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SHORT FORM ORDER

INDEX No. 10-27431
CAL No. 12-00977MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 48 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE 8-16-12 (#001)
MOTION DATE 8-16-12 (#002)
ADJ. DATE 1-22-13
Mot. Seq. # 001 - MotD
002 - MD

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JAIME B. SOLIS and GENINE T. SOLIS,

Plaintiffs,

- against -

ANN T. BROCHHAGEN and CAREN E. KATZ,

Defendants.

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Upon the following papers numbered 1 to 18 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-10; (002) 11-13; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 14-18; Replying Affidavits and supporting papers _; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the branch of motion (001) by the defendant, Caren E. Katz, pursuant to CPLR 3212 for summary judgment on the basis that she bears no liability for the occurrence of the accident is granted and the complaint as asserted against her is dismissed; and that branch of motion (001) which seeks dismissal of the complaint of Jaime Solis on the basis that he did not incur a serious injury as defined by Insurance Law § 5102 (d), has been rendered academic by withdrawal of that part of the motion by letter dated December 26, 2012 of the moving defendant and is denied as moot; and it is further

ORDERED that motion (002) by defendant, Ann T. Brochhagen, pursuant to CPLR 3212 for summary judgment on the basis that she bears no liability for the occurrence of the accident, for denial of co-defendant Katz's application for judgment in Katz's favor on the issue of liability is denied; and for further order determining that the plaintiff Jaime Solis has not sustained a serious injury as defined by Insurance Law § 5102 (d), is denied in its entirety; and it is further

PR

ORDERED that the plaintiff is directed to serve a copy of this order with notice of entry upon all parties and upon the Clerk of the Calendar Department, Supreme Court, Riverhead, within thirty days of the date of this order, and said Clerk is directed to schedule this matter for a trial on damages forthwith.

The plaintiffs, Jaime B. Solis and Genine T. Solis, seek damages, personally and derivatively, for injuries allegedly arising out of a chain collision motor vehicle accident which occurred on November 12, 2009, on Southern State Parkway fifty feet west of the intersection with 27-Wantagh State Parkway, in the Town Hempstead, New York, when the front end of the vehicle operated by defendant Ann T. Brochhagen made contact with the rear-end of the vehicle operated by defendant Caren E. Katz, and the front of the vehicle operated by defendant Katz then made contact with the rear of the plaintiff's vehicle.

The defendants seek summary judgment dismissing the complaint as asserted against them on the basis they bear no liability for the occurrence of the accident. It is noted that the Note of Issue was filed on May 16, 2012. The last day for filing the motions for summary judgment was on September 13, 2012. Motion (001) was not accompanied by an affidavit of service, however, the return date was prior to the last day to file the motion, and is thus, considered timely.

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 (***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]).

In support of motion (001) defendant Katz has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, the answer served by defendant Katz, and plaintiff's verified bill of particulars; the unsigned but certified transcript of the examinations before trial of Caren Katz dated January 26, 2012, Ann Brochhagen dated November 15, 2011, and Jaime Solis dated November 15, 2011; and an uncertified copy of the MV 104 Police Accident Report. Initially, the Court notes that the unsworn MV-104 police accident report constitutes hearsay and is inadmissible (*see* ***Lacagnino v Gonzalez***, 306 AD2d 250, 760 NYS2d 533 [2d Dept 2003]; ***Hegy v Coller***, 262 AD2d 606, 692 NYS2d 463 [2d Dept 1999]). The defendant has not submitted a copy of co-defendant Brochhagen's answer despite being required to do so pursuant to CPLR 3212.

In support of motion (002), defendant Brochhagen has submitted an attorney's affirmation. Although counsel for defendant Brochhagen makes reference to exhibits A and B, the summons and complaint and answer, said exhibits have not been annexed to, or provided to this court. Defendant Brochhagen, by counsel, adopts all the factual and legal arguments made in motion (001). It is noted that motion (002) was served on September 17, 2012. The note of issue was filed on May 16, 2012, and defendant Brochhagen's motion (002) was served more than 120 days after the filing of the note of issue in that it was served on September 13, 2012, without explanation by the defendant for failure to timely serve the same. However, in that both motions are premised on the issue of liability between the defendants, this court will consider motion (002) (*see* ***Brill v City of New York,*** 2 NY3d 648, 781 NYS2d 261

[2004]).

Caren Katz testified to the extent that on November 12, 2009, she was operating her vehicle, a black crossover Subaru Forester, in a westbound direction on Southern State Parkway in the left of three travel lanes in that direction. Traffic was heavy and the maximum rate of speed which she traveled was about forty-five miles per hour. She brought her vehicle to a moderate stop. She had seen a Volkswagen behind her between ten and thirty seconds prior to the accident. It was moving at that time. The first impact occurred to the rear of her vehicle while her vehicle was stopped for more than two seconds. She felt and heard that impact, although she did not see it. At the time of the first impact to the rear of her vehicle, the vehicle in front of her vehicle, a Honda, was stopped for five seconds or less. They were separated by about three-quarters of a car length prior to the impact to the rear of the Katz vehicle. That impact, Katz testified, caused her vehicle to move forward. She testified that the "screws on the license plate touched the car in front" of her seconds after the impact to her vehicle.

Ann Brochhagen testified to the extent that on November 12, 2009, she was traveling westbound on Southern State Parkway, driving her Volkswagen Passat. It was a gray day, cold and cloudy, and the roads were dry. When asked if her vehicle was in good working order, she replied "[p]robably, my brakes were a little bit worn." She testified, however, that she had not been experiencing any problems with the brakes. She described traffic as heavy and stop and go. When the accident occurred, she was in the left travel lane of three westbound lanes, and was attempting to move back into the middle lane at about thirty miles per hour, and looked to her right. She illuminated her directional signal, but realized that there was too much traffic and started moving back into the left lane. There was a Subaru in front of her in the left lane, but she did not notice if the brake lights were on. As she moved back into the left lane, still traveling about thirty miles per hour, the Subaru was much closer, about a car length ahead. She started applying her brakes hard as she moved back into the left lane, as traffic began slowing down. Within seconds, the accident occurred. The left front of her vehicle struck the rear of the Katz vehicle toward the passenger side. She did not believe any portion of her vehicle was in the middle lane when the impact occurred. She believed the Katz vehicle was either stopped or stopping when the impact occurred. Her vehicle was traveling about thirty miles per hour at the time of the impact with the Katz vehicle. She saw vehicles in front of the Katz vehicle, either stopped or slowed down when the impact occurred. She did not hear an impact between the Katz vehicle and the plaintiff's vehicle.

Jaime Solis testified to the extent that he was driving his wife's Honda Civic on November 12, 2009, when it became involved in an accident. He was traveling westbound on Southern State Parkway in the left of three travel lanes. It was clear and dry. Traffic was heavy so he slowed at times. He brought his vehicle to a stop for about fifteen seconds, behind a stopped vehicle, when he heard a bang, a screeching sound, and a bang. His foot was on the brake when he felt a moderate impact to the rear of his vehicle, causing his vehicle to move forward a little bit. When he saw his vehicle after the accident, he noticed that the license plate was dented, the bumper was dented a little, and the driver side of the other car was imbedded into his right rear bumper.

It is well settled that when a driver of a motor vehicle approaches another automobile from the rear, he or she is bound to maintain a safe rate of speed and has the duty to keep control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (***Chepel v Meyers,*** 306 AD2d 235, 762 NYS2d 95 [2d Dept 2003]; ***Power v Hupart,*** 260 AD2d 458, 688 NYS2d 194 [2d Dept 1999]; *see also* Vehicle and Traffic Law § 1129[a]). Moreover, a rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability regarding the operator of the moving vehicle and imposes a duty of explanation on the operator of the moving vehicle to excuse the collision by providing a non-negligent explanation, such as a mechanical failure, a sudden stop of the vehicle ahead, and unavoidable skidding on a wet pavement or some other reasonable excuse (*see* ***Rainford v Han***, 18 AD3d 638; 795 NYS2d 645 [2d Dept 2005]; ***Thoman v Rivera***, 16 AD3d 667, 792 NYS2d 558 [2d Dept

2005]; ***Power v Hupart***, *supra*).

In the instant action, the adduced testimonies clearly establish that defendant Brochhagen was traveling about thirty miles per hour, attempting to change from the left travel lane to the middle land on Southern State Parkway, and then back again to the left travel lane when she struck the vehicle operated by defendant Katz in the rear. The Katz vehicle was described by Brochhagen as either stopping or stopped at the time of the impact. She did not notice if the brake lights on the Katz vehicle were on at the time of the impact. It has been further established that the Katz vehicle was then pushed forward into the plaintiff's vehicle. Defendant Brochhagen has not come forward with a non-negligent explanation for the occurrence of the accident (*see* ***Rainford v Han***, supra; ***Thoman v Rivera***, *supra*; ***Power v Hupart***, *supra*).

Moreover, drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident (***Filippazzo v Santiago,*** 277 AD2d 419, 716 NYS2d 710 [2d Dept 2000]). Based upon the adduced testimonies, Brochhagen did not observe what she should have seen, namely that traffic in the left lane was stopped or stopping as she attempted to pull back into the left lane after attempting to move into the middle lane and could not do so. Brochhagen failed to exercise reasonable care under the circumstances to avoid an accident. Based upon the foregoing, no liability has been established as against either defendant Katz or the plaintiff who were either both stopped or stopping when the impacts occurred.

