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

LESLIE OGLETREE,

Plaintiff,

- against -

FRANKLIN ROLLE, PENA NORMANDYS, FRANCISCO PIMENTEL, BRIAN PARTMAN and ARNOLD SMITH,

Defendants.

- x

Index No.: 29966/2010

Motion Date: 12/19/12

Motion No.: 110

Motion Seq.: 3

The following papers numbered 1 to 24 were read on this motion by defendant, ARNOLD SETH, for an order pursuant to CPLR 3212(b), granting summary judgment and dismissing the plaintiff's complaint against said defendant on the ground that said defendant bears no liability for causing injuries to the plaintiff:

	Papers Numbered
Defendant SETH's Notice of Motion	1 - 7
Defendant ROLLE's Affirmation in Opposition	8 - 10
Defendant PARTMAN'S Affirmation in Opposition	11 - 13
Plaintiff's Affirmation in Opposition	14 - 16
SETH's Reply Affirmations(3)	17 - 24

In this action for negligence, plaintiff, Ms. Leslie Ogletree, seeks to recover damages for personal injuries she sustained as a result of a motor vehicle accident that occurred on July 9, 2010. The five vehicle, chain reaction accident, took place on Atlantic Avenue near its intersection with Saratoga Avenue, Kings County, New York. Plaintiff commenced the action by filing a summons and complaint on December 1, 2010. Plaintiff served a note of issue and certificate of readiness on June 11, 2012. This matter is presently on the calendar of the Trial Scheduling Part for April 23, 2013.

Defendant, Arnold Seth, now moves by notice of motion for an order pursuant to CPLR 3212(b), granting summary judgment and dismissing the plaintiff's complaint against him on the ground that his vehicle, the third vehicle in the chain, was at a complete stop when it was struck in the rear bu the vehicle operated by defendant Rolle. Seth contends that he was not negligent in the operation of his vehicle and that stopping his vehicle to avoid colliding with the Partman vehicle in front of his vehicle was not a proximate cause of the injuries sustained by the plaintiff, who was operating the fifth vehicle in the chain.

In support of the motion for summary judgment, defendant Seth submits an affirmation from counsel, Tracy Morgan, Esq.; a copy of the pleadings; and copies of the transcripts of the deposition testimony of plaintiff, Leslie Ogletree and defendants, Francisco Pimental, Brian Partman, Arnold Seth and Franklin Rolle

The deposition testimony of the parties is as follows:

Francisco Pimental testified at an examination before trial on January 24, 2012. He stated that on the date of the accident he was employed at a bodega on Third Avenue in Brooklyn. He was going to work in a Chevrolet Lumina owned by his niece Pena Normandys. He had passed the green traffic signal at the intersection with Saratoga Avenue. He testified that he was proceeding at a rate of 30 miles per hour in the left lane when the vehicle in front of his came to a sudden stop so he applied his brakes suddenly to avoid hitting the car ahead of his car at which point his vehicle was hit in the rear by the vehicle operated by Brian Partman. His vehicle did not make contact with the vehicle in front of his. He stated that he heard two or three additional impacts behind his vehicle that happened almost simultaneously. Based upon what he heard, he believed that the vehicle behind his was also struck in the rear and that the accident involved four vehicles.

Brian Partman, age 57, testified on January 24, 2012. He stated that he is employed by Schacht Electric Supply located on Atlantic Avenue in Brooklyn. He testified that on the date of the accident he was on his way to work, operating a black Acura. He was driving in the left lane of Atlantic Avenue and came to a stop when he saw the vehicle in front of his turn towards the middle lane and then come back into the left lane and stop short. He applied his brakes hard but his vehicle struck the Pimental vehicle in front of his. His vehicle was not hit in the rear by

any other vehicles. He did not hear or see any other collisions and was not aware of any other collisions until he learned that there were other accidents at approximately the same time.

Arnold Seth, age 43, testified at an examination before trial on January 24, 2012. He stated that he is employed as an electrical controls engineer by Trans Canada located on Vernon Boulevard in Long Island City, Queens. On the date of the accident he was driving to work with his wife in a four door silver Honda Accord. He stated that the accident involved five vehicles and occurred on Atlantic Avenue between Saratoga Avenue and Lewis Avenue. He was proceeding at a rate of speed of 25 - 35 miles per hour in the left lane. He states that as he was proceeding he noticed that the vehicle in front of his, Mr. Partman's Acura, struck the Pimental vehicle in the rear. He testified that when he observed the accident in front of him he brought his vehicle to a controlled stop without stopping short. He stated that he was able to stop his vehicle without hitting the car in front of him. He estimated that he stopped ten seconds after the Acura came to a stop. He was ten feet from the Acura when he stopped. However 2 - 3 seconds after he stopped, his vehicle was struck in the rear by a green Mercury minivan operated by Mr. Rolle. He stated that he felt two contacts because the vehicle behind his was also struck in the rear. However, he did not observe any other impacts with the other vehicles. The last vehicle in the chain was a Nissan, operated by Ms. Ogletree. Therefore, Seth's testimony was to the effect that he stopped his vehicle without hitting any other vehicles in front of his vehicle. He was then hit by Rolle's minivan and the impact between the minivan and plaintiff's Nissan came subsequent to the impact between the van and his car. He stated when he exited his vehicle he observed that the Acura in front of his had stopped because it had struck the car in front of it.

Franklin Rolle, age 44, testified on December 14, 2011. He stated that he is employed as a mechanic electrician with CM Ritchey Electric. On the date of the accident he was going to work and operating a green Ford van. He was proceeding on Atlantic Avenue in the left lane. He had just passed the intersection of Saratoga Avenue. He observed a police car in the right lane. He stated that there was a prior two vehicle accident in the left lane between a Jeep and a car. He was traveling 15 feet behind a Honda. He brought his vehicle to a stop 10 feet from the Honda and then after a minute his vehicle was struck on the rear driver's side propelling his car into the Honda in front of him. He stated that the vehicle in front of his came to a slow stop. He stated that he never entered the center lane. Mr. Rolle testified that the vehicle in front of his tried to go to the

right but did not enter the center lane. Seth's passenger tire was on the white line and he had his turn signal on. Rolle also put his right turn signal on. He stated that the vehicle behind his also tried to turn to the right. When he observed the vehicle behind he saw that the front of Ogletree's vehicle was partially in the middle lane and the back was in the left lane.

Plaintiff, **Leslie Ogletree, age 49**, testified on December 14, 2011. She testified that at 6:20 a.m. on the date of the accident she was operating her Nissan Rogue westbound on Atlantic Avenu**e**. She was heading to work at Long Island University in Brooklyn and had just picked up her friend, Karen Williams. She testified that there were five vehicles involved in the accident, all proceeding westbound on Atlantic Avenue. Atlantic Avenue consists of three lanes of traffic in each direction. She stated that there is a traffic signal at the intersection of Atlantic Avenue and Saratoga Avenue which was green when she first observed it. She stated that she was proceeding in the middle lane and there was police activity in the right lane. A mini van operated by defendant Rolle passed her vehicle in the left lane tried to come into the middle lane and hit her fender on the drivers side. She stated that her vehicle was moving at the time of the impact. When the police arrived at the scene she told the Officer that there had been a three car accident in the left lane when a green mini van came past her and hit her vehicle. She stated that her foot was on the brake at he time of the impact her vehicle was moving slowly. Ogletree testified that Rolle's vehicle struck the vehicle in front of his in the left lane and then came back towards the middle lane and caught the driver's side of her fender. She stated that she only felt one impact to her vehicle and that as a result of the impact, she hit her right knee on the console. She never made contact with any of the vehicles involved in the three car accident. She did not see any impacts in the left lane but she heard the noise of the impact. Her vehicle was struck 3 - 4 seconds after she heard the impact in the left lane.

Counsel for Seth, the operator of vehicle number three in this five vehicle accident, contends that the evidence submitted in support of his motion for summary judgment, including the deposition testimony of Partman, Seth, and Rolle demonstrates that Seth brought his vehicle to a stop due to the rear-end collision that occurred immediately in front of his vehicle. Counsel contends that based upon the deposition testimony there is no basis to find that Seth, whose vehicle was stopped two vehicles in front of the plaintiff's vehicle, is liable for the alleged injuries to the plaintiff who claims that her vehicle was struck by the Rolle vehicle. Seth claims that Rolle, in the

fourth vehicle, failed to maintain a safe speed and distance behind Seth's vehicle.

