[* 1]

SHORT FORM ORDER

INDEX No. 09-44653
CAL No. 11-01508MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL M. MARTIN
Justice of the Supreme Court

MOTION DATE 8-29-11 (#001)
MOTION DATE 9-28-11 (#002)
ADJ. DATE 11-15-11
Mot. Seq. # 001 - MG
002 - X MD

ANGELO GONZALEZ,

Plaintiff,

- against -

WENDY JO SWINDELL and KRISTINA SWINDELL,

Defendant.

JACOBY & JACOBY, ESQS.
Attorney for Plaintiff
1737 North Ocean Avenue
Medford, New York 11763

RICHARD T. LAU & ASSOCIATES
Attorney for Defendants
300 Jericho Quadrangle, P.O. Box 9040
Jericho, New York 11753

Upon the following papers numbered 1 to 31 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 20 ; Notice of Cross Motion and supporting papers 12 - 20 ; Answering Affidavits and supporting papers 21 - 29 ; Replying Affidavits and supporting papers 30 - 31 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff for an order granting summary judgment in his favor on the issue of liability pursuant to CPLR 3212 is granted; and it is further

ORDERED that the motion by defendants for an order granting summary judgment pursuant to CPLR 3212 dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of the Insurance Law is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff as a result of a rear-end collision which occurred on April 14, 2009 at approximately 4:30 p.m., at the intersection of Grand Boulevard and East Jefryn Boulevard, in the Town of Babylon, New York. The undisputed facts establish that plaintiff was the driver of a Dodge pickup truck which was hit in the rear end by a vehicle owned by defendant Kristina Swindell and operated by defendant Wendy Jo Swindell.

Plaintiff now moves for an order granting summary judgment in his favor on the issue of liability, alleging that there are no triable issues of fact in connection therewith.

Defendants oppose the motion arguing that there are questions of fact as to whether the plaintiff's vehicle was completely stopped or stopping at the time of the collision, and whether plaintiff was negligent in the operation of his vehicle causing it to come to an abrupt stop without warning. Additionally, defendants cross-move for summary judgment dismissing the complaint on the ground that the injuries allegedly sustained by plaintiff fail to satisfy the "serious injury" threshold requirement of Section 5102 (d) of the Insurance Law.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see, **Rotuba Extruders, Inc. v Ceppos***, 46 NY2d 223, 413 NYS2d 141[1978]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797,799 [2d Dept 1988]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see **Alvarez v Prospect Hosp.***, *supra*).

Vehicle and Traffic Law §1129 (a) provides that "[t]he driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway." Therefore, "[v]ehicle stops which are foreseeable under the prevailing conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a [statutory] duty to maintain a safe distance between his or her car and the car ahead" (***Barberena v Budd Enters.***, 299 AD2d 305, 306, 749 NYS2d 147 [2d Dept 2002]; *see also **Malak v Wynder***, 56 AD3d 622, 867 NYS2d 539 [2d Dept 2008]). Moreover, a rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of negligence with respect to the operator of the moving vehicle and imposes a duty on that operator to provide a non-negligent explanation for the collision (*see **Hughes v Bo Cai***, 55 AD3d 675, 866 NYS2d 253 [2d Dept 2008]).

Plaintiff has established that his vehicle was stopped or stopping when it was hit in the rear by defendants' vehicle. Defendants have failed to come forward with a non-negligent explanation for the collision. Defendant Wendy Jo Swindell testified that she was traveling at approximately 30 miles per hour and was two car lengths behind plaintiff's vehicle just prior to the collision. Her testimony revealed that it had stopped raining but that the roads were wet at the time. Defendant Wendy Jo Swindell also indicated that she was unable to see the traffic light at the intersection where the accident took place because plaintiff's "vehicle was kind of almost blocking the view of the traffic light so I did not see the traffic light, what color it was. I was going with the flow of traffic." Taking into account that the roadway was wet and defendant's claim of limited visibility of the traffic light due to the size of

plaintiff's vehicle, it is clear that her allowance of only two car lengths between her vehicle and plaintiff's was insufficient and not reasonable or prudent under the prevailing circumstances. Even if plaintiff brought his vehicle to a sudden and abrupt stop, defendant was under an obligation to keep a safe distance to afford her the ability to stop her vehicle without a collision. Accordingly, plaintiff's motion for summary judgment in his favor on the issue of liability is granted.

Turning next to the defendants' cross motion, in support thereof, they submit copies of the pleadings, the verified bill of particulars, a transcript of plaintiff's deposition, and sworn reports of Michael J. Katz, M.D. and Stephen W. Lastig, M.D. The plaintiff submits, in opposition to the cross motion, an affidavit of Salvatore R. Principe, D.C. as well as his medical records.

A "serious injury" is defined 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 constitutes 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" (Insurance Law § 5102[d]). The Court of Appeals has held that the issue of whether a claimed injury falls within the statutory definition of a "serious injury" is a question of law for the courts in the first instance, which may properly be decided on a motion for summary judgment (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Charley v Goss***, 54 AD3d 569,863 NYS2d 205 [1st Dept 2008]).

