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SHORT FORM ORDER

INDEX No. 09-45380

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 1-26-12 (#001)
MOTION DATE 6-22-12 (#002)
MOTION DATE 7-12-12 (#003)
ADJ. DATE 2-7-13
Mot. Seq. # 001 - MG
002 - MD
003 - MD

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JUAN CARLOS ROSALES,

Plaintiff,

- against -

CAMILO CHAPARRO-VACA, LUIS CHAPARRO, MARVIN J. BANEGAS and JOSE ROMERO,

Defendants.

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CARMAN, CALLAHAN & INGHAM, LLP
Attorney for Defendants Banegas and Romero
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Upon the following papers numbered 1 to 42 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-8; (002) 9-23; (003)24-25; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 26-27; 28-32; 33-34; Replying Affidavits and supporting papers 35-36; 37-39; 40-42 ; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (001) by the defendants, Marvin J. Banegas and Jose Romero, pursuant to CPLR 3212 for an order granting summary judgment on the issue of liability is granted, and the plaintiff is directed to serve a copy of this order with notice of entry upon the defendants and the Clerk of the Calendar Department, Supreme Court, Riverhead, within forty five days of the date of this order, and the Clerk is directed to calendar this matter for a trial on damages forthwith; and it is further

ORDERED that motion (002) by defendants, Camilo Chaparro-Vaca and Luis Chaparro, pursuant to 3212 dismissing the plaintiff's complaint on the basis that the plaintiff, Juan Carlos Rosales, has not sustained a serious injury as defined by Insurance Law § 5102 is denied; and it is further

ORDERED that motion (003) by defendants, Marvin J. Banegas and Jose Romero, pursuant to 3212 dismissing the plaintiff's complaint on the basis that the plaintiff, Juan Carlos Rosales, has not sustained a serious injury as defined by Insurance Law § 5102 is denied.

In this action, the plaintiff, Juan Carlos Rosales, seeks damages personally for serious injuries alleged to have been sustained by him when he was a passenger in the vehicle operated by defendant Marvin Banegas and owned by Jose Romero, on March 27, 2009, on Westwood Drive at the intersection with Pheasant Place in Islip, New York, when it came into contact with the vehicle owned and operated by defendants Camilo Chaparro-Vaca and Luis Chaparro. The Chaparro defendants have asserted a cross claim against defendants Banegas and Romero for contribution and indemnification.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]; ***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

Turning to motion (001), the defendants Banegas and Romero seek summary judgment on the issue of liability. In support of this motion, movants have submitted, inter alia, an attorney's affirmation, a copy of the summons and complaint, their answer with cross claim, and plaintiff's verified bill of particulars, and transcripts of the examinations before trial of Juan Carlos Rosales and Camilo Chaparro-Vaca, both dated April 7, 2011, which are unsigned but accompanied by proof of service pursuant to CPLR 3216. Two copies of the transcript of the examination before trial of Marvin Banegas dated October 6, 2011, have been submitted unsigned and are considered as adopted by accurate by him (***Ashif v Won Ok Lee,*** 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]). It is noted that the moving defendants have not provided a copy of the answer served by the co-defendants, as required pursuant to CPLR 3212. In searching the records, it is noted that the co-defendants have provided a copy of their answer with a cross claim against Chaparro-Vaca and Chaparro wherein they seek judgment over against their co-defendants for an apportionment of liability.

