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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

THOMAS COLEMAN,

Plaintiff,

- against -

ALBERT PENNACHIO, DARLENE MARRONE and STEPHEN G. OPECA,

Defendants.

TRIAL / IAS PART 32
NASSAU COUNTY

Index No. 10080/07

Motion Sequence No. 001, 002

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits 1, 2
Answering Affidavits 3
Replying Affidavits 4, 5
Briefs: Plaintiff's / Petitioner's .....
Defendant's / Respondent's .....

The defendant Stephen G. Opeca moves pursuant to CPLR 3212 and Insurance Law §§ 5102 and 5104 for an order granting summary judgment dismissing the complaint and any cross claims. The defendants Albert M. Pennachio and Darlene Marrone oppose that motion, and cross move for an order pursuant to CPLR 3212 and Insurance Law §§ 5102 and 5104 for an order granting summary judgment dismissing the complaint, denying that part of the co-defendant's motion seeking summary judgment on the issue of liability. The defendant Stephen G. Opeca opposes that cross motion. The plaintiff opposes both motions. The underlying personal injury action arises from a motor vehicle

accident on a cloudy, dry late afternoon of Wednesday, August 30, 2006, on Newbridge Road, in North Bellmore, County of Nassau, State of New York. This Court has carefully reviewed all of the papers submitted with respect to the motion and cross motion.

Opeca's attorney states, in a supporting affirmation dated June 18, 2008, to this defendant's motion, the evidence shows the accident was caused by the negligence of the Pennachio, whose vehicle struck the plaintiff's vehicle in the rear, and pushed it into Opeca's vehicle. Opeca's attorney points to Opeca's March 12, 2008 deposition where Opeca testified he drove north on Newbridge Road on the day of the accident, stopped on Newbridge Road at its intersection with Little Neck Avenue in backed up traffic when his vehicle was struck by Pennachio's vehicle. Opeca's attorney claims the impact pushed the Opeca vehicle forward into the car in front. Opeca's attorney also points to Pennachio's March 12, 2008 deposition where Pennachio admits involvement in the accident, states traffic conditions were medium to slightly heavy, being distracted just prior to the accident by a police car and a truck, and striking the Opeca vehicle. Opeca's attorney notes, in the police report regarding the accident, Pennachio is reporting as having told Police Officer Bryan E. Egan he "looked to the right at a police car and when he looked back at the car in front of him was stopped and he couldn't stop in time."

Opeca's attorney states the complaint should be dismissed because the plaintiff fails to meet the serious injury threshold. Opeca's attorney points to the verified bill of particulars served on or about September 10, 2007, where the plaintiff alleges specific

injuries. Opeca's attorney noted the plaintiff testified at a deposition on March 12, 2008, and stated, after the accident, he was examined by EMS workers, who suggested the plaintiff go to the hospital, but the plaintiff decided not to go there. Opeca's attorney reports the plaintiff testified he was picked up by a friend who later drove the plaintiff to Huntington Hospital where that medical center sent the plaintiff home after x-rays which revealed no fractures. Opeca's attorney asserts the plaintiff testified he underwent physical therapy in early October 2007 at Northport Physical Therapy for about 13 to 15 times, but never receiving any knee treatment, and no surgery had been recommended. Opeca's attorney states the plaintiff testified being confined to bed/home for only about a week, and when asked if there are any activities the plaintiff could not do, the plaintiff responded he could no longer ride a bicycle nor take long drives, but none of the plaintiff's doctors ever advised the plaintiff not to ride a bicycle. Opeca's attorney avers C.M. Sharma, M.D., a diplomate of the American Board of Psychiatry and Neurology, and the Chief, Neurology Education, Cabrini Medical Center, conducted an independent neurological examination of the plaintiff on April 16, 2008. Dr. Sharma reported that neurological examination was normal with only subject complaints of cervical and lumbar pain. Dr. Sharma did not find any neurological problems causally related to the subject accident, nor any neurological disability. Dr. Sharma concluded there was no need for the plaintiff to obtain any neurological treatment, and the plaintiff could perform usual work and activities.

