SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

ANGEL MORALES,

Plaintiff,

- against -

AWLAD M. HOSSAIN and LUG TRANS CORP.,

Defendants.

- x

Index No.:5269/2012

Motion Date: 06/14/12

Motion No.: 25

Motion Seq.: 1

The following papers numbered 1 to 12 were read on this motion by plaintiff, ANGEL MORALES, for an order pursuant to CPLR 3212(b) granting plaintiff partial summary judgment on the issue of liability and setting this matter down for a trial on damages:

	Papers Numbered
Notice of Motion-Affidavits-Exhibits	1 - 6
Defendant's Affirmation in Opposition	7 - 9
Reply Affirmation	10 - 12

In this negligence action, the plaintiff, Angel Morales, seeks to recover damages for personal injuries he sustained as a result of a motor vehicle accident that occurred on September 21, 2011, between the plaintiff's vehicle and the vehicle owned by defendant Lug Trans Corp. and operated by defendant Awlad M. Hossain. The accident took place on the southbound FDR Drive at E. 63rd Street, New York County, New York. At the time of the accident, plaintiff, Angel Morales was stopped in traffic when his vehicle was hit in the rear by the vehicle being operated by defendant Hossain. The plaintiff was allegedly injured as a result of the impact.

The plaintiff commenced this action by filing a summons and

complaint on March 12, 2012. Issue was joined by service of defendants' verified answer dated April 9, 2012. Plaintiff now moves for an order pursuant to CPLR 3212(b), granting partial summary judgment on the issue of liability and setting this matter down for a trial on damages.

In support of the motion, the plaintiff submits an affirmation from counsel, Christopher Persaud, Esq., a copy of the pleadings, an uncertified copy of the police accident report (MV-104); and an affidavit from the plaintiff dated April 26, 2012.

In the police accident report the Officer describes the accident stating: "driver of Veh #2 (plaintiff) stopped in traffic. Driver of veh #1 did not stop and struck veh #2 in the rear. Inattention to traffic ahead caused this accident."

In his affidavit, the plaintiff states:

"On September 21, 2011..I was involved in a motor vehicle accident while stopped in traffic on the FDR Drive at or near the East 63rd Street exit. I was the operator of a 2010 Mazda motor vehicle. There were three lanes for moving vehicles. At the time of the accident I was traveling in the right lane. I brought my vehicle to a stop for traffic ahead of me. I was stopped for approximately one to two minutes when I felt an impact to the rear of my vehicle. At the time of the impact my foot was on the brake. I was looking straight ahead. I did not see the other vehicle prior to the impact. Following the impact, I saw that the vehicle that struck me was a vehicle being operated by defendant Awlad M. Hossain."

Plaintiff's counsel contends that the accident was caused solely by the negligence of the defendant driver in that his vehicle was traveling too closely in violation of VTL § 1129 and that the defendant driver failed to bring his vehicle to a stop prior to rear-ending the plaintiff's vehicle. Counsel contends, therefore, that the plaintiff is entitled to partial summary judgment as to liability because the defendant driver was solely responsible for causing the accident while the plaintiff was free from culpable conduct.

In opposition, the defendant submits an affidavit dated May 24, 2012 in which he states as follows:

"On September 21, 2011, I was driving a 2011 Ford motor vehicle. I leased this vehicle from its owner, Lug Trans Corp., and was driving it with its consent and permission. I was driving on the southbound FDR Drive at or near its intersection with East 63rd Street. At this time, I was driving at approximately ten miles per hour and was one to one and a half car lengths behind a 2010 Mazda. As I approached 63rd Street, the Mazda in front of me suddenly and without any signal or warning, came to an abrupt and sudden stop. Prior to this happening, I did not see any brake lights from the rear of the Mazda. Even though I was able to apply my brakes after I saw the Mazda in front of me suddenly and abruptly stop without any signal or warning, I was unable to avoid coming into contact with it. I later learned that the driver of the Mazda that suddenly and abruptly stopped in front of me was Angel Morales.

In opposition to the motion, defendants' counsel, Brian L. Gotlieb, Esq., states that the plaintiff's motion must be denied, as there are conflicting versions of how the accident took place, and in addition, the defendant has proffered a non-negligent explanation for the rear end collision. Counsel also maintains that the instant motion is premature as discovery, including depositions of the parties remain outstanding. Further, counsel contends that the police report is not in admissible form for purposes of the motion as it is not certified (see CPLR 4518[c]; Kang v Violente, 60 AD3d 991 [2d Dept. 2009]).

This court agrees with the defendants that as the police report submitted is uncertified and unsworn, it is not in admissible form and will not be considered for purposes of the instant motion for summary judgment (see Rodriguez v Ryder Truck, Inc., 91 AD3d 935 [2d Dept. 2012]; Toussaint v Ferrara Bros. Cement Mixer, 33 AD3d 991 [2d Dept. 2006]).

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form in support of his position (see Zuckerman v. City of New York, 49 NY2d 557[1980]).

"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" (Macauley v ELRAC, Inc., 6 AD3d 584 [2d Dept.

2003]). It is well established law that a rear-end collision creates a prima facie case of negligence on the part of the driver of the rearmost vehicle, requiring the operator of that vehicle to proffer an adequate, non-negligent explanation for the accident (see Klopchin v Masri, 45 AD3d 737 [2d Dept. 2007]; Hakakian v McCabe, 38 AD3d 493 [2d Dept. 2007]; Reed v. New York City Transit Authority, 299 AD2d 330 [2d Dept. 2002]; Velazquez v Denton Limo, Inc., 7 AD3d 787 [2d Dept. 2004]).

Here, plaintiff testified that his vehicle was at a complete stop in traffic for one to two minutes when it was suddenly struck from behind by defendants' vehicle. Thus, the plaintiff satisfied his prima facie burden of establishing entitlement to judgment as a matter of law on the issue of liability (see Volpe v Limoncelli,74 AD3d 795 [2d Dept. 2010]; Vavoulis v Adler, 43 AD3d 1154 [2d Dept. 2007]; Levine v Taylor, 268 AD2d 566 [2000]).

Having made the requisite prima facie showing of entitlement to summary judgment, the burden then shifted to defendant to raise a triable issue of fact as to whether plaintiff was also negligent, and if so, whether that negligence contributed to the happening of the accident (see Goemans v County of Suffolk,57 AD3d 478 [2d Dept. 2007]). This Court finds that the defendant failed to provide evidence as to a non-negligent explanation for the accident sufficient to raise a triable question of fact (see Lampkin v Chan, 68 AD3d 727 [2d Dept. 2009]; Cavitch v Mateo, 58 AD3d 592 [2d Dept. 2009]; Garner v Chevalier Transp. Corp, 58 AD3d 802 [2d Dept. 2009]; Kimyagarov v Nixon Taxi Corp., 45 AD3d 736 [2d Dept. 2007]). Although defendant maintains that the accident was the result of plaintiff braking or stopping suddenly, this does not explain his failure to maintain a safe distance from the vehicle in front of him [see Dicturel v Dukureh,71 AD3d 558 [1st Dept. 2010]; Shirman v Lawal,69 AD3d 838 [2d Dept. 2010]; Lampkin v Chan,68 AD3d 727 [2d Dept. 2009]; Zdenek v Safety Consultants, Inc.,63 AD3d 918 [2d Dept. 2009]). The defendant's argument that the plaintiffs' vehicle may have stopped short is not sufficient to provide a non-negligent explanation for the rear-end collision (see Plummer v Nourddine, 82 AD3d 1069 [2d Dept. 2011][the mere assertion that the respondents' (vehicle) came to a sudden stop while traveling in heavy traffic was insufficient to raise a triable issue of fact}]; Staton v Ilic, 69 AD3d 606 [2d Dept. 2010]; Ramirez v Konstanzer, 61 AD3d 837 [2d Dept. 2009]).

The defendant's explanation, that he did not observe brake lights illuminated on the plaintiff's vehicle was insufficient to rebut the presumption of negligence created by the rear-end collision, and raise a triable issue of fact to defeat summary judgment (see Macauley v ELRAC, Inc., 6 AD3d 584[2d Dept. 2004][defendant's testimony that she did not recall seeing brake

lights or tail lights illuminated on the plaintiff's vehicle before the collision did not adequately rebut the inference of negligence]; Gross v Marc, 2 AD3d 681 [2d Dept. 2003][the defendant failed to provide evidence sufficient to raise a triable question of fact as to whether the alleged malfunctioning brake lights on the plaintiff's vehicle proximately caused the accident]; Waters v City of New York, 278 AD2d 408 [2d Dept. 2000][defendant's statement that he did not observe any illuminated brake lights indicating that the truck was stopped is insufficient to establish a genuine issue of material fact precluding summary judgment]; also see Santarpia v First Fid. Leasing Group, Inc., 275 AD2d 315 [2d Dept. 2000]; Lopez v Minot, 258 AD2d 564[2d Dept. 1999]).

The defendants' contention that the plaintiff's motion for summary judgment is premature is without merit. Defendants failed to offer any evidentiary basis to suggest that discovery may lead to relevant evidence. The mere hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery is an insufficient basis upon which to deny the motion (see CPLR 3212[f]; Hanover Ins. Co. v Prakin, 81 AD3d 778 [2d Dept. 2011]; Essex Ins. Co. v Michael Cunningham Carpentry, 74 AD3d 733 [2d Dept. 2010]]; Peerless Ins. Co. v Micro Fibertek, Inc., 67 AD3d 978 [2d Dept. 2009]; Gross v Marc, 2 AD3d 681 [2d Dept. 2003]).

As the evidence in the record demonstrates that the defendants failed to provide a non-negligent explanation for the collision, and as no triable issues of fact have been put forth as to whether plaintiff may have borne comparative fault for the causation of the accident, and based on the foregoing, it is hereby

ORDERED, that the plaintiff's motion is granted, and the plaintiff, ANGEL MORALES shall have partial summary judgment on the issue of liability against the defendants, AWLAD M. HOSSAIN and LUG TRANS CORP., and it is further,

ORDERED, that the Clerk of Court is authorized to enter judgment accordingly; and it is further,

ORDERED, that upon completion of discovery on the issue of damages, filing a note of issue, and compliance with all the rules of the Court, this action shall be placed on the trial calendar of the Court for a trial on damages.

Dated: June 15, 2012
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.