SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

ALINE ANTENOR,

Plaintiff,

- against -

JEAN JINGZI LUO, SHAWN SHUKUANG LIU and NATHALIE DOBREZ,

Defendants.

Index No.: 6971/2012

Motion Date: 02/21/13

Motion No.: 1

Motion Seq.: 1

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The following papers numbered 1 to 28 were read on the motion by defendants JEAN JINGZI LUO and SHAWN SHUKUANG LIU for an order pursuant to CPLR 3103 striking the plaintiff's Notice to Admit dated August 13, 2012; and the respective cross-motions of the plaintiff and co-defendant NATHALIE DOBREZ for an order pursuant to CPLR 3212 granting summary judgment on the issue of liability;

Papers Numbered

Defendant Luo Notice of Motion-Affidavits-Exhibits.....1 - 5
Plaintiff's Notice of Cross Motion.....6 - 10
Defendant Dobrez's Notice of Cross-Motion.....11 - 14
Defendant Luo Affirmations in Opposition(2).....15 - 18
Plaintiff's Affirmation in Partial Opposition.....19 - 21
Plaintiff's Reply Affirmation.....22 - 24
Defendant Luo's Reply Affirmation.....25 - 28

This is a personal injury action in which plaintiff, Aline Antenor, seeks to recover damages for injuries she sustained as a result of a multi-vehicle accident that occurred on July 7, 2011 on the eastbound lanes of the Grand Central Parkway near its intersection with Union Turnpike, Queens County, New York. At the time of the accident plaintiff was operating her vehicle in heavy traffic on the Grand Central Parkway when her vehicle was struck in the rear by the vehicle owned and operated by defendant

Nathalie Dobrez. The Dobrez vehicle had initially been struck in the rear by the vehicle operated by defendant Jean Jingzi Luo causing it to have been propelled into the plaintiff's vehicle.

The plaintiff commenced this action by filing a summons and complaint on April 2, 2012. Issue was joined by service of defendant Dobrez's verified answer dated June 28, 2012. Defendant Luo joined issue by service of her answer with affirmative defenses on May 29, 2012. As the vehicle operated by Luo was registered in the State of California, plaintiff served a Notice to Admit dated August 13, 2012 on the Luo defendants seeking information regarding her vehicle including, the registration number, names of the operator, title owner, registered owner, lessor, and lessee and whether the Luo vehicle made contact with the Dobrez vehicle on July 7, 2011. On August 30, 2012 the Luo defendants served an objection to the Notice to Admit.

The Luo defendants now move for a protective order striking the Notice to Admit on the ground that the information requested had been responded to in the defendant's answer. Defendant asserts that he should not be called upon to admit or deny that which has already been admitted by his pleading and in addition that the information requested can be obtained at the depositions.

Plaintiff opposes the motion, seeks an order compelling the defendants to serve a proper response to plaintiff's Notice to Admit and cross-moves for an order pursuant to CPLR 3212 dismissing the affirmative defenses contained in the defendants' answer, granting plaintiff partial summary judgment on the issue of liability and setting the matter down for a trial on physical injury and damages.

In support of the motion for summary judgment the plaintiff submits an affirmation from counsel, Ira B. Gordon, Esq., a copy of the pleadings, a copy of the police accident report (MV104), a copy of an accident report filed by Nathalie Dobrez, a copy of the California motor vehicle registration information regarding the Luo vehicle, a copy of Dobrez's response to plaintiff's Notice to Admit, a copy of plaintiff's bill of particulars and an affidavit of facts from plaintiff Aline Antenor.