The attorney for Pennachio and Marrone states, in a supporting affirmation to their cross motion, for the purposes of judicial economy, and for this cross motion only as it pertains to the issue of a threshold, this affiant adopts and incorporates the June 18, 2006 affirmation by Opeca's attorney. The attorney for Pennachio and Marrone avers, for the reasons enumerated in that June 18, 2006 affirmation by Opeca's attorney, the plaintiff's complaint should be dismissed. The attorney for Pennachio and Marrone points out this plaintiff, who drove the second car in this three-car accident, testified Opeca's vehicle came to an abrupt stop causing the plaintiff to stop. The attorney for Pennachio and Marrone notes the plaintiff testified Opeca braked abruptly because Opeca was going to let another vehicle merge from the right when Opeca could have continued, and passed that car. The attorney for Pennachio and Marrone asserts, when Opeca stopped, the plaintiff was forced to abruptly stop. The attorney for Pennachio and Marrone contends the plaintiff's testimony creates a question of fact whether the Opeca has any liability for the happening of the accident.

The plaintiff's attorney states, in an opposing affirmation dated August 15, 2008, there is a question of fact whether Opeca's conduct was a substantial cause of the collision. The plaintiff's attorney claims Opeca's vehicle came to an unforeseeable and abrupt stop in front of the plaintiff's vehicle, and seconds later the plaintiff's vehicle was rear-ended by the vehicle driven by Pennachio and owned by Marrone. The plaintiff's attorney asserts Opeca bears responsibility for the accident because Opeca's conduct put a

sequence of events into motion that resulted in injuries to the plaintiff. The plaintiff's attorney points to the plaintiff's testimony that at or near the time of the accident, most traffic was stopped because a police officer was writing a ticket on the soft shoulder of the road, approximately 40 to 50 yards behind where the plaintiff was struck. The plaintiff's attorney notes the plaintiff testified he and Opeca got of their cars after the impact, and the plaintiff said to Opeca, "I guess it wasn't such a bright idea to slam on your brakes like that," and Opeca responded, "I guess not." The plaintiff's attorney comments the plaintiff testified having a conversation with Pennachio, at the scene after the impact, and Pennachio said, "I'm sorry he was looking at the police officer writing the ticket." The plaintiff's attorney states the plaintiff testified his car was stopped behind Opeca's vehicle for approximately three to 5 seconds before the plaintiff felt the impact to the rear of the plaintiff's car. The plaintiff's attorney avers there is a question of fact as to how the accident occurred which should be resolved by the jury, and Pennachio's negligence does not absolve Opeca of liability as a matter of law.

The plaintiff's attorney contends the motion and cross motion must be denied since factual issues exist whether the plaintiff sustained a permanent loss of use of a body organ, member, function or system, or permanent consequential limitation of use of a body function or system, or significant limitation of use of a body function or system under Insurance Law § 5102 (d). The plaintiff's attorney submits the medical evidence is sufficient to create a question of fact whether the plaintiff sustained a permanent loss of

use of a body organ, member, function or system under Insurance Law § 5102 (d), so the defense motion and cross motion must be denied. The plaintiff's attorney asserts summary judgment should be denied as Dr. Sharma, the defense expert, failed to set forth the objective tests performed to support that expert's finding the plaintiff has no ongoing disability. The plaintiff's attorney claims Dr. Sharma's report should not be considered because it is totally inadequate since the plaintiff was examined by the doctor for less than five minutes. The plaintiff's attorney challenges, in detail, the doctor's examination and the conclusions, and points out the defense expert examined the plaintiff without the verified bill of particulars. The plaintiff's attorney asserts Dr. Sharma's report does not contain any range of motion evaluations because, in all likelihood, the doctor never even touched the plaintiff's neck, back or legs, to wit the areas the plaintiff has complaints. The plaintiff's attorney remarks, while Dr. Sharma noted reviewing the MRI reports, the doctor neither performed any testing on the affected areas nor demonstrated those herniations do not constitute a serious injury. The plaintiff's attorney states the plaintiff has submitted medical evidence which is sufficient to create a question of fact as to whether the plaintiff suffered a permanent injury as defined by law. The plaintiff's attorney points to the Huntington Hospital Emergency Room records where the plaintiff presented on August 30, 2006, showing specific injuries, after medical examination and x-rays, with a diagnosis of acute lower back pain, sciatia, and prescriptions for Percocet and Flexeril. The plaintiff's attorney points to examinations and diagnosis by Dr. Daniel Rich,

an orthopedist on August 31, 2006, and September 11, 2006; Next Generation Radiology for an MRI on September 5, 2006, January 17, 2007, and September 12, 2007; Northport Physical Therapy from October 2006 through December 2006, on 16 occasions; Dr. Philip Ragone, a neurologist on December 8, 2006, February 5, 2007, August 15, 2007, September 18, 2007, and on May 21, 2008; Stone to Water - Miriam Goldstein for a massage once; Dr. Jeffrey Beers - Physicial Medicine and Rehabilitation on September 20, 2007; Dr. Paul Capobianco, an Osteopath on October 25, 2007, and on other numerous occasions, including May 27, 2008; and Dr. Itzhak Haimovac, Neurological Specialties of Long, PLLC, on May 1, 2008 for an EMG/NCV on the right side. Dr. Ragone and Dr. Capobianco touch, in unsworn statements dated May 21, 2008 and May 27, 2008, respectively, on the plaintiff's injuries and these injuries causal relationship. Dr. Capobianco states, in an affirmation dated July 30, 2008, it is the doctor's opinion with a reasonable degree of medical certainty, in view the plaintiff's symptoms have persisted for nearly two years after the accident, the disc herniations of the lumbar spine and accompanying nerve damage as confirmed by EMG is a significant limitation of use of a body functioning system. Dr. Capobianco states he has been treated the plaintiff with regard to injuries the plaintiff sustained in the August 30, 2006 automobile accident, and the automobile accident, in the doctor's opinion with a reasonable degree of medical certainty, was the proximate cause of these injuries. Dr. Capobianco opines, within a reasonable degree of medical certainty, the plaintiff has likely suffered a permanent loss of

use of body organ, member, function or system, and possibly permanent consequential limitation of use of a body function or system, and significant limitation of use of a body function or system. Dr. Capobianco finds, within a reasonable degree of medical certainty the persistence of symptoms to date offers a poor prognosis, and since the plaintiff's symptoms have persisted for nearly two years after the accident the plaintiff's condition could be permanent.

The attorney for Pennachio and Marrone states, in a reply affirmation dated August 20, 2008, to the plaintiff's opposition, the plaintiff's opposing papers rest solely on findings by the plaintiff's experts which are not in admissible form. The attorney for Pennachio and Marrone points, in detail, at several reports which are unsigned, and not affirmed, and submits the Court should not consider these documents, nor any references to the massage. The attorney for Pennachio and Marrone submits the MRI, CT scan, NCV and x-ray reports regarding the plaintiff's injuries are insufficient to raise a serious injury under the Insurance Law § 5102 (d). The attorney for Pennachio and Marrone contends Dr. Capobianco's July 30, 2008 affirmation is insufficient to raise a serious injury under Insurance Law § 5102 (d) because the doctor failed to address the plaintiff's gap in treatment. The attorney for Pennachio and Marrone points out the plaintiff treated with Dr. Capobianco, according to the plaintiff's submissions and the reports of Dr. Capobianco, from October 25, 2007 through January 24, 2008, more than a four month gap in treatment. The attorney for Pennachio and Marrone notes the plaintiff failed to

submit any sworn statements from treating doctors or health care providers stating the plaintiff has difficulty performing certain activities and can no loner perform certain activities as a result of this accident. The attorney for Pennachio and Marrone avers the plaintiff's deposition testimony and affidavit, without more, are insufficient to raise a triable issue of fact. The attorney for Pennachio and Marrone asserts Dr. Sharma questioned the plaintiff regarding past medical history, current medical complaints; reviewed numerous medical reports, including the MRI reports of the plaintiff's lumbar and cervical spines; and diagnosed subjective cervical and lumbar pain and a normal examination. The attorney for Pennachio and Marrone reports Dr. Sharma determined this plaintiff does not have neurological disability.

