SHORT FORM ORDER

INDEX No. 08-37102
CAL. No. 10-01853MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 10-28-10
ADJ. DATE: 3-3-11
Mot. Seq. # 004 - MD
005 - MD
006 - MD

STEVEN CASIANO, JR.,	:	ROSENBERG & GLUCK, LLP
	:	Attorney for Plaintiff
Plaintiff,	:	1176 Portion Road
	:	Holtsville, New York 11742
	:	
- against -	:	PICCIANO & SCAHILL, P.C.
	:	Attorney for Defendants Brofman
	:	900 Merchants Concourse, Ste. 310
	:	Westbury, New York 11590
NICHOLAS P. BROFMAN, HARVEY F.	:	
BROFMAN, DAMIAN P. ROBINSON and	:	DESENA & SWEENEY, ESQS.
MICHELLE H. ROBINSON,	:	Attorney for Defendants Robinson
	:	1383-32 Veterans Memorial Highway
Defendants.	:	Hauppauge, New York 11788

Upon the following papers numbered 1 to 61 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; 14 - 23; 24 - 34 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 35 - 49; 50 - 51 ; Replying Affidavits and supporting papers 52 - 55; 56 - 57; 58 - 59; 60 - 61; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motions (#004 and #005) by defendants Nicholas Brofman and Harvey Brofman seeking summary judgment dismissing plaintiff's complaint and the motion (#006) by defendants Damian Robinson and Michelle Robinson seeking summary judgment dismissing plaintiff's complaint hereby are consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendants Nicholas Brofman and Harvey Brofman seeking summary judgment in their favor on the issue of liability and dismissing plaintiff's complaint is denied; and it is further

ORDERED that the motion by defendants Nicholas Brofman and Harvey Brofman seeking summary judgment in their favor on the ground that plaintiff failed to sustain an injury within the meaning of Insurance Law § 5102(d) is denied; and it is further

ORDERED that the motion by defendants Michelle Robinson and Harvey Robinson seeking summary judgment in their favor on the ground that plaintiff failed to sustained an injury within the meaning of Insurance Law § 5102(d) is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff Steven Casiano, Jr. as a result of a motor vehicle accident that occurred on Gateway Boulevard, approximately four miles north of Crossway Drive, in the Town of Brookhaven on August 5, 2007. The accident allegedly happened when a vehicle operated by defendant Damian Robinson and owned by defendant Michelle Robinson was struck in the driver's side by the vehicle operated by defendant Nicholas Brofman and owned by defendant Harvey Brofman. At the time of the accident, the Robinson vehicle was attempting to make a left turn onto Gateway Boulevard, while exiting the Gateway Plaza shopping center's parking lot. Plaintiff, the front seat passenger in the Robinson vehicle when the accident occurred, alleges that he struck his left knee on the dashboard and that his body struck the passenger's side door as a result of the collision. By his bill of particulars, plaintiff alleges that he sustained various personal injuries as a result of the accident, including traumatic chondromalacia of left knee; left knee joint effusion; patellofemoral grinding; subluxation of the patella; left knee contusion; and disc herniations at levels T6 through T11 and level L4/L5. Plaintiff further alleges that he was incapacitated from his employment at Staples as an office supply specialist for approximately three weeks following the subject accident.

The Brofman defendants now move for summary judgment in their favor on the ground that plaintiff failed to sustain an injury within the "serious injury" threshold requirement of Insurance Law § 5102 (d) as a result of the subject accident. In support of the motion, the Brofman defendants submit, a copy of the pleadings, plaintiff's deposition transcript, and the medical report of Dr. Edward Toriello. At defendants' request, Dr. Toriello conducted an independent orthopedic examination of plaintiff on August, 11, 2009. The Robinson defendants also move for summary judgment in their favor, asserting that plaintiff's alleged injuries fail to come within the serious injury threshold requirement of Insurance Law § 5102 (d). The Robinson defendants also assert that plaintiff's alleged injury to his left knee is the result of a prior sport's injury in 1999, and that his alleged injury to his back is the result of a prior motor vehicle accident in 2005. The Robinson defendants rely on the same evidence as the Brofman defendants on their motion for summary judgment.

