SHORT FORM ORDER

ORIGINAL

INDEX No. 17-615035
CAL. No. 19-01386MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice of the Supreme Court

MOTION DATE 8-12-19 (002)
MOTION DATE 9-5-19 (001)
ADJ. DATE 9-5-19
Mot. Seq. # 001 - MG
002 - MG

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JAMES MAROLDA,

Plaintiff,

- against -

JEFFREY H. KREINCES,

Defendant.

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Upon the following papers read on the e-filed motions for summary judgment and to vacate the note of issue: Notice of Motion/ Order to Show Cause and supporting papers by plaintiff, dated July 17, 2019; by defendant July 24, 2019; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers by plaintiff, dated July 26, 2019; by defendant, dated August 22, 2019; Replying Affidavits and supporting papers by plaintiff, dated August 23, 2019; Other ___; it is,

ORDERED that the motion (seq. #001) by plaintiff, and the motion (seq. #002) by defendant are consolidated for the purposes of this determination; and it is further

ORDERED that the motion by plaintiff for summary judgment in his favor on the issue of defendant's negligence is granted; and it is further

ORDERED that the motion by defendant Jeffrey Kreinces for an Order vacating the Note of Issue is granted; and it is further

ORDERED that a copy of this Order shall be served on the Calendar Clerk; and it is further

ORDERED that counsel for the parties shall appear before this Court on **February 27, 2020 at 9:30 a.m.** for a Compliance Conference.

This is an action to recover damages for injuries allegedly sustained by plaintiff James Marolda as a result of a motor vehicle accident that occurred on March 3, 2017, on Northern State Parkway, at or near Willis Avenue in North Hempstead, New York. Plaintiff's stopped vehicle allegedly was struck in the rear by a vehicle owned and operated by defendant Jeffrey Kreinces.

Defendant now moves for an Order vacating the Note of Issue and the Certificate of Readiness for Trial on the ground that the Certificate of Readiness incorrectly indicates that all pretrial discovery, including physical examinations, has been completed, and that no outstanding requests for discovery remain. Defendant contends that plaintiff has neither appeared for a physical examination nor provided certain authorizations. In support of his motion, defendant submits, among other things, copies of the Note of Issue and the Certificate of Readiness, and the Notice for Discovery and Inspection dated March 26, 2013.

In opposition to defendant's motion, plaintiff contends, in part, that pretrial discovery has been completed with the exception of plaintiff's independent medical examination. He also denies receiving defendant's Notice for Discovery and Inspection dated March 26, 2013. In support of his opposition, plaintiff submits, among other things, copies of a Preliminary Conference Stipulation and Order dated February 7, 2018, a So-Ordered Stipulation dated June 13, 2019, and a Compliance Conference Order dated June 13, 2019.

Plaintiff moves for summary judgment on the issue of defendant's negligence, contending that his vehicle was stopped for traffic when it was struck in the rear by defendant's vehicle. In support of his motion, plaintiff submits, among other things, the transcripts of the parties' deposition testimony. In opposition, defendant argues that plaintiff made a sudden stop and failed to observe prevailing traffic conditions at the time of the accident.

On August 6, 2018, plaintiff appeared for an examination for trial. He testified that his vehicle was stopped for traffic at the time of the collision. The vehicle in front of plaintiff's vehicle allegedly was also stopped at the time of the accident. Plaintiff testified that the force of the impact with defendant's vehicle propelled his vehicle into the vehicle in front of it, which caused a chain-reaction accident.

On March 29, 2019, defendant appeared for an examination before trial. He testified that he did not observe traffic ahead of him slow down prior to the collision. According to defendant's testimony, he first observed plaintiff's stopped vehicle at the time of the collision. He testified that his vehicle was

traveling at a rate of speed of approximately 50 miles per hour prior to the accident. The speed limit on Northern State Parkway near Willis Avenue allegedly was 55 miles per hour. Defendant allegedly did not recall how long plaintiff's vehicle had been stopped for, or whether the impact between the front of his vehicle and the rear of plaintiff's vehicle resulted in plaintiff's vehicle striking another vehicle.

Pursuant to the Compliance Conference Order dated June 13, 2019, plaintiff was directed to file a Note of Issue on or before August 8, 2019. By a So-Ordered Stipulation dated June 13, 2019, plaintiff was also directed to appear for an independent medical examination within 60 days. According to the Court's computerized records, the Note of Issue and the Certificate of Readiness were filed on July 15, 2019. The Certificate of Readiness states that all pretrial discovery, including physical examinations, has been completed. However, it also indicates that plaintiff has not yet appeared for an independent medical examination.

The Uniform Rules for Trial Courts (22 NYCRR) § 202.21 (e) provides that within 20 days after service of a note of issue and certificate of readiness, any party to the action may move to vacate the note of issue "upon affidavit showing in what respects the case is not ready for trial, and the court may vacate the note of issue if it appears that a material fact in the certificate of readiness is incorrect." In addition, at any time, the court on its own motion may vacate a note of issue if it appears that a material fact in the certificate of readiness is incorrect (*see* 22 NYCRR § 202.21 [e]). A statement contained in a certificate of readiness indicating that all pretrial discovery has been completed is a material fact, and where such a statement is incorrect, the note of issue should be vacated (*see* ***Cioffi v S.M. Foods, Inc.***, ___ AD3d ___, 2019 NY Slip Op 09250 [2d Dept 2009]; *see e.g.* ***Barrett v New York City Health & Hosps. Corp.***, 150 AD3d 949, 55 NYS3d 318 [2d Dept 2017]; ***Ferreira v Village of Kings Point***, 56 AD3d 718, 868 NYS2d 697 [2d Dept 2008]).