Opeca's attorney states, in a reply affirmation dated July 16, 2008, in reply to the opposition by Pennachio and Marrone to Opeca's motion, and in further support of that motion, Opeca bears no liability since his vehicle was struck from behind because of Pennachio's negligence. Opeca's attorney contends the plaintiff has failed to sustain a serious injury under Insurance Law § 5102 (d). Opeca's attorney disagrees with the case law cited by the attorney for Pennachio and Marrone, and states the facts in that Court of Appeals case involving an abrupt lane change differ from the circumstances here regarding a rear end collision with a stopped car. Opeca's attorney contends the rear end collision here, in the absence of a non-negligent explanation constitutes negligence as a matter of law. Opeca's attorney avers there is no dispute Opeca was struck in the rear

while stopped, so there are no questions of fact on the issue of liability as to Opeca.

The three drivers were familiar with the northbound Newbridge Road, and Little Neck Parkway near the accident location, and testified to the following circumstances: Opeca left work in a 1997 Mitsubishi Galant , and headed home entering Newbridge Road northbound from the Southern State Parkway about 1,500 feet from the ensuing accident. On Newbridge Road, Opeca did not stop, but observed a police car with its lights activated on the right hand side, but offset in the northbound traffic lane with another vehicle which looked like landscaping or construction. Opeca slowed the Mitsubishi from 30, 35 miles per hour, and moved over slightly to yield as he approached the police car at about 20 miles per hour to avoid it. Coleman left his brother-in-law's house in Levittown headed to Home Depot in his 2003 Acura eventually entering the Southern State Parkway, and exited it heading northbound on Newbridge Road where he encountered a continuous stop and go flow of traffic until the accident happened. Coleman was unsure about the distance from that Newbridge Road entry point to the accident, but he made several stops along the way. Coleman observed a police officer writing a ticket on the soft shoulder of the one lane Newbridge Road, on the right, approximately 30 or 40 yards to 50 yards south of the initial collision site. While Coleman was unsure whether he stopped at the spot of the police activity, he observed traffic was stopping there, and believed that police activity was the reason most traffic was stopped. Coleman stopped, from a speed of approximately 20 to 25 miles per hour, for three to five seconds about a car to a car length

and a half behind Opeca's car before Coleman felt the impact of the 1997 Ford van driven by Pennachio, to the rear of the Acura. Coleman claims the reason he stopped then was the 1997 Mitsubishi Galant driven by Opeca abruptly stopped to let a woman driver enter onto Newbridge Road from Little Neck Avenue. Coleman described that first impact as, "Heavy. It was like an explosion," and Coleman's car moved forward, and impacted with the rear of Opeca's car. Pennachio came from home in the 1997 Ford van, and was on his way alone to visit his cousin. Pennachio testified the accident occurred approximately 30 seconds after he entered on Newbridge Road, and traffic was medium to slightly heavy. Pennachio initially saw Coleman's car, which was then moving, maybe four to five seconds before the impact with it. At that moment, when Pennachio first observed Coleman's car, Pennachio was slowing from maybe 25 miles per hour to approximately 20 miles per hour. Pennachio saw a police vehicle on the side of the road. It appeared, to Pennachio, the police officer pulled over a very wide truck with a rear storage concrete or tree area, and a portion of the truck was on Newbridge Road. Pennachio testified he thought, but was uncertain, the accident happened a little pass the truck. Pennachio testified, "I was veering to get away from that area of the road, and you know, when I had turned my head and turned around, traffic was starting to slow down. Everyone was starting to slow down- -." Pennachio testified he noticed approximately 15 to 25 cars slowing down ahead of him, and brake lights on as he passed the police car, and looked forward again. Pennachio observed the brake lights on Coleman's car; had his foot on the

brake; and the two vehicles were approximately a car length and a half or a van length and a half apart. Pennachio testified Coleman's car was moving, trying to avoid hitting Opeca's car, to wit coming to a stop as the van made a light to moderate impact with the rear of Coleman's car.

Vehicle and Traffic Law § 1129 (a) provides: "The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway."

