicle, without more, does not constitute a non-negligent explanation for the happening of the accident. But, he argues that he had to contend "with numerous extraneous conditions: rain; heavy traffic; a vehicle suddenly changing lanes; a vehicle stopped in the middle of an expressway; [and] an accident several vehicles ahead of him" (NYSCEF Doc No. 54, affirmation of Michael P. O'Brien, ¶ 7). Thus, he submits that a triable issue of fact exists as to whether he could have reasonably expected that traffic would continue unimpeded on the highway.

Murillo-Chavez opposes both the motion and cross motion and adopts the arguments raised in Annicaro's opposition.

It is well settled that "[w]hen approaching another vehicle from behind, drivers are required to maintain a reasonably safe rate of speed, maintain control over the vehicle, and use reasonable care to avoid a collision, by, among other things, including maintaining a safe distance" (*Passos v MTA Bus Co.*, 129 AD3d 481, 481 [1st Dept 2015], citing Vehicle and Traffic Law § 1129 [a]). "[A] rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the rear vehicle's driver, and imposes a duty upon the driver of the rear vehicle to come forward with an adequate nonnegligent explanation for the accident" (*Quiros v Hawkins*, 180 AD3d 500, 501 [1st Dept 2020]). "A claim that the lead driver came to a sudden stop, standing alone, is insufficient to rebut the presumption that the

rearmost driver was negligent and the stopped vehicle was not negligent" (*Giap v Hathi Son Pham*, 159 AD3d 484, 485 [1st Dept 2018]). The rule applies "when the front vehicle stops suddenly in slow-moving traffic, even if the sudden stop is repetitive, when the front vehicle, although in stop-and-go traffic, stopped while crossing an intersection, and when the front car stopped after having changed lanes" (*Johnson v Phillips*, 261 AD2d 269, 271 [1st Dept 1999] [internal citations omitted]). The rule also applies to multi-car, rear end collisions where the presumption of liability rests with the rearmost driver (*see Chang v Rodriguez*, 57 AD3d 295, 295 (1st Dept 2008]; *Ferguson v Honda Lease Trust*, 34 AD3d 356, 357 [1st Dept 2006]; *De La Cruz v Ock Wee Leong*, 16 AD3d 199, 200 [1st Dept 2005]; *Mustafaj v Driscoll*, 5 AD3d 138, 138-139 [1st Dept 2004]).

As applied herein, McLean has demonstrated her entitlement to summary judgment (*see Butler v Petrova*, 116 AD3d 580, 580 [1st Dept 2014]); *Chang*, 57 AD3d at 295). It is well settled that a driver must "make reasonable use of his or her senses" (*Miller v DeSouza*, 165 AD3d 550, 550 [1st Dept 2018]). "A driver is expected to drive at a sufficiently safe speed and to maintain enough distance between himself and cars ahead of him so as to avoid collisions with stopped vehicles, taking into account the weather and road conditions" [*Mitchell v Gonzalez*, 269 AD2d 250, 251 [1st Dept 2000]; *accord Matos v Sanchez*, 147 AD3d 585, 586 [1st Dept 2017 [stating that drivers must take inclement weather into account]). McLean's unrebutted, sworn testimony shows that she safely brought her vehicle to a complete stop before the rear end impact from Annicaro's vehicle propelled her vehicle forward into the rear of Murillo-Chavez's stopped vehicle. Both Annicaro and Murillo-Chavez fail to raise a triable issue of fact in opposition to McLean's motion on whether McLean caused or contributed to the accident. Notably, plaintiff has not opposed McLean's motion.

Turning to plaintiff's cross motion, an innocent driver who does not contribute to the happening of a motor vehicle accident may be awarded summary judgment on the issue of his or

her culpable conduct (*see Oluwatayo v Dulinayan*, 142 AD3d 113, 120 [1st Dept 2016]). In this instance, plaintiff, the lead vehicle in the chain, has demonstrated his entitlement to partial summary judgment on the issue of his liability. His unrebutted testimony establishes that he brought his vehicle to a gradual stop before it was struck in the rear. Therefore, plaintiff has established that he did not cause or contribute to the happening of the accident (*see Prine v Santee*, 21 NY3d 923, 925 [2013]). Defendants have not challenged whether plaintiff's vehicle was at a complete stop prior to the accident.

That said, defendants have raised plaintiff's failure to wear a seat belt as an affirmative defense in their answers, among other affirmative defenses (NYSCEF Doc No. 29, McDonagh affirmation, exhibit C, ¶ 8; NYSCEF Doc No. 30, McDonagh affirmation, exhibit D at 4). A determination in plaintiff's favor on the issue of his culpable conduct in that he did not cause or contribute to the happening of the motor vehicle accident has no bearing on the viability of these other affirmative defenses, including whether the potential damages awarded to plaintiff, if any, may be reduced to any extent. The issues raised in those affirmative defenses, except negligence in his operation of his vehicle, shall come before the trier of fact in the damages trial.

As to the balance of the cross motion, partial summary judgment against Annicaro is granted. The evidence is unrebutted that Annicaro was operating his vehicle too quickly in light of the posted speed limit, lack of visibility due to the slope of the roadway, and inclement weather. Moreover it is clear that his vehicle struck the one in front of it causing a chain reaction which damaged the plaintiff's vehicle. The liability of Murillo-Chavez and the percentage attributed Annicaro shall be determined at the liability trial.

Accordingly, it is

ORDERED that the motion of defendant Corine McLean for summary judgment dismissing the complaint and the cross claims asserted against her (motion sequence no. 1) is granted, and the complaint and the cross claims asserted against said defendant are dismissed,

with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:

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IGOR SHTULBERG,

Plaintiff, Index No. 160089/2016

- against -

METROPOLITAN TRANSPORTATION AUTHORITY, FRANK ANNICARO, and JOHNNY MURILLO-CHAVEZ,

Defendants.

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and it is further

ORDERED that the cross motion of plaintiff Igor Shtulberg for summary judgment is granted to the extent of finding that plaintiff has no culpable conduct in causing the subject motor vehicle accident, and partial summary judgment against Annicaro and the MTA. The cross motion is otherwise denied. Interest on any damages awarded against Annicaro and the MTA shall run from this date.

Dated: June 1, 2020

ENTER:

Lisa A. Sokoloff A.J.S.C.

CHECK ONE:	☐	CASE DISPOSED		☒	NON-FINAL DISPOSITION		
	☐	GRANTED	☐ DENIED	☒	GRANTED IN PART	☐	OTHER
APPLICATION:	☐	SETTLE ORDER		☐	SUBMIT ORDER		
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN		☐	FIDUCIARY APPOINTMENT	☐	REFERENCE