Juan Carlos Rosales testified to the extent that he was involved in a motor vehicle accident on March 27, 2009, while he was a passenger seated in the rear passenger seat of the vehicle operated by defendant Marvin Banegas. Carlos Florez was a passenger in the right front seat. Banegas, who was on his way to work, was dropping Rosales off at Rosales' place of employment. The accident occurred about 7:35 a.m. on Westwood Drive. It was raining at the time. He described Westwood Drive as a two-way street, one lane in each direction. Rosales testified that they crossed over about two to three intersections, at about thirty miles an hour, the posted speed limit, and did not stop as they had no stop signs for travel in their direction. As they approached the intersection with Pheasant Place, which had a stop sign for traffic entering the intersection with Westwood Drive, he noted that the other vehicle on

Pheasant Place, did not stop at the stop sign. Banegas' vehicle was struck between the front and rear doors on the driver's side by the co-defendants' vehicle, causing the front of the Banegas vehicle to strike a lamp post, breaking the post in two. Rosales testified that he was knocked unconscious from the impact. He testified that his body was flung forward and backwards, and he hurt his spinal column, neck, and right leg.

Camilo Chaparro-Vaca testified to the extent that he was the operator of a motor vehicle involved in the accident with the Banegas vehicle. He was traveling on Pheasant Place when he came to the intersection with Westwood where there was a stop sign controlling traffic. He testified that he made a full stop at the stop sign for about three seconds. While he was stopped, he looked for traffic approaching from Westwood, but there were cars parked outside the houses on Westwood obstructing his view. He leaned forward to get a better view and did not see any vehicle approaching on Westwood, but suddenly saw the plaintiff's vehicle approaching from his right. He stated that he swerved to the left as he was pulling into the intersection. His vehicle had traveled about five feet from the stop sign into the intersection prior to the impact. The plaintiff's vehicle was about a car length into the intersection at the time of impact. The right front fender of his vehicle made contact with the plaintiff's vehicle. Chaparro-Vaca testified that the plaintiff's vehicle did not have a stop sign at the intersection. He further testified that he stated, "I want to say between forty -five and fifty" when asked what speed the Banegas vehicle was traveling. He continued that his speed was ten miles per hour. Luis Chaparro is Chaparro-Vaca's father with whom he lived at the time of the accident.

Marvin J. Banegas testified to the extent that on March 27, 2009, he was the unlicensed driver of a car owned by Jose Romero. Juan Carlos Rosales was seated in the rear passenger seat behind Carlos Lopez who was seated in the right front passenger seat. He was driving on Westwood Drive for about ninety seconds, en route to work, at about thirty to thirty-five miles per hour. He was about 75 meters from the intersection when he pulled to the right side of the road to get a CD out for Carlos Lopez. He entered back onto the roadway and traveled to the intersection with Pheasant Place. When he was about half-way through the intersection, and about one to two seconds prior to impact, he saw the co-defendants' vehicle. Banegas testified that his vehicle had passed the stop sign, and the co-defendants' vehicle was about a quarter of the way into the intersection, traveling fast, between sixty and eighty miles per hour. He tried to steer to the left to avoid the accident. After the first impact, there was second impact when his vehicle struck the lamp post on the other side of the intersection, breaking the lamp post. The impact from the co-defendants' vehicle was to his driver's side toward the rear door of his vehicle, and the impact with the lamp post was with the front of his vehicle. He told Chaparro-Vaca, in Spanish, after the accident, that he should be more careful, and to look at what he caused. Chaparro-Vaca asked him if he was okay, and they had no further conversation. He saw no cars parked on Westwood Drive prior to the accident. He observed skid marks in the intersection from the co-defendants' vehicle.

A driver, operating a vehicle on a street governed by a stop sign, is required not only to stop, but to yield to vehicles on the intersecting thoroughfare operating with the right of way (Vehicle and Traffic Law § 1142 (a)). The driver is also required to see the oncoming traffic through the proper use of his or her other senses. The undisputed fact that a driver was unable to drive through an intersection without being struck by a second driver's vehicle is compelling evidence of the immediate hazard created by the

second driver's vehicle as it approached the intersection. Regardless of which vehicle enters an intersection first, the driver with the right-of-way is entitled to anticipate that the other driver will obey traffic laws which required that person to yield. A driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision (see ***Vainer v Santiago***, 79 AD3d 1023, 914 NYS2d 236 [2d Dept 2010]; ***Yelder v Walters***, 64 AD3d 762, 883 NYS2d 290 [2d Dept 2009]). "While a driver has a duty to see that which through the proper use of his or her senses should have been seen [internal citations omitted], a driver who has the right-of -way is entitled to anticipate that the other motorist will obey the traffic law requiring him or her to yield [internal citations omitted], (***Steiner v Dincesen***, 95 AD3d 877, 943 NYS2d 585 [2d Dept 2012]).