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (***Dufel v Green***, 84 NY2d 795, 798, 622 NYS2d 900 [1995]; *see also* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Porcano v Lehman***, 255 AD2d 430, 680 NYS2d 590 [2d Dept 1988]; ***Nolan v Ford***, 100 AD2d 579, 473 NYS2d 516 [1984], *aff'd* 64 NYS2d 681, 485 NYS2d 526 [2d Dept 1984]).

Insurance Law § 5102 (d) defines a "serious injury" as "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, such as, affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant may also establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see* ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; ***Torres v Micheletti***, 208 AD2d 519,616 NYS2d 1006 [2d Dept 1994]). Once defendant has met this burden, plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see* ***Dufel v Green***, *supra*; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [4th Dept 2003]; ***Pagano v Kingsbury***, *supra*). However, if a defendant does not establish a prima facie case that the plaintiff's injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff's opposition papers (*see* ***Burns v Stranger***, 31 AD3d 360, 819 NYS2d 60 [2d Dept 2006]; ***Rich-Wing v Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2d Dept 2005]; *see generally*, ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

The submissions of the Brofman defendants and the Robinson defendants, including the affirmed report of an orthopedic surgeon and the transcript of plaintiff's deposition, met their prima facie burden that plaintiff did not sustain an injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Castillo v Collado***, __ AD3d __, 2011 NY Slip Op 03284 [1st Dept 2011]; ***McLoud v Reyes***, 82 AD3d 848, 919 NYS2d 32 [2d Dept 2011]). The Court initially notes that sprains and strains and contusions are not serious injuries within the meaning of Insurance Law § 5102(d) (*see* ***Rabolt v Park***, 50 AD3d 995, 858 NYS2d 197 [2d Dept 2008]; ***Washington v Cross***, 48 AD3d 457, 849 NYS2d 784 [2d Dept 2008]; ***Maenza v Letkajornsook***, 172 AD2d 500, 567 NYS2d 850 [2d Dept 1991]). The affirmed medical report of Dr. Toriello states that a physical examination of plaintiff revealed full ranges of motion in the thoracic and lumbar regions of his spine, and in his left knee. Dr. Toriello opines that the contusion to the left knee and the strain to the lower back sustained by plaintiff have resolved, and that plaintiff does not have an orthopedic disability and is capable of performing the duties of his occupation. In addition, plaintiff testified at his deposition that he only missed three weeks of work as a result of the subject accident (*see* ***McIntosh v O'Brien***, 69 AD3d 585, 893 NYS2d 154 [2d Dept 2010]; ***Morris v Edmond***, 48 AD3d 432, 850 NYS2d 641 [2d Dept 2008]).

Therefore, the burden shifted to plaintiff to come forward with evidence in admissible form to raise a triable issue of fact as to whether he sustained a serious injury in the subject accident (*see* ***Thompson v Abbasi***, 15 AD3d 95, 788 NYS2d 48 [1st Dept 2005; *generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Unsworn medical reports of a plaintiff's examining physician or chiropractor are insufficient to defeat a motion for summary judgment (*see* ***Grasso v Anegarmi***, 79 NY2d 813, 580 NYS2d 178 [1991]). However, a plaintiff may rely upon unsworn MRI reports if they have been referred to by a defendant's examining expert (*see* ***Caulkins v Vicinanzo***, 71 AD3d 1224, 895 NYS2d 600 [3d Dept 2010]; ***Ayzen v Melendez***, 299 AD2d 381, 749 NYS2d 445 [2d Dept 2002]). To recover under 'the limitations of use' categories, a plaintiff must present objective medical evidence of the extent, percentage or degree of the limitation

or loss of range of motion and its duration (*see* ***Magid v Lincoln Servs. Corp.***, 60 AD3d 1008, 877 NYS2d 127 [2d Dept 2009]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006];***Meyers v Bobower Yeshiva Bnei Zion***, 20 AD3d 456, 797 NYS2d 773 [2d Dept 2005]). A sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part may also suffice (*see* ***Toure v Avis Rent A Car Systems, Inc.***, *supra*; ***Dufel v Green***, *supra*). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]).

