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

MARCOS RICARDO PARRENO,

Plaintiff,

- against -

CRM EXPRESS INCORPORATED and HENRY RUIZ,

Defendants.

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Index No.: 13805/2012

Motion Date: 06/27/13

Motion No.: 129

Motion Seq.: 1

The following papers numbered 1 to 11 were read on this motion by plaintiff, MARCOS RICARDO PARRENO, for an order pursuant to CPLR 3212(b) granting partial summary judgment on the issue of liability and setting this matter down for a trial on damages only:

| | Papers Numbered |
|---|---|
| Notice of Motion-Affidavits-Exhibits-Memo of Law | 1 - 5 |
| Defendant's Affirmation in Opposition | 6 - 9 |
| Reply Affirmation | 10 - 11 |

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In this negligence action, the plaintiff, MARCOS RICARDO PARRENO, seeks to recover damages for personal injuries he allegedly sustained as a result of a motor vehicle accident that occurred on August 22, 2011 between the motor vehicle owned by defendant CRM Express Incorporated and operated by defendant Henry Ruiz and the motor vehicle owned by MTLR Corp. and operated by plaintiff Parreno. At the time of the accident, the plaintiff was operating a commercial vehicle on the Long Island Expressway in the vicinity of E. 167th Street in Queens County when his vehicle was struck in the rear by the trailer-tractor operated by defendant Ruiz. Plaintiff alleges that his vehicle was struck as he was stopped in traffic. The plaintiff allegedly sustained

serious injuries as a result of the impact including a rotator cuff tear of the left shoulder requiring arthroscopic surgery and a herniated disc of the lumbosacral spine.

The plaintiff commenced this action by filing a summons and complaint on July 3, 2010. Issue was joined by service of defendants' verified answer on September 4, 2012. Plaintiff now moves, prior to examinations before trial, for an order pursuant to CPLR 3212(b), granting partial summary judgment on the issue of liability and setting the matter down for a trial on damages only.

In support of the motion, plaintiff submits an affidavit dated March 25, 2013 in which plaintiff states:

"At the time of the accident I was completely stopped for traffic on the Long Island Expressway at/or near its intersection with East 167th Street, Queens County, New York. My vehicle was stopped for approximately one minute before being struck in the rear by the vehicle owned by defendant CRM and negligently operated by defendant Ruiz. I did not stop short prior to the happening of the subject accident. The defendants' vehicle did not honk its horn prior to the happening of the subject accident. My right foot was on the brake at the time of the rear-end impact."

Plaintiff's counsel, Carey S. Bernstein, Esq., contends that the accident was caused solely by the negligence of defendant in that his vehicle was traveling too closely to the vehicle in front in violation of VTL § 1129 and that defendant failed to safely bring his vehicle to a stop prior to rear-ending the plaintiff's vehicle. Counsel states that plaintiff's affidavit clearly states that plaintiff's vehicle was lawfully stopped in traffic when it was struck by the Ruiz vehicle. Counsel alleges that defendant was negligent in that he failed to maintain a safe speed, failed to maintain a safe distance between his car and the car in front of him in violation of VTL § 1129(a) and failed to avoid striking the vehicle of defendant Parreno in the rear. Counsel asserts that a claim that a lead vehicle made a sudden stop, standing alone is insufficient to rebut the presumption of negligence on the part of the following vehicle (see Hackney v Monge, 103 AD3d 844 [2d Dept. 2013]; Plummer v Nourddine, 82 AD 3d 1069 [2d Dept. 2011]; Staton v Ilic, 69 AD3d 606 [2d Dept. 2010]; Jumandeo v Franks, 56 AD3d 624 [2d Dept. 2008]; Kastritsos v Marcello, 84 AD 3d 1174 [2d Dept. 2011]; Ramirez v Konstanzer, 61 AD3d3d 837 [2d Dept. 2009]). Further counsel states that from the evidence submitted it can not be inferred that plaintiff's actions were negligent or a proximate cause of the accident.

Counsel contends, therefore, that plaintiff is entitled to partial summary judgment as to liability because defendant Ruiz was solely responsible for causing the accident while Mr. Parreno was free from culpable conduct.

In opposition to the motion, defendant's counsel, Darran D. Winslow, Esq., states that the plaintiff's motion is premature as the affidavit of the plaintiff submitted in support of the motion is inconsistent with his statement contained in the motor vehicle accident report filed by Parreno. In his accident report, Parreno states: "I was going straight on the LIE in the middle lane when I yielded due to the construction cones and vehicle #1 (defendant) rear-ended me." Counsel contends that this version of the accident is inconsistent with the plaintiff's affidavit in that the accident report does not state that he was stopped for one minute prior to being rear-ended by the defendant. Counsel contends that plaintiff's statements are plagued with inconsistencies and credibility issues and therefore plaintiff has failed to make a prima facie showing of entitlement to summary judgment as a matter of law. In addition, the defendant submits an affidavit from the defendant dated May 23, 2013 which states:

"I was driving defensively and observing the vehicles in front of me when the plaintiff's box truck came to an abrupt stop without signaling or warning. I was driving a tractor-trailer. I was driving under the listed speed limit at the time of the accident. I was going with traffic which was moderately heavy at that time. Just prior to the accident, the plaintiff abruptly stopped without warning or signal. At the time of the accident, the vehicle driven by Mr. Parreno was not at a complete stop. At the time of the accident the vehicle driven by Mr. Parreno was not stopped for approximately one minute."

In the description section of the police accident report the police officer who responded to the scene states: "at t/p/o operator of veh #1 (defendant) states that veh #2(plaintiff), stopped short causing him to rear end him." Plaintiff was unable to provide a statement to the police officer at the scene.

