Franco-Montoya v Fackner
2012 NY Slip Op 32857(U)
June 27, 2012
Sup Ct, Suffolk County
Docket Number: 10-20909
Judge: Peter H. Mayer
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SHORT FORM ORDER

INDEX No. 10-20909
CAL No. 12-00587MV

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 5-15-12
ADJ. DATE 7-24-12
Mot. Seq. # 001 - MD
002 - MD
003 - MD

---X

JOHN FRANCO-MONTOYA and BANI ZAPATA,

Plaintiffs,

- against -

THOMAS P. FACKNER,

Defendant.

---X

THOMAS P. FACKNER,

Third-Party Plaintiff,

- against -

STACEY L. MELNICK,

Third-Party Defendant.

---X

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant/third-party plaintiff, dated April 12, 2012 , and supporting papers (including Memorandum of Law dated ____); (2) Notice of Motion by the defendant/third-party defendant, dated April 12, 2012 , supporting papers; (3) Notice of Motion/Order to Show Cause by the third-party defendant, dated April 27, 2012, and supporting papers (including Memorandum of Law dated ____); (4) Affirmation in Opposition by the plaintiffs, dated June 22, 2012, and supporting papers; (5)Affirmation in Opposition by the defendant/third-party plaintiff, dated July 16, 2012, and supporting papers; (6) Affirmation In Support by the third-party defendant dated April 19, 2012, and supporting papers; (7) Reply Affirmation by the defendant/third-party plaintiff, dated July 16, 2012, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion (#001) by the defendant/third-party plaintiff Thomas Fackner, the motion (#002) by the defendant/third-party plaintiff Thomas Fackner, and the motion (#003) by the third-party defendant Stacey Melnick hereby are consolidated for the purposes of this determination; and it is

ORDERED that the motion by the defendant/third-party plaintiff Thomas Fackner seeking summary judgment dismissing the complaint is denied; and it is

ORDERED that the motion by the defendant/third-party plaintiff Thomas Fackner seeking vacatur of the note of issue is denied; and it is further

ORDERED that the motion by the third-party defendant Stacey Melnick seeking summary judgment dismissing the third-party complaint is denied.

The plaintiffs John Franco-Montoya and Bani Zapata commenced this action to recover damages for injuries they allegedly sustained as a result of a motor vehicle accident that occurred on the Sagtikos Parkway, approximately 500 feet north of the Southern State Parkway, in the Town of Islip on September 9, 2009. It is alleged that the accident occurred when the vehicle operated by the defendant/third-party plaintiff Thomas Fackner ("Fackner") struck the rear of the vehicle operated by the third-party defendant Stacey Melnick ("Melnick"). As a result of the collision between the Fackner and Melnick vehicles, the Melnick vehicle was pushed forward into the vehicle operated by the plaintiff John Franco-Montoya (Franco-Montoya") and owned by the plaintiff Bani Zapata ("Zapata"). At the time of impact, the vehicles operated by Melnick and Franco-Montoya were stopped in the left lane of the southbound Sagtikos Parkway and Zapata was riding as a front seat passenger in the vehicle operated by Franco-Montoya.

By his bill of particulars, Franco-Montoya alleges, among other things, that he sustained various personal injuries as a result of the subject accident, including a herniated disc at level C3-C4, bulging discs at levels C2 through C6, and a tear of the medial meniscus of the right knee. Franco-Montoya also alleges that he was confined to his bed for approximately one day and to his home for approximately two days as a result of the injuries he sustained in the collision. By her bill of particulars, Zapata alleges, among other things, that as a result of the accident she also sustained various personal injuries, including bulging discs at levels C3 through T12 and straightening of normal cervical lordosis. Zapata alleges that she was confined to her bed for approximately one week and to her home for approximately one month as a result of the injuries she sustained in the accident. Zapata further alleges that she was incapacitated from her employment for approximately one month as a result of her injuries. The plaintiffs allege that Fackner was negligent in the operation of his motor vehicle and that he was the proximate cause of the subject collision. Thereafter, Fackner commenced a third-party action against Melnick asserting claims for negligence, indemnification and contribution.

