[* 1] SCANNED ON 10/5/2009

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

PRESENT: HON. PAUL WOOTEN Justice PART 22

LAWRENCE PERRY,
Plaintiff,

- v -

SARAH B. COLLINS, MICHAEL A. COLLINS, and RICHARD J. VIGAY,
Defendants.

INDEX NO. 103561/08

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO. 94

The following papers, numbered 1 to 3 were read on the motion by plaintiff for summary judgment on the issue of liability.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits...	1
Answering Affidavits — Exhibits (Memo)	2
Replying Affidavits (Reply Memo)	3

FILED
OCT 02 2009
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ■ No

On August 22, 2006, plaintiff was involved in a three car collision with a vehicle owned by defendant Sarah Collins and operated by defendant Michael Collins, and a vehicle owned and operated by defendant Richard Vigay. The plaintiff's vehicle was followed by defendants Collins' vehicle, followed by defendant Vigay's vehicle. The accident occurred on Third Avenue near its intersection with East 101st Street. Plaintiff commenced this action to recover for alleged injuries sustained as a result of the subject accident. Defendants Sarah Collins and Michael Collins now move pursuant to CPLR 3212, for an order granting summary judgment on the issue of liability.

SUMMARY JUDGMENT STANDARD

The proponent of a motion for summary judgment is required to make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Thomas v Holzberg*, 751 NYS2d 433, 434 [1 Dept 2002]. The motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof . . ." (CPLR § 3212 [b]). A party may also demonstrate a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman*, *supra*; *Prudential Securities Inc. v Rovello*, 692 NYS2d 67 [1 Dept 1999]).

Where the movant has established a *prima facie* case of negligence, opposing parties are required to submit evidentiary proof in admissible form raising triable issues of material fact in order to defeat the motion for summary judgment (*Mazurek v Metropolitan Museum of Art*, 812 NYS2d 12 [1 Dept 2006]; *Perez v Brux Cab Corp.*, 674 NY2d 343 [1 Dept 1998]; *Zuckerman v City of New York*, *supra*).

It is well settled that the "driver of a motor vehicle must maintain a safe distance between his vehicle and the one in front of him, and that a rear-end collision with a stopped 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 such accident" *(see Woodley v*

Ramirez, 810 NYS2d 125 [1 Dept 2006]; *Garcia v Bakemark Ingredients Inc.*, 797 NY2d 467 [1 Dept 2005], *quoting Johnson v Phillips*, 690 NYS2d 545 [1 Dept 1999]; *Mullen v Rigor*, 778 NYS2d 168 [2004]; *Agramonte v City of New York*, 732 NYS2d 414 [2001]). In addition, a "driver is expected to drive at a sufficiently safe speed and to maintain enough distance between himself and cars ahead of him so as to avoid collisions with stopped vehicles taking into account the weather and road conditions" (*Malone v Morillo*, 775 NY2d 312 [1 Dept 2004], *quoting Mitchell v Gonzalez*, 703 NY2d 124 [1 Dept 2000]).

DISCUSSION

In support of their motion defendants Sarah and Michael Collins have submitted, inter alia, a copy of the pleadings, the police accident report and their affidavits. Defendant Michael Collins claims that prior to the subject accident, plaintiff's vehicle was traveling northbound, in the third lane, on Third Avenue, and his vehicle was traveling in the fourth lane. Defendant Michael Collins also claims that that plaintiff's vehicle suddenly cut into his lane, in an attempt to avoid a truck in the third lane and avoid being side-swiped, he stopped suddenly. Subsequently, he was rear -ended by defendant Vigay's vehicle, which caused him to rear-end plaintiff's vehicle.

Defendants Sarah and Michael Collins have established *prima facie* entitlement to summary judgment, as their vehicle was a stationary vehicle involved in a rear-end collision (*see Mariano v New York City Transit Authority*, 831 NYS2d 155 [1 Dept 2007]; *Woodley, v Ramirez, supra; Garcia v Bakemark Ingredients, supra)*. The burden then shifted to the opposing parties, to rebut the inference of negligence by offering a non-negligent explanation for the contact (*Ferguson v Honda Lease Trust*, 826 NYS2d 10

[1 Dept 2006]), and thereby, raise triable issues of material fact in order to defeat the motion for summary judgment (*Mazurek v Metropolitan Museum of Art, supra; Perez v Brux Cab Corporation, supra; Zuckerman v City of New York, supra*.

In opposition plaintiff has submitted a copy of the pleadings and the affidavit of their attorney. Plaintiff argues that summary judgment is premature because discovery has not been completed. However, the fact that discovery has not been completed does not "foreclose the grant of summary judgment"(*Frierson v Concourse Plaza Assocs.*, 592 NYS2d 309 [1 Dept 1993]). In addition, the affirmation by plaintiff's counsel, who had no personal knowledge of the accident, is not admissible evidence and insufficient to create a *prime facie* case of negligence or a triable issue of fact (*see Coleman v Maclas, supra; Johnson v Phillips*, 261 AD2d 269, 270-271, 690 NYS2d 545 [1999] and *Zuckerman v City of New York, supra)*.

Also in opposition, defendant Vigay submits, inter alia, his affirmation. Defendant Vigay claims that the plaintiff's vehicle cut in front of defendant Michael Collins, which caused defendant Michael Collins' vehicle to strike the plaintiff's vehicle, which caused his vehicle to strike defendant Michael Collins vehicle.

The "credibility of the parties is not an appropriate consideration for the court", on a motion for summary judgment (*Plantamura v. Penske Truck Leasing*, 668 NYS2d, 157 [1 Dept 1998]). Moreover, in deciding a summary judgement motion, the Court must bear in mind that issue finding rather than issue determination is the key (*see Sillman v. Twentieth Century Fox Film Corp.* 3 NY2d 395 [1957]). Since Summary Judgement is a drastic remedy which deprives a litigant of his or her day in court, the evidence abduced on the motion must be liberally construed in light most favorable to

the opposing party. See *Kasselman v. Lever House Restaurant*, 29 AD3d 302 [1st Dept 2006]; *Goldman v. Metropolitan Life Insurance Co.* 13 AD3d 289 [1st Dept 2004]). In light of the two different versions of events presented by the parties regarding the circumstances of the subject accident, there remains issues of fact as to the cause of the subject accident, thus, requiring resolution by a trial.

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

ORDERED that defendants Sarah Collins and Michael Collins motion for summary judgment on the issue of liability is denied; and it is further

ORDERED that the clerk is directed to enter judgment accordingly; and it is further

ORDERED that all parties are directed to appear at a Preliminary Conference on. October 19 2009, at 9:30 a.m., in DCM (80 Centre Street, room 103).

This constitutes the Decision and Order of the Court.

FILED
OCT 02 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: September 17, 2009

SEP 17 2009

Paul Wooten J.S.C.

Paul Wooten
J.S.C.

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

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