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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

LOUISE RIGINIO and MICHAEL RIGINIO,

TRIAL/IAS PART 9

INDEX NO. 9997/06 (MS 2)
INDEX NO. 9997/06 (MS 3)
INDEX NO. 10927/06 (MS 3)

Plaintiff(s),

- against -

MOTION SEQUENCE
NO. 2 & 3 & 3

THEODORE WOZNIAK,

MOTION SUBMISSION
DATE: April 22, 2008

Defendant(s).

Action No. 1

RONALD DIRIENZO and GAETANA DIRIENZO,

Action No. 2

Plaintiff(s),

- against -

INDEX NO. 10927/06

MICHAEL RIGINIO and THEODORE WOZNIAK,

Defendant(s).

The following papers read on this motion:

Notice of Cross Motion	X
Notice of Motion	X
Affirmation in Support	XX
Reply Affirmation	XXXX
Affirmation in Opposition	XXX

Upon the foregoing papers, the motion by the plaintiffs in Action No. 2 Ronald Dirienzo and Gaetana Dirienzo, for an Order pursuant to CPLR §3212 granting plaintiffs Ronald Dirienzo and Gaetana Dirienzo partial summary judgment on the issue of liability against the defendant Theodore Wozniak; the motion by the defendant in Action No. 2 and plaintiff on the counterclaim in Action No. 1, Michael Riginio, for an Order

pursuant to CPLR §3212 granting summary judgment to Michael Riginio, the defendant in Action 2 and the plaintiff on the counterclaim in Action 1 and the motion by the plaintiff in Action No. 1, Louise Riginio, for an Order granting plaintiff Louise Riginio [a passenger in her husband Michael Riginio's vehicle] partial summary judgment as against defendant Wozniak on the issue of liability upon the ground that there are no triable issues of fact and that, as a matter of law, plaintiff Louise Riginio is entitled to judgment on liability against said defendant and upon granting partial summary judgment as aforesaid, setting this matter down for an immediate trial by jury on the issue of damages, are all determined as hereinafter provided:

These personal injury actions arises out of a three car accident that occurred on April 2, 2006 at approximately 9:35 pm on the Verrazano Bridge, Kings County, New York. At the time of the alleged incident the vehicle driven by Ronald Dirienzo was the first vehicle, which was allegedly it in the rear by the vehicle driven by Michael Riginio which was the second vehicle and the Riginio vehicle was allegedly struck in the rear by the vehicle driven by Theodore Wozniak which was the third vehicle.

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 negligence 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 AD2d 583, 613 NYS2d 417; *Starace v Inner Circle Qonexions*, 198 AD2d 493, 604 NYS2d 179; *Edney v Metropolitan Suburban Bus Auth.*, 178 AD2d 398, 577 NYS2d 102; *Benyarko v Avis Rent A Car Sys.*, 162 AD2d 572, 573, 556 NYS2d 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 NY2d 132, 135, 269 NYS2d 115, 216 NE2d 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 b*

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Castle Exec. Contr. Co., 26 AD2d 83, 85, 271 NYS2d 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 NYS2d 179; *Young v City of New York*, 113 AD2d 833, 834, 493 NYS2d 585).

Under the circumstances of this case, the plaintiffs established a prima facie case of negligence. Since the defendant was under a duty to maintain a safe distance between his car and Leal's car (see, *Vehicle and Traffic Law §1129[a]*), his failure to do so, in the absence of a nonnegligent explanation, constituted negligence as a matter of law (see, *Silberman v Surrey Cadillac Limousine Serv.*, 109 AD2d 833, 486 NYS2d 357). The defendant's deposition and accident report, which allege only that Leal's car stopped short in heavy traffic, are insufficient to raise a triable issue of fact (see, *Silberman v Surrey Cadillac Limousine Serv., supra*)."

see *Leal v Wolf, supra* at 111-112

The Court observes that although Ronald DiRienzo stated at his deposition that at the time of the accident his vehicle was stopped (see *deposition transcript of Ronald DiRienzo at pg 32*) and that Michael Riginio set forth at his deposition that his vehicle was stopped (see *deposition transcript of Michael Riginio at pg 23*). Theodore Wozniak testified at his deposition:

"Q. When the police came to the scene, now, did you speak to the officer at the scene?

A. Yes.

Q. Did you describe the accident to him at that point?

A. Yes.

Q. What did you say to him, and what did he say to you?

A. He asked to describe what happened. I told him that I was driving on the left-hand lane, and the traffic came to an abrupt stop. I saw the car in front of me hit the car in front of him, and then I hit him."

see *deposition transcript of Theodore Wozniak at pgs 24-25*

Based upon the foregoing, there is an issue of fact as to how the accident in issue occurred. As such, the application by the plaintiffs Ronald Dirienzo and Gaetana Dirienzo for an Order pursuant to CPLR §3212 granting plaintiffs Ronald Dirienzo and Gaetana Dirienzo partial summary judgment on the issue of liability against the defendant Theodore Wozniak; the motion by the defendant in Action No. 2 and plaintiff on the counterclaim in Action No. 1, Michael Riginio for an Order pursuant to CPLR §3212 granting summary judgment to Michael Riginio, the defendant in Action 2 and the plaintiff on the counterclaim in Action 1 and the motion by the plaintiff Louise Riginio for an Order granting plaintiff Louise Riginio [a passenger in her husband Michael Riginio's vehicle] partial summary judgment as against defendant Wozniak on the issue of liability upon the ground that there are no triable issues of fact and that, as a matter of law, plaintiff Louise Riginio is entitled to judgment on liability against said defendant and upon granting partial summary judgment as aforesaid, setting this matter down for an immediate trial by jury on the issue of damages, are all respectively denied (also see, *Shikir v Falzarano*, 42 AD3d 517, 840 NYS2d 810 (Second Dept., 2007).

SO ORDERED.

DATED: 6/24/2008

Ray S. Malen
ENTERED J.S.C.

JUN 27 2008