In opposition, plaintiff contends that he sustained injuries within the "limitations of use" categories as a result of the subject accident, and that the Brofman and Robinson defendants have failed to make a prima facie showing that he did not sustain an injury within the meaning of Insurance Law § 5102(d). Plaintiff also asserts that the injury he sustained in the 1999 motor vehicle accident was to his right elbow, that he is not claiming an injury to his right elbow, and that such injury is not relevant to the subject litigation. Additionally, plaintiff argues that he did not suffer from a pre-existing condition in his left knee, explaining that after receiving treatment for a knee sprain suffered in the seventh grade, he did not receive any additional treatment, and he did not feel any pain in the years between that incident and the subject incident. Plaintiff further argues that he only sustained a disc bulge at level L2/L3 as a result of a 2005 motor vehicle accident, and that he did not sustain any injuries to his thoracic spine. Plaintiff, in opposition to the motion, submits, inter alia, his affidavit, excerpts of his and Nicholas Brofman's deposition transcripts, and the excerpts of nonparty witness Deborah Cooks's deposition transcript. Plaintiff also submits the unsworn medical reports of Dr. Michele Rubin, Dr. John Himelfarb and Dr. Samir Haddad, and the affirmed medical reports of Dr. Pradeep Albert, Dr. Steven Tunzinkiewicz and Dr. Modesto Fontanez.

Plaintiff, in opposition, has come forward with sufficient evidence to raise a triable issue of fact as to whether he sustained a serious injury to the thoracic and lumbar regions of his spine under the limitations of use categories of Insurance Law § 5102(d) as a result of the subject accident (*see* ***Evans v Pitt***, 77 AD3d 611, 908 NYS2d 729 [2d Dept 2010], *lv denied* 16 NY3d 736, 917 NYS2d 100 [2011]; ***Lee v McQueens***, 60 AD3d 914, 876 NYS2d 114 [2d Dept 2009]; ***Williams v Clark***, 54 AD3d 942, 864 NYS2d 493 [2d Dept 2008]). "[T]he mere existence of bulging discs and herniations, in the absence of objective evidence as to the extent of the alleged physical limitations resulting from the injuries and their duration, is not evidence of serious injury" (***Pierson v Edwards***, 77 AD3d 642, 643, 909 NYS2d 76 [2d Dept 2010]; *see* ***Lozusko v Miller***, 72 AD3d 908, 899 NYS2d 358 [2d Dept 2008]; ***Zarate v McDonald***, 31 Ad3d 632, 819 NYS2d 288 [2d Dept 2006]). However, when evidence of disc bulges and herniations are coupled with evidence of range of motion limitations, positive MRI findings and objective test results, this is sufficient to defeat summary judgment (*see* ***Wadford v Gruz***, 35 AD3d 258, 826 NYS2d 57 [2d Dept 2006]; ***Meely v 4 G's Truck Renting Co., Inc.***, 16 AD3d 26, 789 NYS2d 277 [2d Dept 2005]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). Plaintiff primarily relies upon the affirmation of Dr. Fontanez, his treating neurologist, in opposition to defendants' motions. In his affirmation, Dr. Fonatez opines, based upon his contemporaneous and recent examinations of plaintiff and his review of the MRI examinations of plaintiff's thoracic and lumbar spines, which revealed, among other things, disc herniations at levels T6 through T11 and levels L1 through L5, that plaintiff's thoracic and lumbar injuries, and range of motion limitations were significant and permanent range of motion limitations, and that such limitations are causally related to the subject accident (*see* ***Tai Ho Kang v Young Sun Cho***, 74 AD3d 1328, 904 NYS2d 743 [2d Dept 2010]; ***Pearce v Oliverta-Puerto***, 73 AD3d 879, 903 NYS2d 408 [2d Dept 2010]; ***Whitehead v Olsen***, 70 AD3d 678, 894 NYS2d 93 [2d Dept 2010]).