Turning to that part of motion (002) wherein defendant Brochhagen seeks summary judgment on the basis that Jaime Solis had not sustained a serious injury as defined by Insurance Law § 5102 (d), it is noted that Brochhagen relies on the evidentiary submissions proffered by defendant Katz. Such evidentiary submissions, in addition to those already set forth, are, inter alia, an attorney's affirmation and the signed report of Dr. Lee Kupersmith dated January 10, 2012.

By way of the bill of particulars, the plaintiff claims that the following injuries were caused by the subject accident: herniated discs at C3-4 and C4-5 with mass effect on the cord; herniated disc at C6-7; cervical spine sprain; aggravation and/or exacerbation of previously symptomatic dengenerative disc disease of the cervical spine; herniated disc at L5-S1; lumbar spine sprain; aggravation and/or exacerbation of previously asymptomatic degenerative disc disease of the lumbar spine.

Based upon a review of the evidentiary submissions, it is determined that defendant Brochhagen has not demonstrated prima facie entitlement to summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d).

Dr. Kupersmith has not submitted a copy of his curriculum vitae to qualify as an expert in this matter. Although Dr. Kupersmith has set forth the materials and records which he reviewed, including the MRIs of the plaintiff's cervical spine and lumbar spine, none of the medical records or reports have been provided to this court, leaving this court to speculate as to the contents of the same. The general rule in New York is that an expert cannot base an opinion on facts he did not observe and which were not in evidence, and that the 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]).

Dr. Kupersmith has set forth in his report that the plaintiff has pain radiating from his lower back down his leg, but does not indicate which leg. No report from a neurologist who performed an independent neurological examination on behalf of the defendants has been submitted by the defendants (***Browdame v Candura***, 25 AD3d

747, 807 NYS2d 658 [2d Dept 2006]), precluding summary judgment.

While Dr. Kupersmith has stated that the plaintiff had no orthopedic disability that is causally related to the subject accident, he does not rule out that the herniated lumbar and cervical discs are causally related to the accident. Furthermore, Dr. Kupersmith has set forth objective findings of deficits in range of motion values relative to the plaintiff's lumbar spine as to forward flexion, extension, left and right lateral rotation, and left and right lateral flexion, raising factual issues with regard to this injury.

By way of letter dated December 26, 2012, counsel for defendant Katz withdrew the motion for summary judgment on the threshold issue of serious injury in that he is in receipt of the plaintiffs' supplemental bill of particulars which alleges the plaintiff underwent lumbar fusion surgery. However, no party has submitted such supplemental bill of particulars to this court, raising further factual issues as to whether or not this surgery is related to the injuries claimed in this action.

The defendants' expert has 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 (***Delayhaye v Caledonia Limo & Car Service, Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]; *see* ***Uddin v Cooper***, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; ***Toussaint v Claudio,*** 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]; *see* ***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]). The plaintiff testified that on the date of the accident, he was employed by Office Solutions Incorporated as a copy technician. He was en route to a service call when the accident occurred, and after the accident, went to that call. When he arrived at the site of the service call, he called his employer and told him he was feeling numbness and pain in his back. He then went to the doctor that same day, and presented with pain in his neck and back for which x-rays were taken, and muscle relaxants were prescribed. He testified that he missed close to three months from work due to the injuries and pain, especially in his back. In January 2011, he started physical therapy for pain and stiffness in his back, three to five times a week for about two months. He last had physical therapy in May 2011. He also had cervical and lumbar spine MRIs taken. Prior to this accident, he did not sustain any injuries to his back or neck. After the accident, he could not bend over to repair the machines at work, and he could not drive for long periods of time due to the pain. In July 2011, he hit a curb while driving and stayed out of work for a week and a half due to the back pain, however, he stated, there was no accident. His orthopedist, Dr. Drezik, recommended that he stop working and referred him to see Dr. Dowling, a spine surgeon. Dr. Dowling ordered more MRI studies of his entire back, and ordered one more month of physical therapy. He was advised that if the additional physical therapy did not help, then surgery was recommended as a nerve was being pinched by the herniated disc in his back. He experiences pain in his back radiating down his left leg. He was unemployed at the time of his deposition.

Based upon the foregoing, it is determined that the defendant has failed to establish that the plaintiff did not sustain a serious injury under either category set forth in Insurance Law § 5102 (d).

Movant has failed to satisfy the burden of establishing, prima facie, that the plaintiff did not sustain a "serious injury" within the meaning of Insurance Law §5102 (d) (*see,* ***Agathe v Tun Chen Wang***, 98 NY2d 345, 746 NYS2d 865 [2006]); *see also* ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]). Inasmuch as the defendant has failed to establish 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]).

Accordingly, that part of defendant's motion (002), which seeks summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law §5102 (d) is denied.

The foregoing constitutes the Order of this Court.

Dated: March 18, 2013
Riverhead, NY

HON. HECTOR D. LASALLE, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**