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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

SAMIR MASTAKI

- v -

AN ASHRAFUDDIN, TROUT TRANS CORP., DAVID JUSTIN DEUTSCH and HENRI DEUTSCH

INDEX NO. 111245/06

MOTION DATE 7-11-07

MOTION SEQ. NO. 001

MOTION CAL. NO. 90

The following papers, numbered 1 to 4 were read on this motion by defendants David Justin Deutsch and Henri Deutsch for summary judgment on the issue of liability.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Memo)	2,3
Replying Affidavits (Reply Memo)	4

Cross-Motion: ☐ Yes ■ No

This is an action for damages allegedly sustained as a result of a three-car motor vehicle accident which occurred on December 10, 2005, at the intersection of 34th Street and 12th Avenue in Manhattan. Plaintiff Samir Mastaki was a passenger in a vehicle operated by defendant An Ashrafuddin and owned by defendant Trout Trans Corp. Ashrafuddin's vehicle struck the rear of a vehicle driven by defendant David Deutsch and owned by defendant Henri Deutsch. Duetsch's vehicle, in turn, struck the vehicle in front of it, which was driven by non-party Anne Marie Olsen and stopped at a red traffic signal. The Deutsch defendants maintain that they, too, were stopped at the light when struck in the rear and, on that basis, now seek summary judgment on the issue of liability dismissing the complaint as against them.

It is well settled that 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 eliminate any material issues of fact. See Alvaraz v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Once the movant meets this burden, it becomes incumbent upon the party opposing the motion to come forward with proof in admissible form to raise a triable issue of fact. See Alvaraz v Prospect Hospital, supra; Zuckerman v City of New York, supra.

In deciding a summary judgment motion, the court must bear in mind that issue finding rather than issue determination is the key. See Sillman vTwentieth Century Fox Film Corp., 3 NY2d 395 (1957). Furthermore, since summary judgment is a drastic remedy which deprives a litigant of his or her day in court, the evidence adduced on the motion must be liberally construed in the light most favorable to the opposing party. See Kesselman v Lever House Restaurant, 29 AD3d 302 (1st Dept. 2006); Goldman v Metropolitan Life Ins. Co., 13 AD3d 289 (1st Dept. 2004).

It is also settled law that the driver of a motor vehicle is expected to drive at a safe rate of speed, taking into account weather and road conditions, and to maintain a safe distance from the vehicle in front of him (see Vehicle and Traffic Law §§1129[a];1180[a]; Mitchell v Gonzalez, 269 AD2d 250 [1st Dept. 2000]). "[T]his rule imposes on [drivers] a duty to be aware of traffic conditions, including vehicle stoppages." Johnson v Philips, 261 AD2d 269, 271 (1st Dept. 1999). Furthermore, a rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the driver who strikes the vehicle in front, unless the operator of the rear vehicle can come forth with an adequate, non-negligent explanation for the collision. See Somers v Condlin, 39 AD3d 289 (1st Dept. 2007); Francisco v Schoepfer, 30 AD3d 275 (1st Dept. 2006); Garcia v Bakemark Ingredients (East) Inc., 19 AD3d 224 (1st Dept. 2005); Grimes-Carrion v Carroll, 13 AD3d 125 (1st Dept. 2004);Johnson v Phillips, supra.

In support of their motion, the Deutsch defendants proffer the summons and complaint, their answer and discovery demands, the police report of the accident which states, *inter alia*, that defendant Justin Deutsch told a police officer that he was stopped when struck by Ashrafuddin's vehicle, and an affidavit of Justin Deutsch in which he maintains that he "came to a complete stop" behind Olsen's vehicle before the impact.

In opposition, defendants Ashrafuddin and Trout Trans Corp., and the plaintiff argue that the motion is procedurally defective inasmuch as it fails to include a copy of its answer with cross-claims, and that the motion is premature as discovery has not been completed. Their opposition papers consist of an affirmation of their attorney, the police report and the MV-104 filed by Ashrafuddin. In the MV-104, dated December 12, 2005, two days after the accident, Ashrafuddin states that the Deutsch vehicle stopped abruptly. In her opposition papers, the plaintiff, by an affirmation of counsel, argues that the motion is premature and appends a copy of the same MV-104.

