Short Form Order

SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 7 NASSAU COUNTY

PRESENT:
Honorable Karen V. Murphy
Justice of the Supreme Court

LUCAS SANCHEZ,

Plaintiff,

-against-

ROBERT C. GULLO,

Defendant.

Index No. 607874/2017
Motion Submitted: 06/11/19
Motion Sequence: 001

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....	X
Answering Papers.....	X
Reply.....	X
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

Plaintiff moves this Court for an Order granting him summary judgment on the ground that defendant negligently, proximately and solely caused the subject automobile accident and striking defendant's first, third, fourth, sixth and seventh affirmative defenses. Defendant opposes the requested relief.

This action arises from a motor vehicle accident that occurred on October 17, 2016, at the intersection of Fulton Avenue and North Franklin Avenue. Plaintiff alleges that his vehicle was stopped in the right lane at said intersection when defendant's vehicle, operated by defendant, struck plaintiff's vehicle in the rear.

This Court recognizes that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of

fact. (***Andre v. Pomeroy,*** 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment should only be granted where the Court finds as a matter of law that there is no genuine issue as to any material fact. (***Cauthers v. Brite Ideas, LLC,*** 41 A.D.3d 755, 837 N.Y.S.2d 594 [2d Dept., 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the defendant. (***Makaj v. Metropolitan Transportation Authority***, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

A rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of negligence with respect to the operator of the moving vehicle and imposes a duty on the operator of the moving vehicle to rebut the inference of negligence by providing a non-negligent explanation for the collision. (***McCoy v. Zaman***, 67 A.D.3d 653, 886 N.Y.S.2d 916 (2d Dept., 2009); ***Velasquez v. Denton Limo., Inc.***, 7 A.D.3d 787, 776 N.Y.S.2d 874 [2d Dept., 2004]).

In support of his motion, plaintiff submits *inter alia* a copy of the pleadings, the police report[1], the transcripts of plaintiff's and defendant's examinations before trial (Exhibits F and G), and photographs[2] of the street where the accident occurred.

During his deposition, plaintiff testified he was stopped at a red light in the right lane behind another vehicle at the time of the accident. (Exhibit F at pg. 21). Plaintiff had his turn signal on while waiting for the light to change. (*Id* at pg. 31). When plaintiff came to a stop for the light, a taxi cab was stopped at the curb to the right of his vehicle to pick up a passenger, who entered the cab from the rear passenger door. (*Id.* at pgs. 27, 29). As the light was turning green, the taxi pulled in front if plaintiff's car (*Id.* at pgs. 36-37). Plaintiff did not hear screeching tires or brakes or honking horns before he was hit in the rear by defendant's vehicle. (*Id.* at pg. 33).

Based on his submissions in support of the instant motion, plaintiff has established his *prima facie* entitlement to summary judgment as a matter of law.

In order to defeat plaintiff's motion for summary judgment, defendant must provide a non-negligent explanation for the rear-end collision sufficient to raise an issue of fact as to whether the possibly negligent operation of plaintiff's car caused or contributed to the accident. (***Foti v. Fleetwood Ride, Inc.***, 57 A.D.3d 724, 871 N.Y.S.2d 215 (2d Dept., 2008); ***Boockvor v. Fischer***, 56 A.D.3d 405, 866 N.Y.S.2d 767 [2d Dept., 2008]).

Defendant argues plaintiff came to an abrupt stop without warning to the defendant because the passenger door of the taxi cab opened for a passenger. Specifically, defendant

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[1] The police report is not in admissible form and, therefore, will not be considered by the Court.

[2] Plaintiff's moving papers state photographs depicting the damages to his vehicle were attached as an exhibit. However, after a careful review of plaintiff's exhibits, the Court notes the pictures are not attached and cannot be considered.

testified that on the day of the accident, which was a cool, bright sunny day, he was traveling in the right lane and came to a stop for a yellow to red light. (Exhibit G at pgs. 22, 27, 29). While he was stopped at the light, plaintiff's vehicle was stopped in front of defendant's vehicle. (*Id.* at pg. 30). Defendant further testified that just before the accident, the taxi cab ahead of plaintiff's vehicle stopped and the rear passenger door opened to let a passenger out. (*Id.* at pg. 34). Defendant was stopped approximately five feet behind plaintiff's vehicle. (*Id.* at pg. 36). Defendant, while his car was in motion due to the light changing green, observed plaintiff's brake lights when the taxi's door opened. (*Id.* at pg. 38). Defendant applied his brake but hit plaintiff in the rear. (*Id.*).