Defendants contend that the question of whether the plaintiff's vehicle was stopped at the time of the accident is a material issue of fact and that the plaintiff's abrupt stop on the Long Island Expressway is a violation of VTL §1202(a)(1)(j) and is a sufficient nonnegligent explanation to preclude granting the motion for summary judgment (citing De Cosmo v Hulce, 204 AD2d 953 {3d Dept. 1994]; Makaj v Metropolitan Transp Auth, 18 D3d 625 [2d Dept. 2005]). In addition, defendant contends that

the plaintiff did not give any type of signal prior to stopping short on the Expressway in violation of VTL § 1163 (citing Klopchin v Masri, 45 AD3d 737[2d Dept. 2007]). Thus, counsel argues that as there conflicting accounts of how the accident happened triable issue of fact exist that preclude the granting of summary judgment (citing Boockvor v Fischer, 56 AD3d 405 [2d Dept. 2008]).

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]).

"When the driver of an automobile approaches another automobile from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle" (Macauley v ELRAC, Inc., 6 AD3d 584 [2d Dept. 2003]). It is well established law that a rear-end collision 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 Hearn v Manzolillo, 103 AD3d 689[2d Dept 2013]; Taing v Drewery, 100 AD3d 740; Kastritsios v Marcello, 84 AD3d 1174[2d Dept. 2011]; Klopchin v Masri, 45 AD3d 737 [2d Dept. 2007]; Hakakian v McCabe, 38 AD3d 493 [2d Dept. 2007]; Velazquez v Denton Limo, Inc., 7 AD3d 787 [2d Dept. 2004]).

Here, Parreno submitted an affidavit stating that his vehicle was at a complete stop in traffic on the Long Island Expressway when it was suddenly struck from behind by the defendants' truck. Thus, Mr. Parreno satisfied his prima facie burden of establishing entitlement to judgment as a matter of law on the issue of liability (see Volpe v Limoncelli,74 AD3d 795 [2d Dept. 2010]; Vavoulis v Adler, 43 AD3d 1154 [2d Dept. 2007]; Levine v Taylor, 268 AD2d 566 [2000]). This court does not find that the plaintiff's statement contained in his accident report was inconsistent with his affidavit because in either version, whether was he was stopped in traffic or slowed down due to traffic cones, he was lawfully proceeding on the Long Island Expressway when his vehicle was rear-ended by the defendants' truck.

Having made the requisite prima facie showing of entitlement to summary judgment, the burden then shifted to defendant Ruiz to raise a triable issue of fact as to whether Parreno was 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 defendant Ruiz failed to provide evidence as to 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]; Cavitch v Mateo, 58 AD3d 592 [2d Dept. 2009]; Garner v Chevalier Transp. Corp, 58 AD3d 802 [2d Dept. 2009]; Kimyagarov v Nixon Taxi Corp., 45 AD3d 736 [2d Dept. 2007]).

The defendant admitted to the police officer at the scene that he struck the plaintiff's vehicle in the rear. Although Ruiz maintains that the accident was the result of plaintiff braking or stopping suddenly, this does not explain his failure to maintain a safe distance from the vehicle in front of him [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]). The defendants' argument that the plaintiff's vehicle may have stopped short is not sufficient to provide a non-negligent explanation for the rear-end collision (see Plummer v Nourddine, 82 AD3d 1069 [2d Dept. 2011][the mere assertion that the respondents' vehicle came to a sudden stop while traveling in heavy traffic was insufficient to raise a triable issue of fact]; Staton v Ilic, 69 AD3d 606 [2d Dept. 2010]; Ramirez v Konstanzer, 61 AD3d 837 [2d Dept. 2009]). A bare claim that the driver of the lead vehicle suddenly stopped, standing alone, is insufficient to rebut the presumption of negligence (see Ramirez v Konstanzer, 61 AD3d 837 [2nd Dept 2009]; Jumandeo v Franks, 56 AD3d 614 [2nd Dept 2008]).

Ruiz's explanation that he did not observe any warnings or signal on the Parreno vehicle is insufficient to rebut the presumption of negligence created by the rear-end collision or to raise a triable issue of fact to defeat summary judgment (see Macauley v ELRAC, Inc., 6 AD3d 584[2d Dept. 2004][defendant's testimony that she did not recall seeing brake lights or tail lights illuminated on the plaintiff's vehicle before the collision did not adequately rebut the inference of negligence]; Gross v Marc, 2 AD3d 681 [2d Dept. 2003][the defendant failed to provide evidence sufficient to raise a triable question of fact as to whether the alleged malfunctioning brake lights on the plaintiff's vehicle proximately caused the accident]; Waters v City of New York, 278 AD2d[2d Dept. 2000][defendant's statement that he did

not observe any illuminated brake lights indicating that the truck was stopped is insufficient to establish a genuine issue of material fact precluding summary judgment]; also see Santarpia v. First Fid. Leasing Group, Inc., 275 AD2d 315 [2d Dept. 2000]; Lopez v. Minot, 258 AD2d 564[2d Dept. 1999]).

The defendants' contention that the plaintiff's motion for summary judgment is premature is without merit. The defendants 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]).

Therefore, as the evidence in the record demonstrates that defendants failed to provide a non-negligent explanation for the collision and as no triable issues of fact have been put forth as to whether plaintiff may have borne comparative fault for the causation of the accident, and based on the foregoing, it is hereby,

ORDERED, that the plaintiff's motion is granted, and the plaintiff, MARCOS RICARDO PARRENO, shall have partial summary judgment on the issue of liability against the defendants, CRM EXPRESS INCORPORATED and HENRY RUIZ, and the Clerk of Court is authorized to enter judgment accordingly.

Dated: July 3, 2013
Long Island City, N.Y.

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ROBERT J. McDONALD
J.S.C.