> A rear-end collision into a stopped automobile creates a prima facie case of liability with respect to the operator of the moving vehicle, imposing a duty of explanation on its operator (***see, Gambino v City of New York***, 205 AD2d 583; ***Starace v Inner Circle Qonexions***, 198 AD2d 493; ***Edney v Metropolitan Suburban Bus Auth.***, 178 AD2d 398; ***Benyarko v Avis Rent A Car Sys.***, 162 AD2d 572, 573). The operator is required to rebut the inference of negligence created by the unexplained rear-end collision (***see, Pfaffenbach v White Plains Express Corp.***, 17 NY2d 132, 135), since the operator of the moving vehicle is in a better position "to excuse the collision either through a mechanical failure, or a sudden stop of the vehicle ahead, or an unavoidable skidding on a wet pavement, or any other reasonable cause" (***Carter v Castle Elec. Contr. Co.***, 26 AD2d 83, 85). If the operator cannot come forward with any evidence to rebut the inference of negligence, the plaintiff may properly be awarded judgment as a matter of law (***see, Starace v Inner Circle Qonexions, supra***, 198 AD2d, at 493; ***Young v City of New York***, 113 AD2d 833, 834)

Barile v. Lazzarini, 222 A.D.2d 635, 636, 635 N.Y.S.2d 694 [2nd Dept., 1995].

The Second Department hold:

> This court has repeatedly held that the explanation that the stopped vehicle came to sudden stop, standing alone, is insufficient to rebut the inference of negligence (***see Geschwind v. Hoffman, supra; Jeremic v. Tong, supra; Colon v. Cruz***, 277 A.D.2d 195, 715 N.Y.S.2d 647).
> A sudden stop, coupled with other evidence, such as failure to comply with the Vehicle and Traffic Law with respect to proper signaling (***see Purcell v.***

Axelsen, 286 A.D.2d 379, 729 N.Y.S.2d 495; ***Colonna v. Suarez***, 278 A.D.2d 355, 718 N.Y.S.2d 618; ***Martin v. Pullafico***, 272 A.D.2d 305, 707 N.Y.S.2d 891; ***Maschka v. Newman***, 262 A.D.2d 615, 692 N.Y.S.2d 472; ***Glick v. Hittner & Sons***, 111 A.D.2d 150, 489 N.Y.S.2d 8), or stopping in high-speed traffic (***see Mundo v. City of Yonkers***, 249 A.D.2d 522, 672 N.Y.S.2d 128; ***cf. Corbly v. Butler***, 226 A.D.2d 418, 641 N.Y.S.2d 71), or in response to an emergency created by a nonparty to the action (***see Kienzle v. McLoughlin***, 202 A.D.2d 299, 610 N.Y.S.2d 771; ***Varsi v. Stoll***, 161 A.D.2d 590, 555 N.Y.S.2d 169) can constitute a nonnegligent explanation for a rear-end collision

Chepel v. Meyers, 306 A.D.2d 235, 239, 762 N.Y.S.2d 95 [2nd Dept., 2003].

The sudden stop of a lead car is one of the non-negligent explanations of a rear-end collision (***see Gaeta v. Carter***, 6 A.D.3d 576, 775 N.Y.S.2d 86; ***Chepel v. Meyers***, 306 A.D.2d 235, 762 N.Y.S.2d 95; ***Purcell v. Axelsen***, 286 A.D.2d 379, 729 N.Y.S.2d 495), because the operator of that car has a duty to avoid stopping suddenly without properly signaling to avoid a collision "when there is opportunity to give such signal" (Vehicle and Traffic Law § 1163; ***see id.***; ***Colonna v. Suarez***, 278 A.D.2d 355, 718 N.Y.S.2d 618)

Taveras v. Amir, 24 A.D.3d 655, 656, 808 N.Y.S.2d 368 [2nd Dept., 2005].

