SHORT FORM ORDER **INDEX NO. 608453/2020**

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:
Hon. Paul J. Baisley, Jr., J.S.C.

DAISY CURCIO,

Plaintiff,

-against-

NICHOLAS CARSON, NEW U.S. NONWOVENS, LLC, and EAN HOLDINGS, LLC,

Defendants.

ORIG. RETURN DATE: September 17, 2020
FINAL RETURN DATE: November 25, 2020
MOT. SEQ. #: 001 MotD

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Upon the following e-filed papers read on this motion for summary judgment : Notice of Motion and supporting papers by plaintiff, dated August 31, 2020; Answering Affidavits and supporting papers by defendants Nicholas Caron and Nonwovens, LLC, dated October 15, 2020, and by defendant EAN Holdings, LLC, dated November 24, 2020 .; Replying Affidavits and supporting papers by plaintiff, dated November 24, 2020 ; it is,

ORDERED that the motion by plaintiff seeking, inter alia, summary judgment in her favor on the issue of liability is granted to the extent indicated herein, and is otherwise denied; and it is further

ORDERED that a preliminary conference will be conducted on February 24, 2021.

Plaintiff Daisy Curcio commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle collision that occurred at or near exit 51 of the Long Island Expressway in Babylon, New York, on October 17, 2019. The accident allegedly happened when a vehicle owned by defendant EAN Holdings, LLC ("EAN"), and operated by defendant Nicholas Carson collided with the rear of plaintiff's motor vehicle after it came to a stop due to traffic. As a result of the collision, plaintiff's vehicle was propelled into the rear of a vehicle owned and operated by nonparty Kenneth McDonald. The complaint also lists Carson's employer, defendant New U.S. Nonwovens, LLC, which leased the vehicle he was driving from EAN prior to the accident, as a defendant to the action.

Plaintiff now moves for partial summary judgment in her favor on the issue of liability on the ground defendants' negligence was the sole proximate cause of the accident. Plaintiff also requests

dismissal of defendants' affirmative defense based on comparative negligence. In support of the motion, plaintiff submits a copy of the pleadings, a certified police accident report, and an affidavit stating that she was completely stopped behind traffic when the vehicle operated by Carson unexpectedly struck the rear of her vehicle and propelled it into the vehicle ahead of her. New U.S. Nonwovens and Carson oppose the motion, arguing that it is premature, and that plaintiff failed to eliminate triable issues from the case as to how the accident occurred. EAN also opposes the motion, arguing, inter alia, that it was merely the lessor of the vehicle involved in the accident and, as such, the claims against it are preempted by the Graves Amendment (49 USC § 30106).

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 (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden shifts to the opposing party to show by tender of sufficient facts in admissible form that triable issues of fact remain which preclude summary judgment in the movant's favor (*see* CPLR 3212; *Altieri v Golub Corporation*, 292 AD2d 734, 741 NYS2d 126 [3d Dept 2002]). Although a plaintiff is no longer required to establish his or her freedom from comparative negligence (*Rodriguez v City of New York*, 31 NY3d 312, 324, 76 NYS3d 898 [2018]), the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where such plaintiff moves for summary judgment dismissing a defendant's affirmative defense of comparative negligence (*see Higashi v M&R Scarsdale Rest., LLC*, 176 AD3d 788, 111 NYS3d 92 [2d Dept 2019]; *Lopez v Dobbins*, 164 AD3d 776, 79 NYS3d 566 [2d Dept 2018]; *Poon v Nisanov*, 162 AD3d 804, 808, 79 NYS3d 227 [2d Dept 2018]).

A rear-end collision with a stopped vehicle creates a prima facie case of liability with respect to the operator of the moving vehicle, unless the operator of the moving vehicle comes forward with an adequate, non-negligent explanation for the accident (*Bustillo v Matturro*, 292 AD2d 554, 740 NYS2d 360 [2d Dept 2002]; *Harris v Ryder*, 292 AD2d 499, 739 NYS2d 195 [2d Dept 2002]). Where multiple collisions occur in the case of a rear-end chain collision, "the operator of the middle vehicle may establish prima facie entitlement to judgment as a matter of law by demonstrating that the middle vehicle was struck from behind by the rear vehicle and propelled into the lead vehicle" (*Kuris v El Sol Contr. & Constr. Corp.*, 116 AD3d 675, 676, 983 NYS2d 580 [2d Dept 2014]; *see Raimondo v Plunkitt*, 102 AD3d 851, 958 NYS2d 460 [2d Dept 2013]). Moreover, the doctrine of respondeat superior renders an employer vicariously liable for torts committed by an employee acting within the scope of the employment so long as the tortious conduct is generally foreseeable and a natural incident of the employment (*Scott v Lopez*, 136 AD3d 885, 886, 25 NYS3d 298 [2d Dept 2016]). An employee's action may be considered to be within the scope of employment when it "is performed while the employee is engaged generally in the business of the employer, or if the act may be reasonably said to be necessary or incidental to such employment" (*Scott v Lopez*, 136 AD3d 885, 886, 25 NYS3d 298; *see Davis v Larhette*, 39 AD3d 693, 694, 834 NYS2d 280 [2d Dept 2007]). "Where travel is part of the employment, the crucial test is whether the employment created the necessity for the travel" (*Carlson v American Intl. Group, Inc.*, 30 NY3d 288, 305, 67 NYS3d 100 [2017]).

