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SHORT FORM ORDER

COPY

INDEX No. 08-37321
CAL. No. 10-01323 MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 8-10-10
ADJ. DATE 12-7-10
Mot. Seq. # 002 - MD

WILLIE R. THOMAS,	:	SIBEN & SIBEN, LLP
	:	Attorney for Plaintiff
	:	90 East Main Street
Plaintiffs,	:	Bay Shore, New York 11706
	:	
- against -	:	ROBERT P. TUSA, ESQ.
	:	Attorney for Defendant Rupp
	:	898 Veterans Memorial Highway
	:	Hauppauge, New York 11788
AIMEE RUPP and HEATHER MEIER,	:	
	:	HAMMILL, O'BRIEN, CROUTIER, PC
Defendants.	:	Attorney for Defendant Meier
	:	6851 Jericho Turnpike, Suite 250
	:	Syosset, New York 11791

Upon the following papers numbered 1 to 24 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 14 - 22 ; Replying Affidavits and supporting papers 23 - 24 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant Heather Meier for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint against her is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, Willie Thomas, as a result of a motor vehicle accident on March 8, 2007 at approximately 2:50 p.m. At the time of the accident, plaintiff was allegedly a passenger in a vehicle owned and operated by defendant Heather Meier when it collided with a vehicle owned and operated by defendant Aimee Rupp.

It is undisputed that the accident occurred at the T-intersection of Montauk Highway and Munsell Road in the Town of Bellport, New York. Montauk Highway, which is a two-way roadway

with one lane in each direction, runs east and west, and Munsell Road, which runs north and south, terminates at a T-intersection with Montauk Highway. On the day of the accident, Munsell Road was controlled by a stop sign, and Montauk Highway was not controlled by either a stop sign or a traffic signal. Defendant Meier, who had the right of way, was traveling eastbound on Montauk Highway, and defendant Aimee Rupp, who was traveling northbound on Munsell Road, was in the process of making a left turn into the westbound lane of Montauk Highway at the intersection.

Defendant Meier now moves for summary judgment dismissing the complaint against her on the issue of liability on the ground that the accident was solely the result of defendant Rupp's failure to yield to her eastbound vehicle when defendant Rupp was making a left turn across Montauk Highway. In support, defendant Meier submits, *inter alia*, the deposition testimony of plaintiff and defendants Rupp and Meier.

At her deposition, defendant Meier testified to the effect that, on the day of the accident, she was traveling southbound on Taylor Avenue, which terminates at a T-intersection with Montauk Highway, and made a left turn into the eastbound lane of Montauk Highway at the intersection. When she was already halfway passed Munsell Road, she observed the Rupp vehicle coming toward her out of Munsell Road. The corner of Taylor Avenue and Montauk Highway was a house length away from the corner of Munsell Road and Montauk Highway. Defendant Meier testified that, at the time of the impact, she was driving her vehicle at the speed of 15 to 20 miles per hour. Prior to the accident, she neither activated her right turn signal nor saw the Rupp vehicle.

At her deposition, defendant Rupp testified to the effect that, on the day of the accident, she had been traveling northbound on Munsell Road and came to stop at a stop sign at the intersection with Montauk Highway. She stopped approximately five times at the stop sign because her vision of the westbound traffic coming from her right was obstructed by a vehicle parked on the eastbound shoulder of Montauk Highway. Prior to the accident, defendant Rupp observed that the Meier vehicle was standing on Taylor Avenue with its turn signal activated; that the turn signal was off when the vehicle made a left turn into the eastbound lane of Montauk Highway; and that the turning signal was back on as the vehicle approached Munsell Road. When defendant Rupp observed the Meier vehicle reducing the speed with its turn signal activated, she felt that the vehicle would make the right turn into Munsell Road. However, the Meier vehicle did not enter Munsell Road, but went straight on Montauk Highway and collided with the Rupp vehicle which entered the intersection with Montauk Highway. Defendant Rupp testified that the Meier vehicle was operated by plaintiff Willie Thomas, and that the highest speed the vehicle attained just prior to the accident was approximately five miles per hour.

