

<b>Harris v Bah</b>
2020 NY Slip Op 35308(U)
November 18, 2020
Supreme Court, Kings County
Docket Number: Index No. 518966/2018
Judge: Lara J. Genovesi
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RECEIVED NYSCEF: 11/23/2020  
At IAS Part 34 of the Supreme  
Court of the State of New York,  
Kings County, located at 360 Adams  
Street, Brooklyn New York, on the  
18th day of November, 2020.

**PRESENT: Hon. Lara J. Genovesi**, JSC

KERON S. HARRIS

*Plaintiff(s)*

- against -

ALPHA MAMADOU BAH and DOOR TO DOOR  
PICKUPS, INC.,

*Defendant(s)*

**SHORT FORM ORDER**

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Cal. No. MOA 1-2

Recitation of the papers considered in review of this motion:	Papers Numbered
Notice of Motion - Order to Show Cause and Affidavits (Affirmations) Annexed	NYSCEF Doc. # 20-28, 36-54
Answering Affidavit (Affirmation)	NYSCEF Doc. # 57-58
Reply Affidavit (Affirmation)	NYSCEF Doc. # 61, 63
Affidavit (Affirmation)	
Pleadings - Exhibits	
Stipulations - Minutes	
Filed Papers	

Plaintiff commenced the instant action for personal injuries as a result of a motor vehicle accident which took place on December 24, 2017, wherein plaintiff's vehicle was struck in the rear by a vehicle owned by defendant Door to Door Pickups Inc., and operated by defendant Alpha Mamadou Bah. In his bill of particulars, plaintiff alleges that he sustained injuries to his right and left shoulders, neck, cervical, lumbar and thoracic spine as a result of the accident (see NYSCEF Doc. # 23 at (¶ 10). He further alleges that he sustained a significant disfigurement, fracture, permanent loss of body function/system, permanent consequential limitation, a significant limitation,

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Motion Seq. #  
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and a non-permanent medically determined injury which prevented him from his usual and customary activities for 90 out of the first 180 days following the accident (see id. at ¶ 20).

003 Plaintiff moves, sequence number three, inter alia, for summary judgment on the issue of liability. "A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, requiring that operator to come forward with evidence of a nonnegligent explanation for the collision to rebut the inference of negligence" (Greene v. Raskin, 186 A.D.3d 575 [2020]). Here, plaintiff met his burden and established entitlement to summary judgment as a matter of law by providing his examination before trial transcript, wherein he testified that his vehicle was at a complete stop when it was struck in the rear by defendants' vehicle (see NYSCEF Doc. # 42).

In opposition, defendants failed to produce evidence in admissible form sufficient to raise a triable issue of fact. This Court notes that pursuant to the order of the Hon. Lizette Colon, defendant is precluded from testifying or offering an affidavit in opposition to this motion (see NYSCEF Doc. # 32, Order dated February 11, 2020). Defendant provided a copy of the MV-104, wherein he stated "[o]n this day it was raining. The driver of the other vehicle slammed on his brakes. I asked him why did he just stop [sic] his car he said he didn't want to hit the pothole" (NYSCEF Doc. # 58). "The defendant driver's unsworn MV-104 accident report constitutes inadmissible hearsay, and was insufficient to raise a triable issue of fact" (see Chen v. Heart Transit, Inc., 143 A.D.3d 945 [2 Dept., 2016] citing Allstate Ins. Co. v. Ramlall, 132 A.D.3d 617, [2 Dept., 2015]; see also Bates v. Yasin, 13 A.D.3d 474 [2 Dept., 2004]). Further, "[t]he fact that the defendants were precluded from submitting an affidavit from the defendant driver due to his failure to appear for a deposition does not constitute an acceptable excuse for the failure to tender evidence in admissible form" (Chen v. Heart Transit, Inc., 143 A.D.3d 945, supra).

ENTERED / SO ORDERED

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Accordingly, plaintiff's motion for summary judgment on the issue of liability is granted.

Defendants move for summary judgment on the issue of damages alleging that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). Here, defendants failed to meet their burden and establish that plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102(d). Although defendants failed to address plaintiff's allegation of significant disfigurement as stated in the bill of particulars, plaintiff abandoned that allegation by his failure to address it in opposition (see *Yi Di Chen v. Falikman*, 186 A.D.3d 1295 [2 Dept., 2020]).

"The papers submitted by the defendant failed to eliminate triable issues of fact regarding the plaintiff's claim, set forth in the bill of particulars, that he sustained a serious injury under the 90/180-day category of Insurance Law § 5102(d)" (*Reid v. Edwards-Grant*, 186 A.D.3d 1741, 129 N.Y.S.3d 798 [2 Dept., 2020]). "While the defendant relied upon the transcript of the plaintiff's deposition testimony to establish her prima facie entitlement to judgment as a matter of law with respect to the 90/180-day category, this evidence failed to identify the plaintiff's usual and customary daily activities during the specific relevant time frame, and did not compare the plaintiff's pre-accident and post-accident activities during that relevant time frame" (*id.*). Here, plaintiff's testimony revealed only that he can no longer play badminton, throw around a football, lift weights for a long time, run for a long time, or lift "stuff" for a long time (NYSCEF Doc. # 25).

As defendants did not meet their burden, this Court need not examine the sufficiency of plaintiff's opposition papers. However, even assuming, arguendo, that defendants met their burden, plaintiff provided credible medical evidence sufficient to raise a triable issue of fact on the significant limitation and permanent consequential limitation categories of Insurance Law 5102(d). The sworn report of

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Dr. Friedman, MD, shows range of motion loss at an examination on July 16, 2020, in plaintiff's cervical spine and causally relates the loss to this accident (see NYSCEF Doc. # 44). Accordingly, defendants' motion for summary judgment (sequence number 2) pursuant to Insurance Law 5102(d) is denied.

KINGS COUNTY CLERK  
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