At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 20th day of October 2020.

PRESENT:
HON. LARA J. GENOVESI,
J.S.C.

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DAVID RIPKA,

Index No.: 519667/2017

Plaintiff,

DECISION & ORDER

-against-

MICHAEL DECRESENZO, DEREK WARD and FELDMAN LUMBER US LBM LLC,

Defendants.

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

	NYSCEF Doc. No.:
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed	36-46, 47-52
Opposing Affidavits (Affirmations)	48, 53, 54
Reply Affidavits (Affirmations)	53

Introduction

Plaintiff, Davik Ripka, moves by notice of motion, sequence number two, pursuant to CPLR § 3212, for summary judgment on the issue of liability and for such

other relief as the Court deems proper. Defendants Derek Ward and Feldman Lumber US LBM LLC and Michael Decresenzo oppose this motion.

Defendants, Derek Ward and Feldman Lumber US LBM LLC move by notice of cross motion, sequence number three, pursuant to CPLR § 3212, for summary judgment on the issue of liability and for such other relief as the Court deems proper. Defendant Michael Decresenzo and plaintiff oppose this motion.

Background

This action involves a three car rear-end collision that occurred on June 26, 2017, on the Long Island Expressway. Plaintiff, David Ripka (Ripka), drove the first vehicle; vehicle one. The second vehicle was owned by defendant Feldman Lumber US LBM LLC and operated by Derek Ward (Ward). The third vehicle was owned and operated by defendant Michael Decresenzo (Decresenzo); vehicle three. It is undisputed that all three vehicles were traveling in the left lane in stop and go traffic. It is also undisputed there was a rear end collision involving all three vehicles.

Plaintiff stated by affidavit that he felt two consecutive impacts from the rear push his vehicle forward. These impacts occurred approximately one second apart (*see* NYSCEF Doc. No. 38, Exhibit A, Affidavit). Defendant Ward testified at an examination before trial (EBT) on September 17, 2018 (*see* NYSCEF Doc. No. 44, Exhibit G). Ward describes the traffic on the LIE as stop and go meaning "it would go from forty and slow down all the way to ten and then go up again" (*id.* at 34). Ward testified that his vehicle was stopped at the time of the accident for one to two minutes (*id.* at 35, 36). Plaintiff was also stopped at the time of the impact (*id.* at 39). Ward's

vehicle was approximately a half a car length behind plaintiff's vehicle (*id.*). Ward did not hear screeching brakes or tires prior to the impact (*id.* at 40). He testified that Decresenzo's vehicle was traveling at approximately 40 to 45 miles per hour (*id.* at 42). Ward felt one impact to the rear and then his vehicle rear ended plaintiff's vehicle (*id.* at 44).

The owner and operator of the third vehicle in this three-car rear end collision, defendant Decresenzo, testified at an EBT on September 17, 2018 (*see* NYSCEF Doc. No. 43, Exhibit F). He testified that his highest rate of speed two minutes before the impact was 20 miles per hour (*see id.* at 47, 53). Decresenzo does not know if Ward's vehicle was fully stopped at the time of impact (*see id.* at 55). He saw the brake lights on Ward's vehicle a second before impact (*see id.* at 72). He further testified that he heard two sets of cars screeching, one car after another (*see id.* at 56-57, 64). He did not hear an impact in between the time of the screeching tires (*see id* at 65). He did not hear any crash sound after his car rear ended the car in front of him (*see id.* 66-67). Decresenzo saw Ward's vehicle directly in front of him but was unable to see plaintiff's vehicle (*see id.*). When he "slammed on his brakes" Decresenzo was traveling 20-30 miles per hour (*id.* at 59-60). There was one car length between his vehicle and the vehicle in front of him prior to impact (*see id.* at 62, 70).

This action was commenced by the filing of the summons and complaint on October 11, 2017 (*see* NYSCEF Doc. No. 1). Issue was joined on December 8, 2017 and January 8, 2918 (*see* NYSCEF Doc. No. 4 and 12). The note of issue was filed on January 28, 2020 (*see* NYSCEF Doc. No. 32).

Discussion

Summary Judgment

"[T]he 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" (*Stonehill Capital Mgmt., LLC v. Bank of the W.,* 28 N.Y.3d 439, 68 N.E.3d 683 [2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 501 N.E.2d 572 [1986]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Chiara v. Town of New Castle*, 126 A.D.3d 111, 2 N.Y.S.3d 132 [2 Dept., 2015], citing *Vega v. Restani Const. Corp.,* 18 N.Y.3d 499, 965 N.E.2d 240 [2012]; *see also Lee v. Nassau Health Care Corp.*, 162 A.D.3d 628, 78 N.Y.S.3d 239 [2 Dept., 2018]). Once a moving party has made a prima facie showing of its entitlement to summary judgment, the burden shifts to the opposing party 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 Fairlane Fin. Corp. v. Longspaugh,* 144 A.D.3d 858, 41 N.Y.S.3d 284 [2 Dept., 2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, *supra; see also Hoover v. New Holland N. Am., Inc.,* 23 N.Y.3d 41, 11 N.E.3d 693 [2014]). A plaintiff does not need to demonstrate the absence of their own comparative negligence to be entitled to partial summary judgment as to a defendant's liability (*see Rodriguez v City of New York*, 31 N.Y.3d 312, 76 N.Y.S.3d 898 [2018 N.Y. Slip Op. 02287]). However, the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where the plaintiff moved for summary judgment dismissing a defendant's

affirmative defense of comparative negligence (*see Poon v. Nisanov*, 162 A.D.3d 804, 808, 79 N.Y.S.3d 227 [2 Dept., 2018]).

"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, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision" (*Xin Fang Xia v. Saft*, 177 A.D.3d 823, 113 N.Y.S.3d 249 [2 Dept., 2019]; *see also Ordonez v. Lee*, 177 A.D.3d 756, 110 N.Y.S.3d 339 [2 Dept., 2019]).

In the case at bar, the plaintiff established his prima facie entitlement to judgment as a matter of law through the submission of plaintiff's affidavit. Plaintiff demonstrated that he was not negligent in the happening of the accident. His vehicle was in stop and go traffic on the Long Island Expressway when it was struck in the rear twice. Plaintiff established negligence on the part of the operator of the rear vehicle, Decresenzo, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision. In opposition, defendant failed to raise a triable issue of fact.

Vehicle two, owned by defendant Feldman Lumber US LBM LLC and operated by Ward failed to establish their prima facie entitlement to judgment as a matter of law. In support of their motion, cross-movants relied on the deposition testimony of Ward and Decresenzo. Ward testified that his vehicle was stopped, and rear ended by Decresenzo first and then he skidded into plaintiff. Decresenzo testified that although he could not see the plaintiff's vehicle, he heard one impact. He was not sure whether vehicle two was stopped; he saw brake lights and heard two sets of cars screeching, one car after another

prior to impact. Further, plaintiff stated by affidavit that his vehicle was rear ended twice. In consideration of these conflicting versions of the impact/s, there are issues of fact.

Conclusion

Accordingly, plaintiff's, motion for summary judgment as to liability is granted as to plaintiff and Decresenzo. The defendants, Ward and Feldman Lumber US LBM LLC's cross motion is denied. Questions of fact exist with respect to vehicle two.

This constitutes the decision and order of this Court.

ENTER:

Hon. Lara J. Genovesi
J.S.C.