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

PRESENT: HON. DEBORAH A. KAPLAN Justice PART 22

THIERNO SADOU DIALLO

- v -

OUMAR BAILO BARRY, ABDOULAYE DIALLO, FORD MOTOR CREDIT CORP., PULAU ELECTRONICS CORP., GERALD LOPEZ, HANN AUTO TRUST and RICHARD S. SAMAY

INDEX NO. 100627/05

MOTION DATE 9-19-07

MOTION SEQ. NO. 004

MOTION CAL. NO. 37

The following papers, numbered 1 to 7, were read on this motion by defendants Oumar Bailo Barry and Abdoulaye Diallo for summary judgment on the issue of liability.

Notice of Motion - Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Memo)	2,3,4,6,7
Replying Affidavits (Reply Memo)	5

Cross-Motion: ☐ Yes ■ No

This is an action seeking damages for injuries allegedly sustained in a four-car collision which occurred on October 27, 2004, at a traffic light on Second Avenue at the intersection of 108th Street in Manhattan. The lead car, operated by James McIver, who is not a party to the main action, was struck in the rear by a vehicle operated by defendant Abdoulaye Diallo and owned by defendant Oumar Bailo Diallo. The Diallo vehicle was struck in the rear by a vehicle operated by defendant Gerald Lopez and owned by defendant Pulau Electronics Corp.. The fourth car was driven by defendant Richard Samay and owned by defendant Hann Auto Trust. Plaintiff Thierno Sadou Diallo was passenger in the Diallo vehicle, the second in the chain. Defendants Oumar Bailo Barry and Abdoulaye Diallo move for summary judgment dismissing the complaint and all cross-claims against them on the ground that they are not liable as a matter of law. The plaintiff and all co-defendants oppose the motion. For the reasons set forth below, the motion is denied.

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 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 Alvarez v Prospect Hospital, 68 NY2d 320 (1986); 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). 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). "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, 40AD3d 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).

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. A non-negligent explanation may be 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); Mitchell v Gonzalez, supra.

In the instant case, the deposition testimony of the plaintiff and defendant Samay, the only deposition testimony submitted in support of the motion, does not establish any non-negligent explanation for striking the lead vehicle and falls far short of establishing the

moving defendants' entitlement to judgment as a matter of law. Rather, it presents triable issues of fact as to, *inter alia*, the sequence of the impacts, whether the McIver vehicle or the Diallo vehicle was stopped when first struck, the color of the traffic signal, and the speed of the vehicles just prior to impact. Indeed, the proof submitted suggests that defendant Abdoulaye Diallo may have been traveling at an unsafe rate of speed and/or following too closely. See Vehicle and Traffic Law §§1129[a];1180[a]; Mitchell v Gonzalez, supra.

The plaintiff testified, inter alia, that the Diallo vehicle was moving slowly when it was struck in the rear either by one or two vehicles and then struck the rear of the McIver vehicle. However, the plaintiff's testimony does not establish that the McIver vehicle was moving at the time of that impact. Nor does it establish that the light was either red or green. Rather, the plaintiff testified that the light had turned to "blue"and defendant Diallo was trying to signal to McIver to move forward. Samay's deposition testimony was that the light was green, he was traveling less than 30 mph, and he was three or four car lengths behind the Lopez vehicle, which stopped for reasons not apparent to Samay. Samay also testified that he observed the McIver vehicle stopped within the intersection up ahead.

There is no merit to the moving defendants' argument that they are entitled to summary judgment because their own vehicle was stopped when struck in the rear. If the Diallo vehicle was stopped as a result of a collision which they, in part, caused, this does not make theirs a "stopped or stopping vehicle" so as to absolve them of liability for the collisions involving the Lopez and Samay vehicles. Rather, it may provide each of those two rear vehicles with a non-negligent explanation for striking the car in front of it. See Somers v Condlin, supra; Francisco v Schoepfer, supra; Garcia v Bakemark Ingredients (East) Inc., supra; Grimes-Carrion v Carroll, supra; Johnson v Phillips, supra. Furthermore, defendant Abdoulaye Diallo never appeared for a deposition, in violation of numerous court orders directing him to appear. Consequently, by an order dated January 31, 2007, that defendant is now precluded from offering evidence adverse to the plaintiff at trial. According to the plaintiff, who lived with him, Abdoulaye Diallo moved back to Africa after the accident and has not returned.

The Court notes that the police accident report submitted by the moving defendants cannot be considered on the motion since 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). Even if the report were admissible, it would not advance the moving defendants' position. In addition to stating that defendant Diallo told the officer that McIver stopped short, it also states that McIver told the officer he was stopped at a red light when struck from behind by Diallo.

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

ORDERED that the motion of defendants Oumar Bailo Barry and Abdoulaye Diallo for summary judgment on the issue of liability is denied; and it is further,

ORDERED that the parties shall appear for a status conference on December 20, 2007, at 9:30 a.m at Part 22, 80 Centre St, Room 136, as previously scheduled.

Dated: December 6, 2007

Deborah Kaplan

Deborah Kaplan, J.S.C.

DEBORAH A. KAPLAN

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**