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SHORT FORM ORDER

INDEX No. 10-22865
CAL No. 12-00748MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 10-5-12
ADJ. DATE 2-7-13
Mot. Seq. # 001 - MD
002 - MD

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PATRICIA CHRISTENSEN and PAUL CHRISTENSEN,

Plaintiffs,

- against -

ASIL KARAKET, SIBEL KAYA and FRANK G. DIFRANCO,

Defendants.

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Upon the following papers numbered 1 to 37 read on these motions for summary judgments ; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-12; Notice of Cross Motion and supporting papers (002) 13-19; Answering Affidavits and supporting papers 20-29; 30-32; Replying Affidavits and supporting papers 33-35; 36-37; Other ___; it is,

ORDERED that this motion (seq. #001) by defendant, Frank G. DiFranco, for an Order, pursuant to 3212, dismissing the plaintiff's complaint on the bases that he bears no liability for the occurrence of the accident, and that the plaintiff, Patricia Christensen, has not sustained a serious injury as defined by Insurance Law § 5102 is denied; and it is further

ORDERED that this cross-motion (seq. #002) by the defendants, Asil Karaket and Sibel Kaya, for summary judgment on the issue that the plaintiff, Patricia Christensen, has not sustained a serious injury as defined by Insurance Law § 5102 is denied.

In this action, the plaintiffs, Patricia Christensen and Paul Christensen, seek damages personally and derivatively for personal injuries alleged to have been sustained by Patricia Christensen, on October 28 , 2009 at about 3:54 p.m., on County Road 83, at or near the intersection with Granny Road in Brookhaven, New York, when the vehicle operated by Patricia Christensen, and the vehicle owned by defendant Asil Karaket and operated by defendant Sibel Kaya, and the vehicle operated by Frank DiFranco, were involved in a motor vehicle accident.

KAK

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]).

The motion by defendant DiFranco is supported by, *inter alia*, an attorney's affirmation; copies of the summons and complaint, defendant DiFranco's answer and defendants Karaket and Kaya's answers each with cross-claims for judgment over against each other for apportionment of damages and contribution, and plaintiff's verified bill of particulars; copies of the transcripts of the examination before trial of Frank DiFranco dated October 21, 2011, the unsigned transcript of Sibel Kay dated June 29, 2010 which has not been objected to by Kay and is considered herein, and of Patricia Christensen dated October 21, 2011; and the sworn reports of Lee M. Kuppersmith, M.D. dated February 7, 2012 concerning his independent orthopedic examination of the plaintiff, and Maria Audrey DeJesus, M.D. dated November 8, 2011 concerning her independent neurological review of the plaintiff.

In support of their cross-motion, defendants Karaket and Kaya have submitted, *inter alia*, an attorney's affirmation; copies of the summons and complaint, defendants' respective answers, and plaintiff's bill of particulars; and movants incorporate by reference those exhibits contained in the moving papers submitted with the motion-in-chief. It is noted that the note of issue in this action was filed on April 18, 2012, and therefore the last day to serve a motion for summary judgment was on August 16, 2012. However, defendants Karaket and Kaya did not serve the cross-motion until August 29, 2012, well beyond the 120 days permitted pursuant to CPLR 3212, and have offered no excuse for their untimely service of this motion. Thus, their cross-motion is not timely, but will be considered in that it involves, in part, the identical issue regarding serious injury as set forth in the motion-in-chief (*see* ***Brill v City of New York,*** 2 NY3d 648, 781 NYS2d 261 [2004]).

LIABILITY

Frank DiFranco testified to the extent that on October 28, 2009, he was operating his motor vehicle on County Road 83 in a southbound direction in the left travel lane at about forty miles per hour. County Road 83 contained three travel lanes in each direction. It was raining and his headlights and windshield wipers were on as the driving conditions were "poor." He approached the intersection of County Road 83 with Granny Road, which was controlled by a three-phase traffic signal device with turn arrows. The accident occurred about 100 feet from Granny Road. Two impacts occurred to his vehicle. The first impact occurred to the rear of his vehicle while he was in the left travel lane on County Road 83. At no time prior to the first impact did he see the co-defendant's vehicle. As a result of that first impact, DiFranco stated that he lost control of his vehicle, and within two to three seconds thereafter, he was involved in another impact with the plaintiff's vehicle. With

that second impact, the front driver's side by the headlight and his front quarter panel on the driver's side of his vehicle made contact with the plaintiff's vehicle.

Sibel Kaya testified to the extent that on the date of the accident she was operating the motor vehicle owned by defendant Karaket, with his permission. It was raining heavily. She had no difficulty operating that vehicle prior to the accident. Prior to the accident she was traveling from Rocky Point to Holtsville in the middle lane of County Road 83 (North Ocean Avenue), but did not know what compass direction she was traveling in. Traffic was heavy. She does not remember if she made any lane changes prior to the accident. She did not remember if there were any cars ahead of her or along side of her. As she was driving, her car began to slide to the right, so she turned the steering wheel to the left. She also testified that when her car began to slide, it slid at the time of the accident and not before the accident. She has no memory of her vehicle coming into contact with another vehicle. She did not know what speed she was operating her vehicle prior to the accident. She noticed no other vehicles sliding on the roadway prior to the accident. After the accident, her vehicle was in the left southbound travel lane, turning to the right. Kaya testified that she told Karaket that she lost control of the car and had the accident.

Patricia Christensen testified to the extent that at the time of the accident she was traveling in the left lane in a northbound direction on County Road 83. She had both her windshield wipers and headlights on. She described traffic conditions as moderate. She last remembers driving, approaching the intersection with Granny Road. Her first memory following the accident was waking up in the hospital emergency room at Stony Brook.

Defendant Kaya testified that there was a witness who testified that she had been traveling in a northbound direction and that she cut across the median into oncoming traffic; however, no witness statement has been submitted in support of this application. Kaya did not know what direction she was traveling at the time. Defendant DiFranco did not see the plaintiff's vehicle at any time prior to the accident, and the plaintiff and defendant Kaya do not know how the accident happened. It is concluded that there are factual issues concerning the circumstances of the accident and the direction defendant Kaya's vehicle was traveling immediately prior to the accident, thus precluding summary judgment on the issue of liability.

In view of the forgoing, that branch of the motion by defendant DiFranco which seeks summary judgment dismissing the complaint on the issue of liability is denied.

SERIOUS INJURY

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 the verified bill of particulars, the plaintiffs allege that as a result of this subject accident, the following injuries have been sustained: bulging disc at C5-6 with bilateral foraminal narrowing; aggravation and/or exacerbation type I Chiara malformation with cervical syrinx; cervical spine sprain; concussion with loss of consciousness; brain injury; retrograde amnesia; left parietotemporal extracranial scalp hematoma; left rib contusion; left knee contusion; left hand abrasion; and left ear laceration.

None of the medical records or diagnostic studies such as the CTs of the plaintiff's head, cervical spine, and chest; MRIs of the plaintiff's cervical spine and brain; and the independent medical examinations by Dr. Paul Miller dated March 29, 2010 and Dr. Fromm dated April 27, 2010, have been provided in support of the moving defendants' expert opinions. 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]), which evidence reviewed by the examining physicians has not been provided in this case, thus precluding summary judgment.

Neither Dr. Kupersmith nor Dr. DeJesus have set forth any of the findings reported in the CT or MRI studies, and do not rule out that the plaintiff's claim of cervical spine disc bulging at C5-6 is not causally related to the subject accident. Dr. Kuppersmith opined that the causal relationship exists to the accident of October 28, 2009 with regards to the plaintiff's neck, ribs, left hand, and left knee.

Dr. Kuppersmith stated that the claimant's type-1 Chiari malformation and syringmyelia is beyond his field of expertise. Dr. DeJesus opined that at the time of her examination that there was no aggravation or exacerbation of the Chiari malformation, however, she does not set forth a basis for this conclusory and unsupported opinion. Thus, factual issues are raised with regard to causation and/or aggravation of this particular injury, precluding summary judgment.

Although the plaintiff claims to have sustained a laceration to her ear, no report from an examining physician concerning this injury and any subsequent scarring has been submitted (*see* ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]), thus raising factual issues leaving this Court to speculate as to whether this injury is related to the accident, precluding 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* ***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; *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]; ***Delayhaye v Caledonia Limo & Car Service, Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]), precluding summary judgment.

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) as to either category of injury, 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, this motion and cross-motion are denied insofar as they seek summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as to either category of injury defined in Insurance Law § 5102 (d).

Dated: February 28, 2013

Hon. Joseph Farneti
Acting Justice Supreme Court Justice

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION