SHORT FORM ORDER

INDEX No. 09-40640
CAL. No. 11-00297MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 6-14-11 (#001)
MOTION DATE 7-19-11 (#002)
ADJ. DATE 8-10-11
Mot. Seq. # 001 - MD
002 - XMD

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MICHAEL ROMAGNOLO,

Plaintiff,

- against -

PAMELA AHREM AND ROBERT T. AHREM,

Defendants.

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MICHAEL S. LANGELLA, P.C.
Attorney for Plaintiff
2459 Ocean Avenue
Ronkonkoma, New York 11779

JOHN C. BURATTI & ASSOCIATES
Attorney for Defendants
150 Broadway, Suite 140
New York, New York 10038

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendants, dated May 20, 2011, and supporting papers (including Memorandum of Law dated _____); (2) Affirmation in Opposition by the plaintiff, dated July 28, 2011, and supporting papers; (3) Reply Affirmation by the plaintiff, dated August 2, 2011, and supporting papers; (4) Reply Affirmation by the defendants, dated July 28, 2011, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that this motion by defendants Pamela Ahrem and Robert Ahrem seeking summary judgment dismissing plaintiff's complaint is denied; and it is further

ORDERED that this cross motion by plaintiff Michael Romagnolo seeking summary judgment in his favor on the issue of liability is denied.

Plaintiff Michael Romagnolo commenced this action against defendants Pamela Ahrem and Robert Ahrem to recover damages for injuries he allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Patchogue-Holbrook Road and Union Avenue in the Town of Brookhaven on July 6, 2008. It is alleged that plaintiff's vehicle, which was traveling southbound on Patchogue-Holbrook Road, was struck on the driver's side by the vehicle owned by defendant Pamela Ahrem and operated by defendant Robert Ahrem when the Ahrem vehicle attempted to make a left turn from northbound Patchogue-Holbrook Road onto Union Avenue. By his bill of particulars, plaintiff

alleges that he sustained various personal injuries as a result of the subject accident, including a radial head fracture with medial epicondylitis of the left elbow, left foot plantar fascitis, and left knee patella tendinitis. Plaintiff further alleges that as a result of the injuries he sustained due to the incident he was confined to his home for approximately five weeks, and that he missed approximately five to six weeks from his employment as a bartender.

Defendants now move for summary judgment on the basis that the injuries plaintiff alleges to have sustained as a result of the subject accident do not meet the "serious injury" threshold requirement of Insurance Law § 5102(d). Defendants, in support of the motion, submit copies of the pleadings, plaintiff's deposition transcript, uncertified copies of plaintiff's medical records from Southside Hospital, and the sworn medical reports of Lee Kupersmith, M.D., and Michael Winn, M.D. At defendants' request, Dr. Kupersmith conducted an independent orthopedic examination of plaintiff on November 16, 2010 and Dr. Winn performed an independent radiological review of the X-ray of plaintiff's left elbow on June 8, 2010.

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (***Dufel v Green***, 84 NY2d 795, 798, 622 NYS2d 900 [1995]; *see also* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Porcano v Lehman***, 255 AD2d 430, 680 NYS2d 590 [2d Dept 1988]; ***Nolan v Ford***, 100 AD2d 579, 473 NYS2d 516 [1984], *aff'd* 64 NYS2d 681, 485 NYS2d 526 [2d Dept 1984]).

Insurance Law § 5102 (d) defines a "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.***, *supra*; ***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, [such as], 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 may also 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]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; ***Torres v Micheletti***, 208 AD2d 519,616 NYS2d 1006 [2d Dept 1994]). Once a defendant has met this

burden, the plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see* ***Dufel v Green***, *supra*; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [4th Dept 2003]; ***Pagano v Kingsbury***, *supra*). However, if a defendant does not establish a prima facie case that the plaintiff's injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff's opposition papers (*see* ***Burns v Stranger***, 31 AD3d 360, 819 NYS2d 60 [2d Dept 2006]; ***Rich-Wing v Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2d Dept 2005]; *see generally* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Based upon the adduced evidence, defendants established, prima facie, their entitlement to judgment as a matter of law that the injuries plaintiff allegedly sustained as a result of the subject accident fail to meet the serious injury threshold requirement of Insurance Law § 5102(d) (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***DeJesus v Cruz***, 73 AD3d 539, 902 NYS2d 503 [1st Dept 2010]; ***Singh v City of New York***, 71 AD3d 1121, 898 NYS2d 218 [2d Dept 2010]). Defendant's examining orthopedist, Dr. Kupersmith, in his medical report states that an examination of plaintiff's left elbow, knee, and ankle revealed that he has full ranges of motion in those areas, and that there was no evidence of tenderness, effusion or swelling. Dr. Kupersmith opines that the contusions that plaintiff sustained to his left elbow, knee, and ankle as a result of the subject accident have resolved. Dr. Kupersmith states that plaintiff's patella tendinitis also has resolved, and that based upon his review of the X-ray reports concerning plaintiff's left elbow, he did not find any evidence of a left elbow radial head fracture. Dr. Kupersmith further states that plaintiff does not have any objective evidence of an orthopedic disability as a result of the subject accident. Likewise, Dr. Winn states in his medical report that the X-ray examination of plaintiff's left elbow does not reveal any evidence of a fracture or dislocation, or joint effusion, and that the joint spaces of plaintiff's left elbow are well maintained. Dr. Winn further states that there are no findings on the X-ray examination of plaintiff's left elbow that are causally related to the subject accident.

Furthermore, reference to plaintiff's own deposition testimony sufficiently refutes the "90/180" category under Insurance Law § 5102(d) (*see* ***Jack v Acapulco Car Serv., Inc.***, 63 AD3d 1526, 897 NYS2d 648 [4th Dept 2010]; ***Bleszcz v Hiscock***, 69 AD3d 639, 894 NYS2d 481 [2d Dept 2010]; ***Lopez v Abdul -Wahab***, 67 AD3d 598, 889 NYS2d 178 [2d Dept 2009]; ***Kuchero v Tabachnikov***, 54 AD3d 729, 864 NYS2d 459 [2d Dept 2008]).

Therefore, defendants have shifted the burden to plaintiff to come forward with evidence in admissible form to raise a material triable issue of fact as to whether he sustained an injury within the meaning of the Insurance Law (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). To recover under the "limitations of use" categories, a plaintiff must present objective medical evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration (*see* ***Magid v Lincoln Servs. Corp.***, 60 AD3d 1008, 877 NYS2d 127 [2d Dept 2009]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]; ***Meyers v Bobower Yeshiva Bnei Zion***, 20 AD3d 456, 797 NYS2d 773 [2d Dept 2005]). 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 may also suffice (*see*

Toure v Avis Rent A Car Systems, Inc., *supra*; ***Dufel v Green***, *supra*). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]). Further, evidence of pain and discomfort alone, unsupported by credible medical evidence that diagnoses and identifies the injuries, is insufficient to sustain a finding of serious injury (*see* ***Scheer v Koubek***, 70 NY2d 678, 518 NYS2d 788 [1987]). Unsworn medical reports of a plaintiff's examining physician or chiropractor are insufficient to defeat a motion for summary judgment (*see* ***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]). However, a plaintiff may rely upon unsworn MRI reports if they have been referred to by a defendant's examining expert (*see* ***Caulkins v Vicinanzo***, 71 AD3d 1224, 895 NYS2d 600 [3d Dept 2010]; ***Ayzen v Melendez***, 299 AD2d 381, 749 NYS2d 445 [2d Dept 2002]).

Plaintiff opposes the motion on the grounds that he sustained injuries within the "limitations of use" categories of the Insurance Law as a result of the subject accident, and that defendants failed to meet their prima facie burden on the motion. More particularly, plaintiff contends that he sustained a fracture to his left elbow as a result of the subject accident. Plaintiff, in opposition to the motion, submits the sworn medical reports of Philip Schrank, M.D., and Gabriel Gelves, M.D., and a copy of his medical records from Southside Hospital.

In opposition to defendants' prima facie showing, plaintiff has come forward with admissible evidence that raises a triable issue of fact as to whether he sustained an injury within the limitations of use categories of Insurance Law § 5102(d) (*see* ***Pommells v Perez.***, *supra*, ***Licari v Elliott***, *supra*; ***Harris v Boudart***, 70 AD3d 643, 893 NYS2d 631 [2d Dept 2010]). Plaintiff, in opposition, primarily relies upon the affirmation of Dr. Schrank, his treating orthopedic physician. In his medical report., Dr. Schrank states that he began treating plaintiff on July 9, 2009, for left elbow pain and left ankle pain, and continued to treat him until November 25, 2009. Dr. Schrank states that an examination of plaintiff's left upper extremity revealed left elbow tenderness over the antecubital fossa, a decreased range of motion in his left upper extremity, tenderness upon palpation to the lateral and medial epicondyle, and radial head tenderness. Dr. Schrank states that an examination of plaintiff's left lower extremity revealed tenderness over the inferior pole of the patella and the distal tib-fib ligament. Dr. Schrank opines that plaintiff sustained a left elbow radial head fracture, a left ankle medial contusion, and left knee patella tendinitis as a result of the subject accident. Similarly, Dr. Gelves states in his medical report that his review of plaintiff's left elbow X-ray films reveals that plaintiff sustained a cortical fracture of his left elbow as a result of the subject accident. Additionally, plaintiff's medical reports from Southside Hospital Emergency Room Department indicate that plaintiff sustained a closed radial head fracture of the left elbow and left knee contusion.

