Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2
Justice

JENNIFER ALLEN

Plaintiff,

-against-

ABDULLAH ABUTAHER, ANDREAS KAMBANIS, SARAH BUSWELL and GAIL S. BUSWELL

Defendant

Index No: 701320/12

Motion Date: 3/17/14

Motion Seq. No.: 2 & 3

ORIGINAL

The following numbered papers[1] read on this motion by defendants, ABUTAHER and KAMBANIS and cross-motion by defendants, BUSWELLs for summary judgment dismissing the complaint on the grounds that plaintiff has not sustained a serious injury within the meaning of Sections 5102 and 5104 of the Insurance Law; and cross-motion by defendants, BUSWELLs for summary judgment in their favor as to liability

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits	27 - 35
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Upon the foregoing papers it is ordered that this motion and cross-motion are determined as follows.

This is an action to recover for personal injuries plaintiff allegedly sustained in a rear end collision automobile accident on October 22, 2011 at the intersection of 9th Ave. and West 24th St. in New York City when the vehicle operated by Abutaher struck the rear left fender of the vehicle operated by Sara Buswell. Plaintiff was a front seated passenger in the Buswell vehicle.

[1]Reply Affirmation of Laura K. Eckman, dated March 13, 2014 was not considered inasmuch as it is not in the e-file system.

A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed to avoid colliding with the other vehicle (see Zweeres v Materi, 94 AD3d 1111 [2012]; Nsiah-Ababio v. Hunter, 78 AD3d 672, 672 [2010]; see Vehicle and Traffic Law(VTL) § 1129[a]). However, the lead vehicle has a duty not to stop suddenly or slow down without proper signaling so as to avoid a collision (see Quezada v. Aquino, 38 AD3d 873 [2007]; Chepel v. Meyers, 306 AD2d 235, 237 [2003]). A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence of the operator of the rear vehicle requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision (see generally Tutrani v. County of Suffolk, 10 NY3d 906, 908 [2008]; Parra v. Hughes, 79 AD3d 1113, 1114 [2010]). "One of several non-negligent explanations for a rear-end collision is a sudden stop of the lead vehicle" (Gleason v. Villegas, 81 AD3d 889 [2011] quoting Foti v. Fleetwood Ride, Inc., 57 AD3d 724, 725 [2008]; see Chepel v. Meyers, supra).

To prevail on a motion for summary judgment on the issue of liability, the moving party has the burden of establishing, prima facie, not only that the negligence of the other party, but also that the movant was free from comparative fault (see Thoma v. Ronai, 82 NY2d 736, 737 [1993]; Lanigan v. Timmes, 111 AD3d 797, [2013]; Pollack v. Margolin, 84 AD3d 1341, 1342 [2011]; Mackenzie v. City of New York, 81 AD3d 699, 700 [2011]; Roman v. A1 Limousine, Inc., 76 AD3d 552 [2010]).

In support of their cross-motion as to liability, the Buswells submitted the deposition testimony of the plaintiff and the drivers of the vehicles which establish, prima facie, that the defendant, Abutaher, was negligent in striking the rear of the Buswell (Vehicle and Traffic Law § 1129[a]), however, they are insufficient to establish, prima facie, Sarah Buswells' freedom from comparative negligence. Sarah Buswell testified that she was unfamiliar with New York City, did not know the names of the streets and she was following the GPS directions. She testified that she was traveling on a street (later identified as 9th Ave.) when the GPS directed her to make a left turn. She testified that she stopped for a red light at the intersection where the GPS said to turn left (later identified as West 24th St.), with her left turn signal turned on. When the light turned green she started to move forward to turn left, however, she stopped and tried to go straight when the plaintiff said that she can't turn because there was a barrier blocking her movement. Defendant, Abutaher, testified that the light was green, he was proceding behind Buswell through the intersection when she

suddenly stopped at an angle to turn left without displaying a left turn signal.

Such deposition testimony is sufficient to raise issues of fact as to how the accident occurred and as to Sarah Buswell's possible comparative negligence (see Martin v. Cartledge, 102 AD3d 841 [2013]; Kertesz v. Jason Transp. Corp., 102 AD3d 658 [2013]; Pollard v. Independent Beauty & Barber Supply Co., 94 AD3d 845, 846 [2012]).

Accordingly, the branch of Buswells' motion for summary judgment dismissing the complaint and all cross-claims insofar as they are asserted against them is denied.

The defendants separately move for summary judgment dismissing the complaint on the ground that plaintiff has not sustained a serious injury within the meaning of the insurance law.

In support of their motions the defendants submitted competent medical evidence including the affirmed neurologic examination report of Dr. Singh, and the affirmed MRI reports of Dr. Eisenstadt and Dr. Coyne and the plaintiff's deposition testimony which establish, prima facie, that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the accident (see Pommells v. Perez, 4 NY3d 566, 574 [2005]; Toure v. Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v. Eyler, 79 NY2d 955 [1992]). Thus, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact by submitting competent medical proof (see Gaddy v. Eyler, supra; Licari v. Elliott, 57 NY2d 230, 235 [1982]; Lopez v. Senatore, 65 NY2d 1017 [1985]).

In opposition the plaintiff submitted sufficient medical evidence including the affirmed report of her treating chiropractor, Dr. Dimitri, sufficient to raise a triable issue of fact as to whether she sustained a serious injury (see Desir v. Castillo, 59 AD3d 659 [2009]). Dr. Dimitri set forth quantified range of motion limitations of plaintiff's cervical and lumbar spine he found at his contemporaneous and recent examinations of the plaintiff, results of other objective orthopedic tests such as cervical compression test, cervical distraction test, Soto Hall, Kemp and Valsalva tests which were all positive. He also adequately addressed the defendants' expert radiologists' opinions that the conditions revealed on the plaintiff's cervical and lumbosacral MRIs are degenerative. For example, Dr. Dimitri pointed out that while there is some degeneration of the plaintiff's cervical spine, plaintiff is only 23 years old and

the immediate onset of symptoms after the accident "strongly contradicts the opinion of wholesale degeneration throughout the cervical and lumbar spine". Finally, the plaintiff has provided an adequate explanation and evidence for any alleged gap in treatment.

Dated: May 22 2014
D# 50

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J.S.C.