**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 31
NASSAU COUNTY

JOHN P. MIXON and ANN MIXON,

Plaintiffs,

- against -

Index No.: 18666/10
Motion Seq. No.: 01
Motion Dates: 01/20/12

STEVEN GENTILE,

Defendant.

**The following papers have been read on this motion:**

| | Papers Numbered |
|---|---|
| Notice of Motion, Affirmation and Exhibits | 1 |
| Affirmation in Partial Opposition | 2 |

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiffs move, pursuant to CPLR § 3212, for an order granting partial summary judgment against defendant on the issue of liability upon the ground that there are no triable issues of fact; for an order striking defendant's First Affirmative Defense alleging plaintiff John P. Mixon's culpable conduct; and for an order directing an immediate trial on the issue of damages. Defendant submits partial opposition to the motion.

This action arises from a motor vehicle accident which occurred on April 8, 2010, at approximately 5:28 p.m., approximately twenty feet east of Exit 36B on the Northern State Parkway, Town of Oyster Bay, New York. The accident involved two vehicles, a 1999 Mercury Sable station wagon owned and operated by plaintiff John P. Mixon and a 2008 Acura MDX

owned and operated by defendant. Plaintiffs commenced the action by the filing and service of a Summons and Verified Complaint on or about October 1, 2010. Issue was joined on or about October 28, 2010.

Briefly, it is plaintiffs' contention that the accident occurred when plaintiff John P. Mixon was operating his vehicle in an eastbound direction on the Northern State Parkway in the vicinity of South Oyster Bay Road and said vehicle was rear-ended by defendant's vehicle. Plaintiff John P. Mixon states that, at the time of the subject accident, there was "bumper to bumper" traffic on the parkway. As he was completely stopped for traffic for a "number of seconds," he felt a "severely hard jolt" and heard an explosion of glass from the rear of his vehicle. As a result of the impact, plaintiff John P. Mixon's vehicle moved forward, despite the fact that his foot was on the brake. Plaintiffs submit that, on the date of the accident, visibility was clear and the subject roadway was dry, flat and straight.

Plaintiffs claim that defendant was the negligent party in that he failed to maintain a safe distance behind plaintiffs' vehicle, as well as failed his duty to exercise reasonable care under the circumstances to avoid an accident. Plaintiffs additionally claim that defendant cannot come up with a non-negligent explanation for striking plaintiffs' vehicle in the rear.

In defendant's opposition to plaintiffs' motion, defendant states, "[t]his affirmation is submitted in partial opposition to plaintiff's (*sic*) motion dated December 23, 2011. Defendant's opposition is to the portion of plaintiff's (*sic*) motion which requests that the Court set this matter down for an immediate trial. Defendant submits that plaintiff's (*sic*) request for an immediate trial is improper. Plaintiff (*sic*) has failed to show that this case should be expedited for any reason. Therefore, it is defendant's position that this case should follow the standard case track."

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.,* 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985). If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra.* When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra.* Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.,* 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue

of fact is presented. The burden on the Court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989). It is the existence of an issue, not its relative strength that is the critical and controlling consideration. *See Barrett v. Jacobs*, 255 N.Y. 520 (1931); *Cross v. Cross*, 112 A.D.2d 62, 491 N.Y.S.2d 353 (1st Dept. 1985). The evidence should be construed in a light most favorable to the party moved against. *See Weiss v. Garfield*, 21 A.D.2d 156, 249 N.Y.S.2d 458 (3d Dept. 1964).

When the driver of an automobile approaches another automobile from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle and to exercise reasonable care to avoid colliding with the other vehicle pursuant to New York State Vehicle and Traffic Law ("VTL") § 1129(a). *See Krakowska v. Niksa*, 298 A.D.2d 561, 749 N.Y.S.2d 55 (2d Dept. 2002); *Bucceri v. Frazer*, 297 A.D.2d 304, 746 N.Y.S.2d 185 (2d Dept. 2002).

A rear end collision with a stopped vehicle establishes a *prima facie* case of negligence on the part of the operator of the offending vehicle. *See Tutrani v. County of Suffolk*, 10 N.Y.3d 906, 861 N.Y.S.2d 610 (2008). Such a collision imposes a duty of explanation on the operator. *See Hughes v. Cai*, 55 A.D.3d 675, 866 N.Y.S.2d 253 (2d Dept. 2008); *Gregson v. Terry*, 35 A.D.3d 358, 827 N.Y.S.2d 181 (2d Dept. 2006); *Belitsis v. Airborne Express Freight Corp.*, 306 A.D.2d 507, 761 N.Y.S.2d 329 (2d Dept. 2003).

As noted, a rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of liability with respect to the operator of the rearmost vehicle, thereby requiring the operator to rebut the inference of negligence by providing a non-negligent explanation for the

collision. *See Francisco v. Schoepfer*, 30 A.D.3d 275, 817 N.Y.S.2d 52 (1st Dept. 2006); *McGregor v. Manzo*, 295 A.D.2d 487, 744 N.Y.S.2d 467 (2d Dept. 2002).

Vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since the following driver is under a duty to maintain a safe distance between his or her car and the car ahead. *See Shamah v. Richmond County Ambulance Service, Inc.*, 279 A.D.2d 564, 719 N.Y.S.2d 287 (2d Dept. 2001).

Drivers must maintain safe distances between their cars and the cars in front of them and this rule imposes on them a duty to be aware of traffic conditions including stopped vehicles. *See* VTL § 1129(a); *Johnson v. Phillips*, 261 A.D.2d 269, 690 N.Y.S.2d 545 (1st Dept. 1999).

Drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident. *See Filippazzo v. Santiago*, 277 A.D.2d 419, 716 N.Y.S.2d 710 (2d Dept. 2000).

Plaintiffs, in their motion, have demonstrated *prima facie* entitlement to summary judgment on the issue of liability against defendant. Therefore, the burden shifts to defendant to demonstrate an issue of fact which precludes summary judgment. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

As defendant submitted no opposition to plaintiffs' liability arguments, defendant has failed to meet his burden to demonstrate an issue of fact which precludes summary judgment. Defendant failed to submit any evidence to establish a non-negligent explanation for striking plaintiffs' vehicle in the rear.

Accordingly, in light of defendant's failure to raise any triable issues of fact, plaintiffs' motion, pursuant to CPLR § 3212, for an order granting partial summary judgment against defendants on the issue of liability and for an order striking defendant's First Affirmative

Defense alleging plaintiff John P. Mixon's culpable conduct is hereby **GRANTED**.

With respect to plaintiffs' request for an order directing an immediate trial on the issue of damages, this matter is currently scheduled for a Pre-Trial Conference in Nassau County Supreme Court, Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, on March 15, 2012, at 9:30 a.m. The Court sees no need to deviate from this date nor to order an immediate trial. Accordingly, all of the parties are directed to appear on the March 15, 2012 date.

This constitutes the Decision and Order of this Court.

**ENTER:**

**DENISE L. SHER, A.J.S.C.**

Dated: Mineola, New York
January 25, 2012

ENTERED
JAN 27 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE