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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE FREDERICK D.R. SAMPSON IA Part 31
Justice

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JASBIR S. JUDGE and SUKHWINDER JUDGE

Plaintiffs,

-against-

SIMA L. HOCH, BENJAMIN HOCH, and ELVIS SOOKCHAN,

Defendants.

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Index Number 25986 2009

Motion Date October 6, 2011

Motion Cal. Number 34

Motion Seq. No. 1

The following papers numbered 1 to 29 read on this motion by plaintiffs pursuant to CPLR 3212 for summary judgment on the issue of liability against defendants Sima L. Hoch and Benjamin Hoch and on these cross motions by defendant Elvis Sookchan for summary judgment in his favor dismissing plaintiffs' complaint and all cross claims against him, and by defendants Sima L. Hoch and Benjamin Hoch pursuant to CPLR 602(a) to consolidate or join this action for trial with another action arising out of the same sued-upon event and presenting common questions of law and fact, and pursuant top CPLR 3212, for summary judgment dismissing plaintiffs' complaint in its entirety on the ground that plaintiff Jasbir S. Judge did not sustain a serious injury as defined by Insurance Law § 5102(d) as a result of the subject vehicular collision.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-4
Notices of Cross Motion - Affidavits - Exhibits	5-14
Answering Affidavits - Exhibits	15-25
Reply Affidavits	26-29

Upon the foregoing papers it is ordered that the motion and cross motions are determined as follows:

This action arises out of a three-vehicle chain collision on the southbound Van Wyck Expressway in Queens County, New York. The evidence submitted herein by plaintiffs and defendant Sookchan demonstrates that the vehicles of both plaintiff Jasbir S. Judge and defendant Sookchan were stopped in traffic when a vehicle owned by defendant Benjamin Hoch and operated by defendant Sima L. Hoch struck defendant Sookchan's vehicle in the rear, propelling it into the vehicle owned and operated by plaintiff Jasbir S. Judge.

A rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability with respect to the operator of the moving vehicle and imposes a duty on that operator to come forward with an adequate, non-negligent explanation for the collision. (*See Hakakian v McCabe*, 38 AD3d 493 [2007]; *see also Emil Norsic & Son, Inc. v L.P. Transportation, Inc.*, 30 AD3d 368 [2006]; *Neidereger v Misuraca*, 27 AD3d 537 [2006].) If the operator of the moving vehicle cannot come forward with evidence to rebut the inference of negligence with a non-negligent explanation, the driver of the lead vehicle may properly be awarded judgment as a matter of law. (*See Celentano v Moriarty*, 75 AD3d 572[2010]; *see also Hauser v Adamov*, 74 AD3d 1024 [2010]; *Davidoff v Mullokandov*, 74 AD3d 862 [2010].) Evidence that a vehicle was rear-ended and propelled into the stopped vehicle in front may provide a sufficient non-negligent explanation. (*See Franco v Breceus*, 70 AD3d 767 [2010]; *see also Ortiz v Haidar, 68 AD3d 953* [2009]; *Katz v Masada II Car & Limo Serv., Inc.*, 43 AD3d 876 [2007].)

In this case, plaintiffs met their initial burden of demonstrating their entitlement to partial summary judgment as a matter of law in their favor and against defendants Sima L. Hoch and Benjamin Hoch on the issue of liability by submitting competent evidence that the vehicles of plaintiff Jasbir S. Judge and defendant Sookchan were both stopped when defendant Sookchan's vehicle was struck in the rear by the vehicle operated by defendant Sima L. Hoch. Defendants Sima L. Hoch and Benjamin Hoch, in opposition, failed to raise a triable issue of fact. Summary judgment cannot be defeated by "mere conclusions, expressions of hope or unsubstantiated allegations or assertions." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Even if defendant Sookchan suddenly stopped, as the Hoch defendants contend, a claim that the driver of the lead vehicle made a sudden stop is insufficient by itself to rebut the presumption of negligence. (*See Shirman v Lawal*, 69 AD3d 838 [2010]; *see also Mallen v Su*, 67 AD3d 974 [2009]; *Neidereger v Misuraca*, *supra*.) Accordingly, plaintiffs' motion for partial summary judgment in their favor and against defendants Sima L. Hoch and Benjamin Hoch on the issue of liability is granted.

Defendant Sookchan also met his burden of demonstrating his entitlement to judgment as a matter of law by submitting competent evidence which provides a non-negligent explanation for the rear-end collision with plaintiff Jasbir S. Judge's vehicle in front, that is, Sookchan's stopped vehicle was struck in the rear by the vehicle operated by defendant Sima L. Hoch and propelled into plaintiff Jasbir S. Judge's stopped vehicle. (*See Katz v Masada II Car & Limo Serv., Inc.*, *supra.*) Plaintiffs do not oppose defendant Sookchan's cross motion, and defendants Sima L. Hoch and Benjamin Hoch fail to raise a triable issue of fact in opposition to the cross motion. Their claim of sudden stop by defendant Sookchan does not rebut the inference of negligence. (*See Shirman v Lawal*, *supra*.) Accordingly, defendant Sookchan's cross motion for summary judgment in his favor is granted and plaintiffs' complaint and all cross claims against him are dismissed.

Defendants Sima L. Hoch and Benjamin Hoch failed to make a prima facie showing that plaintiff Jasbir S. Judge did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident. In support of this branch of their cross motion, defendants Sima L. Hoch and Benjamin Hoch submitted, among other things, the affirmed reports of their examining physician, Edward A. Toriello, and plaintiffs' bill of particulars. Dr. Toriello found that plaintiff Jasbir S. Judge had restriction of motion in extension of his lumbosacral spine two years after the subject accident. (*See Volpetti v Yoon Kap*, 28 AD3d 750 [2006]; *see also McDowall v Abreu*, 11 AD3d 590 [2004]; *Cordero v Salazar*, 10 AD3d 380 [2004].) Dr. Toriello's reports, therefore, raise issues of fact as to whether the injured plaintiff suffered a significant limitation of use of a body function or system. (*See* Insurance Law § 5102[d]; *see also Velazquez v Quijada*, 269 AD2d 592 [2000]; *Ledermann v Dalgish*, 254 AD2d 176 [1998].) In light of these findings by their expert, defendants Sima L. Hoch and Benjamin Hoch did not meet their initial burden on the branch of their cross motion for summary judgment. (*See McDowall v Abreu*, *supra*.) Since defendants Sima L. Hoch and Benjamin Hoch failed to meet their initial burden of establishing a prima facie case that plaintiff Jasbir S. Judge did not sustain a serious injury, it is not necessary to consider whether plaintiffs' opposition papers are sufficient to raise a triable issue of fact. (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *see also McDowall v Abreu*, *supra*; *Coscia v 938 Trading Corp.*, 283 AD2d 538 [2001].) In any event, plaintiffs, in opposition, presented competent evidence raising triable issues of fact on the 90/180 category, as well as, to whether plaintiff Jasbir S. Judge sustained a serious injury under the permanent, consequential, and/or significant limitation of use categories of Insurance Law § 5102(d) to his lumbar spine as a result of the accident. (*See Pearce v Olivera-Puerto*, 73 AD3d 879 [2010]; *see also Valeus v Sanon*, 66 AD3d 879 [2009]; *Noel v Choudhury,* 65 AD3d 1316 [2009].) This evidence includes the sworn report of plaintiff Jasbir S. Judge's examining and treating physician, Dr. Richard J. Mills, noting decreased range of motion and spasm in plaintiff Jasbir S. Judge's lumbar spine contemporaneous with the 2008 accident, and specifying decreased range of motion in his lumbar spine, as well as

spasm, as evidenced by objective medical findings, including straight-leg raising and range of motion tests performed at a recent examination, along with evidence of L4-L5disc bulge as confirmed by magnetic resonance imaging reports.[1] (*See Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002]; *see also Hyun Jun Kim v Collazo*, 38 AD3d 842 [2007]; *Clervoix v Edwards*, 10 AD3d 626 [2004].) Dr. Mills also asserted that plaintiff Jasbir S. Judge's injuries are permanent and causally related to the subject motor vehicle accident. (*See Arias v Janelle Car Service Corp.*, 72 AD3d 848 [2010]; *see also Bachan v Paratransit*, 71 AD3d 610 [2010]; *Clervoix v Edwards*, *supra*.) The evidence also includes plaintiff Jasbir S. Judge's testimony that he has only been able to work part-time driving his cab since the accident due to his injuries, which was also noted in the submitted medical records. Accordingly, the branch of the cross motion of defendants Sima L. Hoch and Benjamin Hoch for summary judgment dismissing plaintiffs' complaint is denied.

Finally, defendants Sima L. Hoch and Benjamin Hoch seek to consolidate this action for joint trial with another action in this Court under Index Number 14809/10 brought by defendant Elvis Sookchan against plaintiff Jasbir S. Judge and defendants Sima L. Hoch and Benjamin Hoch seeking damages for personal injuries allegedly sustained by Sookchan in the subject motor vehicle accident. A motion to consolidate actions for joint trial pursuant to CPLR 602(a) rests in the sound discretion of the trial court. Absent a showing of prejudice to a substantial right by a party opposing the motion, consolidation should be granted where common questions of law or fact exist. *(See Nationwide Assoc., Inc. v Targee Street Internal Medical Group, P.C.*, 286 AD2d 717 [2001]; *see also Gadelov v Shure*, 274 AD2d 375 [2000]; *Mattia v Food Emporium, Inc.*, 259 AD2d 527 [1999].)

This action and the Sookchan action arise from the same occurrence and clearly raise common questions of law and fact. In addition, no prejudice to a substantial right would result from consolidation. Although the Sookchan action is currently stayed pending completion of discovery pursuant to a so-ordered stipulation of the Honorable Martin E. Ritholtz, dated November 1, 2011, only limited discovery remains and that action soon will be ready for trial. Thus, the actions should be tried jointly. Accordingly, the branch of the cross motion of defendants Sima L. Hoch and Benjamin Hoch to consolidate is granted and the aforementioned actions shall be tried jointly in this Court and separate Index Numbers, Requests for Judicial Intervention (RJI), and Notes of Issue shall be filed for each.

The title of the actions combined for joint trial shall be:

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[1] Dr. Mills reliance on unsworn MRI reports was proper since they were referred to and relied upon by the Hoch defendants' examining physician. (*See Ayzen v Melendez*, 299 AD2d 381 [2002].)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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JASBIR S. JUDGE and SUKHWINDER JUDGE,

Plaintiffs,

Action No. 1
Index No. 25986/09

against -

SIMA L. HOCH, BENJAMIN HOCH and ELVIS SOOKCHAN,

Defendants.

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ELVIS SOOKCHAN,

Plaintiff,

Action No. 2
Index No. 14809/10

- against -

JASBIR S. JUDGE, SIMA L. HOCH and BENJAMIN HOCH,

Defendants.

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A copy of this order with notice of entry shall be served on all parties to the actions combined, the Clerk of Queens County and, at the time of the filing of a Note of Issue, on the Clerk of the Trial Term Office.

Dated: January 20, 2012

J.S.C.