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SHORT FORM ORDER

COPY

INDEX No. 08-36835
CAL. No. 10-00239MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 6-18-10
ADJ. DATE 11-15-10
Mot. Seq. # 001- MG
002- XMD

JOSEPH LABITA, Plaintiff, - against - FRANCINE SAER AND ALEXANDER GOLDBERG, Defendants.	BLOOM & NOLL, LLP Attorneys for Plaintiff 170 Old Country Road, Suite 316 Mineola, New York 11501 LAW OFFICES OF EPSTEIN, FRANKINI & GRAMMATICO Attorneys for Defendants 45 Crossways Park Drive, Suite 102 Woodbury, New York 11797

Upon the following papers numbered 1 to 35 read on this motion and cross-motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8 ; Notice of Cross Motion and supporting papers 11 - 19 ; Answering Affidavits and supporting papers 9 - 10; 20 - 33 ; Replying Affidavits and supporting papers 34 - 35 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the plaintiff for an order pursuant to CPLR 3212 granting partial summary judgment in his favor on the issue of liability is granted; and it is further

ORDERED that this cross motion by the defendants, Francine Saer and Alexander Goldenberg s/h/a Alexander Goldberg, for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint on the ground that the plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied.

This is an action to recover damages for injuries allegedly sustained by the plaintiff on March 1, 2008 when his vehicle was struck by a vehicle owned by the defendant Francine Saer and operated by the defendant Alexander Goldenberg s/h/a Alexander Goldberg (Goldenberg) on Route 347 approximately one quarter mile west of Stony Brook Road in Stony Brook, New York.

6-28-11

The plaintiff now moves for partial summary judgment in his favor on the issue of liability on the ground that the negligence of the defendant Goldenberg was the sole proximate cause of said accident inasmuch as the vehicle that he was operating struck the rear of the plaintiff's vehicle as it was coming to a stop for a red light.

As a general rule, a rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the rearmost vehicle, imposing a duty of explanation on that operator to excuse the collision either through a mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on a wet pavement, or any other reasonable cause (*see*, ***DeLouise v S.K.I. Wholesale Beer Corp.***, 75 AD3d 489, 904 NYS2d 761 [2d Dept 2010]; ***Klopchin v Masri***, 45 AD3d 737, 737, 846 NYS2d 311 [2d Dept 2007]; ***Leal v Wolff***, 224 AD2d 392, 393, 638 NYS2d 110 [2d Dept 1996]). In addition, when a driver of an automobile approaches another automobile from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (*see*, ***Filippazzo v Santiago***, 277 AD2d 419, 419, 716 NYS2d 710 [2d Dept 2000]).

The deposition testimony of the parties reveals that at the time of the subject accident, the roads were dry and the plaintiff and the defendant Goldenberg were traveling in the westbound left lane of Route 347. The plaintiff testified at his deposition that just prior to the subject accident the traffic in front of him was slowing down for a red light at the intersection and that his vehicle was moving less than 40 miles per hour. In addition, the plaintiff testified that seconds before said accident he observed in his rear view mirror the defendants' vehicle approaching the plaintiff's vehicle. The defendant Goldenberg testified at his deposition that the traffic on Route 347 prior to the subject accident was heavy and described it as stop-and-go. In addition, the defendant Goldenberg testified that he observed the plaintiff's vehicle approximately 15 to 20 feet ahead of him about one minute prior to the accident and he was not sure if the plaintiff's vehicle was stopped or moving because he did not see the plaintiff's brake lights. The defendant Goldenberg also testified that he hit his brakes hard because the plaintiff's vehicle was right in front of him and he struck the rear bumper of the plaintiff's vehicle. The plaintiff described the impact to the rear of his vehicle as heavy and the defendant Goldenberg believed that his driver's side air bag deployed. The defendant Goldenberg could not recall if he took his eyes off the road prior to the accident. The defendant Goldenberg did testify that he had a problem with visibility, glare from the sun, and explained that he was too short for the sun visor and did not have sunglasses.