In her affidavit, Ms. Antenor states that on July 7, 2011, at approximately 6:00 p.m., she was the operator of a motor vehicle owned by her husband, Ernst Antenor that was struck in the rear while proceeding in the right lane of the eastbound Grand Central Parkway. She states that the accident involved her vehicle and two other vehicles, a vehicle operated by Jean Jingzi

Luo and a motor vehicle operated by Nathalie Dobrez. The affidavit states that at the time of the accident Ms. Antenor was traveling in the right lane and moving slowly behind slow moving traffic when her vehicle was struck in the rear by the vehicle operated by defendant Dobrez. She states that she learned after the accident that the Dobrez vehicle was propelled into her vehicle by the Luo vehicle which started the chain reaction when it struck the Dobrez vehicle in the rear. Ms. Antenor states that there was only one impact to the rear of her vehicle. Plaintiff further states that as a result of the impact she sustained serious personal injuries to her cervical spine, lumbar spine, left shoulder and left knee requiring left knee arthroscopic surgery.

The police accident report, based upon statements of the drivers, was prepared at the scene by a police officer who did not witness the accident. In his report the Officer states: "at "t/p/o Veh. #1 (Luo) struck Veh. # 2 (Dobrez), which caused Veh. #2 to strike Veh. # 3(plaintiff). Operator # 2(Dobrez) states that she was moving slowly in traffic in the right lane when the accident happened. Operator # 3 (Luo) states that Veh. 2 (Dobrez) stopped and she slid on wet pavement rear-ending Veh. # 2."

Defendant Nathalie Dobrez also cross-moves for summary judgment dismissing the plaintiff's complaint against her and submits an affidavit dated January 18, 2013. The affidavit states that on July 7, 2011, while operating her vehicle on the Grand Central Parkway, her vehicle was struck in the rear by the vehicle operated by Jean Jingzi Luo. She states that the impact from the rear caused her vehicle to be pushed into the rear of the Antenor vehicle.

Counsel for defendant Dobrez contends that the evidence submitted in support of her cross-motion for summary judgment demonstrates that the Dobrez vehicle, the middle vehicle of the three cars, was lawfully stopped in traffic when her car was rear-ended by the Luo vehicle which propelled her vehicle into the plaintiff's vehicle. Counsel contends that summary judgment should be awarded to Dobrez, dismissing the plaintiff's complaint and all cross-claims against her because the evidence showed that Dobrez was completely stopped in traffic at the time of the accident and the sole proximate cause of the accident was the negligence of Luo in rear-ending her vehicle and further, there is no evidence in the record that Dobrez was negligent in any manner. Dobrez contends that it is clear that defendant Luo failed to maintain a proper lookout, failed to maintain a proper speed and failed to maintain a safe distance from the vehicle in front of her.

As Dobrez was stopped and propelled into the plaintiff's vehicle, counsel contends that the proof submitted demonstrates that the complaint should be dismissed against Dobrez as Dobrez could not be liable for any of the injuries claimed by plaintiff Antenor (see Ferguson v Honda Lease Trust, 34 AD3d 356 [1st Dept. 2006]; Mustafaj v Driscoll, 5 AD3d 139 [1st Dept. 2004]; McNulty v DePetro, 298 AD2d 566 [2d Dept. 2002]; Harris v Ryder, 292 AD2d 499 [2d Dept. 2002]; Cerda v Paisley, 273 AD2d 339 [2d Dept. 2000]).

Likewise, counsel for plaintiff seeks partial summary judgment on liability stating that the plaintiff, the driver of the lead vehicle was lawfully proceeding slowly in traffic on the Grand Central Parkway when her vehicle was struck in the rear and thus her conduct did not contribute to causing the accident.

Counsel for defendant Luo opposes the respective cross-motions for summary judgment on the grounds that the motions are premature as depositions have not yet been held. In addition, counsel alleges that there are questions of fact which are raised by the affidavit of Jean Jingzi Luo. In her affidavit dated October 10, 2012, Ms. Luo states that on July 7, 2011 she was proceeding eastbound in the right lane of the Grand Central Parkway at approximately 5:40 p.m. She states that the roads were wet as it had recently been raining. She states that "suddenly and without explanation, the Toyota ahead of me abruptly decelerated. I did not see anything on the roadway ahead of the Toyota to warrant the abrupt stopping. I immediately applied pressure to my brake pedal when I observed the Toyota ahead of me abruptly decelerate. However, I was unable to avoid an impact with the Toyota. At the moment of impact with my vehicle, the Toyota had almost fully stopped but had not completely stopped. After I hit the Toyota, the Toyota came into contact with the vehicle ahead of it."

Counsel claims that Ms. Luo was placed in an emergency situation by the actions of Ms. Dobrez in abruptly decelerating for no apparent reason in violation of VTL § 1163(c). Counsel claims that Ms. Luo's inability to take evasive maneuvers is not demonstrative of her negligence because she did not have a sufficient amount of time during which to evaluate the situation and attempt to avoid an impact with the Dobrez vehicle. Counsel claims that Ms. Luo's statement that the Dobrez vehicle decelerated for no apparent reason is sufficient evidence of a non-negligent explanation to find a question of fact as to liability.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position (see Zuckerman v. City of New York, 49 NY2d 557[1980]).

It is well established law that a rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence on the part of the driver of the rearmost vehicle, requiring the operator of that vehicle to proffer an adequate, non-negligent explanation for the accident (see Klopchin v Masri, 45 AD3d 737 [2d Dept. 2007]; Hakakian v McCabe, 38 AD3d 493 [2d Dept. 2007]; Reed v. New York City Transit Authority, 299 AD2 330 [2d Dept. 2002]; Velazquez v Denton Limo, Inc., 7 AD3d787 [2d Dept. 2004].

Here, Ms. Antenor and Ms. Dobrez submitted affidavits stating that they were proceeding lawfully on the Grand Central Parkway when the Dobrez vehicle was struck from behind by the vehicle driven by Ms. Luo causing the chain reaction accident. "The rearmost driver in a chain-reaction collision bears a presumption of responsibility" (Ferguson v Honda Lease Trust, 34 AD3d 356 [1st Dept. 2006], quoting De La Cruz v Ock Wee Leong, 16 AD3d 199[1st Dept. 2005]). Evidence that a vehicle was rear-ended and propelled into the stopped vehicle in front of it may provide a sufficient non-negligent explanation (see Katz v Masada II Car & Limo Serv., Inc., 43 AD3d 876 [2d Dept. 2007]). Plaintiff and Dobrez both demonstrated that their conduct was not a proximate cause of the rear-end collision between their vehicle and the vehicles behind them (see Abrahamian v. Tak Chan, 33 AD3d 947 [2d Dept. 2006}; Calabrese v. Kennedy, 8 AD3d 505 [2d Dept. 2006]; Ratner v Petruso, 274 AD2d 566 [2d Dept. 2000]). Thus plaintiff and defendant Dobrez satisfied their prima facie burden of establishing entitlement to judgment as a matter of law by demonstrating that their vehicles were struck in the rear in a chain reaction which was commenced by defendant Jean Jingzi Luo. Plaintiff and Dobrez made a prima facie showing that Luo failed to keep a safe distance, failed to maintain safe speed and failed to observe what was there to be seen.

Having made the requisite prima facie showing of their entitlement to summary judgment, the burden then shifted to defendant Lou to raise a triable issue of fact as to whether Dobrez or Antenor were also negligent, and if so, whether that negligence contributed to the happening of the accident (see Goemans v County of Suffolk,57 AD3d 478 [2d Dept. 2007]). This

court finds that Luo failed to submit evidence as to any negligence on the part of co-defendant or plaintiff or to provide a non-negligent explanation for the accident sufficient to raise a triable question of fact (see Lampkin v Chan, 68 AD3d 727 [2d Dept. 2009]; Gomez v. Sammy's Transp., Inc., 19 AD3d 544 [2d Dept. 2005]).

