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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

NANCY HATHAWAY and GEORGE SUSSMAN

INDEX NO. 116120/05

MOTION DATE 7-11-07

- v -

MOTION SEQ. NO. 002/~~003~~

MOHAMMED ALAM, GERALDINE HACKING CORP., WILLIAM SHILL, AMANDA SHILL and SOOZY KATZEN

MOTION CAL. NO. 48

The following papers, numbered 1 to 10, were read on these motions and cross-motions for summary judgment on the issue of liability.

	PAPERS NUMBERED
Notice of Motion – Affidavits — Exhibits	1
Notice of Motion – Affidavits — Exhibits	2
Notice of Cross-Motion – Affidavits — Exhibits- Memo of Law	3
Affirmations in Opposition	4, 5, 6,7
Affirmations in Reply	8, 9,10

Cross-Motion: ■ Yes ☐ No

This is an action to recover damages for injuries allegedly arising from a multi-car collision on the FDR Drive on October 24, 2005. While in the left-hand southbound lane of the highway near 73rd Street, stopped in slow-moving traffic, a vehicle driven by defendant Soozy Katzen was struck lightly in the rear by a vehicle driven by defendant Amanda Shill and owned by her father, defendant William Shill. The vehicle behind the Shill vehicle, a taxi driven by defendant Mohammed Alam and owned by defendant Geraldine Hacking Corp., upon moving into the left lane, struck the rear of the Shill vehicle, propelling it into the Katzen vehicle a second time, but with greater impact. Plaintiff Nancy Hathaway, a passenger in the taxi, sustained facial fractures. Plaintiff George Sussman, her husband, has withdrawn his derivative claims. The plaintiff has discontinued her action against defendant Katzen.

There are three motions now before the court. (1) Defendant William Shill moves for summary judgment on the issue of liability, dismissing all claims and cross-claims against him, (2) Defendant Amanda Shill cross–moves for the same relief; (3) Defendant Soozy Katzen moves for summary judgment dismissing all cross-claims against her. That motion is unopposed.

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 plaintiff met his burden, it became incumbent upon the defendants 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.

It 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 this case, neither defendant Amanda Shill nor defendant Alam have established an adequate non-negligent explanation for their collision with the car in front of them. However, the proof raises triable issues as to the apportionment of liability between them.

Katzen testified at her deposition that when she got onto the FDR Drive at 79th Street, the right lane of traffic was closed due to construction. Traffic was moving slowly since there were "three lanes going into two." About a minute or so after she got into the left lane, and about five to seven seconds after she had come

to a complete stop in the traffic, her car was lightly "tapped" from behind by the Shill vehicle. According to Katzen, she had seen the Shill vehicle approaching in her rearview mirror but did not think it was going to make contact with her car. Katzen testified that this first impact did not cause her car to move forward. However, about five to ten seconds later, the Shill vehicle struck her car again with greater force, causing it to "jerk forward a little" and denting in her rear bumper.

At his deposition, Mohammed Alam testified that he picked up the plaintiff on Columbus Avenue and entered the FDR Drive at 73rd Street, heading for 23rd Street. Traffic was moving slowly, and all three lanes were moving at about the same rate of speed. While traveling about 30 miles per hour, he merged from the right-hand lane to the middle lane, and then attempted to move into the left-hand lane. He put his turn signal on. As soon as he got into the far left lane, he realized the car in front of him, the Shill car, was only three to five feet in front of him and was not moving as fast as he first thought. He applied his brakes and tried to swerve back to the middle lane, but to no avail. He struck the rear of the Shill car with "medium" impact, but his airbags did not deploy. The impact occurred about three or four seconds after getting into the left lane. Alam testified that he saw no brake lights on the Shill vehicle, and did not hear any brakes screeching. He was then unaware that the Shill vehicle struck the car in front of it, but was later told it did. The two front lights and hood of the taxi were damaged. Alam testified that the taxi is equipped with seatbelts but the plaintiff was not wearing one.

Plaintiff Nancy Hathaway, who was seated in the back seat of the taxi, testified that she did not recall if she was wearing a seatbelt. She characterized the impact as heavy and that she heard screeching brakes "a fraction of a second" before it happened. Her face struck the acrylic partition causing multiple fractures.

Amanda Shill was not deposed and has been precluded from testifying at trial due to her repeated failure to appear for a deposition. As such, she will be unable to present any account of the accident to contradict any other account. Of course, an order of preclusion alone does not warrant the granting of summary judgment on the issue of liability. Rather, the court must determine the effect of the preclusion order in each case. See Ramos v Shendell Realty Group, Inc., 8 AD3d 41 (1st Dept. 2004); Mendez v Queens Plumbing Supply, Inc, 12 Misc 2d 1064 (Sup Ct, Bronx County 2006). Here, however, the proof submitted, which includes the deposition testimony summarized above, presents no basis to grant her motion.