Moreover, where a defendant in an action seeking damages for a serious injury presents evidence that a plaintiff's alleged pain and injuries are related to a pre-existing condition, the plaintiff must come forward with medical evidence addressing the defense of lack of causation (***Pommells v Perez***, 4 NY3d 566, 580, 797 NYS2d 380 [2005]; *see* ***Ciordia v Luchian***, 54 AD3d 708, 864 NYS2d 74 [2d Dept 2008]; ***Luciano v Luchsinger***, 46 AD3d 634, 847 NYS2d 622 [2d Dept 2007]; ***Giraldo v Mandanici***, 24 AD3d 419, 805 NYS2d 124 [2d Dept 2005]). Dr. Fontanez specifically notes in his affirmation that plaintiff sustained injuries to his lumbar spine in a prior motor vehicle accident in 2005, that he received physical therapy and that he had a full recovery by the time he finished treatment at the end of 2005. Dr. Fontanez also explained that the MRI films taken after the 2005 accident revealed that plaintiff had not sustained any injuries to his thoracic spine, and that there was a minimal subligamentous disc bulge at level L2/L3. In addition, the medical reports of Dr. Pradeep Albert and Dr. Steven Tuzinkiewicz demonstrate that plaintiff did not sustain any injuries to his thoracic spine in his prior motor vehicle accident in 2005. Thus, the difference of opinion between Dr. Fontanez and defendants' expert, Dr. Toriello, as to whether plaintiff's symptoms were proximately caused by the accident or the result of a pre-existing degenerative condition raises triable issues of fact (*see* ***Torain v Bah***, 78 AD3d 588, 913 NYS2d 27 [1st Dept 2010]. "Where conflicting medical evidence is offered on the issue of whether a plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury" (***Noble v Ackerman***, 252 AD2d 392, 395, 675 NYS2d 86 [1st Dept 1998]; *see* ***Johnson v Garcia***, 82 AD3d 561, 919 NYS2d 13 [1st Dept 2011]; ***LaMasa v Bachman***, 56 AD3d 340, 869 NYS17 [1st Dept 2008]; ***Reynolds v Burghezi***, 227 AD2d 941, 643 NYS2d 248 [4th Dept 1996]). Accordingly, the motions for summary judgment dismissing plaintiff's complaint on the ground that plaintiff's injuries do not meet the serious injury threshold are denied.

The Brofman defendants also move for summary judgment in their favor on the issue of liability, arguing that Damian Robinson's negligent operation of the Robinson vehicle was the sole proximate cause of the subject accident's happening. In particular, the Brofman defendants allege that Damian Robinson's direction of travel was controlled by a stop sign, and that his failure to yield the right of way to the Brofman's vehicle resulted in the accident's occurrence. In support of the motion, the Brofman defendants submit a copy of the pleadings, a copy of the police motor vehicle accident report, and the parties' deposition transcripts. The Brofman defendants also submit the nonparty witness deposition transcripts of Deborah Cook and Kendell Northcutt. Plaintiff opposes the motion on the basis that the Brofman defendants have failed to establish a prima facie case that they were not a proximate cause of the subject accident's occurrence. The Robinson defendants also oppose the motion on the ground that there are material questions of fact as to whether the accident was caused by Nicholas Brofman's negligent operation of the Brofman vehicle.

