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

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

LENNOX LIBURD

INDEX NO. 110252/07

MOTION DATE 1-23-08

- v -

MOTION SEQ. NO. 001

LESLIE J. WILSON

MOTION CAL. NO.

KAPLAN, J.:

This is an action to recover damages for injuries allegedly sustained as a result of a motor vehicle accident, which occurred on September 22, 2005 at approximately10:00 a.m., on County Road No. 39 near its intersection with Tuckahoe Lane in Southampton, New York. Plaintiff Lennox Liburd, moves pursuant to CPLR § 3212 for summary judgment on the issue of liability. The movant avers that he was the driver of a vehicle which was struck in the rear by a vehicle owned and operated by Leslie Wilson.



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. 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).

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, supra; Alvarez v Prospect Hospital, supra; Winegrad v New York Univ. Med Ctr., supra; Zuckerman v City of New York, supra.

In support of his motion, the plaintiff proffers the pleadings, his affidavit and a copy of the New York City Police Department report filled out in conjunction with this collision. In opposition, the defendant submits no evidence to establish a non-negligent explanation for the rear-end collision. Affirmations of attorneys who claim no personal knowledge of the accident are without probative value on a summary

judgment motion. See Zuckerman v City of New York, supra at 563; Johnson v Rudolph, 34 AD3d 338 (1st Dept. 2004). While an attorney's affirmation 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), no attachments were submitted with the defendant's attorney's affirmation.

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).

The motion must be granted since the plaintiff 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, supra; Alvarez v Prospect Hospital, supra; Winegrad v New York Univ. Med Ctr., supra; Zuckerman v City of New York, supra.

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 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.

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).

The plaintiff's submissions show that the Liburd car was struck from behind by the Wilson vehicle. As indicated, the plaintiff has also offered the New York City Police report filled out shortly after the collision. In the First Department, police reports are admissible as business records (CPLR 4518[a]) 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 (1st Dept. 1965). If the information contained in the report came from witnesses not engaged in the police business in the course of which the report was made, or it came from a witness who had no duty to report the information, the report is not admissible. See Johnson v Lutz, 226 App Div 772 (1930); Holliday v Hudson Armored Car & Courier Service, Inc., supra; Yeargans v Yeargans, supra; see also State Farm Mutual Automobile Insurance Co. v Langan, 18 AD3d 860 (2nd Dept. 2005); Conners v Duck's Cesspool Service, Ltd., 144 AD2d 329 (2nd Dept. 1988); Casey v Tierno, 127 AD2d 727 (2nd Dept. 1987). While the driver of an offending vehicle is required to provide the responding police officer with proof of registration of the vehicle (see Lopez v Ford Motor Credit Company, 238 AD2d 211 [1st Dept. 1997]), he or she has no duty to report the circumstances or the causes of the accident. See Cover v Cohen, 61 NY2d 261 (1984); Hatton v Gassler, 219 AD2d 697 (1st Dept. 1995); see also Mooney v Osowiecky, 235 AD2d 603 (3rd Dept. 1997).

Indeed, the First Department has consistently held 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); Murray v Donlan, 77 AD2d 337 (2nd Dept. 1980). A review of the undisputed facts indicates that defendant Liburd struck the Wilson vehicle from behind. As such, he was negligent. See Malone v Morillo, supra; Mitchell v Gonzalez, supra; Johnson v Philips, supra.

As discussed above, the defendant has merely submitted the affirmation of his attorney, who claims no personal knowledge of the accident. Contrary to the defendant's contention, the fact that the depositions have not yet been conducted does not preclude the granting of the motion. "A grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is

being offered to suggest that discovery may lead to relevant evidence." Bailey v NYCTA, 270 AD2d 156, 157 (1st Dept. 2000); see also Cioe v Petrocelli Electric Co., Inc., 33 AD3d 377 (1st Dept. 2006). No affidavit of defendant driver Wilson nor any other evidentiary basis is supplied by the defendant's opposing papers to suggest that discovery may establish a non-negligent explanation.

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

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

**ORDERED** that the parties are directed to appear on February 8, 2008 in the DCM courtroom, Room 103, 80 Centre Street, 9:30 a.m., for conference as previously directed.

This constitutes the Decision and Order of the Court.

**Dated: February 6, 2008**



Deborah Kaplan

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

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