Defendant's motion to vacate the Note of Issue and the Certificate of Readiness is granted. The Certificate of Readiness incorrectly states that all pretrial discovery, including physical examinations, has been completed (*see* ***Young v Destaso Funding, LLC***, 92 AD3d 778, 938 NYS2d 476 [2d Dept 2012]; ***Ferreira v Village of Kings Point***, *supra*; ***Brown v Astoria Fed. Sav.***, 51 AD3d 961, 858 NYS2d 793 [2d Dept 2008]). As these were misstatement of material facts, the filing of the Note of Issue was a nullity, and it must be vacated (*see* 22 NYCRR § 202.21 [e]; ***Barrett v New York City Health & Hosps. Corp.***, *supra*; ***Young v Destaso Funding, LLC***, *supra*; ***Brown v Astoria Fed. Sav.***, *supra*; ***Gregory v Ford Motor Credit Co.***, 298 AD2d 496, 748 NYS2d 507 [2d Dept 2002]).

The Court now turns to plaintiff's motion for summary judgment in his favor on the issue of defendant's negligence. The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 87 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v***

New York Univ. Med. Ctr., *supra*). Once the movant demonstrates a *prima facie* entitlement to judgment as a matter of law, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557; 427 NYS2d 595 [1980]; *see also* CPLR 3212 [b]). The failure to make a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*). In deciding the motion, the court must view all evidence in the light most favorable to the nonmoving party (*see* ***Matter of New York City Asbestos Litig.***, 33 NY3d 20, 99 NYS3d 734 [2019]; ***Vega v Restani Constr. Corp.***, *supra*).

A plaintiff is no longer required to show freedom from comparative fault to establish his or her *prima facie* entitlement to judgment as a matter of law on the issue of negligence (***Rodriguez v City of New York***, 31 NY3d 312, 76 NYS3d 898 [2018]; *see* ***Xin Fang Xia v Saft***, 177 AD3d 823, 2019 NY Slip Op 08248 [2d Dept 2019]; ***Liu v Lowe***, 173 AD3d 946, 102 NYS3d 713 [2d Dept 2019]; ***Catanzaro v Edery***, 172 AD3d 995, 101 NYS3d 170 [2d Dept 2019]). A driver of an automobile approaching another automobile from the rear must maintain a reasonably safe rate of speed and control over his or her vehicle, and exercise reasonable care to avoid colliding with the other vehicle (*see* Vehicle and Traffic Law § 1129 [a]; ***Bloechle v Heritage Catering, Ltd.***, 172 AD3d 1294, 101 NYS3d 424 [2d Dept 2019]; ***Comas-Bourne v City of New York***, 146 AD3d 855, 45 NYS3d 182 [2d Dept 2017]; ***Schmertzler v Lease Plan U.S.A., Inc.***, 137 AD3d 1101, 27 NYS3d 648 [2d Dept 2016]). A rear-end collision with a stopped or stopping vehicle establishes a *prima facie* case of negligence on the part of the operator of the rear vehicle, and thereby requires that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision (*see* ***Clements v Giatas***, 178 AD3d 894, 112 NYS3d 539 [2d Dept 2019]; ***Ordonez v Lee***, 177 AD3d 756, 110 NYS3d 339 [2d Dept 2019]; ***Gelo v Meehan***, 177 AD3d 707, 110 NYS3d 333 [2d Dept 2019]). A non-negligent explanation may include evidence of a mechanical failure, a sudden, unexplained stop of the leading vehicle, an unavoidable skidding on wet pavement, or any other reasonable cause (*see* ***Clements v Giatas***, *supra*; ***Grant v Carrasco***, 165 AD3d 631, 84 NYS3d 235 [2d Dept 2018]; ***Tumminello v City of New York***, 148 AD3d 1084, 49 NYS3d 739 [2d Dept 2017]).

Plaintiff established his *prima facie* entitlement to summary judgment in his favor on the issue of defendant's negligence by demonstrating, *prima facie*, that plaintiff's vehicle was stopped when it was struck in the rear by defendant's vehicle (*see* ***Clements v Giatas***, *supra*; ***Morgan v Flippen***, 173 AD3d 735, 102 NYS3d 108 [2d Dept 2019]; ***Auguste v Jeter***, 167 AD3d 560, 88 NYS3d 509 [2d Dept 2018]). The parties do not dispute that plaintiff's vehicle was stopped at the time of the subject collision. In opposition, defendant failed to raise a triable issue of fact as to the existence of non-negligent explanation for the collision (*see* ***Xin Fang Xia v Saft***, *supra*; ***Gelo v Meehan***, *supra*; ***Buchanan v Keller***, 169 AD3d 989, 991 NYS3d 252 [2d Dept 2019]). Assuming *arguendo* that plaintiff's vehicle came to came to a sudden stop,"vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows" (***Catanzaro v Edery***, *supra* at 996, quoting

Arslan v Costello, 164 AD3d 1408, 1409-1410, 84 NYS3d 229 [2d Dept 2018]; *see* ***Buchanan v Keller***, *supra*; ***Annan v New York State Off. of Mental Health***, 165 AD3d 1020, 87 NYS3d 70 [2d Dept 2018]). Absent evidence that defendant maintained a reasonably safe distance and speed behind plaintiff's vehicle, defendant's claim that plaintiff's vehicle came to a sudden stop is insufficient to preclude summary judgment (*see* ***Hackney v Monge***, 103 AD3d 844, 960 NYS2d 176 [2d Dept 2013]; ***Taing v Drewery***, 100 AD3d 740, 954 NYS2d 175 [2d Dept 2012]).

Accordingly, the motions by plaintiff and defendant are granted.

Dated: January 21, 2020

Hon. Joseph Farneti
Acting Justice Supreme Court

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**