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| Manno v Olivia Transp. Corp. |
| 2011 NY Slip Op 31534(U) |
| June 6, 2011 |
| Sup Ct, Suffolk County |
| Docket Number: 08-21981 |
| Judge: Jeffrey Arlen Spinner |
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 12-1-10 (#001 & #002)
ADJ. DATE 3-30-11
Mot. Seq. # 001 - MD
002 - MG

| | | | |
|-------------------------------------|---|-------------|---|
| -----X | | | SIBEN & SIBEN, LLP |
| JOSEPH E. MANNO, JR., | : | | Attorney for Plaintiff |
| | : | | 90 East Main Street |
| | : | Plaintiff, | Bay Shore, New York 11706 |
| | : | | |
| | : | | BAKER, MCEVOY, MORRISSEY et al |
| - against - | : | | Attorney for Defendants Olivia Transportation |
| | : | | & Valle-Benitez |
| | : | | 330 West 34th Street, 7th Floor |
| OLIVIA TRANSPORTATION CORP., MARLON | : | | New York, New York 10001 |
| VALLE-BENITEZ, ELIZABETH SAQUICARAY | : | | |
| and LUIS CONCE, | : | | ABAMONT & ASSOCIATES |
| | : | | Attorney for Defendants Saquicaray and Conce |
| | : | Defendants. | 200 Garden City Plaza, Suite 400 |
| -----X | : | | Garden City, New York 11530 |

Upon the following papers numbered 1 to 38 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; 13 - 23; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 24 - 32; 33 - 34; Replying Affidavits and supporting papers 35 - 36; 37 - 38; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#001) by defendant Olivia Transportation Corp. and defendant Marlon Valle-Benitez, and the motion (#002) by defendant Luis Conce and defendant Elizabeth Saquicaray are consolidated for purposes of this determination; and it is further

ORDERED that this motion by defendant Olivia Transportation Corp. and defendant Valle-Benitez for summary judgment dismissing the complaint on the ground that plaintiff did not sustain "serious injury" within the meaning of Insurance Law § 5104(d) is denied; and it is further

ORDERED that this motion by defendant Conce and defendant Saquicaray for an order pursuant to CPLR 3212 granting them summary judgment in their favor is granted.

(RR)

In this action, plaintiff Joseph Manno, Jr., seeks damages for personal injuries allegedly sustained on October 14, 2007, as a result of a motor vehicle accident that occurred on Sunrise Highway in the Town of Islip. The collision allegedly happened when a vehicle driven by defendant Marlon Valle-Benitez and owned by defendant Olivia Transportation Corp. (hereinafter the Transportation defendants) collided with plaintiff's vehicle. The complaint alleges that a vehicle operated by defendant Luis Conce and owned by defendant Elizabeth Saquicaray also was involved in the subject accident. According to the bill of particulars, plaintiff suffered various injuries as a result of accident, including disc herniation at level C6-7, cervical and lumbosacral spine sprain, cervical and lumbar radiculitis, vertigo, and blurred vision. The Transportation defendants assert a cross claim against defendant Conce and defendant Saquicaray for indemnification and contribution.

The Transportation defendants now move for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). The Transportation defendants' submissions in support of their motion include a copy of the pleadings, a transcript of plaintiff's deposition testimony, an affirmed medical report of Dr. Edward Weiland, an affirmed medical report of Dr. Stanley Bogaty, and a magnetic resonance imaging (MRI) report of Dr. A. Robert Tantleff. Plaintiff opposes the Transportation defendants' motion, arguing that triable issues of fact remain as to whether he sustained a serious injury. In opposition, plaintiff submits, among other things, transcripts of the parties' deposition testimony, affirmed medical reports of Dr. Nunzio Saulle, MRI reports of Dr. David Panasci and Dr. Steven Mendelsohn, and an affirmed medical report of Dr. Nestor Blyznak.

Defendant Conce and defendant Saquicaray move for summary judgment in their favor, arguing that there is no evidence that they were negligent or that their conduct was a substantial factor in causing the accident between plaintiff's vehicle and the Transportation defendants' vehicle. In support, they submit a copy of the pleadings and transcripts of the parties' deposition testimony. The Transportation defendants and plaintiff oppose this motion, arguing that triable issues of fact exist, as there is conflicting testimony by the parties as to the happening of the accident.

At his examination before trial, plaintiff testified that prior to the collision he was traveling eastbound on the middle lane of Sunrise Highway at a speed of 50 miles per hour. He stated that the operator of the Transportation defendants' vehicle was driving erratically behind him, switching between the lanes, and that the vehicle's headlights were flickering on and off. Plaintiff testified that defendant Conce's vehicle was in front of his vehicle, traveling on the left lane. He explained that the Transportation defendants' vehicle eventually passed his vehicle, and at some point attempted to merge into the left lane and may have collided with the Conce vehicle. Plaintiff further testified that the Transportation defendants vehicle then swerved back into the middle lane, and that the rear right passenger side door of the Transportation defendants' vehicle collided with the front driver side of his vehicle.

At his examination before trial, defendant Valle-Benitez, who was employed by defendant Olivia Transportation at the time of the accident, testified that he was traveling in the middle lane of Sunrise highway at a speed of 55 miles per hour for 10 minutes prior to the subject accident. Initially, defendant

Valle-Benitez testified that plaintiff's vehicle was moving towards the middle lane, and he tried to avoid contacting plaintiff's vehicle by merging into the left lane, causing the left fender of his vehicle to collide with the Conce vehicle. However, defendant Valle-Benitez later testified that plaintiff's vehicle, which was in the right lane, struck his vehicle causing his vehicle to come into contact with the Conce vehicle.

At his examination before trial, defendant Conce testified that he was traveling eastbound on the left lane of Sunrise Highway for about five minutes prior to the subject accident. He stated that he observed the Transportation defendants' vehicle traveling in the middle lane behind him, and that its headlights were flickering. Mr. Conce testified that plaintiff's vehicle was to the right of his vehicle. He testified that the front bumper of Transportation defendants' vehicle struck the right rear passenger side of his vehicle.

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."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, i.e., affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (*Pagano v Kingsbury*, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see Fragale v Geiger*, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; *Torres v Micheletti*, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]; *Craft v Brantuk*, 195 AD2d 438, 600 NYS2d 251 [2d Dept 1993]; *Pagano v Kingsbury, supra*). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact (*see Gaddy v Eyler, supra; Pagano v Kingsbury, supra; see generally Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

Here, Dr. Weiland's medical report states that a range of motion examination of plaintiff's cervical spine revealed flexion and extension to 45 degrees (normal 45 to 60 degrees), right and left lateral rotation to 80 degrees (normal 70 to 80 degrees), and right and left lateral flexion to 45 degrees (normal 40 to 45 degrees). It states that range of motion testing of plaintiff's lumbar spine revealed flexion to 90 degrees (normal 80 to 90 degrees), extension to 30 degrees (normal 30 degrees), and right and left lateral flexion to 30 degrees (normal 30 to 40 degrees). It further states that an examination of

plaintiff's thoracolumbar spine was within normal limits, that there was full range of motion, and that there was no spasm or crepitus about the musculature. The report states that there were subjective complaints of pain by plaintiff during range of motion testing of his neck, but that no joint crepitus or effusions were noted.

Dr. Stanley Bogaty's medical report states that an examination of plaintiff's vision revealed uncorrected visual acuity of 20/30 in the right eye and 20/25 in the left eye. It states that during the refraction test, plaintiff complained multiple times of nausea, but that there was no evidence plaintiff actually had significant symptoms of nausea during the examination. An examination of the extraocular motility was performed, and it was found to be entirely within normal limits. Dr. Bogaty opines that plaintiff has an entirely normal eye examination with no evidence of any traumatic injury or any other abnormality. He further states that plaintiff complained multiple times when a light was shone in his eyes, and that he complained of a severe headache after the dilated pupil examination. Dr. Bogaty concludes that plaintiff is capable of engaging in all normal activities of daily living and that there is no disability of any kind related to his eyes.

In addition, defendants submit the MRI report prepared by Dr. Tantléff regarding the MRI examinations of plaintiff's cervical spine performed on November 20, 2007. The report states that the examination revealed regional discogenic changes of the cervical spine with minimal degenerative focal disc protrusions at levels C5-6, C6-7 and C7-T1 of no significance. It states that the regional discogenic changes are consistent with plaintiff's age and are unrelated to the subject accident.

Here, the Transportation defendants failed to make a prima facie showing that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see Rizzo v Torchiano*, 57 AD3d 872, 868 NYS2d 926 [2d Dept 2008]). Significantly, Dr. Weiland's medical report is deficient in that the normal range of motion measurements that he sets forth for plaintiff consists of variable ranges, leaving the Court to speculate as to under what circumstances those variable ranges occur (*see Powell v Alade*, 31 AD3d 523, 818 NYS2d 600 [2d Dept 2006]; *Manceri v Bowe*, 19 AD3d 462, 798 NYS2d 441 [2d Dept 2005]). Inasmuch as defendants failed to establish their prima facie entitlement to judgment as a matter of law based on whether plaintiff sustained serious injuries, it is unnecessary to consider whether plaintiff's opposition papers were sufficient to raise a triable issue of fact on that matter (*see Penoro v Firshing*, 70 AD3d 659, 897 NYS2d 110 [2d Dept 2010]; *Umar v Ohrnberger*, 46 AD3d 543, 846 NYS2d 612 [2d Dept 2007]). Accordingly, summary judgment dismissing the complaint based on plaintiff's failure to meet the serious injury threshold is denied.

As to the issue of defendant Conce's and defendant Saquicaray's liability for the subject accident, Vehicle and Traffic Law §1128(a) provides, in pertinent part, that whenever any roadway has been divided into two or more clearly marked lanes for traffic, "a vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety." Defendant Conce and defendant Saquicaray have established their prima facie entitlement to judgment as a matter of law by presenting evidence that the Transportation defendants' vehicle crossed over their lane of travel and collided with the left rear portion of the vehicle defendant Conce was operating, violating Vehicle and Traffic Law § 1128(a) (*see*

