SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present:

HON. ANTHONY L. PARGA

Justice

---X PART 8

NORMAN ESCOFFERY,

INDEX NO. 9941/10

Plaintiff,

-against-

MOTION DATE: 06/09/11
SEQUENCE NO: 01

ROBERT P. LAUBSCH,

Defendant.

---X

Notice of Motion, Aff & Exs........ 1
Affirmation in Opposition........ 2
Reply Affirmation........ 3

Upon the foregoing papers, plaintiff's motion for summary judgment on the issue of liability, pursuant to CPLR §3212, is denied.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff as a result of a three car, rear-end chain, motor vehicle accident which occurred on March 2, 2010, eastbound on Fordham Road, at or near the intersection with the entrance to the Bronx Zoo in the Bronx, New York. Plaintiff, Norman Escoffery, was the driver of the middle vehicle in this chain collision, defendant, Robert P. Laubsch was the driver of the rear-most vehicle, and a non-party was the driver of the front vehicle.

Plaintiff moves for summary judgment on the issue of liability. In support of his motion, plaintiff has submitted his duly executed affidavit, along with the deposition transcripts of both the plaintiff and the defendant. At his deposition, plaintiff testified that he was attempting to bring his vehicle to a stop, and was in the process of slowing down, when he felt an impact to the rear of his vehicle. Plaintiff testified that he "slammed on the brake" when he saw that the vehicle in front of him was stopped. Plaintiff testified that before he was able to stop, his vehicle

was hit in its rear by the defendant's vehicle and pushed into the vehicle in front of plaintiff. Plaintiff testified that he felt the impact to the rear of his vehicle before his vehicle struck the car in front of it.

In opposition, defendant, Robert P. Laubsch, argues that the plaintiff's vehicle struck the vehicle in front of it before the defendant struck the rear of the plaintiff's vehicle. Defendant contends that an accident occurred between the plaintiff's vehicle and the vehicle in front of the plaintiff, and thereafter, the defendant was unable to avoid the accident, striking the plaintiff's vehicle in the rear after the impact between the first two vehicles occurred. Defendant Laubsch testified at his deposition that the middle car, driven by the plaintiff, "crashed into" the front car first, and, upon seeing this accident, he aggressively applied his brakes to stop, but was unable to bring his vehicle to a stop before making contact with the plaintiff's vehicle.

A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the rearmost vehicle, and imposes a duty on the operator of the rearmost vehicle to come forward with an adequate non-negligent explanation for the accident. (*Carman v. Arthur J. Edwards Mason Contracting Co.*, Inc., 71 A.D.3d 813 (2d Dep't 2010)(emphasis added); *Maynard v. Vandyke*, 69 A.D.3d 515 (2d Dep't 2010); *Trombetta v. Cathone*, 59 A.D.3d 526 (2d Dep't 2009); *Ramirez v. Konstanzer*, 61 A.D.3d 837 (2d Dep't 2009); *Garner v. Chevalier Transportation Corp.*, 58 A.D.3d 802 (2d Dep't 2009); *Jumandeo v. Franks*, 56 A.D.3d 614 (2d Dep't 2008); *Johnston v. Spoto*, 47 A.D.3d 888 (2d Dep't 2008); *Harrington v. Kern*, 52 A.D.3d 473 (2d Dep't 2008); *Woods v. Johnson*, 44 A.D.3d 1201 (2d Dep't 2007)). The proponent of a summary judgement motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Alvarez v. Prospect Hosp.,* 68 N.Y.2d 320 (Ct. of App. 1986)). Once the movant has demonstrated a prima facie showing of entitlement to judgement, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of a fact which require a trial of the action. (*Zuckerman v. City of New York,* 49 N.Y.2d 557 (Ct. of App. 1980)).

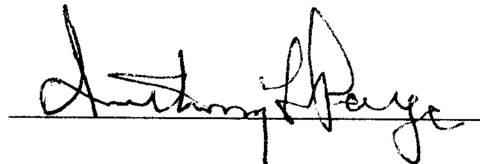
The defendant has demonstrated a non-negligent explanation for the happening of the

accident and has raised a triable issue of fact sufficient to defeat the plaintiff's motion. The conflicting testimony as to how this chain accident occurred creates a question of fact as to whether the actions of the plaintiff caused or contributed to the accident. In determining whether summary judgment is appropriate, the Court must view the parties' competing contentions in the light most favorable to the non-moving party. (*Pearson v. Kix McBride, LLP*, 63 A.D.3d 895, 883 N.Y.S.2d 53 (2d Dept. 2009); *Stukas v. Streiter*, 83 A.D.3d 18, 918 N.Y.S.2d 176 (2d Dept. 2011); *Marine Midland Bank, N.A. v. Dino & Arties' Automatic Transmission Co.*, 168 A.D.2d 610, 563 N.Y.S.2d 447 (2d Dept. 1990)).

If there is any doubt as to the existence of a triable issue of fact, or if a material issue of fact is arguable, summary judgment should be denied. With respect to summary judgment, issue finding, rather than issue determination, is the court's function. (*Celardo v. Bell*, 222 A.D.2d 547, 635 N.Y.S.2d 85 (2d Dept. 1995); *Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 A.D.2d 572, 536 N.Y.S.2d 177 (2d Dept. 1989)).

Accordingly, plaintiff's motion for summary judgment is denied.

Dated: July 14, 2011



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