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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

WAYNE GORDON and FIONA GORDON,

Plaintiff(s),

- against -

CARLITA RODRIGUEZ,

Defendant(s).

TRIAL/IAS PART 24

INDEX NO. 30496/98

MOTION SEQUENCE NO. 1

MOTION SUBMISSION DATE: June 30, 2000

The following papers read on this motion:

Notice of Motion	**X**
Affirmation in Opposition	**X**
Reply Affirmation	**X**

Upon the foregoing papers, the motion, by plaintiffs, for an Order, pursuant to CPLR 3212, directing the entry of summary judgment in favor of the plaintiffs and against the defendant on all issues of liability upon the grounds that there is no defense to the cause of action, is determined as hereinafter set forth.

This action involves a multiple car accident which occurred on August 16, 1997 at approximately 9:00 p.m. at the intersection of Uniondale Avenue and Nassau Road, Uniondale, New York. At that time the plaintiffs contend that the defendant's vehicle struck the plaintiffs' vehicle in the rear while the plaintiffs were stopped at a red light at the intersection.

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in **Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc., 207 AD2d 880, 616 NYS2d 650, 651 (Second Dept., 1994):**

> "It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). Of course, summary judgment is a drastic

remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Zuckerman v. City of New York, supra*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718)."

In examining the issue of a rear-end collision, the Court in **Leal v. Wolff, 224 AD2d 392, 638 NYS2d 110 (Second Dept., 1996)** stated:

"A rear-end collision with a stopped automobile establishes a prima facie case of neglignece on the part of the operator of the moving vehicle and imposes a duty on the operator of the moving vehicle to explain how the accident occurred *(see, Gambino v. City of New York,* 205 A.D.2d 583, 613 N.Y.S.2d 417; *Starace v. Inner Circle Qonexions*, 198 A.D.2d 493, 604 N.Y.S.2d 179; *Edney v. Metropolitan Suburban Bus Auth.,* 178 A.D.2d 398, 577 N.Y.S.2d 102; *Benyarko v. Avis Rent A Car Sys.,* 162 A.D.2d 572, 573, 556 N.Y.S.2d 761). The operator of the moving vehicle is required to rebut the inference of negligence created by an unexplained rear-end collision *(see, Pfaffenbach v. White Plains Express Corp.,* 17 N.Y.2d 132, 135, 269 N.Y.S.2d 115, 216 N.E.2d 324) because he or she is in the best position to explain whether the collision was due to a mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on a wet pavement, or some other reasonable cause *(see, Carter v. Castle Elec. Contr. Co.,* 26 A.D.2d 83, 85, 271 N.Y.S.2d 51). If the operator of the moving vehicle cannot come forward with any evidence to rebut the inference of negligence, the plaintiff may properly be awarded judgment as a matter of law *(see, Starace v. Inner Circle Qonexions, supra,* at 493, 604 N.Y.S.2d 179; *Young v. City of New York,* 113 A.D.2d 833, 834, 493 N.Y.S.2d 585)." **Leal v. Wolff supra at pages 111-112.**

In support of the plaintiffs' application, the plaintiffs, amongst other things, submit the deposition transcript of the driver of the plaintiffs' vehicle , the plaintiff Wayne Gordon. Therein, Mr. Gordon avers that the traffic light at the intersection was red (see deposition transcript at page 15); that there was a vehicle in front of him which was slowing down to stop for the light (see deposition transcript at page 16); that the plaintiff brought his vehicle to a stop behind that vehicle at the intersection (see deposition transcript at page 17); that the light never changed prior to the Gordon vehicle being struck in the rear (see deposition transcript at page 18); that the plaintiffs' vehicle had been stopped for approximately fifteen seconds prior to impact (see deposition transcript at page 19); that at the time of impact theplaintiff's left foot was on the brake (see deposition transcript at page 19).

In opposition to the motion, the defendant does not offer any evidence in admissible form from the defendant Carlita Rodriguez or any witness to the accident. The defendant's submission of an alleged telephone conversation between a claims adjustor and the plaintiff Wayne Gordon is not in admissible form and as such, is not considered herein. Assuming arguendo that the Court were to consider the arguments advanced by the defendant's counsel in opposition as that of a person with personal knowledge, the contentions raised therein consist of speculation, guess and surmise **(see Beecher v. Northern Men's**

Sauna, __AD2d__, 705 NYS2d 465, Second Dept., 2000). The defendant's further contention as to the credibility of the plaintiff Wayne Gordon's version of the accident at issue raises an issue not properly considered in relation to a motion for summary judgment **(see Ferrante v. American Lung Assn., 90 NY2d 623, 665 NYS2d 25, 687 NE2d 1308)**.

Accordingly, based on the foregoing the plaintiffs' application for an Order, pursuant to CPLR 3212, directing the entry of summary judgment in favor of the plaintiffs and against the defendant on all issues of liability upon the grounds that there is no defense to the cause of action is **granted**.

SO ORDERED.

DATED: 9/6/2000

XXX J.S.C.