Counsel for defendant, Partman, opposes the motion and contends that Seth has not demonstrated, prima facie, as a matter of law that his actions were not a proximate cause of the injuries sustained by plaintiff, Leslie Ogletree. Counsel claims that the deposition testimony of the parties is conflicting as to how the accident took place, and in addition, there are questions of fact as to the order of impacts, which vehicles were moving or stopped at the time of the impacts, the cause of the impacts, whether there was more than one accident, and the time period between collisions. Counsel claims that Rolle testified that he brought his vehicle to a stop because he realized that Seth did not observe or realize that the prior two-vehicle accident had just occurred. In addition, counsel states that it was unreasonable for Seth to stop 12 feet behind the Partmen vehicle on a city street where there is a high volume of traffic. Counsel claims that had Seth not left so much room ahead of his vehicle when he came to a stop, the impacts involving the Rolle and Ogletree vehicles might not have occurred. Counsel claims that summary judgment for any party is inappropriate where the testimony of each of the five drivers is contradictory.

In opposition, plaintiff's counsel, Joshua I. Fiscus, Esq., states that for the sake of brevity and in the spirit of judicial economy he joins in the arguments set forth in the affirmation in opposition submitted by counsel for defendant Partman. Counsel also claims that as Rolle testified that Seth's vehicle began to merge from the left lane into the center lane that there is a question of fact as to Seth's liability.

Counsel for Rolle, opposes the motion for summary judgment based upon the multiple disputed issues of fact including the lane each vehicle was in at the time of the impact, the order of impacts, the cause of the various collisions and whether there was one discrete accident or two. Further counsel contends that issues regarding credibility should be left to the trier of fact (citing Martinez v Martinez, 93 AD3d 767 [2d Dept. 2012]).

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]).

As Seth stopped his vehicle in front of the plaintiff's vehicle to avoid hitting the Partmen vehicle, Seth contends that the proof submitted shows that the complaint should be dismissed against him as he could not be liable for any of the injuries claimed by plaintiff(see Ferguson v Honda, 34 AD3d 356 [1st Dept. 2006]; Mustafaj v Driscoll, 5 AD3d 138 [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]).

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, it is clear from the testimony of Seth, Rolle and Partman, that the Seth vehicle was at a complete stop prior to being struck in the rear by the Rolle vehicle. As Rolle testified that the Seth vehicle had come to a gradual stop at the time of the impact, Seth demonstrated that his conduct was not a proximate cause of the rear-end collision with Rolle and Ogletree or a proximate cause of the plaintiff's injuries (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, Seth satisfied his prima facie burden of establishing entitlement to judgment as a matter of law by demonstrating that his vehicle was stopped at the time it was struck in the rear (see Ianello v. O'Connor, 58 AD3d 684 [2d Dept. 2009]).

Having made the requisite prima facie showing of their entitlement to summary judgment, the burden then shifted to plaintiff or any of the co-defendants to raise a non-negligent explanation for the rear-end collision with Seth's vehicle or a triable issue of fact as to whether Seth 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 the plaintiff and the co-defendants failed to submit evidence as to any negligence on the part of Seth or to provide a non-negligent explanation for striking his vehicle in the rear 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]). "A claim that the driver of the lead vehicle made a sudden stop, standing alone, is insufficient to rebut the presumption of negligence" (Campbell v City of Yonkers, 37 AD3d 750 [2d Dept. 2007] quoting Ayach v Ghazal, 25 AD3d 742 [2d Dept. 2006]; also see Plummer v Nourddine, 82 AD3d 1069 [2d Dept. 2011]; Kastritsios v Marcello, 923 NYS2d 863 [2d Dept. 2011]; Ramirez v Konstanzer, 61 AD3d 837 [2d Dept. 2009]; Jumandeo v Franks, 56 AD3d 614 [2d Dept. 2008]). If the operator of the moving vehicle cannot come forward with evidence to rebut the inference of negligence, the occupants and owner of the stationary vehicle are entitled to summary judgment on the issue of liability (see Kimyagarov v. Nixon Taxi Corp., 45 AD3d 736 [2d Dept. 2007]). "Vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, 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 car and the car ahead (see Vehicle and Traffic Law § 1129 [a]). 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.

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

ORDERED, that the motion by defendant ARNOLD SETH for summary judgment dismissing the plaintiff's complaint and any and all cross-claims against him is granted.

Dated: March 18, 2013
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.