Nor does the proof show that Katzen " acted in such a way as to cause or contribute to the accident, such as stopping suddenly or by veering in front of [Shill]." Somers v Condlin, supra at 84. Rather, it shows that Katzen drove at a safe rate of speed for the traffic and road conditions and was stopped in traffic when struck from the rear by Shill. Accordingly, defendant Katzen is entitled to summary judgment on the issue of liability. Indeed, her co-defendants do not oppose her motion.

Contrary to the arguments made by both William Shill's attorney and Amanda Shill's attorney, the proof does not establish, as a matter of law, that they were similarly free of negligence and are entitled to summary judgment as against co-defendants Alam and Geraldine Hacking. The suggestion of the Shill defendants that the Alam vehicle may have struck their vehicle before their vehicle struck Katzen's is not supported by Alam's deposition testimony and is simply belied by Katzen's testimony that she felt one small impact followed by a larger one, five to ten second later. Since, as stated above, Amanda Shill failed to appear for a deposition, there is no testimony to contradict Katzen's account. Her attorney's affirmation does not fill that void. An affirmation of an attorney may serve as a vehicle 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. However, where, as here, the attorney claims no personal knowledge of the accident, the affirmation is without probative value on a summary judgment 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).

Furthermore, while the deposition testimony clearly shows Alam to be negligent, it also indicates that Amanda Shill may have been following the Katzen vehicle too closely and, thus, caused the first impact and may have contributed to the second impact. In light of the undisputed testimony that she struck the rear of the Katzen vehicle while it was stopped and thereby came to a sudden stop, and Alam's deposition testimony that he did not see brake lights on the Shill car, it cannot be concluded, as a matter of law, that Amanda Shill was free of negligence. And, as the owner of the vehicle his daughter was driving, defendant William Shill is, of course, vicariously liable for any negligence on her part. See Vehicle and Traffic Law § 388. He does not raise any permissive use issue. Thus, summary judgment must also be denied as to him.

However, Amanda Shill correctly argues that neither the police report, which states that Shill was following too closely, nor the MV-104 filed by Alam, which says that Shill "stopped short" are admissible evidence and may not be considered on this motion. 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 relied upon by defendants Alam and Geraldine Hacking does not advance their position. Similarly, 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. The MV-104 report in this case, relied upon by defendants Alam and Geraldine Hacking and by the plaintiff in her opposition papers, is not certified or sworn and, in any event, is self-serving as to defendants Alam and Geraldine Hacking. Thus, it would be insufficient, alone, to raise a triable issue of fact. See Bates v Yasin, 13 AD3d 474 (2nd Dept. 2004).

"In general, questions of negligence regarding a road accident are best resolved at a jury trial"(Lindgren v NYCHA, 269 AD2d 299, 302 [1st Dept. 2000]) and the issue of comparative negligence and apportionment of liability are almost always matters for the finder of fact. See Andre v Pomeroy, 35 NY2d 361, 366 (1974); Hazel v Nika, 40 AD3d 430 (1st Dept. 2007); Cabrera v Hirth, 8 AD3d 196 (1st Dept. 2004); Thoma v. Ronai, 189 A.D.2d 635 (1st Dept. 1993), *affd.*, 82 NY2d 736 (1993); Hopkins v Haber, 39 AD3d 471 (2nd Dept. 2007).

Finally, the court notes that innocent passengers in motor vehicle accidents can be entitled to summary judgment on the issue of liability, notwithstanding any potential issues of comparative negligence as between the defendants. See Garcia v Tri-County Ambulette Service, Inc., 282 AD2d 206 (1st Dept. 2001); Johnson v

Phillips, 261 AD2d 269 (1st Dept. 1999); Silberman v Surrey Cadillac Limousine Service, Inc., 109 AD2d 833 (2nd Dept. 1985). However, in light of fact the defendants have asserted affirmative defenses based upon the plaintiff's alleged failure to wear seat belt in the taxi, the court declines to search the record and grant summary judgment to her. See CPLR 3212(b); Dunham v Hilco Construction Co., 89 NY2d 425 (1996).

Accordingly, defendant Katzen's motion for summary judgment dismissing all claims against her is granted but a trial is required to determine the comparative negligence and apportionment of liability between the remaining parties.

For these reasons and upon the foregoing papers, it is,

ORDERED that the motion of defendant Soozy Katzen for summary judgment on the issue of liability is granted, without opposition, all claims and cross-claims against her are dismissed and the Clerk is to enter judgment accordingly, and it is further,

ORDERED that the motion of defendant William Shill for summary judgment on the issue of liability and the cross-motion of defendant Amanda Shill seeking the same relief are denied in their entirety, and it is further,

ORDERED that the remaining parties are to appear for a pre-trial conference on October 18, 2007, at 9:30 a.m. at Part 22, 80 Centre Street, Room 136.

FILED
SEP 04 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: August 21, 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**