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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

IBRAHIMA BAH

- v -

ABLAYE DIAGNE and MOHAMED A.A. OSMAN

INDEX NO. 112904/05

MOTION DATE 7-11-07

MOTION SEQ. NO. 001

MOTION CAL. NO. 6

The following papers, numbered 1 to 4, were read on this motion by the plaintiff for partial summary judgment on the issue of liability and cross-motion by the defendants for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102(d).

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits (and Memo)	1
Notice of Cross-Motion - Affidavits — Exhibits	2
Affirmation in Opposition	3
Replying Affidavits (Reply Memo)	4

Cross-Motion: ■ Yes ☐ No

This is an action to recover damages for injuries arising from a motor vehicle accident between two livery vehicles. The undisputed facts establish that at approximately 7:00 p.m. on March 17, 2005, a 2000 Lincoln Continental operated by defendant Ablaye Diagne and owned by defendant Mohamed Osman rear-ended a 1997 Lincoln Towncar operated by plaintiff Ibrahima Bah near the intersection of 136th Street and Eighth Avenue in Manhattan. The plaintiff testified at his deposition that when struck, his car was moving at a speed of up to 30 miles per hour and his foot was on the gas pedal. Defendant Diagne claims that the plaintiff stopped short, making the collision unavoidable.

The 62-year-old plaintiff, complaining of back and neck pain, was transported to Harlem Hospital and released with a prescription for pain medication. MRI studies

conducted in July 2005 showed disc herniations and bulges in his cervical and lumbar spines. At his deposition, the plaintiff, a self-employed taxi driver, testified that he stayed home from work for six months. He wore a support belt for about the same length of time and underwent a course of physical therapy, first once a week and then once every two weeks, for three or four months. The treatment terminated when he exhausted his No-Fault benefits. He testified that he can no longer walk long distances, climb stairs easily or lift heavy objects. He continues to suffer pain "from time to time" in his neck, back and right leg. In his Bill of Particulars, the plaintiff alleges that his injuries constitute a "permanent loss or use of a body organ or member" and/or a"significant limitation of use of a body function or system" and/or an injury under the "90/180" category of "serious injury" as defined by Insurance Law § 5102(d).

There are two motions now before the court - (1) the plaintiff moves for partial summary judgment on the issue of liability, and (2) the defendants cross-move for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a"serious injury" within the meaning of the Insurance Law §5102(d).

(1) Motion for Summary Judgment on the Issue of Liability

To prevail on a motion for summary judgment, the moving party must produce evidentiary proof in admissible form sufficient to show the absence of any material issue of fact and the right to judgment as a matter of law. If the moving party makes the requisite showing, the burden then shifts to the opposing party to come forward with proof in admissible form to raise a triable issue of fact requiring a trial. 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).

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). 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 well settled 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]; Malone v Morillo, 6 AD3d 324 (1st Dept. 2004); 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). Thus, 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.

Here, the plaintiff argues that he is entitled to judgment as a matter of law on the issue of liability since defendant Diagne admits that the plaintiff's car was stopped when hit and he fails to proffer a non-negligent explanation for the collision. The court notes that the plaintiffs' attorney alleges in his own affirmation that the plaintiff was stopped at a red light when struck. The court notes that this allegation contradicts the plaintiff's account of the accident. In any event, affirmations of attorneys who claim no personal knowledge of the accident are without probative value on motions such as these. See Zuckerman v City of New York, supra at 563; Johannsen v Rudolph, 34 AD3d 338 (1st Dept. 2006); Diaz v New York City Transit Authority,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. Attached to counsel's affirmation are the transcripts of the plaintiff's own deposition testimony, as well as defendant Diagne's testimony.

The plaintiff testified at his deposition that he had stopped for a light at 125th Street and drove uptown just past 135th Street with all lights in his favor. At that point, his car was moving at a speed of up to 30 miles per hour, his foot was on the gas pedal, he was in the middle of the block, there was light traffic and he was suddenly struck in the rear by Diagne. The plaintiff never saw the defendant's car behind him, but only the traffic in front of him. Diagne also testified that he was traveling uptown on Eighth Avenue in the far right lane behind the plaintiff but maintained that the plaintiff stopped "right dead in the middle of the street." According to Diagne, just prior to the collision, both cars had just stopped

for a red traffic signal and then, upon the light turning green, proceeded uptown. Diagne estimated that he was only "five or six meters" behind the plaintiff's car, his foot was on the gas pedal, he was traveling 18-20 miles per hour and he was "cruising" or looking for passengers. According to Diagne, when the plaintiff stopped short, he applied his brakes but it was too late.

