STATE OF NEW YORK
SUPREME COURT ULSTER COUNTY

THOMAS G. MAYONE,
Plaintiff,

- against -

TERRY HUGHES AND SONYA CAB SERVICE INC.,
Defendants.

DECISION & ORDER

Index No.: EF2020-599
RJI No.: 55-20-0468

PRESENT: HON. LISA M. FISHER:

APPEARANCES: Joseph E. O'Connor, Esq.
Counsel for Plaintiff, movant
O'Connor & Partners, PLLC
255 Wall Street
Kingston, New York 12401

Barbara A. Anzelmo, Esq.
Counsel for Defendants
Law Offices of Frank J. Laurino
999 Stewart Avenue
Bethpage, New York 11714-3551

FISHER, J.:

This personal injury matter involves a motor vehicle accident occurring on May 17, 2018, wherein Plaintiff was a seatbelted driver of a stopped car that was rear-ended by the car operated by Defendant Terry Hughes (hereinafter "Hughes") and owned by Defendant Sonya Cab Service Inc. (hereinafter "Cab Company"). Defendant Hughes testified at his deposition that there was a line of vehicles stopped at a red traffic light. He testified he brought his car to a stop, dropped his water bottle on the floor by the brake, and he went to retrieve the bottle which caused his car to move forward to strike Plaintiff's car. The police accident report indicates that Defendant Hughes told responding police officers that he had a problem with his brakes which resulted in the crash. When he was asked at his deposition if he told responding police officers this story, Defendant Hughes testified "[i]t's possible. I don't recall. It's been a year." As a result, Plaintiff contends he suffered serious injuries as a result of Defendants' negligence.

Now, Plaintiff moves for summary judgment on liability only. Defendants submit opposition and Plaintiff submits a reply. There is a separate companion action *Mayone, Jr. v Hughes, et al.* (Index No.: 18-3826, Sup Ct, Ulster County, Schreibman, J.) brought by Plaintiff's son against the same Defendants. Summary judgment was previously granted to the plaintiff therein by Decision and Order, dated September 13, 2019.

It is well-settled that "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 demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *accord Hollis v Charlew Const. Co., Inc.*, 302 AD2d 700 [3d Dept 2003]). Here, it is undisputed that Plaintiff has established his initial summary judgment burden inasmuch as "[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" (*Bell v Brown*, 152 AD3d 1114, 1114 [3d Dept 2017]); *see Johnson v First Student, Inc.*, 54 AD3d 492, 492–93 [3d Dept 2008] ["Where a moving vehicle is involved in a rear-end collision with a stopped vehicle, a prima facie case of negligence arises against the operator of the moving vehicle, requiring the driver to provide an adequate, nonnegligent explanation for the collision."]).

Once the movant has made such a showing, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact. (*See Zuckerman*, 49 NY2d at 562 ["mere conclusions, expressions of hope or unsubstantiated allegations or asserts are insufficient."].) In a rear end car accident, the burden therefore shifts to the rear vehicle "to demonstrate a nonnegligent explanation for the collision" (*Bell*, 152 AD3d at 1114; *see Johnson*, 54 AD3d at 492–93; *see also Martin v LaValley*, 144 AD3d 1474, 1477 [3d Dept 2016]).

Here, Defendants utterly fail to do so by expressing a litany of irrelevant and non-dispositive rhetorical questions why there was a sudden change of lanes, was Plaintiff eating, drinking or using a cell phone, or was Plaintiff intoxicated or impaired by drugs, alcohol, or prescription medication. These are supported with boilerplate law and out-of-department cases that are both non-binding and unappetizing to the Court. Defendant Hughes's own testimony dispels the attenuated questions by his counsel's affirmation, either in fact or on the law. For instance, Plaintiff was stopped at a red light in a line of vehicles and there is no testimony or mention of a

lane change. Even if Plaintiff was intoxicated or impaired, which there is no evidence of same, the fact that Plaintiff was stopped at a red light would not mean his fictional intoxication or impairment was a substantial factor in causing the accident (*see Wallace v Terrell*, 295 AD2d 840, 841 [3d Dept 2002] [finding drunk driver's actions were not the proximate cause of the motor vehicle accident notwithstanding being negligent per se for having a BAC over .10]). The same analysis would be true if Plaintiff was using eating, drinking, or using a cell phone.

The allegation that disclosure is not completed is not an aegis to Defendants who, under CPLR R. 3212 (f), failed to demonstrate how further disclosure might reveal the existence of evidence within the exclusive knowledge of the moving party which would warrant denial of the motion (*see Saratoga Assoc. Landscape Architects, Architects, Engrs. & Planners, P.C. v The Lauter Dev. Group*, 77 AD3d 1219, 1222 [3d Dept. 2010]; *Stoian*, 66 AD3d at 1280–81; *Heim v Tri-Lakes Ford Mercury, Inc.*, 25 AD3d 901, 903–04 [3d Dept 2006]; *Bevens v Tarrant Mfg. Co., Inc.*, 48 AD3d 939, 942 [3d Dept 2008]; *Green v Covington*, 299 AD2d 636 [3d Dept 2002]). It is also necessary to demonstrate that a reasonable attempt was made, prior to the motion, to pursue the disclosure claimed necessary which Defendants have also failed to make a showing of same. (*See Steinborn v Himmel*, 9 AD3d 531 [3d Dept 2004]; *Judd v Vilardo*, 57 AD3d 1127, 1131 [3d Dept 2008]; *Spellburg v South Bay Realty, LLC*, 49 AD3d 1001, 1003 [3d Dept 2008].)

Inasmuch as summary judgment was previously granted in the related matter over a year ago, it is unclear why this matter proceeded in this fashion without admitting liability with a deposition such as Defendant Hughes'; part of practicing law is also *counseling* a client how to proceed, and this motion is indefensible. Plaintiff is awarded maximum amount of costs on motion of $100.00 (CPLR §§ 8106, 8202) for having to bring what should be an unnecessary motion.

To the extent not specifically addressed above, the parties' remaining contentions have been examined and found to be lacking in merit or rendered academic.

Thereby, it is hereby

ORDERED that Plaintiff's motion on liability is **GRANTED**, with costs in the amount of $100.00, and all other relief requested therein is denied in its entirety.

This constitutes the Decision and Order of the Court. Please note that the original of this Decision and Order has been filed by Chambers with the County Clerk on NYSCEF. The prevailing party must comply with CPLR R. 2220 with regard to filing, entry and Notice of Entry.

IT IS SO ORDERED.

DATED: December 4, 2020
Catskill, New York

ENTER:

HON. LISA M. FISHER
SUPREME COURT JUSTICE

Papers Considered:

1) Notice of motion, filed September 8, 2020; affirmation, of Joseph E. O'Connor, Esq., with annexed exhibits, filed September 8, 2020; affidavit of Thomas G. Mayone, filed September 8, 2020;
2) Affirmation in opposition, of Barbara A. Anzelmo, Esq., filed September 14, 2020; and
3) Affirmation, of Joseph E. O'Connor, Esq., with annexed exhibit, filed September 17, 2020.