Fackner now moves for summary judgment on the basis that neither Franco-Montoya nor Zapata sustained injuries within the meaning of the "serious injury" threshold requirement of § 5102(d) of the Insurance Law as a result of the subject accident. In support of the motion, Fackner submits copies of the

pleadings, the plaintiffs' deposition transcripts, and the sworn medical reports of Dr. Isaac Cohen. Dr. Cohen, at Fackner's request, conducted independent orthopedic examinations on Franco-Montoya and Zapata on June 9, 2011.

The plaintiffs oppose the motion on the grounds that Fackner failed to demonstrate his prima facie entitlement to judgment as a matter of law, that they did not sustain serious injuries within the meaning of the Insurance Law as a result of the subject accident, and that their evidence in opposition raises triable issues of fact as to whether they sustained injuries within the "limitations of use" categories and the 90/180" category of the Insurance Law as a result of the subject. In opposition to the motion, Franco-Montoya and Zapata submit the sworn medical reports of Dr. John Himelfarb, Dr. Gary Dicanio and Dr. Greenfield.

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* ***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 [2d Dept 1984], *aff'd* 64 NY2d 681, 485 NYS2d 526 [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 a defendant has met this burden, the 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*).

Here, Fackner demonstrated his prima facie entitlement to judgment as a matter of law that the injuries Franco-Montoya allegedly sustained in the subject accident do not come within the meaning of § 5102(d) of the Insurance Law (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). Fackner's examining orthopedist, Dr. Cohen, states in his medical report that an examination of Franco-Montoya revealed that he has full range of motion in his cervical spine and right knee. Dr. Cohen states that the paravertebral muscles of Franco-Montoya's cervical spine are supple and non-tender upon palpation, that his motor strength is 5/5, and that there is no erythema or effusion present in his right knee. He states that an examination of Franco-Montoya's right knee joint is unremarkable, that there is no evidence of medial or lateral instability, and that the meniscal signs are negative. Dr. Cohen opines that the strain to Franco-Montoya's cervical spine and the right knee contusion that he allegedly sustained in the subject accident have resolved, and that he is capable of performing his daily living activities without restrictions.

Fackner also demonstrated his prima facie entitlement to judgement as a matter of law that Zapata did not sustain an injury within the meaning of the serious injury threshold requirement of the Insurance Law as a result of the subject accident (*see* ***Pommells v Perez***, 4 NY3d 566, 574, 797 NYS2d 380 [2005]; ***Licari v Elliott***, *supra*). The Court notes that sprains and strains are not serious injuries within the meaning of Insurance Law § 5102(d) (*see* ***Rabolt v Park***, 50 AD3d 995, 858 NYS2d 995 [2d Dept 2008]; ***Byam v Waltuch***, 50 AD3d 939, 857 NYS2d 605 [2d Dept 2008]; ***Washington v Cross***, 48 AD3d 457, 849 NYS2d 784 [2d Dept 2008]). Dr. Cohen states in his medical report that an examination of Zapata's spine and left shoulder reveals that she has full range of motion in those regions, that there is normal lordotic curvature of the thoracolumbosacral and cervical regions, and that there are no muscle spasms or trigger points upon palpation of the paravertebral muscles in those areas. Dr. Cohen states that the straight leg raising test is negative, bilaterally, that there is no muscle atrophy or sensory deficit, and that upon palpation of the AC joint of the left shoulder there is no tenderness or weakness during external rotation. Dr. Cohen opines the strains that Zapata sustained to her cervical and thoracic regions and left shoulder as a result of the subject accident have resolved, and that Zapata has normal joint function in her cervical, thoracic and lumbar spinal regions and in her left shoulder. Dr. Cohen further states that Zapata is not disabled and is capable of performing her normal daily living activities without restrictions.

Therefore, the burden shifted to the plaintiffs to come forward with competent medical evidence based on objective findings, sufficient to raise a triable issue of fact that they sustained a serious injury (*see* ***Gaddy v Eyler***, *supra*). A plaintiff claiming a significant limitation of use of a body function or system must substantiate his or her complaints with objective medical evidence showing the extent or degree of the limitation caused by the injury and its duration (*see* ***Ferraro v Ridge Car Serv.***, 49 AD3d 498, 854 NYS2d 408 [2d Dept 2008]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 772 [2d Dept 2006]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). Whether a limitation of use or function is 'significant' or 'consequential' (i.e. important . . .), relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (***Dufel v Green***, *supra* at 798). To prove the extent or degree of physical limitation with respect to the "limitations of use" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided or there must be 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 (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]; ***Toure v Avis Rent A Car Systems, Inc.***, *supra* at 350; *see also* ***Valera v Singh***, 89 AD3d 929, 923 NYS2d 530 [2d Dept 2011]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see* ***Licari v Elliott***, *supra*). However, evidence of contemporaneous range of motion limitations is not a prerequisite to recovery (*see* ***Perl v Meher***, *supra*; ***Paulino v Rodriguez***, 91 AD3d 559, 937 NYS2d 198 [1st Dept 2012]).

In opposition to the motion, Franco-Montoya has raised triable issues of fact as to whether he sustained a serious injury within the meaning of the Insurance Law (*see* ***Belliard v Leader Limousine Corp.***, __ AD3d __, 2012 NY Slip Op 02826 [2d Dept 2012]; ***Johnson v Cristino***, 91 AD3d 604, 936 NYS2d 275 [2d Dept 2012]; ***Young Chool Yoo v Rui Dong Wang***, 88 AD3d 991, 931 NYS2d 373 [2d Dept 2011]). Franco-Montoya primarily relies upon the affirmation of Dr. Dicanio, who states that he began treating Franco-Montoya on a regular basis on September 10, 2009, after he presented to him with complaints of pain in his neck and right knee that he attributed to the subject accident, and that he continued to treat him until his No Fault benefits were terminated in 2010. Dr. Dicanio states that his initial examination of Franco-Montoya immediately after the subject accident revealed that he had significant limitations in the range of motion of his cervical spine and right knee, and that he diagnosed Franco-Montoya as suffering from internal derangement of the right knee and cervicalgia in his cervical spine. Dr. Dicanio states that Franco-Montoya, throughout his treatment, exhibited significant range of motion limitations in his cervical spine and continued to have a positive patella grind test of the right knee, and that an magnetic resonance imaging ("MRI") examination confirmed that he suffered from a torn meniscus in his right knee. Dr. Dicanio states that a re-examination of Franco-Montoya conducted on May 31, 2012 revealed that he continues to suffer significant range of motion restrictions in his cervical spine and right knee. Dr. Dicanio opines that Franco-Montoya has sustained significant limitations to his cervical spine and right knee that are permanent, and that these limitations are the direct result of the injuries he sustained in the subject collision.

In addition, Zapata has come forward with admissible evidence that raises a triable issue of fact as to whether she sustained an injury within the limitations of use categories of Insurance Law § 5102(d) (*see* ***Evans v Pitt***, 77 AD3d 611, 908 NYS2d 729 [2010], *lv denied* 16 NY3d 736, 917 NYS2d 100 [2011]; ***Harris v Boudart***, 70 AD3d 643, 893 NYS2d 631 [2d Dept 2010]); ***Lee v McQueens***, 60 AD3d 914, 876 NYS2d 114 [2009]; ***Williams v Clark***, 54 AD3d 942, 864 NYS2d 493 [2008]). In a sworn medical report, Dr. Dicanio concludes that the injuries Zapata sustained to her left shoulder and cervical and thoracic regions are the direct result of the subject motor vehicle accident. Dr. Dicanio states that Zapata initially presented to him on September 10, 2009 with complaints of pain to her left shoulder and spine that were attributed to the subject accident, and that prior to the subject accident Zapata was asymptomatic. He states that his initial examination of Zapata revealed significant range of motion limitations in her cervical and thoracic regions and left shoulder; that she exhibited tenderness and muscle spasms upon palpation of her thoracic spine; and that she had a positive impingement sign of the left shoulder. Dr. Dicanio states that when Zapata's No Fault benefits ended and her treatment was terminated in 2010, she still was symptomatic and continued to experience restricted ranges of motion in her cervical and thoracic regions and in her left shoulder. Dr. DiCanio states that a re-examination of Zapata performed on May 31, 2012 revealed that Zapata's range of motion in her cervical spine had improved, but that her range of motion remained restricted in her thoracic spine and in her left shoulder. Dr. Dicanio opines that Zapata continues to suffer from internal derangement of the left shoulder and

restricted ranges of motion in her thoracic spine.

Thus, the affirmed medical reports of Franco-Montoya's and Zapata's experts conflict with those of Fackner's experts, who found that neither plaintiff sustained a serious injury in the subject accident and that any injuries were resolved. "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]; ***Ocasio v Zorbas***, 14 AD3d 499, 789 NYS2d 166 [2d Dept 2005]; ***Reynolds v Burghezi***, 227 AD2d 941, 643 NYS2d 248 [4th Dept 1996]). Moreover, "where [a] plaintiff establishes that at least some of his [or her] injuries meet the 'no-fault' threshold, it is unnecessary to address whether his [or her] proof with respect to other injuries he [or she] allegedly sustained would have been sufficient to withstand defendant's motion for summary judgment" (***Linton v Nawaz***, 14 NY3d 821, 822, 900 NYS2d 239 [2010]; *see* ***Rubin v SMS Taxi Corp.***, 71 AD3d 548, 898 NYS2d 110 [1st Dept 2010]). Accordingly, Fackner's motion for summary judgment dismissing the complaint is denied.

Fackner also moves for vacatur of the note of issue, arguing that Melnick has not been produced for an examination before trial and, therefore, the certificate of conformity contains an incorrect assertion that all necessary discovery has been completed. Melnick does not oppose Fackner's motion. Instead she supports his motion to vacate the note of issue on the grounds that discovery is incomplete, because she had not been provided with any of the necessary deposition transcripts and she has not appeared for a deposition.

CPLR 3402 (a) provides that the note of issue may be filed at any time after issue is joined or 40 days after service of the summons irrespective of the joinder of issue, and must be accompanied by whatever date is required by the applicable rules of the court. The purpose of a note of issue and certificate of readiness is to assure that cases which appear on the court's trial calendar are, in fact, ready for trial (***Tirado v Miller***, 75 AD3d 153, 156, 901 NYS2d 358 [2d Dept 2010], *quoting* ***Mazzara v Town of Pittsford***, 30 AD2d 634, 634, 290 NYS2d 435 [4th Dept 1968]). Moreover, a certificate of readiness certifies that all discovery is complete, waived or not required, and that the action is ready for trial (*see* 22 NYCRR § 202.21[b]). The effect of a statement of readiness is to ordinarily foreclose further discovery (*see* ***Tirado v Miller***, 75 AD3d 153, 901 NYS2d 358 [2d Dept 2010]).

Vacatur of the note of issue is governed by Section 202.21 of the Uniform Rules for Trial Courts. This provision states, in pertinent part, that where a party timely moves, upon affidavit, to vacate the note of issue, the party only needs to show that "a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of 22 NYCRR§ 202.21(e) in some material respect" (***Vargas v Villa Josefa Realty Corp.***, 28 AD3d 389, 390, 815 NYS2d 30 [1st Dept 2006]; *see* ***Witherspoon v Surat Realty Corp.***, 82 AD3d 1087, 918 NYS2d 889 [2d Dept 2011]; ***Shoop v Augst***, 305 AD2d 1016, 758 NYS2d 747 [4th Dept 2003]; ***Aviles v 938 SCY Ltd.***, 283 AD2d 935, 725 NYS2d 256 [4th Dept 2001]; *cf.* ***Audiovox Corp. v Benyamini***, 265 AD2d 135, 707 NYS2d 137 [2d Dept 2000]).

Moreover, 22 NYCRR §202.7 (a) of the Uniform Rules of Trial Courts states that a motion relating to disclosure must be supported by an affirmation that counsel "has conferred with counsel for the

opposing party in a good faith effort to resolve the issues raised by the motion." In addition, the affirmation of good-faith effort "shall indicate the time, place, and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held" (*see* Uniform Rules for Trial Courts [22 NYCRR] §202.7 [c]).