Although Luo maintains that the accident was the result of Dobrez braking or suddenly decelerating while proceeding on the parkway, this does not explain her failure to maintain a safe distance from the vehicle in front of her or to safely stop prior to rear-ending the Dobrez vehicle [see Dicturel v Dukureh,71 AD3d 558 [1st Dept. 2010]; Shirman v Lawal,69 AD3d 838 [2d Dept. 2010]; Lampkin v Chan,68 AD3d 727 [2d Dept. 2009]; Zdenek v Safety Consultants, Inc.,63 AD3d 918 [2d Dept. 2009]).

Under the circumstances presented, defendant's assertion that the Dobrez vehicle made an unexpected deceleration does not provide a non-negligent explanation for the rear-end collision. "Vehicle stops which are foreseeable under the prevailing traffic conditions must be anticipated by the driver who follows since he or she is under a duty to maintain a safe distance between his or her vehicle and the vehicle ahead" (see Jackson v Nolasco, 2010 NY Slip Op 31814U [Sup.Ct. Suffolk Cty. 2010]; Vehicle & Traffic Law § 1129; Taing v Drewery, 100 AD3d 740 [2d Dept. 2012}; Plummer v Nourddine, 82 AD3d 1069 [2d Dept. 2011]; Staton v Ilic, 69 AD3d 606 [2d Dept. 2010]; Jumandeo v Franks, 56 AD3d 614[2d Dept. 2008] Shamah v Richmond County Ambulance Serv., Inc., 279 AD2d 564 [2d Dept. 2001]). Thus, drivers must maintain safe distances between their cars and the cars in front of them in light of the traffic conditions including stopped vehicles and wet roads.

The defendant's contention that the plaintiff's cross-motion for summary judgment is premature is without merit. The defendant failed to offer any evidentiary basis to suggest that discovery may lead to relevant evidence. The mere hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery is an insufficient basis upon which to deny the motion (see CPLR 3212[f]; Hanover Ins. Co. v Prakin, 81 AD3d 778 [2d Dept. 2011]; Essex Ins. Co. v Michael Cunningham Carpentry, 74 AD3d 733 [2d Dept. 2010]]; Peerless Ins. Co. v Micro Fibertek, Inc., 67 AD3d 978 [2d Dept. 2009]; Gross v Marc, 2 AD3d 681 [2d Dept. 2003]).

Defendant Luo also moves to strike plaintiff's notice to admit dated August 13, 2012 as set forth above. A notice to admit, pursuant to CPLR 3123(a) is to be used only for disposing

of uncontroverted questions of fact or those that are easily provable, and not for the purpose of compelling admission of fundamental and material issues or ultimate facts that can only be resolved after a full trial (see Tolchin v Glaser, 47 AD3d 922 [2d Dept. 2008]; Hawthorne Group, LLC v RRE Ventures, 7 AD3d 320 {1st Dept. 2004]).

Accordingly, for the reasons set forth above it is hereby,

ORDERED, that the defendant's motion to strike the Notice to Admit is granted in part and denied in part and defendants are directed to supply a response to item nos. 1 through nos. 13 as said items may dispose of questions of fact which are easily provable. Item nos. 14 - 27 are stricken as they seek to elicit information which may be in dispute at trial and are academic in light of the summary judgment decisions (see CPLR 3123; Nacherlilla v Prospect Park Alliance, Inc., 930 NYS2d 643 [2d Dept. 2011]; Meadowbrook-Richman, Inc. v Cicchiello, 273 AD2d 6 [1st Dept. 2000]). Said responses shall be provided within 15 days of service of a copy of this order with notice of entry thereof, and it is further,

ORDERED, that the cross-motion of defendant NATHALIE DOBREZ for summary judgment dismissing the complaint and all cross-claims against her is granted, and it is further,

ORDERED, that the cross-motion by plaintiff, ALINE ANTENOR for partial summary judgment on the issue of liability is granted as against defendants JEAN JINGZI LUO and SHAWN SHUKUANG LIU, and it is further,

ORDERED, that upon completion of discovery on the issue of damages, filing a note of issue, and compliance with all the rules of the Court, this action shall be placed on the trial calendar of the Court for a trial on serious injury and damages.

Dated: April 22, 2013
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.