Vehicle and Traffic Law § 1141, states, in pertinent part, that "[a] driver of a vehicle intending to turn left within an intersection shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard" (*see* ***Gabler v Marly Bldg. Supply Corp.***, 27 AD3d 519, 813 NYS2d 120 [2d Dept 2006]). In addition, Vehicle and Traffic Law §1142 (a), states, in relevant part, that "every driver of a vehicle approaching a stop sign shall stop...and after having stopped shall yield the right of way to any vehicle which has already entered the intersection from another highway or is approaching so closely as to constitute an immediate hazard" (*see* ***Dimou v Iatauro***, 72 AD3d 732, 899 NYS2d 308 [2d Dept 2010]). A driver with the right of way is entitled to anticipate that the driver of the other vehicle will obey the traffic laws that require him or her to yield the right of way (*see* ***Kucar v Town of Huntington***, 81 AD3d 784, 917 NYS2d 646 [2d Dept 2011]; ***Kann v Maggies Paratransit Corp.***, 63 AD3d 792, 882 NYS2d 129 [2d Dept 2009]; ***Berner v Koegel***, 31 AD3d 591, 819 NYS2d 89 [2d dept 2006]).

However, a driver with the right of way has a duty to exercise reasonable care to avoid a collision with another vehicle already in the intersection (*see* ***Todd v Godek***, 71 AD3d 872, 895 NYS2d 861[2d Dept 2010]; ***Demant v Rochevet***, 43 AD3d 981, 842 NYS2d 74 [2d Dept 2007]). Further, a driver is negligent when an accident occurs because he or she failed to see that which through the proper use of his or her senses he or she should have seen (*see* ***Laino v Lucchese***, 35 AD3d 672, 827 NYS2d 249 [2d Dept 2006]; ***Bongiovi v Hoffman***, 18 AD3d 686, 795 NYS2d 354 [2d Dept 2005]; ***Bolta v Lohan***, 242 AD2d 356, 661 NYS2d 286 [2d Dept 1997]). "There can be more than one proximate cause of an accident" (***Cox v Nunez***, 23 AD3d 427, 427, 805 NYS2d 604 [2d Dept 2005]), and issues of comparative negligence generally are a question for the jury (*see* ***Sokolovsky v Mucip, Inc.***, 32 AD3d 1011, 821 NYS2d 463 [2d Dept 2006]; ***Valore v McIntosh***, 8 AD3d 662, 779 NYS2d 782 [2d Dept 2004]).

Plaintiff testified at an examination before trial that he was the front seat passenger in the vehicle operated by Damian Robinson, and that the accident occurred immediately after Mr. Robinson made a left turn onto Gateway Boulevard from the Gateway Plaza shopping center's parking lot. Plaintiff stated that prior to Mr. Robinson executing his left turn, he turned on his left turning signal and stopped at the stop sign that controlled his direction of travel. Plaintiff testified that while the Robinson vehicle was stopped at the stop sign, approximately two vehicles crossed in front of their path, traveling in either direction, and that nothing obstructed the view of Gateway Boulevard. Plaintiff testified that the Robinson vehicle was struck in the middle of the driver's side, and that the Robinson vehicle was moving and completely within the intersection of Gateway Boulevard at the moment of impact. Plaintiff testified that although he never looked to his left, he saw the Brofman vehicle out of the corner of his left eye a split second before the impact, and that he did not hear any tires screeching or horns blowing prior to the collision. Plaintiff further testified that in order to make the left turn, the Robinson vehicle was required to cross over other lanes of traffic, that traffic was light on Gateway Boulevard, and that there were no traffic signals for the traffic traveling straight on Gateway Boulevard.

Nicholas Brofman testified at an examination before trial that he was operating the Brofman vehicle with his father's permission, that he only had a learner's permit, and that his uncle was a passenger in the vehicle. Mr. Brofman testified that he stopped at the traffic light near Home Depot on Gateway Boulevard, that he had traveled approximately one hundred yards when the accident occurred, and that he was traveling at approximately 10 to 15 miles per hour when the collision happened. Mr. Brofman testified that no traffic device controlled his direction of travel in the vicinity of the accident. He testified that he only saw the Robinson vehicle a split second before the impact and that while he was stopped at the traffic light, approximately one hundred yards away, he did not see the Robinson vehicle or any other vehicles waiting at the stop sign to the parking lot exit. He testified that he tried to avoid the accident by applying his brakes and turning his steering wheel to the left, but that his vehicle still struck the middle of the driver's side of the Robinson vehicle. Mr. Brofman further testified that the Robinson vehicle did not stop at the stop sign.

Nonparty witness Deborah Cook testified at an examination before trial that while she was stopped in the left turning lane of Gateway Boulevard, waiting for the traffic to clear to execute a left turn, she witnessed the subject accident. Mrs. Cook testified that prior to the accident the Brofman vehicle was traveling approximately two car lengths behind her vehicle, and that the accident occurred immediately after the Brofman vehicle passed her vehicle. Mrs Cook stated that she observed "a vehicle, from the right, go through the stop sign at the parking lot's exit," and that it was then struck by the Brofman vehicle. Mrs. Cook testified that the Robinson vehicle already was past the stop sign when she first observed it and that she is unable to state whether the Robinson vehicle stopped at the stop sign. Mrs. Cook testified that there was no traffic control device

directing her and Mr. Brofman's direction of travel. Mrs. Cook further testified that the Brofman vehicle struck the rear of the driver's side, and that prior to the accident she did not hear any horns blowing or tires screeching.

Nonparty witness Kendell Northcutt testified at an examination before trial that at the time of the accident, he, plaintiff and Mr. Robinson were on their lunch break, and that he was the backseat passenger on the driver's side in the Robinson vehicle. Mr. Northcutt stated that there is a traffic light on Gateway Boulevard about "half a block" away and to the left, but that where the accident occurred there is no traffic control device for vehicles on Gateway Boulevard. He also explained that he did not see the Robinson vehicle stop at the stop sign, because he was looking down, buckling his seatbelt, but that he felt the vehicle begin to slow down as it was approaching the stop sign. Mr. Northcutt testified that just before the accident occurred he heard plaintiff scream, and that, when he looked up and to his left, he saw the silver grille of the Brofman vehicle approaching their vehicle. He testified that the Brofman vehicle struck the Robinson vehicle in the middle of the driver's side.

Based upon the adduced evidence, the Brofman defendants have failed to establish, prima facie, that Damian Robinson's alleged violation of the Vehicle and Traffic Law was the sole proximate cause of the subject accident (*see* ***Todd v Godek***, *supra*; ***Kaplan v County of Nassau***, 60 AD3d 816, 875 NYS2d 214 [2d Dept 2009]; ***Hernandez v Bestway Beer & Soda Distrib.***, 301 AD3d 381, 753 NYS2d 467 [1st Dept 2003]; *see generally* ***Bonilla v Calabria***, 80 AD3d 720, 915 NYS2d 615 [2d Dept 2011]; ***Gordon v Honig***, 40 AD3d 925, 837 NYS2d 137 [2d Dept 2007]; *cf.* ***Rahaman v Abodeledhman***, 64 AD3d 552, 883 NYS2d 259 [2d Dept 2009]). The fact that Damian Robinson allegedly "ran" the stop sign at the parking lot's exit does not preclude a finding, as a matter of law, that comparative negligence by Nicholas Brofman contributed to the occurrence of the accident (*see* ***Topalis v Zwolski***, 76 AD3d 524 [2d dept 2010]; ***Romano v Forese***, 305 AD2d 576, 759 NYS2d 365 [2d Dept 2003]). "A driver who lawfully enters an intersection may still be found partially at fault for an accident if he or she fails to use reasonable care to avoid a collision with another vehicle in the intersection" (***Siegel v Sweeney***, 266 AD2d 200, 202, 697 NYS2d 317 [2d Dept 1999]). Thus, there are issues of fact as to whether Nicholas Brofman used reasonable care to avoid the collision (*see* ***Sirot v Troiano***, 66 AD3d 763, 886 NYS2d 504 [2d Dept 2009]; ***Demant v Rochevert***, *supra*; ***Hernandez v Bestway Beer & Soda Distrib.***, *supra*). In light of the foregoing, the Court need not consider the sufficiency of the opposition papers (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Volpetti v Yoon Kap*** 28 AD3d 750, 814 NYS2d 237 [2d Dept 2006]). Accordingly, the Brofman defendants' motion for summary judgment in their favor on the issue of liability is also denied.

Dated: June 7, 2011

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION