

SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present:

HON. ANTHONY L. PARGA

Justice

-----X PART 9

JOAN MCGAUGHEY, CHELSEA MCGAUGHEY
AND ROSA RIZZO,

Plaintiff,

INDEX NO. 6196/07
Mot.seq. 09

-against-

JOHN MCAVEY, PETER VALENZE AND
BRIAN OSHEA,

Defendants.

-----X

Notice of Motion, Affs. & Exs.....	<u>1-2</u>
Affirmation In Opposition & Exs.....	<u>3-4</u>
Reply Affirmation & Exs.....	<u>5</u>

Motion by plaintiff Rosa Rizzo for an order granting summary judgment on the issue of liability against all defendants is denied.

Motion by defendant John McAvey for an order vacating the note of issue, for lack of discovery after service of plaintiff's second Amended Bill of Particulars is granted to the extent that plaintiff shall appear for a deposition and a physical exam only as to the left elbow injury on or before October 20, 2010.

In this action plaintiffs were involved in a four-car accident on Southern State Parkway on February 14, 2007. The plaintiffs Chelsea McGaughey and Rosa Rizzo were passengers in the first car operated by plaintiff Joan McGaughey; the second car was owned and operated by defendant John McAvey; the third vehicle was owned and operated by defendant Peter Valenze; and the fourth car was owned and operated by defendant Brian O'Shea.

In support of her application plaintiff Rosa Rizzo refers to the sworn testimony of defendant John McAvey admitting that he was behind the McGaughey' car, and in reaction to her sudden stop, attempted to stop his car and collided with plaintiff's car that slid sideways.

Plaintiff Rizzo refers also to the sworn testimony of defendant Peter Valenze that in heavy traffic, he hit McAvey's car after it stopped abruptly. Plaintiff Rizzo refers to the sworn testimony of defendant Brian O'shea, or the fourth car in the accident. O'shea testified that he hit the rear of Peter Valenze's car when it stopped in front of him while driving in heavy traffic in the center lane. Finally, movant presents the sworn testimony that the Joan McCaughey, the driver of the car in which she was a passenger. Joan McCaughey states that she was moving at about 25 miles per hour when she was first impacted in the rear, she was not stopped.

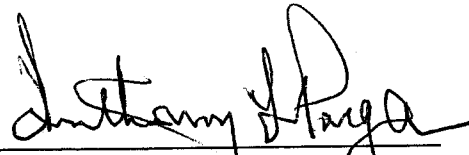
Movant Rosa Rizzo seeks to invoke the well established principle that a "stopped vehicle establishes a prima facie case of liability against the rear moving vehicle and imposes a duty of explanation on its driver" (*Comiskey v. Pisano*, 10 AD3d 441 (2nd Dept. 2004)).

All defendants opposed this motion with sworn testimonial evidence to rebut the inference forclosing a summary disposition of the issue of liability.

With respect to the motion by defendant John McAvey to vacate the note of issue, defendant John McAvey argues that a discovery stipulation signed by all parties on April 20, 2010, the day of the recertification, requires the court to vacate the note of issue for non compliance. In said stipulation, defendant John McAvey sought more

authorizations and an opportunity to conduct a further deposition and physical exam with respect to the additional elbow injury. Plaintiff provided the authorizations on June 4, 2010.

Dated: September 7, 2010



Anthony L. Parga, J.S.C.

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