The defendant correctly argues that a non-negligent explanation maybe made out, in some circumstances, by showing that the front vehicle stopped short. See Sawhey v Bailey, 13 AD3d 203 (1st Dept. 2004); Martin v Pullafico, 272 AD2d 305 (2nd Dept. 2000); Corrado v DeJesus, 264 AD2d 577 (1st Dept. 1999). However, the First Department has repeatedly held that "an assertion that the lead vehicle 'stopped suddenly' is generally insufficient to rebut the presumption of negligence on the part of the offending vehicle." Francisco v Schoepfer, supra at 276; see Ferguson v Honda Lease Trust, 34 AD3d 356 (1st Dept. 2006); Woodley v Ramirez, 25 AD3d 451 (1st Dept. 2006); Figueroa v Luna, 281 AD2d 204 (1st Dept. 2001). Thus, even crediting the defendant's assertion that the plaintiff stopped short, this alone is insufficient to defeat the motion. The plaintiff's moving papers establish that the plaintiff did not swerve in front of the defendant suddenly or cut him off before stopping short. Compare Myers v Crestwood Metals Corp., 40 AD3d 75 (1st Dept. 2007); Lebron v IESI Corp., 6 AD3d 215 (1st Dept. 2004); Evans v Fox Trucking Inc., 309 AD2d 618 (1st Dept. 2003). Rather, the papers establish that the defendant was following too closely and/or at an unsafe rate of speed, leaving himself too little space to avert the collision. See Rutledge v Petrocelli Electrical Co., 307 AD2d 871 (1st Dept. 2003); Moustapha v Riteway International Removal, Inc., 283 AD2d 175 (1st Dept. 2001). Since the defendant has failed to establish a non-negligent explanation for the collision or raise any triable issues as to liability, his negligence is established as a matter of law, and the plaintiff's motion for partial summary judgment must be granted.

(2) Cross-Motion for SummaryJudgment on the Issue of "Serious Injury"

Initially, the court rejects the plaintiff's contention that the cross-motion must be denied as untimely. CPLR 3212(a) permits the court to extend the time to file a summary judgment motion for "good cause shown." Here, the defendant has established that the delay in filing the motion was due to the fact that there was significant outstanding and ongoing discovery at the time the plaintiff filed the note of issue. In particular, the plaintiff repeatedly failed to appear for a physical examination, and the defendant then had difficulty obtaining the examining physician's report. Outstanding discovery may constitute "good

cause show" for a late summary judgment motion. See Gonzalez v 98 Mag Leasing Corp., 95 NY2d 124 (2000); Filannino v Triborough Bridge and Tunnel Authority, 34 AD3d 280 (1st Dept. 2006); Herrera v Felice Realty Corp., 22 AD3d 723 (2nd Dept. 2005) . Nor has the plaintiff alleged that he suffered any prejudice as a result of the brief delay in the filing of the cross-motion, which was filed eleven days after the court's deadline for such motions and about two weeks after the plaintiff's motion. Although the court may, in its discretion, entertain the motion, it nonetheless must be denied on the merits.

Where, as here, a defendant seeks summary judgment on the threshold "serious injury" issue under the "No-Fault" Law (Insurance Law § 5102[d]), he or she bears the initial burden of establishing the absence of a "serious injury" as a matter of law. The party opposing a motion for summary judgment on the threshold "serious injury" issue must come forward with objective proof of his or her injury to raise a triable issue. See Toure v Avis Rent A Car Systems, 98 NY2d 345 (2002); Dufel v Green, 84 NY2d 795 (1995). Subjective complaints alone are not sufficient. See Toure v Avis Rent A Car Systems, supra; Gaddy v Eyler, 79 NY2d 955 (1992). However, "[w]here a defendant fails to meet his initial burden of establishing a prima facie case that the plaintiff did not sustain a serious injury, it is not necessary to consider whether the plaintiff's papers in opposition were sufficient to raise a triable issue of fact." Offman v Singh, 27 AD3d 284, 285 (1st Dept. 2006); see Winegrad v New York Univ. Med Ctr., supra.

It is also settled law that a herniated or bulging disc may constitute a serious injury within the meaning of Insurance Law §5102(d). See Pommels v Perez, 4 NY3d 566 (2005); Nagbe v Mimigreen Hacking Group, Inc., 22 AD3d 326 (1st Dept. 2005); Arjona v Calcano, 7 AD3d 279 (1st Dept. 2004). Furthermore , a CT scan or MRI may constitute objective evidence to support subjective complaints. (see Arjona v Calcano, supra; Lesser v Smart Cab Corp., 283 AD2d 273 [1st Dept. 2001)], so long as the plaintiff offers "some objective evidence of the extent or degree of the alleged physical limitations, and their duration, resulting from the disc injury." Arjona v Calcano, supra; see Pommels v Perez, 4 NY3d 566 (2005); Nagbe v Mimigreen Hacking Group, Inc., supra; Simms v APA Truck Leasing Corp., 14 AD3d 322 (1st Dept. 2005).

In this case, the moving defendants have failed to meet their burden in the first instance of submitting proof in admissible form sufficient to show the absence of any material issue of fact and the right to judgment as a matter of law. They submit the pleadings, including the plaintiff's Bill of Particulars, and the affirmed report of Dr. Iqbal

Merchant, a board-certified neurologist, who examined the plaintiff in January 2007, at the request of the defendants. In his report, Dr. Merchant states that he found only *resolved* sprains/strains of the cervical, thoracic and lumbar spines. However, Dr. Merchant fails to addresses the report of the MRI of plaintiff's spine taken on July 18, 2005, just four months after the accident, which revealed the disc herniations and bulges. See Wadford v Gruz, 35 AD3d 258 (1st Dept. 2006); Nix v Yang Gao Xiang, 19 AD3d 227 (1st Dept. 2005); Dixon v Pena, 5 AD3d 283 (1st Dept. 2004). Moreover, Dr. Merchant finds significant range of motion deficits in the plaintiff's cervical and lumbar spines, while also failing to identify the objective range of motion test(s) he used in reaching those conclusions. See Palladino v Antonelli, 40 AD3d 944 (2nd Dept. May 22, 2007); Park v Champagne, 34 AD3d 274 (1st Dept. 2006); Taylor v Terrigno, 27 AD3d 316 (1st Dept. 2006); Nagbe v Mini Green Hacking Corp., 22 AD3d 326 (1st Dept. 2005).

Since the defendants failed to meet their burden in the first instance, the court need not consider the sufficiency of the plaintiff's opposition papers. Nonetheless, the court notes that the plaintiff's papers include (1) an affirmation of Dr. Robert Diamond, the radiologist who interpreted the July 2005 MRI studies of the plaintiff's spine and found disc herniations and bulges in the cervical and lumbar regions; and (2) an affirmation of Dr. Nagaveni Rao, the plaintiff's treating physician, who first examined the plaintiff a few days after the accident and seven more times through December 2005, monitored his physical therapy and sent him for the July 2005 MRI. Dr. Rao concluded that the spinal injuries revealed in the MRI studies were caused by the subject car accident, resulted in significant range of motion deficits and pain, showed minimal improvement over the course of treatment, and constituted a "permanent partial disability."

Accordingly, the defendants' cross-motion for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain "serious injury" within the meaning of Insurance Law § 5102(d) is denied.

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

ORDERED that the motion by the plaintiff for partial summary judgment on the issue of liability is granted; and it is further,

ORDERED that the cross-motion by the defendants for summary judgment dismissing the complaint on the ground that plaintiff did not sustain "serious injury" as

defined by Insurance Law § 5102(d) is denied; and it is further;

ORDERED that the parties shall appear at Mediation-2, 80 Centre Street, NY, NY, on October 10, 2007, at 9:30 a.m., as previously scheduled.

Dated: September 7, 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**