Drivers must maintain safe distances between their cars and cars in front of them (Vehicle and Traffic Law § 1129[a]) and this rule imposes on them a duty to be aware of traffic conditions, including vehicle stoppages (***Sass v. Ambu Trans Inc.***, 238 A.D.2d 570, 657 N.Y.S.2d 69). As we have phrased it, drivers have a "duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident" (***DeAngelis v. Kirschner***, 171 A.D.2d 593, 567 N.Y.S.2d 457). By now it is well established that a rear-end collision with a stopped vehicle establishes a prima facie case of negligence on the part of the operator of the second vehicle. This rule has been applied when the front vehicle stops suddenly in slow-moving traffic (***Mascitti v. Greene***, 250 A.D.2d 821, 673 N.Y.S.2d 206), even if the sudden stop is repetitive (***Leal v. Wolff, supra***), when the front vehicle, although in stop-and-go traffic, stopped while crossing an intersection (***Barba v. Best Sec. Corp.***, 235 A.D.2d 381, 652 N.Y.S.2d 71), and when the front car stopped while after having changed lanes (***Cohen v. Terranella***, 112 A.D.2d 264, 491 N.Y.S.2d 711)

Johnson v. Phillips, 261 A.D.2d 269, 271, 690 N.Y.S.2d 545 [1 Dept., 1999]; ***see also Quezada v. Aquino***, 38 A.D.3d 873, 873-874, 833 N.Y.S.2d 169 [2 Dept., 2007].

Here, Opeca's car stopped, followed by Coleman's car which was impacted by Pennachio's vehicle. The Coleman's reliance on ***Tutrani v. County of Suffolk*** (10 N.Y.3d 906, 861 N.Y.S.2d 610 [2008]) is misplaced here. The Court of Appeals found, on that record in a memorandum decision, a jury could find the defendant's conduct " 'set into motion an eminently foreseeable chain of events that resulted in [the] collision' " between the vehicles driven by [the others]" (***supra*** at 907). The facts in that matter can be distinguished from the instant case since there a police officer changed lanes without signaling. Here, the Opeca vehicle stopped; yielded the right of way to another vehicle into a single lane roadway in stop and go traffic; and was struck seconds later by the plaintiff's vehicle. Opeca supplies a non-negligent explanation for stopping, and Coleman provides a non-negligent explanation for striking Opeca's vehicle. "The police officer who prepared the report was acting within the scope of his duty in recording [the] statement, and the statement was admissible as the admission of a party (***see Ferrara v. Poranski***, 88 A.D.2d 904, 450 N.Y.S.2d 596; ***Murray v. Donlan***, 77 A.D.2d 337, 433 N.Y.S.2d 184; ***Chemical Leaman Tank Lines v. Stevens***, 21 A.D.2d 556, 251 N.Y.S.2d 240; ***see also Matter of Leon RR***, 48 N.Y.2d 117, 122-123, 421 N.Y.S.2d 863, 397 N.E.2d 374)." (***Guevara v. Zaharakis***, 303 A.D.2d 555, 556, 756 N.Y.S.2d 465 [2nd Dept., 2003]). The police accident report contains an admission by Pennachio regarding his conduct in the incident (***see Moran v. Singh***, 10 A.D.3d 707, 782 N.Y.S.2d 284 [2nd Dept., 2004]; ***Kemenyash v. McGoey***, 306 A.D.2d 516, 762 N.Y.S.2d 629 [2nd

Dept.,2003]). Opeca has shown *prima facie* entitlement to judgment as a matter of law on the issue of liability. In opposition, Coleman and Pennachio failed to demonstrate by admissible evidence the existence of a triable issue of fact as to Opeca's liability (***see Flood v. Travelers Vil. Garage***, 66 A.D.2d 726, 411 N.Y.S.2d 324; ***see Alvarez v. Prospect Hosp.***, 68 N.Y.2d 320, 508 N.Y.S.2d 923, 501 N.E.2d 572; ***Zuckerman v. City of New York***, 49 N.Y.2d 557, 427 N.Y.S.2d 595, 404 N.E.2d 718).

Pennachio and Marrone made a *prima facie* showing of entitlement to judgment as a matter of law on the issue of regarding Insurance Law §§ 5102 and 5104 . However, in opposition, the plaintiffs demonstrated by admissible evidence the existence of triable issues of fact with respect to those threshold issues.

Accordingly, the motion by the defendant Stephen G. Opeca is granted in all respects, and the cross motion by defendants Albert M. Pennachio and Darlene Marrone is denied in all respects.

So ordered.

Dated: **December 17, 2008**

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DEC 23 2008

J. S. C.

NASSAU COUNTY
COUNTY CLERK'S OFFICE

FINAL DISPOSITION NON-FINAL DISPOSITION xxx