In reply, the Deutsch defendants argue that the opposing parties' submissions, including the MV-104, do not constitute proof in admissible form and, thus, fail to raise any triable issues of fact.

The Ashrafuddin defendants are correct in arguing that a motion pursuant to CPLR 3212 must be accompanied by a complete set of the pleadings. Here, the

Deutsch defendants have failed to provide a copy of the Ashrafuddin defendants' answer with their motion. The omission, which is not addressed in the Deutsch defendants' reply papers, requires denial of the motion. See Thompson v Foreign Cars Center, Inc., – AD3d – (2nd Dept. May 22, 2007); Welton v Drobnocki, 289 AD2d 757 (3rd Dept. 2002); A&L Scientific Corp. V Latmore, 265 AD2d 355 (2nd Dept. 1999). The court does not reach the merits the motion but makes several observations as to the parties' submissions.

Police reports may be admissible as business records (CPLR 4518) but only if the report is made based upon the officer's personal observations and while carrying out their police duties. See Holliday v Hudson Armored Car & Courier Service, Inc.,301 AD2d392 (1st Dept. 2003), Yeargans v Yeargans, 24 AD2d 280, 282; see also Mooney v Osowiecky, 235 AD2d 603, 604). The First Department has made clear that a police report which contains hearsay statements regarding the ultimate issues of fact may not be admitted into evidence for the purpose of establishing the cause of the accident. See Figueroa v Luna, 281 AD2d 204 (1st Dept. 2001); Aetna Casualty & Surety Co. v Island Transportation, 233 AD2d 157 (1st Dept. 1996); Sansevere v United Parcel Service, Inc., 181 AD2d 521 (1st Dept. 1992); Kajoshaj v Greenspan, 88 AD2d 538 (1st Dept.1982). As such, the police report submitted by the moving defendants does not advance their position.

In regard to the opposition papers, an MV-104 motor vehicle accident report may be admitted into evidence as an admission only if it is properly sworn or certified. See Fox v Tedesco, 15 AD3d 538 (2nd Dept. 2005); Johnson v Philips, supra.. Thus, the MV-104 report in which defendant Ashrafuddin states that the Deutsch vehicle stopped short could not be considered on this motion because it is not certified or sworn and, in any event, is self-serving as to Ashrafuddin. Thus, it would be insufficient, alone, to raise a triable issue of fact. See Bates v Yasin, 13 AD3d 474 (2nd Dept. 2004). In any event, "[i]t is not a sufficient defense to claim that plaintiff's vehicle stopped short." Mitchell v Gonzalez, supra; see Danza v Longieliere, 256 AD2d434 (2nd Dept. 1998).

As to all parties, the court notes that affirmations of attorneys who claim no personal knowledge of the accident are without probative value on this motion. See Zuckerman v City of New York, supra at 563; Johannsen v Rudolph, 34 AD3d 338 (1st Dept. 2006); Diaz v New York City Tr. Auth.,12 AD3d 316 (1st Dept. 2004). They may, however, serve as vehicles for submitting documentary evidence or other proof in admissible form as an attachment. See Alvarez v Prospect Hospital, supra at 325; Zuckerman v City of New York, supra at 563.

Finally, the court notes that the parties have not yet been deposed and it appears that "facts essential to justify opposition [to the motion] may exist but cannot then be stated" without further discovery. CPLR 3212(f). See Downey v Local 46 2nd Holding Company, 34 AD3d 318 (1st Dept. 2006); Denby v Pace University, 294 AD2d 156 (1st Dept. 2002); Schachat v Bell Atlantic Corp., 282

AD2d 329 (1st Dept. 2001). "A party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment." Amico v Melville Volunteer Fire Company, 39 AD3d 784 (2d Dept. 2007); see Martinez v Fernandez, 37 AD3d 373 (1st Dept. 2007).

For these reasons and upon the foregoing papers as well as oral argument held, it is,

ORDERED that the motion of defendants David Justin Deutsch and Henri Deutsch for summary judgment on the issue of liability is denied; and it is further,

ORDERED that the parties are directed to appear for a discovery compliance conference on August 31, 2007, at 9:30 a.m at DCM, 80 Centre St, Room 103.

This constitutes the Decision and Order of the Court.

Dated: July 17, 2007

Deborah Kaplan, J.S.C.

DEBORAH A. KAPLAN

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**
Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**