The adduced testimonies establish that the accident occurred when the vehicle operated by defendant Chaparro-Vaca entered into the intersection from Pheasant Place, which was controlled by a stop sign, without yielding to the vehicle operated by defendant Banegas as it was traveling the intersecting roadway, and that Chaparro-Vaca failed to see what was there to be seen with the reasonable use of his senses. Thus, defendant Banegas, who entered into the intersection first, with the right-of-way, was entitled to anticipate that the driver of any vehicle entering through the stop sign at the intersection of Pheasant Place would obey the traffic law and yield. Here, Banegas saw the vehicle operated by Chaparro-Vaca only two seconds prior to the impact and did not have time to avoid the collision. While counsel for Chaparro-Vaca argues that Banegas was speeding between forty-five and fifty miles per hour, it has not been demonstrated that speed was the cause of the accident. Likewise, Banegas testified that Chaparro-Vaca was speeding at sixty miles per hour. The plaintiff, by counsel, argues that there can be more than one cause of the accident, and that there are credibility issues concerning the testimony with regard to the speed the parties were traveling. However, these conclusory statements by both defendants and the plaintiff's counsel are speculative at best. There was no foundation established to demonstrate that the speeds each testified to were in any way accurate or supported by evidentiary proof. No expert affidavit or accident reconstruction report has been submitted in support of such claim by Chaparro-Vaca's counsel's affirmation or by plaintiff's counsel that speed was the cause of the accident.

It is thus determined that the sole proximate cause of the accident was due to the negligence of defendant Chaparro-Vaca in his failure to use reasonable care in operating his motor vehicle, his failure to continue to observe traffic on Westwood Drive, his failure to yield to traffic having the right of way, and failure to safely enter into the intersection, and to see what was there to be seen, namely, Banegas' vehicle (*see* ***Sulaiman v Thomas***, 54 AD3d 751, 863 NYS2d 723 [2d Dept 2008]). Here, the adduced testimonies establish that as the plaintiff's vehicle was entering the intersection, Banegas saw the co-defendants' vehicle, traveling about sixty miles an hour about two seconds prior to impact as it went through the stop sign and entered into the intersection. Thus, Banegas established that he had insufficient time to avoid the collision despite the evasive attempt to steer to the left to avoid the collision. It is further determined that Chaparro-Vaca's failure to yield the right-of-way establishes his negligence as a matter of law, and that there is no evidence that co-defendant Banegas contributed to the accident by traveling at an excessive rate of speed or that he had sufficient time to avoid the collision, and negligently failed to take reasonable steps to do so (see ***Williams v Hayes***, 2013 NY Slip Op 908 [Supreme Court, Appellate Division, 2d Dept]; ***Rankel v Saccardo***, 953 NYS2d 263, 2012 NY Slip Op

7285 [Supreme Court, Appellate Division, 2d Dept]; ***Yelder v Walters***, supra).

Accordingly, motion (001) by Marvin J. Banegas and Jose Romero for summary judgment dismissing the plaintiff's complaint on the issue of liability is granted, and the complaint and cross claims asserted against them are dismissed with prejudice.

In motions (002) and (003), the defendants have moved for summary judgment dismissing the complaint on the basis that the plaintiff has not sustained a serious injury as defined by Insurance Law § 5102 (d). It is noted that motion (003), by defendants Banegas and Romero, has not been timely served pursuant to CPLR 3212. The note of issue was filed with this court on February 10, 2012. The last date to serve a motion for summary judgment in this action is June 9, 2012. The defendants Banegas and Romero did not serve motion (003) until June 29, 2012, well beyond the 120 days, without any explanation. However, in that the complaint and cross claims have been dismissed as asserted against them based upon the decision in motion (001), it is determined that motion (003) has been rendered academic. It is further determined, that even if the motion were timely submitted, and had not been denied as moot, defendants Banegas and Romero failed to establish prima facie entitlement to summary judgment dismissing the complaint on the issue of serious injury. Their evidentiary proof was based upon the submissions included in their co-defendants' moving papers which did not establish prima facie entitlement to summary judgment dismissing the complaint on the issue of whether or not the plaintiff sustained a serious injury as defined by Insurance Law § 5102 (d).

Accordingly, motion (003) is denied as moot.

Motion (002) by defendants Chaparro-Vaca and Chaparro is supported by, inter alia, an attorney's affirmation; copies of the summons and complaint, defendants' respective answers, and plaintiff's verified bill of particulars; uncertified copies of plaintiff's Southside Hospital emergency department record; a copy of the transcript of the examination of Juan Carlos Rosales dated April 7, 2011 which is unsigned and uncertified, however, in searching the record, an admissible copy of the plaintiff's transcript has been submitted with motion (001) and is therefore considered; copy of the MRI reports of the plaintiff's cervical spine dated May 20, 2009, left shoulder dated May 6, 2009, left knee dated May 00 *sic,* 2009; and the sworn reports of Michael J. Katz, M.D. dated May 31, 2013 concerning his independent orthopedic examination of the plaintiff, and Stephen W. Lastig, M.D. dated August 10, 2011 concerning his independent radiological review of the MRI studies of the plaintiff's lumbar spine of May 8, 2009, and right shoulder dated April 30, 2009.

Pursuant to Insurance Law § 5102 (d), " '[s]erious injury' means 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."

The term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102(d), the initial burden is on the defendant to "present evidence in competent form, showing that plaintiff has no cause of action" (***Rodriquez v Goldstein***, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (***DeAngelo v Fidel Corp. Services, Inc.***, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (***Cammarere v Villanova***, 166 AD2d 760, 562 NYS2d 808, 810 [3d Dept 1990]).

In order to recover under the "permanent loss of use" category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed 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 (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, *supra*).

By way of his verified bill of particulars, the plaintiff alleges that as a result of this subject accident, he has sustained injuries consisting of a disc herniation at L5-S1; tenosynovitis of the left shoulder; down-sloping acromian of the left shoulder; impingement of the left shoulder; joint effusion of the left shoulder; effusion of the right shoulder; laberal injury of the right shoulder; joint effusion of the left knee; cervical radiculopathy; and straightening of the cervical lordosis.

Based upon a review of the evidentiary submissions, it is determined that the moving defendants in motion (002) have not demonstrated prima facie entitlement to summary judgment dismissing the complaint on either category of injury defined by Insurance Law § 5102 (d). The moving papers raise factual issues which preclude summary judgment.

The defendant has not submitted copies of all the medical records and reports, as required pursuant to CPLR 3212, inclusive of the EMG/NCV studies, ultrasound and MRI of the plaintiff's lumbar spine, and MRIs of the plaintiff's right and left shoulders, and left knee, which Dr. Katz reviewed in forming his opinion. Expert testimony is limited to facts in evidence (*see* ***Allen v Uh,*** 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Marzuillo v Isom,*** 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; ***O'Shea v Sarro***,

106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]; ***Hornbrook v Peak Resorts,*** Inc. 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]).

