SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU
PRESENT: HONORABLE JOHN M. GALASSO, J.S.C.

EDWIN GARCIA,

Plaintiff,

-against-

Sequence #001
Index #11094/06
Part 41

A.T. PROCACCINO, JR., DANIELLA R. AXELRUD and ABRAHAM AXELRUD,

9/12/2007

Defendants.

Notice of Motion for Summary Judgment..1
Reply Affirmation 2
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Upon the foregoing papers, defendants Daniella Axelrud and Abraham Axelrud's motion for an order granting them summary judgment and dismissing co-defendant A.T. Procaccino, Jr.'s cross-claim for indemnity is denied a premature.

This automobile accident occurred while the three vehicles involved were approaching an intersection. While it is uncontested that defendant Procaccino's vehicle struck plaintiff's car in the rear, the accident was precipitated when the Axelrud automobile struck Procaccino's vehicle first.

Plaintiff testified at his deposition that he was stopped for a red light. Defendant Procaccino testified that as he was approaching the stoplight at approximately 5 to 10 miles per hour behind plaintiff, his vehicle was struck first by defendant Axelrud's automobile.

Defendant Axelrud was never deposed.

Plaintiff settled with defendant Axelrud for $20,000.

The Court is now asked to provide a determination as a matter of law based on one page each of deposition testimony from plaintiff and defendant Procaccino. (The police report submitted, whether admissible or not, neither adds nor detracts from the scenario described above).

The law is clear that there is a presumption of negligence against the driver who collides with a stopped automobile in the rear (*Bender v Rodriguez,* 302 AD2d 882). That presumption can be rebutted if the driver provides a sufficient non-negligent explanation(*Gaeta v Carter,* 6 AD3d 576).

The law is also clear that the rear-most driver in a chain-reaction collision is presumed responsible (*De La Cruz v Ock Wee Leong,* 16 AD3d 199).

The issue to be resolved here is can the Court conclude as a matter of law that defendant Procaccino committed no wrong and thus the cross-claim for indemnification should stand, or is defendant Procaccino partially liable, thus invoking the contrabution principles that are governed by General Obligations Law §15-108 when a co-tortfeasor has settled his liability with the injured plaintiff (see *Glaser v Fortunoff*, 71 NY2d 643).

Concerning defendant Procaccino, he may be negligent for following too closely and yet not be a proximate cause of the plaintiff's injury. In any event, no admissible evidence has been presented to establish that at 5 to 10 miles per hour he was following plaintiff too closely under the circumstances present. At the very least, defendant Axelrud should be deposed and all the deposition testimony regarding liability should be submitted to the Court before a determination may be made as a matter of law.

Dated: September 21, 2007

.....J.S.C.