At his deposition, plaintiff testified to the effect that, on the day of the accident, he was involved in an accident at the intersection of Montauk Highway and Munsell Road. He stated that, at the time of the accident, he was a front-seat passenger of the vehicle operated by defendant Meier, and the speed of the vehicle was at approximately 40 miles per hour. Prior to the accident, he neither saw the Rupp vehicle nor heard the sound of a horn or brakes.

A driver who has the right of way is entitled to anticipate that other vehicles will obey the traffic laws that require them to yield (*see*, ***Jenkins v Alexander***, 9 AD3d 286, 780 NYS2d 133 [2004];

Namisnak v Martin, 244 AD2d 258, 664 NYS2d 435 [1997]). Violations of existing law by proceeding into the intersection without yielding the right-of-way constitute negligence as a matter of law pursuant to Vehicle and Traffic Law §§ 1142 (a) and 1172 (a) (*see*, ***Moussouros v Liter***, 22 AD3d 469, 802 NYS2d 460 [2005]; ***Batal v Associated Univs.***, 293 AD2d 558, 741 NYS2d 551 [2002]). However, a driver is required to see what, by the proper use of his or her senses, he or she might have seen (***Levy v Town Bus Corp***, 293 AD2d 452, 739 NYS2d 459 [2002]; ***Gonzalez v County of Suffolk***, 277 AD2d 350, 716 NYS2d 404 [2000]; *see also*, PJI 2:77.1 [2006]).

Here, the deposition testimony of plaintiff and defendant Meier and Rupp conflicted with each other as to the happening of the accident (*see*, ***Viggiano v Camara***, 250 AD2d 836, 673 NYS2d 714 [1998]). Moreover, there are factual issues as to who was driving the Meier vehicle and as to whether the turning signal was activated as the vehicle approached Munsell Road. Under the circumstances, there are questions of fact as to the speed of the Meier vehicle and its driver's attentiveness and care as he or she drove and as to whether the action of defendant Meier contributed to any injuries sustained by plaintiff. Thus, defendant Meier has failed to sustain the initial burden of establishing a prima facie entitlement to judgment as a matter of law. Accordingly, the branch of the motion by defendant Meier for summary judgment on the issue of liability is denied.

Defendant Meier also seek summary judgment on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d).

By his bill of particulars, plaintiff alleges that he sustained serious injuries as a result of the subject accident, including herniated discs at C3-C4, C5-C6 and L5-S1; bulging discs at C6-C7 and L4-L5; cervical radiculopathy; cervical, lumbar and thoracic spine sprain; lumbar myofascitis; aggravation and/or exacerbation of previously asymptomatic disc disease of the lumbar spine; wedge compression fractures at L-1 and T-12; partial thickness tear of the supraspinatus tendon in left shoulder; tendonopathy of the rotator cuff in left shoulder; left shoulder impingement; left shoulder sprain; and left knee sprain.

Insurance Law § 5102 (d) defines "serious injury" as "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."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance***, 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 a "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 Sys.***, 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***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see*, ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Akhtar v Santos***, 57 AD3d 593, 869 NYS2d 220 [2008]). The defendant may satisfy this burden by submitting the plaintiff's own deposition testimony and the affirmed medical report of the defendant's own examining physician (*see*, ***Moore v Edison***, 25 AD3d 672, 811 NYS2d 724 [2006]; ***Farozes v Kamran***, 22 AD3d 458, 802 NYS2d 706 [2005]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see*, ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [1999]).