Neither Dr. Katz nor Dr. Lasting have submitted copies of their respective curriculum vitae in support of their reports to qualify as experts in this action. Although the plaintiff has pleaded that he sustained cervical radiculopathy as a result of the subject accident, as well as a head injury accompanied by loss of consciousness, no report concerning an independent neurological examination of the plaintiff by a neurologist has been submitted by the defendants (*see* ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]), thus raising further factual issues and leaving this court to speculate as to these claimed radicular and head injuries. Dr. Katz has diagnosed the plaintiff with cervical radiculopathy-resolved, and lumbosacral radiculopathy-resolved, establishing that the plaintiff had both cervical and lumbar radiculopathy, however, he does not provide a basis for the conclusory opinion that such conditions are resolved, raising factual issues. Dr. Katz continued that based upon the history given, and the records reviewed, the mechanism of injury is consistent with the sites of injury described, thus establishing causation. He does not rule out that the injuries claimed by the plaintiff with regard to his tenosynovitis of the left shoulder; down-sloping acromian of the left shoulder; impingement of the left shoulder; joint effusion of the left shoulder; effusion of the right shoulder; laberal injury of the right shoulder; and joint effusion of the left knee are causally related to the subject accident.

Dr. Lastig has set forth in his report concerning his radiological review of the plaintiff's lumbar spine of May 8, 2009, that there is degenerative disc disease with disc desiccation at the L5-S1 level, and shallow broad-based midline disc protrusion at L5-S1. It is his opinion that there is evidence of degenerative disc disease with disc desiccation at the L5-S1 level, and broad-based disc protrusion at L5-S1 which is most likely degenerative in origin, unrelated to the accident. However, Dr. Lastig does not set forth a basis for this conclusory opinion, or the duration or origin of the aforementioned degenerative conditions and dessication, thus rasing factual issues precluding summary judgment. While Dr. Lastig has submitted a report concerning his review of the MRI of the plaintiff's right shoulder, he has failed to submit a report concerning his interpretation of the MRI studies of the plaintiff's left shoulder and left knee, raising further factual issues causing the court to speculate as to these injuries, and precluding the granting of summary judgment.

The defendants' experts have offered no opinion as to whether the plaintiff was incapacitated from substantially performing the activities of daily living for a period of ninety days in the 180 days following the accident, and they did not examine the plaintiff during that statutory period (*see* ***Delayhaye v Caledonia Limo & Car Service, Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]; ***Uddin v Cooper***, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]***; Toussaint v Claudio,*** 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]; ***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]). The plaintiff testified that he was self-employed in landscaping and was en route to his job at the time of the accident. He initially had complaints of pain in his neck, back, both shoulders, and left knee following the accident. He treated with physical therapy five days a week for several months, then three days a week. He stopped treating around November or December 2010. He underwent nerve conduction studies and MRI studies of his neck, back and shoulders. He had injections into his back and left shoulder due to the pain. He testified that the pain in his back never goes away. Due to the pain, he is unable to work, or has to get someone to help him because he cannot lift. Prior to this accident, he never

had pain in his back. Prior to the accident, he was working regularly, and now only can work intermittently. He can no longer engage in lifting heavy objects because of his back. Due to his left knee injury he can no longer play soccer, and prior to this injury, played soccer once a week. He also develops pain in his left shoulder with lifting, which he never experienced prior to the accident. Some days his neck hurts. His right knee hurts if he walks a lot. Some days his head hurts. He had to stay home for two months following the accident and could not work. He was a dancer on a team and can no longer participate since the accident. He now has difficulty cutting the grass at his house and cleaning the house. He was not involved in any accidents prior to, or subsequent to, the within accident.

Inasmuch as the moving parties have failed to establish their prima facie entitlement to judgment as a matter of law in the first instance on the issue of "serious injury" within the meaning of Insurance Law § 5102 (d), it is unnecessary to consider whether the opposing papers were sufficient to raise a triable issue of fact (see ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]); ***Krayn v Torella***, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; ***Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]) as the burden has not shifted.

Accordingly, motion (002) by defendants, Camilo Chaparro-Vaca and Luis Chaparro, pursuant to 3212 dismissing the plaintiff's complaint on the basis that the plaintiff, Juan Carlos Rosales, has not sustained a serious injury as defined by Insurance Law § 5102 is denied.

Dated: 3/7/13

A.J.S.C.

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