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

PRESENT: HON. DEBORAH A. KAPLAN *Justice* PART 22

ABRAHAM SCHWARTZ and
EVA SCHWARTZ

- v -

TODD J. POLAKOFF and
VERONICA A. RODRIGUEZ

INDEX NO. 114833/05

MOTION DATE 5-23-07

MOTION SEQ. NO. 004

MOTION CAL. NO. 97

The following papers, numbered 1 to 4, were read on this motion for a summary judgment on the issue of liability and a motion to renew.

	PAPERS NUMBERED
Notice of Motion – Affidavits — Exhibits	1
Affirmation in Opposition to Motion - Defendant Rodriguez	2
Affirmation in Reply	

Cross-Motion: ☐ Yes ■ No

In this action to recover damages for injuries arising from a motor vehicle accident, the undisputed facts establish that the parties were involved in a three-car collision on April 8, 2003, in the southbound lanes of the Harlem River Drive in Manhattan. A vehicle driven by defendant Veronica Rodriguez struck the rear of a vehicle driven by defendant Todd Polakoff which, in turn, was propelled into the rear of a vehicle driven by plaintiff Abraham Schwartz, in which his wife, plaintiff Eva Schwartz, was a passenger. The plaintiffs commenced the instant action against defendants Polakoff and Rodriguez. Each defendant asserted a cross-claim against the other and a counterclaim against Abraham Schwartz.

Abraham Schwartz previously moved for summary judgment on the counterclaims on the issue of liability and both plaintiffs cross-moved for summary judgment as against defendant Rodriguez on the same issue. By an order dated March 28, 2007, this court denied the motion and cross-motion with leave to renew upon the proper papers. The court stated, *inter alia*, that:

"The deposition transcripts submitted by the plaintiffs appear to establish defendant Rodriguez' liability as a matter of law. However, as correctly argued by defendant Rodriguez in her opposition papers, the deposition transcripts do not constitute evidence in admissible form since they are unsigned and unsworn and the plaintiffs fail to establish that they were forwarded to the defendants for their review and more than sixty days had passed, as required by CPLR 3116. See McDonald v Mauss, – AD3d – , 2007 WL 853030 (2nd Dept. March 20, 2007); Reilly v Newireen Associates, 303 AD2d 214 (1st Dept. 2003); Palumbo v Innovative Communications Concepts, Inc., 175 Misc 2d 156 (Sup Ct, NY County 1997)."

Subsequent to the submission of the prior motions but prior to the court's decision, defendant Polakoff moved for summary judgment on the issue of liability, dismissing all claims and cross-claims against him. In support of his motion, Polakoff submits the pleadings in the action as well as his own sworn deposition and that of plaintiff Abraham Schwartz and defendant Rodriguez. At his deposition, Polakoff testified that at the time of the accident he had been traveling in the same lane for "a good deal of time" and was stopped for about ten seconds in that lane when he heard the sound of screeching brakes. Before even having an opportunity to look into his rear view mirror, he was struck in the rear by defendant Rodriguez, and this "heavy" impact propelled his car forward and into the rear of the plaintiffs' vehicle.

The plaintiffs have submitted an "affidavit in support" in which they argue that Polakoff, who struck their vehicle, is entitled to summary judgment on the issue of liability and urge the court to "search the record" to grant summary judgment to them as well. Their submission is, in effect, a motion to renew their prior motions. In any event, a court may search the record and grant summary judgment to a non-moving in regard to any cause of action or issue that is the subject of the motions before the court. See CPLR 3212(b); Dunham v Hilco Construction Co., 89 NY2d 425 (1996).

The plaintiffs have now demonstrated compliance with CPLR 3116 in that the deposition transcripts at issue were forwarded to the defendants for their review and more than sixty days passed. There is no proof to contradict that showing. This deposition testimony establishes that plaintiff Abraham Schwartz was driving at a speed of five to ten miles per hour when struck from behind by defendant Polakoff, after Polakoff was struck by defendant Rodriguez. Rodriguez testified that a few seconds after changing lanes, while traveling at a speed of thirty miles per hour, and while three or four car lengths away, she noticed that Polakoff's vehicle was ahead of her and was not moving. She applied her brakes but was unable to avoid the collision.

Defendant Polakoff has demonstrated, by proof in admissible form, the absence of any triable issues of fact and the right to judgment as a matter of law. See Kosson v Algaze, 84 NY2d 1019 (1995); Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Winegrad v New York Univ. Med Ctr., 64 NY2d 851 (1985); Zuckerman v City of New York, 49 NY2d 557 (1980). 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. While Polakoff has clearly established an adequate non-negligent explanation for his collision with the plaintiffs' vehicle, defendant Rodriguez has failed to come forward with an adequate non-negligent explanation for colliding with Polakoff. Contrary to the arguments of Rodriguez' attorney, the deposition testimony does not raise any factual issue requiring a trial on liability. Rather, it establishes that Rodriguez is solely liable for the accident as a matter of law.

Therefore, and for the reasons set forth in the court's order dated March 28, 2007, it is,

ORDERED that the motion of defendant Todd Polakoff for summary judgment on the issue of liability is granted and all claims and cross-claims against him are dismissed, and the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED that, upon searching the record pursuant to CPLR 3212(b), the court grants summary judgment on the issue of liability to plaintiffs Abraham Schwartz and Eva Schwartz as against defendant Veronica Rodriguez; and it is further,

ORDERED that the plaintiffs are directed to file a Note of Issue in accordance with this court's order dated July 3, 2007; and it is further,

ORDERED that the plaintiffs and defendant Veronica Rodriguez are directed to appear for a pre-trial conference in Part 22, 80 Centre St. Room 136, on September 27, 2007, at 9:30 a.m.

This constitutes the Decision and Order of the Court.

FILED
JUL 31 2007
COUNTY CLERK'S OFFICE
NEW YORK

July 24, 2007
Dated: ~~July 20, 2007~~

Deborah Kaplan
Deborah A. Kaplan ***J.S.C.***

DEBORAH A. KAPLAN
J.S.C.

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