On December 1, 2009, approximately two years and nine months after the subject accident, defendant Meier's sole examining orthopedist, Dr. Arthur Bernhang, examined plaintiff using certain orthopedic and neurological tests, including Spurling's test, provocative tests for median carpal tunnel or ulnar nerve neuropathy, Papoleon's test, O'Brien's test, Yergason's test, straight leg raising test, and FABER and FADIR tests. Dr. Bernhang found that all the test results were negative or normal, except that plaintiff reports neck pain on Spurling's test, and that lying supine straight leg raising test is "actively resisted at 30/30" (30 degrees average). Dr. Bernhang explained that active ranges of joint motion which were observed and measured by goniometer and tape measure and were recorded in left/right order, were compared to average ranges of joint motion. He indicated that plaintiff's cervical extension was 35 degrees (55 degrees average), cervical flexion was 25 degrees (55 degrees average), lateral flexion was 25/25 degrees (45 degrees average), and cervical rotation was 55/60 degrees (85 degrees average). He also indicated that plaintiff's active shoulder abduction was 90/130 degrees (170 degrees average), active shoulder forward flexion was 80/80 degrees (180 degrees average), external rotation was 90/90 degrees (60 degrees average), and internal rotation was 80/80 degrees (80 degrees average). In addition, Dr. Bernhang indicated that "[d]orsolumbar expansion with the knees extended is 2" (4" or > being average)"; that lateral flexion is 30/30 degrees (20 degrees or > being average); and that plaintiff reports pain at 15 degrees of extension of lumbar spine (30 degrees being average).

Here, defendant Meier failed to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see*, ***Lopez v Felton***, 60 AD3d 822, 875 NYS2d 550 [2009]). Initially, the Court notes that the report of defendant Meier's examining orthopedist was deficient inasmuch as the standard of comparison used, average ranges of joint motion, does not comport with the required comparison to the normal range of motion one would expect of a healthy person of the same age, weight, and height (*see*, ***Frey v Fedorciuc***, 36 AD3d 587, 828 NYS2d 454 [2007]; ***Powell v Alade***, 31 AD3d 523, 818 NYS2d 600 [2006]; *see also*, ***Somers v Macpherson***, 40 AD3d 742, 836 NYS2d 620 [2007]). In addition, defendant Meier's examining orthopedist found that plaintiff had range of motion restrictions without a comparative quantification of those findings as to what is normal. Under the circumstances, it cannot be concluded that the ranges of motion in plaintiff's

cervical and lumbar spine and shoulders were normal, or that any limitations were mild, minor, or slight so as to be considered insignificant within the meaning of the no-fault statute (*see*, ***McLaughlin v Rizzo***, 38 AD3d 856, 832 NYS2d 666 [2007].

Also, defendant Meier's examining orthopedist failed to provide any range of motion testing results for flexion and rotation of plaintiff's lumbar spine, which was also alleged to have been seriously injured as a result of the subject accident (*see*, ***Sajid v Murzin***, 52 AD3d 493, 860 NYS2d 559 [2008]; ***Staubitz v Yaser***, 41 AD3d 698, 839 NYS2d 113 [2007]; ***Hughes v Cai***, 31 AD3d 385, 818 NYS2d 538 [2006]). He only provided straight leg raising test results. Moreover, although defendant Meier's examining orthopedist implied that plaintiff was voluntarily restricting his movement during the range of motion testing, such a finding raises credibility issues that cannot be resolved on a motion for summary judgment (*see*, ***Washington v Delossantos***, 44 AD3d 748, 843 NYS2d 186 [2007]).

Inasmuch as defendant Meier failed to meet her prima facie burden, it is unnecessary to consider whether the papers submitted by plaintiff in opposition to defendant's motion for summary judgment were sufficient to raise a triable issue of fact (*see*, ***McMillian v Naparano***, 61 AD3d 943, 879 NYS2d 152 [2009]; ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2008]).

Lastly, the Court finds that the affidavit from David Gushue, a biomedical engineer, which was submitted by defendant Meier, was made and notarized in the State of Pennsylvania, County of Bucks, and is deemed not to be in admissible form pursuant to CPLR 2106 and 2309 (c) as it lacks the required certificate of conformity (*see*, CPLR 2309 [c]; ***PRA III, LLC v Gonzalez***, 54 AD3d 917, 864 NYS2d 140 [2008]). Thus, defendant Meier is not entitled to summary judgment on the issue of serious injury.

In view of the foregoing, the motion by defendant Meier for summary judgment is denied in its entirety.

Dated: April 1, 2011

W. Gerard Asher
J.S.C.

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