Here, the plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability (*see*, ***Abbott v Picture Cars East, Inc.***, 78 AD3d 869, 911 NYS2d 449 [2d Dept 2010]; ***Costa v Eramo***, 76 AD3d 942, 907 NYS2d 510 [2d Dept 2010]). The burden then shifted to the defendants to come forward with a non-negligent explanation for the accident (*see*, ***Costa v Eramo***, 76 AD3d at 942). The defendants failed to submit a non-negligent

explanation for the collision (*see*, ***Agramonte v City of New York***, 288 AD2d 75, 732 NYS2d 414 [1st Dept 2001]; *see also*, ***Macauley v Elrac, Inc.***, 6 AD3d 584, 585, 775 NYS2d 78 [2d Dept 2004]). Since the defendant Goldenberg acknowledged that there was "stop and go" traffic, he cannot claim that the plaintiff's stop was unanticipated (*see*, ***Harrington v Kern***, 52 AD3d 473, 859 NYS2d 480 [2d Dept 2008]). The defendant Goldenberg was obligated to take "appropriate precautions, including maintaining a safe distance" (*see*, *id.* quoting ***David v New York City Bd. of Educ.***, 19 AD3d 639, 639, 797 NYS2d 294 [2d Dept 2005]). Therefore, the motion by the plaintiff for summary judgment on the issue of liability is granted.

The defendants cross move for leave to file a late request for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). The defendants assert that said late motion was necessitated by their recent receipt of the plaintiff's supplemental bill of particulars dated May 11, 2010 and the lack of authorizations to enable the defendants to obtain the medical and hospital records referred to in the plaintiff's attorney's letter dated May 11, 2010.

The plaintiff alleged in his original bill of particulars dated February 12, 2009 that as a result of the subject accident he sustained serious injuries including disc herniations at C5 and C6; left C5/C6 radiculopathy; cervicogenic headaches secondary to whiplash; exacerbation and aggravation of a pre-existing left paracentral disc herniation at L5-S1; exacerbation, aggravation and activation of pre-existing, asymptomatic cervical spine degeneration; and left median neuritis at the wrist. In addition, the plaintiff alleged that he received emergency room treatment at St. Catherine of Siena Hospital one day after the subject accident and was thereafter confined to bed and home for three days. At the time of said accident, the plaintiff was employed as a Key Accounts Manager for Perdue Farms, Inc. and was incapacitated from employment for three days.

The supplemental bill of particulars added the following injuries: disc herniations at C4-C5 and C5-C6; right sided cervical radiculopathy; disc herniation at C5-C6 compressing the spinal cord and the bilateral neural foramen requiring epidural steroid injections; disc herniation at C5-C6 requiring anterior cervical discectomy at C5-C6 with interbody fusion and interbody prosthesis, autograft and allograft and anterior instrumentation at C5-C6 with plate and screws; cervical myelopathy; and cervical and lumbar pain syndrome. The plaintiff alleges that he was admitted to Stony Brook University Hospital on April 1, 2010 and discharged the next day and that he was confined to bed for one week after the surgery and remains confined to home.

In opposition to the cross motion, the plaintiff's attorney contends that he notified the defendants' attorney prior to service of the supplemental bill of particulars that the plaintiff was about to have surgery and that on April 1, 2010, the day of the surgery, the plaintiff served all related medical authorizations upon the defendants' attorney. In reply, the defendants contend that they still have not received all of the plaintiff's treatment and surgical records.

The Court's computer records indicate that the note of issue in this action was filed on February 4, 2010. The affirmed reports of the defendants' examining physicians submitted in support of their cross motion indicate that the plaintiff had been examined by them in November 2009 based on the allegations in the original bill of particulars of disc herniations at C5 and C6 and cervical radiculopathy and that the reports had been prepared in November 2009. The plaintiff underwent cervical spine surgery on April 1, 2010, almost two months after the note of issue was filed, and the defendants were notified in April of the plaintiff's intention to supplement his bill of particulars. The motion by the plaintiff was made on May 12, 2010, the date that it was served. The cross motion was made on June 10, 2010, six days after the 120 day deadline, and is untimely (*see*, CPLR 3212 [a]; ***Grande v Peteroy***, 39 AD3d 590, 833 NYS2d 615 [2d Dept 2007]). The defendants failed to establish good cause for their delay.

Accordingly, the motion for summary judgment on the issue of liability is granted and the cross-motion for summary judgment is denied as untimely. Upon service of a copy of this order with notice of entry, the Calendar Clerk of this Court is directed to place this action on the Calendar Control Part Calendar for the next available date.

Dated: June 14, 2011

W. Gerard Asher
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**