Here, although Fackner's motion was filed within the requisite 20 days of the filing of the note of issue, Fackner's attorney failed to include an affirmation of good faith stating how she and the attorneys for Franco-Montoya, Zapata and Melnick have attempted to resolve the issues raised by the instant motion (*see* Uniform Rules for Trial Courts [22 NYCRR] §202.7 [a], [c]). In addition, Fackner has failed to provide the Court with copies of the note of issue and certificate of readiness which he seeks to vacate, nor has he provided a copy of the compliance conference order with signatures for this court's review. Therefore, summary denial of the motion is required (*see* ***Savin v Brooklyn Mar. Park Dev. Corp.***, 61 AD3d 954, 878 NYS2d 178 [2d Dept 2009]; ***Chervin v Macura***, 28 AD3d 600, 813 NYS2d 746 [2d Dept 2006]; ***Barnes v NYNEX, Inc.***, 274 AD2d 368, 711 NYS2d 893 [2d Dept 2000]; ***Matos v Mira Realty Mgt. Corp.***, 240 AD2d 214, 658 NYS2d 880 [1st Dept 1997]; ***Vasquez v GAPLW Realty***, 236 AD2d 311, 654 NYS2d 16 [1st Dept 1997]). However, Fackner, along with Melnick's support, has established a need for further discovery, namely the conducting of Melnick's examination before trial and the exchange of outstanding discovery amongst the parties (*see* ***Vargas v Villa Josefa Realty Corp.***, *supra*; *cf.* ***Sereda v Sounds of Cuba, Inc.***, 95 AD3d 651, 944 NYS2d 538 [1st Dept 2012]; ***Colon v Yen Ru Jin***, 45 AD3d 359, 845 NYS2d 281 [1st Dept 2007]). The determinative factors as to whether "evidence" sought is discoverable are whether the discovery is material and necessary to facilitate a proper defense or necessary in the prosecution; whether the effect of the examination is overly burdensome to the affected party; and whether, in allowing the examination, the fact finder will receive sufficient information to ensure a fair trial to all parties (*see* CPLR 3101; ***Kavanagh v Ogden Allied Maintenance Corp.***, 92 NY2d 952, 683 NYS2d 156 [1998]).

Thus, the Court directs that the third-party defendant Stacey Melnick appear for a deposition to be scheduled by Fackner on or before February 21, 2013 at a time and place fixed by Fackner, by written notice of not less than 10 days prior to such examination, to be served upon the third-party defendant's attorney, or at such prior time and place as the parties may agree. The Court cautions all parties to cooperate regarding all further correspondence and scheduling of depositions in this action. The action shall remain on the trial calendar. Fackner's motion to strike the matter from the trial calendar and vacate the note of issue and certificate of readiness is denied.

Melnick moves for summary judgment on the basis that she was not the proximate cause of the subject accident and, therefore, no liability can be attributed to her for its happening. In support of the motion, Melnick submits copies of the pleadings, her own affidavit, and certified copies of the police accident report. Fackner opposes the motion on the grounds that there are triable issues of fact as to whether Melnick was negligent in the operation of her vehicle and whether her actions contributed to the subject accident's occurrence. In opposition to the motion, Fackner submits the deposition transcripts of Franco-Montoya and Zapata.

It is well settled that a driver approaching a vehicle from the rear 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* Vehicle and Traffic Law § 1129[a]; ***Brooks v High St. Professional***

Bldg., Inc., 34 AD3d 1265, 825 NYS2d 330 [4th Dept 2006]). "A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence against the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation" (***DeLouise v S.K.I. Wholesale Beer Corp.***, 75 AD3d 489, 490, 904 NYS2d 761 [2d Dept 2010]; *see* ***Reitz v Seagate Trucking, Inc.***, 71 AD3d 975, 898 NYS2d 173 [2d Dept 2010]; ***Harrington v Kern***, 52 AD3d 473, 859 NYS2d 480 [2d Dept 2008]). However, the lead vehicle also has a duty not to stop suddenly or slow down without proper signaling so as to avoid a collision (***Chepel v Meyers***, 306 AD2d 235, 237, 762 NYS2d 95 [2d Dept 2003]; *see* ***Carhuayano v J&R Hacking***, 28 AD3d 413, 813 NYS2d 162 [2d Dept 2006]; ***Gaeta v Carter***, 6 AD3d 576, 775 NYS2d 86 [2d Dept 2004]; ***Purcell v Axelsen***, 286 AD2d 379, 729 NYS2d 495 [2d Dept 2001]; ***Colonna v Suarez***, 278 AD2d 355, 718 NYS2d 618 [2d Dept 2000]; *see also* Vehicle and Traffic Law § 1163). A non-negligent explanation for the collision, such as mechanical failure or the sudden and abrupt stop of the vehicle ahead, is sufficient to overcome the inference of negligence and preclude an award of summary judgment (***Danner v Campbell***, 302 AD2d 859, 859, 754 NYS2d 484 [4th Dept 2003]; *see* ***Davidoff v Mullokandov***, 74 AD3d 862, 903 NYS2d 107 [2d Dept 2010]; ***Rodriguez-Johnson v Hunt***, 279 AD2d 781, 718 NYS2d 501 [3d Dept 2001]).

Based upon the adduced evidence, Melnick demonstrated her prima facie entitlement to judgment as a matter of law on the issue of liability (*see* ***Kastritsios v Marcello***, 84 AD3d 1174, 923 NYS2d 863 [2d Dept 2011]; ***Volpe v Limoncelli***, 74 AD3d 795, 902 NYS2d 152 [2d Dept 2010]; ***Macauley v ELRAC, Inc.***, 6 AD3d 584, 775 NYS2d 78 [2d Dept 2004]). Melnick avers in her affidavit that her motor vehicle was struck in the rear by Fackner's vehicle while it was stopped in the left lane of traffic on the Sagtikos Parkway behind the plaintiffs' vehicle. Melnick states that after her vehicle was struck in the rear, it was propelled forward into the rear of the vehicle driven by Franco-Montoya. "Evidence that a vehicle was rear-ended and propelled into the stopped vehicle in front of it may provide a sufficient non-negligent explanation" (***Katz v Masada II Car & Limo Serv., Inc.***, 43 AD3d 876, 877, 841 NYS2d 370 [2d Dept 2007]; *see* ***Harris v Ryder***, 292 AD2d 499, 739 NYS2d 195 [2d Dept 2002]; ***Campanella v Moore***, 266 AD2d 423, 699 NYS2d 76 [2d Dept 1999]; ***Escobar v Rodriguez***, 243 AD2d 676, 664 NYS2d 568 [2d Dept 1997]). Under these circumstances, Melnick has demonstrated that her actions in operating her vehicle were not the proximate cause of the subject accident's occurrence or the injuries sustained by either Franco-Montoya or Zapata (*see* ***Hauser v Adamov***, 74 AD3d 1024, 904 NYS2d 102 [2d Dept 2010]; ***Hyeon Hee Park v Hi Taek Kim***, 37 AD3d 416, 831 NYS2d 422 [2d Dept 2007]; ***Bournazos v Malfitano***, *supra*, ***Smith v Cafiero***, 203 AD2d 355, 610 NYS2d 76 [2d Dept 1994]).

In opposition, Fackner has raised a triable issue of fact as to whether Melnick was a proximate cause of the subject accident (*see generally* ***Zuckerman v City of New York***, *supra*); NYS2d 354 [2d Dept 2005]; ***Bolta v Lohan***, 242 AD2d 356, 661 NYS2d 286 [2d Dept 1997]). Fackner, in opposition to the motion, submitted the deposition testimonies of Franco-Montoya and Zapata, in which they each testified that there was more than one impact to the rear of their vehicle. In fact, they testified that they felt two separate impacts to the rear of their vehicle while it was stopped in the left lane of traffic on the Sagtikos Parkway, and that there were a total of three vehicles involved in the subject accident. "There can be more than one proximate cause of an accident" (***Cox v Nunez***, 23 AD3d 427, 427, 805 NYS2d 604 [2d Dept 2005]; *see* ***Todd v Godek***, 71 AD3d 872, 895 NYS2d 861[2d Dept 2010]), 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]). Furthermore, 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]). Thus, there are issues of fact as to whether Melnick 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*). Accordingly, Melnick's summary judgment motion seeking dismissal of the third-party complaint is denied.

Dated: 1/27/12

PETER H. MAYER, J.S.C.