[* 1] SCANNED ON 1/13/2007

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

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

MICHAEL PEPE

INDEX NO. 103600/03

MOTION DATE 9-5-07

- v -

MOTION SEQ. NO. 005

HERTZ CORPORATION, et al.

MOTION CAL. NO. 79

The following papers, numbered 1 to 5, were read on this motion by defendants Jonathan Tufenbrun and Hertz Corporation for summary judgment on the issue of liability.

Notice of Motion - Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Memo)	2,3,4
Replying Affidavits (Reply Memo)	5

Cross-Motion: ☐ Yes ■ No

This is an action seeking damages for injuries allegedly sustained as a result of a three-car collision which occurred in the left lane of First Avenue near the intersection of East 69th Street in Manhattan. A vehicle owned and operated by defendant Roberta Milagrosa was struck in the rear by a vehicle owned by defendant Hertz Corporation and operated by defendant Jonathan Tufenbrun. Upon that collision, a third vehicle, a taxi owned by defendant Taxi King Transit Inc. and operated by defendant Dilbar Jahan, struck the rear of Tufenbrun's vehicle. Plaintiff Michael Pepe was a passenger in the taxi.

Defendants Jonathan Tufenbrun and Hertz Corporation now move for summary judgment on the issue of liability, dismissing the complaint as to them. They contend that they are not liable for the collision as a matter of law because, while traveling slowly in the left lane on First Avenue, their car was cut off by Milagrosa's vehicle which suddenly entered the left lane from the middle lane in an attempt to make a left turn onto 69th Street. The moving defendants further contend that they can not be liable for the second impact which occurred seconds later since their car was struck in the rear by Jahan's vehicle while stopped. The plaintiff and non-moving co-defendants oppose the motion on the ground that it is untimely and the papers present issues of fact for a jury.

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. Once the movant meets the 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, 68 NY2d

320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980).

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. Without more, "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); Mitchell v Gonzalez, supra. However, a non-negligent explanation maybe made out, in some circumstances, by showing that the front vehicle stopped short. For example, a sufficient explanation may be that the front vehicle swerved in front of the rear vehicle or cut the rear vehicle off before stopping short, leaving "too little space to safely react and avert a collision." Lebron v IESI Corp., 6 AD3d at 215 [1st Dept. 2004]; see Myers v Crestwood Metals Corp., 40 AD3d 75 (1st Dept. 2007); Sawhey v Bailey, 13 AD3d 203 (1st Dept. 2004); Evans v Fox Trucking Inc., 309 AD2d 618 (1st Dept. 2003); Corrado v DeJesus, 264 AD2d 577 (1st Dept. 1999).

In the instant case, the proof submitted by the moving defendants, which includes the deposition testimony of Tufenbrun and Jahan and an affidavit of Tufenbrun, establishes a non-negligent explanation for Tufenbrun's rear-end collision with Milagrosa's car. That is, it establishes that Milagrosa suddenly and without warning swerved in front of Tufenbrun in an attempt to cross his lane to make a left turn, leaving him "too little space to safely react and avert a collision." Lebron v IESI Corp., supra at 215. It further establishes that both Tufenbrun's car and Milagrosa's car came to a stop after the collision and that Jahan's car struck Tufenbrun's car in the rear seconds later.

Plaintiffs' counsel's argument that the instant motion is untimely is without merit. CPLR 3212(a) provides that *"if no such date is set by the court"* a motion for summary judgment must be made no less than thirty days and no more than 120 days after the filing of the Note of Issue. This Court has set a 60-day rule. Since the instant motion was filed less than 60 days after the Note of Issue, it is timely.

Furthermore, the plaintiff has failed to come forward with proof in admissible form to raise a triable issue as to the causation of the first impact. The plaintiff proffers only an affidavit of his attorney with a copy of the case scheduling order and an E-Courts print-out from the New York State Unified Court System web site. 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). While they 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 5630, the attachments here are not in admissible form and do not raise any triable issue as to liability. Compare Figueroa v Cadbury Utility Constr. Corp., 239 AD2d 285 (1st Dept 2005).

In further opposition, counsel for defendant Milagrosa, who is now deceased (see order of this court [Tingling, J.] dated November 16, 2006, granting motion to amend caption), submits only an affirmation adopting the plaintiff's papers. Co-defendants Jahan, against whom a default judgment was entered, and Taxi King, have also submitted opposition papers consisting only of an attorney's affirmation which adopts the arguments of the plaintiff. Thus, contrary to the plaintiff's contention, the opposing papers have failed to raise any triable issue as to the liability of the moving defendants.

In any event, the Court notes that if Tufenbrun was stopped as a result of a collision which he, in part, caused, this would not make him a "stopped or stopping vehicle" so as to absolve him of liability for the consequent collision between his vehicle and defendant Jahan's vehicle. However, the proof submitted on this motion establishes as a matter of law that he was not negligent and did not contribute to the first collision and consequently, cannot be held liable for the resulting collision with Jahan. The Court further notes that the affidavit of defendant Milagrosa, dated May 5, 2004, submitted with the moving defendants'reply, would not create any triable issue since, in it, the now-deceased defendant essentially concedes that she crossed into Tufenbrun's path as she attempted to turn left from the middle lane.

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

ORDERED that the motion of defendants Jonathan Tufenbrun and Hertz Corporation for summary judgment on the issue of liability is granted, the complaint is dismissed as to those defendants and the Clerk is directed to enter judgment in favor of those defendants only; and it is further,

ORDERED that the parties are directed to appear for trial on November 28, 2007, at 9:30 a.m, Part 40, 60 Centre St, Room 232, as previously scheduled.

This constitutes the Decision and Order of the Court.

Dated: October 31, 2007

Deborah Kaplan, A.S.
DEBORAH A. KAPLAN
J.S.C.

Check one: FINAL DISPOSITION ■ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

FILED
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