Here, plaintiff established her prima facie entitlement to summary judgment against New U.S. Nonwovens and Carson by submitting evidence that Carson's failure to stop the leased vehicle before it

collided into the rear of her vehicle was the sole proximate cause of the accident. Significantly, plaintiff's affidavit states, in pertinent part, that she was completely stopped in traffic when the leased vehicle unexpectedly struck the rear of her vehicle and propelled it into the rear of nonparty Kenneth McDonald's vehicle. Plaintiff also submitted a certified copy of a police accident containing a diagram created by the responding officer which depicts the chain collision accident. The police accident report further notes that the drivers of the vehicles involved in the accident, including Carson, admitted that the accident occurred when the rear-most vehicle collided into the rear of plaintiff's vehicle and propelled it forward. Plaintiff's submissions also included an invoice for the rental of the vehicle which indicates that Carson rented the subject vehicle on behalf of New U.S. Nonwovens earlier in the morning prior to the accident. Such evidence is sufficient to make a prima facie showing of plaintiff's entitlement to summary judgment on the issue of liability as against Carson and New U.S. Nonwovens (*see Ordonez v Lee*, 177 AD3d 756, 110 NYS3d 339 [2d Dept 2019]; *Lopez v Dobbins*, 164 AD3d 776, 79 NYS3d 566 [2d Dept 2018]; *Nikolic v City-Wide Sewer & Drain Serv. Corp.*, 150 AD3d 754, 53 NYS3d 684 [2d Dept 2017]; *Scott v Lopez*, 136 AD3d 885, 886, 25 NYS3d 298). Furthermore, by adducing evidence that she was the middle car in a chain collision and, therefore, free from comparative fault for the happening of the accident, plaintiff also established that the affirmative defense based on her alleged culpable conduct or comparative fault is without merit and should be struck from defendants' answer (*see Gonzalez v Goudiaby*, 177 AD3d 656, 109 NYS3d 890 [2d Dept 2019]; *Lopez v Dobbins*, 164 AD3d 776, 79 NYS3d 566; *Pomerantsev v Vladimir Kodinsky*, 156 AD3d 656, 64 NYS3d 567 [2d Dept 2017]).

In opposition, the Nonwovens defendants failed to raise any triable issue sufficient to defeat plaintiff's prima facie showing (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). As noted above, a prima facie case of liability is established when a defendant rear ends a stopped vehicle (*Bustillo v Matturro*, 292 AD2d 554, 740 NYS2d 360 [2002]; *Harris v Ryder*, 292 AD2d 499, 739 NYS2d 195 [2002]). Furthermore, plaintiff established that she was free from comparative fault for the happening of the accident by adducing evidence that she was the middle car in a chain collision accident (*see Gonzalez v Goudiaby*, 177 AD3d 656, 109 NYS3d 890 [2d Dept 2019]; *Lopez v Dobbins*, 164 AD3d 776, 79 NYS3d 566). The contention that the instant motion is premature also is rejected, as movants "failed to offer an evidentiary basis to suggest that [further] discovery may lead to relevant evidence" in this case (*Conte v Frelen Assoc., LLC*, 51 AD3d 620, 621, 858 NYS2d 258 [2d Dept 2008]; *Woodard v Thomas*, 77 AD3d 738, 913 NYS2d 103 [2d Dept 2010]). The "mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered" by further discovery is an insufficient basis for denying a motion for summary judgment (*Conte v Frelen Assoc., LLC*, 51 AD3d 620, 621, 858 NYS2d 258). Therefore, the branch of plaintiff's motion seeking, inter alia, summary judgment on the issue of liability as against New U.S. Nonwovens and Carson is granted.

Nevertheless, the remaining branch of plaintiff's motion seeking summary judgment on the issue of liability as against EAN is denied. Notably, it is undisputed that EAN merely leased the car to New U.S. Nonwovens, and plaintiff submitted no evidence that EAN engaged in any negligent or criminal conduct which caused or contributed to the happening of the accident (*see* 49 USC § 30106[a]; *Olmann v Neil*, 132 AD3d 744, 745, 18 NYS3d 105; *Burrell v Barreiro*, 83 AD3d 984, 922 NYS2d 465 [2d Dept 2011]; *Hernandez v Sanchez*, 40 AD3d 446, 836 NYS2d 577 [1st Dept 2007]). While Vehicle and

Traffic Law § 388 (1) makes owners of a vehicle liable for injuries caused by a driver's negligence when the vehicle is operated with the owner's consent (*Han v BJ Laura & Son, Inc.*, 122 AD3d 591, 592, 996 NYS2d 132 [2d Dept 2014]; *see Murdza v Zimmerman*, 99 NY2d 375, 379, 756 NYS2d 505 [2003]), liability based on consensual use against the owner of a leased or rented vehicle is preempted by the Graves Amendment provided " (1) the owner is engaged in the trade or business of renting or leasing motor vehicles, and (2) there is no negligence or criminal wrongdoing on the part of the owner" (*see* 49 USC § 30106 [a]; *Olmann v Neil*, 132 AD3d 744, 745, 18 NYS3d 105 [2d Dept 2015]).

Dated: 1/22/21

HON. PAUL J. BAISLEY, JR., J.S.C.