Thus, the affirmed medical reports of plaintiff's experts conflict with those of defendants' experts, who found that plaintiff did not sustain a fracture to his left elbow and that any contusions sustained in the subject accident were resolved. "Where conflicting medical evidence is offered on the issue of whether a plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury" (***Noble v Ackerman***, 252 AD2d 392, 395, 675 NYS2d 86 [1st Dept 1998]; *see* ***Johnson v Garcia***, 82 AD3d 561, 919 NYS2d 13 [1st Dept 2011]; ***LaMasa v Bachman***, 56 AD3d 340, 869 NYS17 [1st Dept 2008]; ***Ocasio v Zorbas***, 14 AD3d 499, 789 NYS2d 166 [2d Dept 2005]; ***Reynolds v Burghezi***, 227 AD2d 941, 643 NYS2d 248 [4th Dept 1996]). Moreover, "where [a]

plaintiff establishes that at least some of his injuries meet the 'no-fault' threshold, it is unnecessary to address whether his proof with respect to other injuries he allegedly sustained would have been sufficient to withstand [defendants'] motion for summary judgment" (***Linton v Nawaz***, 14 NY3d 821, 822, 900 NYS2d 239 [2010]; *see* ***Rubin v SMS Taxi Corp.***, 71 AD3d 548, 898 NYS2d 110 [1st Dept 2010]). Accordingly, defendants' motion for summary judgment dismissing plaintiff's complaint is denied.

Plaintiff cross-moves for summary judgment in his favor on the issue of liability, arguing that Robert Ahrem's disregard of the red light controlling his direction of travel, in violation of Vehicle and Traffic Law § 1111(d)(1), was the sole proximate cause of the subject accident. Plaintiff, in support of the cross motion, submits copies of the parties' deposition transcripts, photocopies of the Ahrem vehicle, and an affidavit from nonparty witness Rose Sidoti. Defendants oppose the motion on the ground that plaintiff failed to establish that he had the green light in his favor at the time of the accident or that Robert Ahrem's operation of his vehicle contributed to the subject accident's occurrence. Defendants, in opposition to the motion, submit Robert Ahrem's deposition transcript.

The conduct of motorists at a traffic signal is governed by Vehicle and Traffic Law § 1111, and not the more general provisions of the Vehicle and Traffic Law, such as those set forth in §§ 1140 or 1141, which govern the conduct of drivers at intersections that are not controlled by traffic lights (*see* ***Dicke v Anci***, 31 AD3d 696, 821 NYS2d 93 [2d Dept 2006]; ***Saggio v Ladone***, 21 AD3d 407,799 NYS2d 586 [2d Dept 2005]; ***Rudolph v Kahn***, 4 AD3d 408, 771 NYS2d 370 [2d Dept 2004]). Section 1111(d)(1) of the Vehicle and Traffic Law allows a driver approaching an intersection with a green traffic signal to proceed through the intersection, provided he or she yields the right of way to vehicles lawfully within the intersection, and exercises reasonable care under the circumstances to avoid a collision (*see* ***Tapia v Royal Tours Serv., Inc.***, 67 AD3d 894, 889 NYS2d 225 [2d Dept 2009]; ***Schiskie v Fernan***, 277 AD2d 441, 716 NYS2d [2d Dept 2000]; ***Siegel v Sweeney***, 266 AD2d 200, 697 NYS2d 317 [2d Dept 1999]; *see generally* ***Shea v Judson***, 283 NY 393, 28 NE2d 885 [1940]). A motorist facing a steady green light has the right to assume that the light is red for cross traffic, and that such traffic will obey the law by stopping for the red light and remaining stationary until the light has changed to green (*see* ***Baughman v Libasci***, 30 AD2d 696, 292 NYS2d 588 [2d Dept 1968]). Moreover, a driver is not required to reduce his or her speed at every intersection, and only is required to employ such reductions where warranted by the prevailing traffic conditions (*see* VTL § 1180(a)(e); ***Wallace v Kuhn***, 23 AD3d 1042, 804 NYS2d 187 [4th Dept 2005]; ***Barile v Carroll***, 280 AD2d 988, 720 NYS2d 674 [4th Dept 2001]). However, a driver proceeding under a green light is not permitted to blindly and wantonly enter an intersection without keeping a proper lookout or employing a reasonable speed (*see* ***Nuziale v Paper Transp. of Green Bay Inc.***, 39 AD3d 833, 835 NYS2d 316 [2d Dept 2007]).

Plaintiff, based upon his submissions, established a prima facie case that Robert Ahrem's negligence was the proximate cause of the subject accident (*see* VTL § 1111 (d)(1); ***Deleg v Vinci***, 82 AD3d 1146, 919 NYS2d 396 [2d Dept 2011]; ***Monteleone v Jung Pyo Hong***, 79 AD3d 988, 913 NYS2d 755 [2d Dept 2010]; ***Pitt v Alpert***, 51 AD3d 650, 857 NYS2d 661 [2d Dept 2008]; ***Borges v Zukowski***, 22 AD3d 439, 801 NYS2d 544 [2d Dept 2005]). Plaintiff's evidence was sufficient to demonstrate that Robert Ahrem proceeded through the subject intersection against the red light, without stopping, and struck plaintiff's vehicle. At his deposition, plaintiff testified that he was traveling in the

right lane of Patchogue-Holbrook Road, that the light was green, that no vehicles were ahead of his vehicle, and that he did not change lanes prior to the subject accident's occurrence. Plaintiff further testified that the Ahrem vehicle was in the left lane of southbound Patchogue-Holbrook Road when he first observed the Ahrem vehicle, approximately five seconds before the accident happened. In addition, Rose Sidoti in her affidavit avers that she witnessed the accident while she was stopped at a red light facing eastbound on Union Avenue. Sidoti states that she observed defendants' vehicle turn left from the northbound left turning lane, proceeding through a red light at the subject intersection, and that plaintiff's vehicle was unable to avoid colliding with defendants' vehicle, because it was the first vehicle through the intersection. Sidoti further states that she observed approximately six vehicles turn left from the left turning lane prior to the Ahrem vehicle's turn.

Therefore, the burden shifted to defendants to raise a triable issue of fact as to whether plaintiff was negligent, and whether such negligence was a proximate cause of the accident (see ***Packer v Mirasola***, 256 AD2d 394, 681 NYS2d 559 [2d Dept 1998]; *see generally* ***Pucco v Caputo,*** 272 AD2d 387, 707 NYS2d 478 [2d Dept 2000]; ***Hanak v Jani***, 265 AD2d 453, 696 NYS2d 237 [2d Dept 1999]). In opposition to plaintiff's prima facie showing, defendants have raised a triable issue of fact as to whether plaintiff's conduct in the operation of his vehicle may have contributed to said accident's occurrence (*see* ***Anastasi v Terio***, 84 AD2d 992, 924 NYS2d 424 [2d Dept 2011]; ***Kim v Acosta***, 72 AD3d 648, 897 NYS2d 721 [2d Dept 2010]; ***Franzese v Consolidated Dairies, Inc.***, 83 AD3d 775, 920 NYS2d 688 [2d Dept 2011]; ***Cox v Nunez***, 23 AD3d 427, 805 NYS2d 604 [2d Dept 2005]). At his deposition, Robert Ahrem testified that he was traveling northbound on Patchogue-Holbrook Road, that there is a separate traffic light that controls vehicles turning left onto Union Avenue, and that the traffic light was green when he entered the turning lane and proceeded to make his turn. Ahrem testified that there was a vehicle stopped in the left lane of the southbound side of the road, that his view was not obstructed by the stopped vehicle, and that he was able to see approximately "four or five cars back when he looked down the southbound right lane" prior to executing his turn. Ahrem further testified that he did not see plaintiff's vehicle prior to the impact and that the front of his vehicle was in the middle of the right southbound lane when the collision occurred. "There can be more than one proximate cause of an accident" (***Cox v Nunez***, *supra* at 427), and issues of comparative negligence generally are a question for the jury (*see* ***Sokolovsky v Mucip, Inc.***, 32 AD3d 1011, 821 NYS2d 463 [2d Dept 2006]; ***Valore v McIntosh***, 8 AD3d 662, 779 NYS2d 782 [2d Dept 2004]). Additionally, given the conflicting versions as to how the accident actually occurred, issues of credibility have been raised that cannot be determined on a motion for summary judgment (*see* ***Viggiano v Camara***, 250 AD2d 836, 673 NYS2d 714 [2d Dept 1998]; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Accordingly, plaintiff's motion for partial summary judgment is denied.

Dated: 2/2/12

Peter H. Mayer
PETER H. MAYER, J.S.C.