Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:
WILLIAM B. REBOLINI
Justice

Cesar A. Rodriguez,

Plaintiff,

-against-

Lillian E. Hurski,

Defendant.

Index No.: 20402/2011

Motion Sequence No.: 001; MG
Motion Date: 1/14/13
Submitted: 3/13/13

Motion Sequence No.: 002; MD
Motion Date: 1/14/13
Submitted: 3/13/13

Attorney for Plaintiff:

Borda, Kennedy, Alsen & Gold, LLP
1805 Fifth Avenue
Bay Shore, NY 11706

Attorney for Defendant:

Richard T. Lau & Associates
300 Jericho Quadrangle, P.O. Box 9040
Jericho, NY 11753

Clerk of the Court

Upon the following papers numbered 1 to 24 read upon these motions for summary judgment: Notice of Motion and supporting papers (001), 1 - 8; Notice of Cross Motion and supporting papers (002), 9 - 14; Answering Affidavits and supporting papers, 15 - 16; 17 - 18; Replying Affidavits and supporting papers, 19 - 24; it is

ORDERED that motion (001) by the plaintiff, Cesar A. Rodriguez, pursuant to CPLR 3212 for summary judgment on the basis that he bears no liability for the occurrence of the accident, is granted; and it is further

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

ORDERED that motion (002) by the defendant, Lillian E. Hurski, pursuant to CPLR 3212 for summary judgment dismissing the complaint asserted against her on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d), is denied.

In this action premised upon the alleged negligence of the defendant, Lillian E. Hurski, the plaintiff, Cesar A. Rodriguez, seeks damages for personal injuries which he claims to have sustained on March 12, 2011, on Route 25 at its intersection with 50 Acre Road, in Smithtown, New York, when his vehicle was struck in the rear by the vehicle operated by defendant.

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 (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). 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 motion (001), the plaintiff seeks summary judgment dismissing the complaint on the basis that he bears no liability for the occurrence of the accident, and supports this application with, inter alia, his affidavit; uncertified copy of the MV 104 Police Accident report; copies of the summons and complaint, answer, and plaintiff's verified bill of particulars; and an unsigned transcript of the defendant's examination before trial which was not objected to by the defendant, and is considered.

In his affidavit, Cesar Rodriguez avers that on March 12, 2011 at approximately 3 p.m., he was operating his vehicle eastbound on Middle Country Road (Route 25), in Smithtown, at or near its intersection with 50 Acre Road. Due to traffic, the vehicles traveling in front of his eastbound vehicle came to a stop. He then brought his vehicle to a stop, and after having been stopped for several seconds, the rear of his vehicle was struck by the front of the defendant's vehicle.

At her examination before trial, the defendant stated that she was traveling eastbound on Route 25 at about 3 p.m. on March 12, 2011. Traffic was heavy, sort of stop and go. She was traveling behind the truck in front of her for about a half mile when the front bumper of her car struck the rear bumper of the plaintiff's truck with a hard impact, totaling her car. She did not know if her vehicle was moving at the time it struck the plaintiff's vehicle, then stated that her car was moving about five miles per hour. She did not know if the plaintiff's vehicle was stopped at the time of the impact, and stated that she did not know she was going to hit it. She last saw the plaintiff's vehicle a couple of seconds before the impact, and thought the plaintiff might have stopped due to traffic. She had dropped her pocketbook and went to pick it up when she hit the plaintiff's vehicle.

Here, the plaintiff has established prima facie entitlement to summary judgment in his favor on the issue of liability. When a driver approaches another vehicle from the rear, he is bound to maintain a reasonably safe rate of speed, to maintain control of his vehicle and to use reasonable care to avoid colliding with the other vehicle (***Chepel v Meyers,*** 306 AD2d 235, 762 NYS2d 95 [2003]; ***Power v Hupart,*** 260 AD2d 458, 688 NYS2d 194 [1999]; *see also* Vehicle and Traffic Law § 1129[a]). The plaintiff has demonstrated prima facie entitlement to summary judgment on the issue of liability by showing that this was a rear-end collision, that the plaintiff's vehicle was stopped at the time of the impact, and that the defendant failed to maintain control of her vehicle, failed to use reasonable care to avoid colliding with the plaintiff's vehicle, and was inattentive as she was picking up her pocketbook which had fallen, causing her to strike the rear of the plaintiff's vehicle.

In opposition, the defendant has failed to raise a factual issue or to come forward with a non-negligent explanation for the occurrence of the accident and her failure to see the plaintiff's vehicle prior to striking it in the rear. A driver, as a matter of law, is charged with seeing what there is to be seen on the road, that is, what should have been seen, or what is capable of being seen at the time (***People of the State of New York v Anderson,*** 7 Misc3d 1022A, 801 NYS2d 238 [City Ct, Ithaca 2005]). Here, the defendant testified that she never saw the plaintiff's vehicle stop prior to striking it in the rear with the front of her vehicle. She had last seen his vehicle seconds before the impact, but dropped her pocketbook and was picking it up when she struck the plaintiff's vehicle. Thus, the defendant has not come forward with a non-negligent explanation with regard to the operation of her vehicle to preclude summary judgment. Although an attorney's affirmation was submitted in opposition to plaintiff's motion, the affidavit of an attorney lacking personal knowledge of the events giving rise to the cause of action or defenses without setting forth evidentiary facts, cannot support or defeat a motion for summary judgment (***Olan v Farrell Lines, Inc.,*** 64 NY2d 1092, 481 NYS2d 370 [1985]). Consequently, the defendant failed to meet the burden of establishing through admissible evidentiary proof, the existence of a triable issue of fact sufficient to defeat summary judgment on the issue of liability.

Accordingly, motion (001) is granted on the issue of liability in favor of the plaintiff.

In motion (002), the defendant 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). In support of this application, the defendant has submitted, inter alia, an attorney's affirmation; copies

of the summons and complaint, answer, and plaintiff's verified bill of particulars; the sworn reports of Lee Kupersmith, M.D. dated June 12, 2012 concerning his independent orthopedic examination of the plaintiff, and Alan B. Greenfield, M.D. dated October 20, 2012, concerning his independent radiological review of the MRI of plaintiff's left shoulder of March 24, 2011; cervical spine MRI of September 25, 2008; lumbar spine MRI dated September 29, 2008; x-ray of the plaintiff's left knee dated April 14, 2011; and the unsigned but certified copy of the transcript of the examination before trial of the plaintiff dated April 10, 2012, to which the plaintiff has not objected. It is noted that the defendant submitted in his reply copies of the MRI reports of the plaintiff's lumbar spine dated September 29, 2008; cervical spine dated September 25, 2008; and left shoulder dated March 24, 2011, as well as an x-ray of the left knee dated April 14, 2011 rather than providing the same in the moving papers. Thus, the plaintiff was precluded from responding to defendant's additional arguments not proffered in the moving papers.

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*).

As a result of this accident, the plaintiff alleges to have sustained injuries consisting of straightening of the cervical curvature with posterior bulge at C5-6; posterior bulges at L4-5 and L5-S1; lateral outlet stenosis impingement related tendinosis and peritendinitis of the supraspinatus and infraspinatus tendons, articular surface partial thickness tear supraspinatus tendon at the footplate; acromioclavicular joint arthrosis with a subacromial and subdeltoid synovitic bursitis; glenohumeral joint arthrosis with small joint effusion; left knee join effusion pooling lateral to the distal femur; suspect sprain of the anterior cruciate ligament, menisco-capsular separation and tearing the posterior horn of the medial meniscus; trigger point injections; examination under anesthesia, diagnostic arthroscopy of the right knee; shaving chondroplasty of the medial condole chondral defect flap tear; postoperative injections of Marcaine; examination under anesthesia of the left shoulder with diagnostic arthroscopy of the left shoulder; partial synovectomy; shaving and debridement of the partial biceps tendon tear; partial anterosubacromial space; arthroscopic assisted full thickness rotator cuff repair with an Opus ArthroCare; left knee medical femoral condole condral flap tear; left shoulder partial rotator cuff tear; left shoulder tendinitis and impingement of the cervical spine sprain/strain; lumbosacral spine sprain/strain; left elbow lateral humeral epicondlyitis; possible left elbow cubical tunnel syndrome; left knee internal derangement; C5-6 radiculopathy with lumbar manipulation under anesthesia in July 2011, and lumbar/thoracic epidural asteroidal injections with Lidocaine on March 16, 2011 and May 4, 2011; cervical, thoracic, thoracolumbar spine; left knee pain; and left shoulder pain.

Upon review of the evidentiary submissions, it is determined that the defendant has not established prima facie entitlement to 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). It is further determined that the moving papers raise triable issues of fact which preclude summary judgment.

Dr. Kupersmith set forth the various medical records which he reviewed, and stated that there were no additional records available for his review. It is unknown whether the opinion of Dr. Kupersmith would be affected in any way if he were to review the entirety of the plaintiff's medical records, including the various MRI and x-ray reports performed on the plaintiff subsequent to this accident, thus raising factual issues. It is noted that upon examination of the plaintiff's left knee, Dr. Kupersmith found a deficit of 20 degrees in his range of motion finding, but does not comment upon this deficit, its cause, or whether it is causally related to the subject accident. Dr. Kupersmith further stated that there were no objective findings to substantiate the plaintiff's subjective complaints, however, a deficit in range of motion is considered an objective finding, thus raising factual issues with respect to Dr. Kupersmith's statement in his report. Dr. Kupersmith does not comment upon the duration of this limitation of motion in the plaintiff's left knee or its permanency, as required

(***Estella v Geico Insurance Company***, 102 AD3d 730, 959 NYS2d 210 [2d Dept 2013]; ***Partlow v Meehan***, 155 AD2d 647, 548 NYS2d 239 [2d Dept 1989]). Dr. Kupersmith does not comment on the injuries claimed relative to the plaintiff's left knee and left shoulder arthroscopy, and whether the need for such surgeries was causally related to the subject accident. Although he states that the plaintiff is status post left shoulder and left knee arthoscopies-improved, he does not state what is meant by the word "improved" or indicate that the plaintiff has achieved full recovery. He does not rule out that any of the claimed cervical and lumbar disc herniations are causally related to the accident.

While Dr. Greenfield reviewed prior MRIs of plaintiff's cervical and lumbar spine MRI of September 25, 2008 and September 29, 2008, respectively, he has not stated that he reviewed the cervical and lumbar spine MRIs taken after the subject accident, nor has he compared the same, raising further factual issues which preclude summary judgment. Additionally, the plaintiff's cervical spine MRI report submitted in defendant's reply demonstrates an additional disc herniation at C3-4, not mentioned by Dr. Greenfield concerning his review of the cervical MRI of September 25, 2008. Dr. Greenfield has not submitted copies of the original MRI reports generated by the plaintiff's examining physician for this court's review, thus raising factual issues concerning whether his opinion or impression is consistent with the impression set forth in the original report. 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 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]; ***Hornbrook v Peak Resorts,*** Inc. 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]).

Although the plaintiff has alleged that he suffered cervical radiculopathy as a result of this accident, no report from a neurologist who examined the plaintiff on behalf of the moving defendant has been submitted to rule out this claimed neurological/radicular injury (*see* ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]), thus raising factual issues precluding summary judgment.

It is further noted that the defendant's examining physicians did not examine the plaintiffs during the statutory period of 180 days following the accident, thus rendering the defendant's physicians' affidavits insufficient to demonstrate entitlement to summary judgment on the issue of whether the plaintiffs were unable to substantially perform all of the material acts which constituted her usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (***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]), and the experts offer no opinion with regard to this category of serious injury (*see* ***Delayhaye v Caledonia Limo & Car Service, Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]). The plaintiff testified that the day following the accident he began to experience pain in his left shoulder and left knee, back, and neck. His doctor sent him for MRI studies for those parts of his body. He received physical therapy four days a week for five months,

then three days a week on an ongoing basis. He underwent surgery on his knee on May 5, 2011, and shoulder in June 2011. He also received injections into his back on March 16, 2011 and May 4, 2011 under anesthesia. He experiences pain in his left knee if he tries to run or uses stairs, and has pain in his back if he sits for more than thirty minutes. He has pain in his neck everyday. He has not been able to play soccer due to the pain in his left knee and back. He testified that it is hard to do things.

Based upon the foregoing, the defendant has failed to demonstrate entitlement to summary judgment on either category of injury defined in 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 moving party 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, motion (002) by the defendant for summary judgment dismissing the complaint on the basis that the plaintiffs did not suffer serious injury as defined by Insurance Law §5102 (d) is denied.

Dated: 4/23/2013

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

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