

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IAS PART 24
Justice

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DANIEL PERALTA and DIANA GONZALEZ,

Plaintiffs,

-against-

CARLOS DIAZ, ET AL.,

Defendants.

Index No.: 6761/05

Motion Dated:
June 26, 2007

Cal. No. 30

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The following papers numbered 1 to 38 read on this motion by defendants Manuel Roberto Espinal and Cristian Silva for summary judgment dismissing the complaint insofar as asserted against them; cross motion by plaintiffs for summary judgment as against defendants Manuel Roberto Espinal, Cristian Silva and Carlos Diaz, or in the alternative to strike the Answer of defendant Carlos Diaz; cross motion by defendant Carlos Diaz for summary judgment dismissing the complaint of plaintiff Diana Gonzalez pursuant to Insurance Law § 5102(d); and cross motion by plaintiff on the counterclaim Daniel Peralta for summary judgment dismissing the counterclaim against him.

	<u>Papers Numbered</u>
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Upon the foregoing papers it is ordered that this motion and these cross motions are decided as follows:

This action arises out of a three car motor vehicle accident, which occurred on December 26, 2004 near the intersection of 108th Street and 41st Avenue in Queens County. Plaintiffs allege that they sustained serious injuries when their vehicle, which was stopped at a red light, was struck in the rear

by a vehicle operated by defendant Espinal and owned by defendant Silva. At the time of the incident, plaintiff Daniel Peralta was the operator of the plaintiffs' vehicle and plaintiff Diana Gonzalez was a passenger in the vehicle. Defendants Espinal and Silva maintain that their vehicle was struck in the rear while it was stopped at a red light by defendant Diaz's vehicle, and the force of this impact caused their vehicle to strike the plaintiffs' vehicle. Plaintiffs commenced the instant action to recover damages for negligence. The instant motion and cross motions ensued.

The proponent of a summary judgment 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. (Ayotte v Gervasio, 81 NY2d 1062, 1063 [1993].) 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. (Zuckerman v City of New York, 49 NY2d 557, 562 [1980].)

It is well established that a rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the moving vehicle and imposes a duty on the operator of the moving vehicle to come forward with an adequate, non-negligent explanation for the accident. (see Emil Norsic & Son, Inc. v L.P. Transp., Inc., 30 AD3d 368, 368 [2006]; Neidererger v Misuraca, 27 AD3d 537, 537-538 [2006]; Niyazov v Bradford, 13 AD3d 501, 502 [2004].) If the operator of the moving vehicle cannot come forward with evidence to rebut the inference of negligence, the operator of the stationary vehicle is entitled to summary judgment. (see Dileo v Greenstein, 281 AD2d 586, 586 [2001]; Lopez v Minot, 258 AD2d 564, 564 [1999].)

In the instant case, defendants Espinal and Silva made a prima facie showing demonstrating their entitlement to judgment as a matter of law. The admissible evidence indicates that their vehicle was lawfully stopped when it was struck in the rear by the vehicle owned and operated by defendant Diaz. According to defendant Espinal, his vehicle struck the plaintiffs' vehicle as the result of this impact. In opposition, plaintiffs have failed to raise a triable issue of fact as to the liability of defendants Espinal and Silva.

With respect to the cross motion by defendant Diaz for summary judgment pursuant to Insurance Law § 5102(d), the court finds that the motion is untimely. Pursuant to a stipulation

dated November 21, 2006, so-ordered by the Honorable Martin E. Ritholtz, motions for summary judgment were to be returnable no later than February 1, 2007. Defendant Diaz has failed to provide "good cause" as to why his cross motion was not even made until February 20, 2007. (Brill v City of New York, 2 NY3d 648, 652 [2004].) The court notes that while an untimely cross motion can be considered if it is made on a ground nearly identical to that of the main motion (see Ellman v Village of Rhinebeck, 41 AD3d 635 [2007]; Grande v Peteroy, 39 AD3d 590, 592 [2007]), such is not the case here. Thus, the issues raised in this cross motion are not already properly before the court. (see Grande v Peteroy, 39 AD3d at 592 [2007].)

The court will, however, consider the cross motion by plaintiffs and cross motion by plaintiff on the counterclaim for summary judgment even though they are untimely since the main motion was timely made on nearly identical grounds. (see Grande v Peteroy, 39 AD3d at 592.)

The cross motion by plaintiff on the counterclaim Daniel Peralta for summary judgment is granted. As noted above, plaintiffs' vehicle was struck in the rear while it was stopped at a red light. There is no admissible evidence that plaintiff on the counterclaim caused or contributed to the subject accident. Thus, plaintiff on the counterclaim is entitled to summary judgment.

With respect to the cross motion by plaintiffs for summary judgment, based on the admissible evidence set forth above, plaintiffs are not entitled to summary judgment against defendants Espinal and Silva inasmuch as their vehicle struck the plaintiffs' vehicle after it was hit by the Diaz vehicle.

The court finds, however, that plaintiffs are entitled to summary judgment against defendant Carlos Diaz. Defendant Carlos Diaz has not come forward with a non-negligent explanation for the accident at hand. Indeed, in his affirmation in opposition, defendant Diaz does not address the specific allegations herein but merely discusses general principles pertaining to summary judgment motions.

Accordingly, this motion by defendants Manuel Roberto Espinal and Cristian Silva for summary judgment is granted, and the complaint against defendants Manuel Roberto Espinal and Cristian Silva is dismissed, and the action is severed against the remaining defendant.

The cross motion by defendant Carlos Diaz for summary

judgment pursuant to Insurance Law § 5102(d) is denied.

The cross motion by plaintiff on the counterclaim Daniel Peralta for summary judgment is granted, and the counterclaim against Daniel Peralta is dismissed.

The branch of the cross motion by plaintiffs for summary judgment against defendants Manuel Roberto Espinal and Cristian Silva is denied.

The branch of the cross motion by plaintiffs for summary judgment against defendant Carlos Diaz is granted, and an assessment of damages against defendant Carlos Diaz shall be held at the time the case is called for trial. The court notes that the court's computer indicates that the matter is scheduled in the Trial Scheduling Part for October 2, 2007.

Dated: September 7, 2007

AUGUSTUS C. AGATE, J.S.C.