The Court recognizes that conclusory assertions that the driver of the lead vehicle made a sudden and unexpected stop are, without more, insufficient to rebut the presumption of negligence (*see* ***Kastritsios v. Marcello***, 2011 N.Y. Slip Op. 4425, 923 N.Y.S.2d 863 (2d Dept. 2011); ***Ramirez v. Konstanzer***, 61 A.D.3d 837, 878 N.Y.S.2d 381 (2d Dept. 2009); ***Vecchio v. Hildebrand***, 304 A.D.2d 749, 758 N.Y.S.2d 666 (2d Dept., 2003); ***McGregor v. Manzo,*** 295 A.D.2d 487, 744 N.Y.S.2d 467 (2d Dept. 2002); ***DiLeo v. Greenstein***, 281 A.D.2d 586, 722 N.Y.S.2d 259 (2d Dept. 2001); ***Shamah v. Richmond County Ambulance Service, Inc.***, 279 A.D.2d 564, 719 N.Y.S.2d 287 [2d Dept., 2001]).

The Court finds defendant has not offered a non-negligent explanation for the rear-end collision other than plaintiff stopped short. Therefore, defendant has failed to raise a triable issue of fact. Accordingly, that branch of plaintiff's motion seeking summary judgment on liability is granted.

The Court now turns to that portion of plaintiff's motion seeking to strike defendant's first, third, fourth, sixth and seventh causes of action. Defendant opposes striking his third, fourth, and sixth affirmative defenses, not his first and seventh affirmative defenses.

Accordingly, that branch of plaintiff's motion seeking to strike defendant's first and seventh affirmative defenses is granted.

Regarding defendant's third affirmative defence, plaintiff testified that he was wearing a seatbelt that laid across his shoulder and lap at the time of the accident. (Exhibit F at pg. 14). During defendant's deposition, he testified he "wouldn't' know" if plaintiff was wearing a seatbelt. Defendant failed to offer any other evidence demonstrating that plaintiff was not wearing a seatbelt at the time of the accident. Accordingly, defendant's third affirmative defense is stricken.

As to defendant's fourth affirmative defense, plaintiff argues defendant was not confronted with a sudden and unexpected perilous situation that was not of his own making. Plaintiff avers he was at a full stop for the red light. When the light turned green, the taxi cab to plaintiff's right pulled out in front of plaintiff's vehicle. Plaintiff observed the taxi

merging into traffic in front of him, so he remained stopped with his right turn signal on. Plaintiff maintains that defendant was not presented with an emergency because plaintiff's vehicle remained stopped. Rather, defendant rear-ended plaintiff because defendant failed to maintain a safe distance behind plaintiff.

Conversely, defendant argues that the taxi cab's abrupt stop caused plaintiff to stop suddenly even though the light was green. Defendant further contends that since he was stopped five feet behind plaintiff's vehicle, there is a triable issue of fact as to whether plaintiff's sudden and abrupt stop presented an emergency situation for defendant.

"Under the emergency doctrine, when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context. Except in [the] most egregious circumstances, it is normally left to the trier of fact to determine if [a particular] situation rises to the level of [an] emergency" (internal quotes and citations omitted). (***Freder v. Costello Indus., Inc.***, 162 A.D.3d 984, 80 N.Y.S.3d 371, 2018 N.Y. App. Div. LEXIS 4650, 2018 NY Slip Op 04700, 2018 WL 3132335).

"However, where the claimed emergency resulted from a defendant's own actions, for example, from the defendant's failure to maintain a safe distance between his or her vehicle and the vehicle in front of him of her, it will not qualify as an emergency under the emergency doctrine. Nor will the emergency doctrine apply where he or she encounters 'a known, foreseeable hazard which he in fact observed enter his path prior to the accident' or where he or she 'fails to be aware of the potential hazards presented by traffic conditions, including stoppages caused by accidents up ahead.'" (*Id.*).

In the case at bar, defendant testified he did not have a recollection of seeing the taxi cab in front of plaintiff's vehicle because he was not pay attention to it; however, he did see the cab and the passenger rear door open. Defendant also testified that he saw plaintiff apply his brakes and was stopped five feet behind plaintiff.

The Court is not persuaded that defendant maintained a safe distance by stopping five feet behind plaintiff. Moreover, defendant observed the taxi cab pull over to let a passenger out at the curb. As such, he should have been aware of the potential hazard presented by the cab reemerging into traffic. Accordingly, that branch of plaintiff's motion seeking dismissal of defendant's fourth affirmative defense is granted.

As to defendant's sixth affirmative defense, plaintiff argues it should be dismissed because plaintiff fully stopped at a red light in a reasonable and safe manner. Plaintiff claims he was not comparatively negligent, wearing a seatbelt, that no emergency occurred, and there is no evidence plaintiff failed to mitigate his damages.

On the contrary, defendant argues plaintiff did not failed to produce evidence, such as testimony, showing plaintiff attempted to mitigate the damages.

The Court finds plaintiff's arguments to strike defendant's sixth affirmative defense is not supported by the evidence presented. Accordingly, that branch of plaintiff's motion seeking dismissal of defendant's sixth affirmative defense is denied.

Based on the foregoing, plaintiff's motion is granted in part and denied in part as set forth above.

The foregoing constitutes the Order of this Court.

Dated: September 24, 2019
Mineola, NY

Karen V. Murphy
J.S.C.

ENTERED
SEP 26 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE