SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : **HON. JOSEPH P. DORSA** **IAS PART 12**
Justice

- x

FRANCO HURTADO,

Plaintiff, Index No.: 15152/04

- against - Motion Date: 8/23/06

WIESLAW PORADA, WARBURTON MOVERS, INC. and LEVERN SCOTT, Motion No.: 15

Defendant.

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The following papers numbered 1 to 20 on this motion:

	Papers Numbered
Defendant Porada's Notice of Motion-Affirmation-Affidavit(s)-Service-Exhibit(s)	1-4
Defendants Warburton Movers, Inc. & Scott's Notice of Cross-Motion-Affirmation-Affidavit(s)-Service-Exhibit(s)	5-8
Plaintiff's Affirmation in Opposition-Affidavit(s)-Exhibit(s)	9-11
Defendant Porada's Affirmation in Opposition-to Cross-Motion-Affidavit(s)-Exhibit(s)	12-14
Defendants Warburton & Scott's Reply Affirmation-Exhibit(s)	15-16
Defendant Porada's Reply Affirmation-Exhibit(s)	17-18
Defendant Warburton & Scott's Reply Affirmation-Exhibit(s) to plaintiff's Affirmation in Opposition	19-20

By notice of motion, defendant Wieslaw Porada (Porada), seeks an order of the Court, granting him summary judgment, pursuant to CPLR §3212 and NYS Ins. Law §5102(d) and §5104.

Plaintiff files an affirmation in opposition.

Defendant Warburton Movers, Inc. (Warburton), and Levern Scott (Scott), file a notice of cross-motion for summary judgment and dismissal on the issue of liability.

Defendant Porada, files opposition to the cross-motion and a reply. Defendants Warburton and Scott file a reply.

The underlying cause of action is a claim by plaintiff for personal injuries alleged to have been sustained in a motor vehicle accident on March 27, 2002, on the eastbound Long Island Expressway at or near the southbound ramp to the Clearview Expressway.

At that time and place plaintiff claims he was stopped in traffic, he heard "screeching" from behind, and then he was rear ended by a truck, operated by defendant Scott, and owned by defendant, Warburton.

Scott maintains that he came to a stop behind plaintiff's vehicle, in stop and go traffic, without coming into contact with plaintiff's vehicle. Scott notes that plaintiff corroborates such in his deposition testimony.

Thereafter, Scott maintains that while he was stopped in traffic behind plaintiff he was hit in the rear by defendant Porada, causing him to propel into plaintiff's vehicle.

In his deposition testimony, Porada claims that Scott stopped suddenly; that he applied his brakes but skidded into Scott nonetheless; that Scott was stopped when Porada hit the rear of Scott's vehicle, but that just prior to that, defendant Scott himself, was skidding to stop. Defendant Porada maintains that if defendant Scott had been traveling a safe distance behind plaintiff, he (Scott) wouldn't have had to stop suddenly, and therefore he (Porada) wouldn't have had to stop suddenly.

"Generally, a rear-end collision with a stopped 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 rebut the inference of negligence by providing a non-negligent explanation for the collision (citations omitted) (Carhuayano v. J&R Hacking, et al., 28 AD3d 413, 414 [2nd Dep't. 2006]).

When the explanation proffered by defendants is that plaintiff "stopped short," the courts have held such explanation to be insufficient to warrant denying summary judgment to plaintiff (Siberman v. Surry Cadillac Limousine Service, Inc.,

109 AD2d 833, 834 [2nd Dep't. 1985]; Dewar v. Padilla, 305 AD2d 629 [2nd Dep't. 2003]).

However, if the explanation proffered by the following vehicles is that the lead vehicle "suddenly stopped," such explanation has been found to raise a triable issue of fact sufficient to warrant denial of summary judgment. ("The sudden stop of a lead car is one of the non-negligent explanations of a rear-end collision (citations omitted) (Taveras v. Amir, 24 AD3d 655, 656 [2nd Dep't. 2005]); (the defendants raised triable issues of fact as to whether [the other driver] made a sudden, negligent, or unexplained stop) Carhuayano v. J&R Hacking, 28 AD3d 413, 414 [2nd Dep't. 2006]); Bakhshi v. McCleod-Wilson, (2006 WL2403332 (EDNY) 9/18/06)).

While this court is at a loss as to the fine distinction made by the Appellate Division between a claim that a driver "stopped short" as opposed to "stopped suddenly" or "suddenly stopped," where, as here, the claim is made that the two lead cars stopped suddenly, summary judgment on liability must be denied.

In support of his motion for summary judgment and dismissal, defendant Porada, submits the affirmed reports of Dr. Kenneth E. Seslowe, based upon an examination conducted on July 26, 2005 and Dr. A. Robert Tantleff, based upon his review of the MRI films and reports on December 22, 2005.

Dr. Seslowe concluded that plaintiff suffered a strain or sprain to his lumbar spine and left knee, but that said injuries were resolved.

Dr. Tantleff concluded that the injuries he observed in the MRI films reviewed were as a result of degenerative, normal aging in this 31 year old man.

In opposition to the motion for summary judgment, plaintiff submits the affirmed report of Dr. Ki Y Park, based upon an examination and treatment from March 28, 2002, the day after the accident until September 2002, when plaintiff's insurance benefits ran out. Dr. Park states that he recommended surgery for plaintiff on his left knee which plaintiff was forced to decline as he was without funds.

Dr. Park also examined plaintiff again on June 22, 2006, administered various tests to determine plaintiff's range of motion and found that the flexion in his lumbar spine measured 75 degrees, with 90 degrees normal; extension 20 degrees with 30

degrees normal, and lateral flexion 30 degrees with 30 degrees normal. With regard to plaintiff's left knee, Dr. Park found plaintiff's flexion to be 125 degrees with extension at 0 degrees.

Plaintiff also submits the affirmed report of Dr. Richard J. Rizzutti, radiologist, based on MRI's taken on April 1, 2002, of the lumbar spine which revealed a disc bulge at L4-5 and a disc herniation at L5-SI.

Dr. Rizzutti, also found as a result of his MRI of plaintiff's left knee on April 8, 2002, a tear in the posterior horn lateral meniscus.

Based upon the foregoing papers the motion is denied as the papers present issues of fact requiring a trial. Specifically, conflicting affidavits establish that issues exist as to whether the plaintiff's injuries to his lumbar spine and left knee are causally related to the accident as well as the nature and extent of said injuries. (See, Insurance Law §5102[d]; Toure v. Avis Rent A Car Systems, Inc., 98 NY2d 345, Meyer v. Guido, 260 AD2d 556; see also, Jones v. Norwich City Sch. Dist., 283 AD2d 809; McKinney v. Corby, 261 AD2d 454; Wolfram v. Vassilou, 239 AD2d 340; Flanagan v. Hoeg, 212 AD2d 756).

Accordingly, upon all of the foregoing, the motion and cross-motion are denied.

Dated: Jamaica, New York
October 10, 2006

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JOSEPH P. DORSA
J.S.C.