In a motor vehicle case, a defendant moving for summary judgment on the issue of whether the plaintiff sustained a serious injury has the initial burden of presenting competent evidence establishing that the injuries do not meet the threshold (*see* ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once this showing has been made, however, the burden shifts to the plaintiff to produce evidentiary proof in admissible form sufficient to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; ***Pagano v Kingsbury***, *supra*; *see also* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

The complaint alleges that plaintiff sustained a serious injury as defined in section 5102(d) of the Insurance Law as a result of the defendant's negligence in causing the accident. Specifically, the bill of particulars alleges that plaintiff sustained the following injuries: disc bulging at L5-S1 where there is a central focally extruded disc herniation in the midline associated with radial annular tear which impresses on the thecal sac and abuts the antermedial margin into the S1 nerve root; posterior disc bulging impinging on the thecal sac at C2-3 though C5-6; lumbar sprain/strain; lumbosacral radiculopathy; cervical radiculopathy; cervical radiculitis; facet arthropathy/syndrome; bilateral L5-S1 nerve root irritation; right C5/C6 nerve root irritation; cervical sprain/strain; and post cervicogenic

headaches. It is further alleged that, as a result of the accident, plaintiff was treated in the emergency room on the date of the accident and that he was partially disabled from the date of the accident to January 26, 2010 (when he lost his job as a result of the accident). The bill of particulars alleges that plaintiff sustained a serious injury within the meaning of the insurance law in that he sustained a permanent and/or partial consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system; and a medically determined injury or impairment of a nonpermanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than ninety days during the one eighty days immediately following the occurrence.

In his report, Dr. Katz avers that he examined the plaintiff on February 1, 2011. He quantified cervical and lumbar spine, right and left shoulders, right and left elbows, right and left hands and lower extremities ranges of motion and compared his findings with normal ranges of motion, concluding that he sustained no limitations. He found that sensation in the C5-T1 innervated dermatomes was intact and that reflex testing revealed that the biceps, triceps, brachioradialis, quadriceps, tibialis posterior and Achilles tendon reflexes were 2+ and symmetric and that Adson's, Babinski, Patrick Lachman's, patellar apprehension, pivot shift and Finkelstein's tests were negative. He noted no presence of paravertebral muscle spasm and no demonstrable clonus. Straight leg raising test was negative. He opined that plaintiff sustained cervical strain with radiculitis and lubrosacral strain with radiculitis which are resolved, and that plaintiff is currently not disabled. He stated that the treatment, as documented in the records he reviewed, including the reports of Salvatore Principe, D.C., appears to be consistent with the injuries diagnosed. Dr. Katz maintains that the MRI reports of the cervical and lumbar spine indicate preexisting degenerative changes and that plaintiff is capable of full time, full duty work as a plumber and steam fitter.

Dr. Lastig, in his report asserts that the MRI study of the lumbar spine revealed degenerative disc disease with disc space narrowing and desiccation at the L5-S1 level, normal position and morphology of the conus medullaris; shallow broad-based midline disc protrusion which displaces epidural fat, but does not deform or displace the thecal sac or traversing S1 nerve roots at L5-S1; unremarkable findings for the remaining lumbar disc spaces; neural foramina appeared patent throughout and unremarkable posterior elements; and, there was no evidence of central lumbar canal stenosis. His impression was that the disc space narrowing and desiccation were the "hallmarks" of degenerative disc disease and, in his opinion, the shallow broad-based midline disc protrusion at L5-S1 was most likely degenerative in origin and unrelated to the April 14, 2009 accident. Defendants have demonstrated their *prima facie* entitlement to judgment as a matter of law by establishing that plaintiff has not sustained serious injuries (*see* ***Toure v Avis Rent A Car Sys.,*** 98 NY2d 345, 746 NYS2d 865 [2002]). The burden of proof, therefore, shifted to plaintiff to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*see* ***Gaddy v Eyler,*** *supra*).

In opposition, plaintiff submits an affidavit and report of his treating chiropractor, Salvatore Principe, D.C. Dr. Principe avows that he first treated plaintiff on April 22, 2009 and last saw him on October 3, 2011. He consistently noted limitations in the lumbar and cervical spine ranges of motion as compared to normal findings using an inclinometer. He also declared that plaintiff is suffering from disc bulging at L5-S1 where there is a central focally extruded disc herniation in the midline associated with radial annular tear which impresses on the thecal sac and abuts the antermedial margin into the S1 nerve

root, and posterior disc bulging impinging on thecal sac at C2-3 through C5-6, as well as bilateral L5-S1 nerve root irritation and right C5-6 nerve root irritation. Dr. Principe avers that the Trendelenburg, Lesagues, Bechterews, Gaenslens, Linders, Nachlas, Ely and Double leg tests were all positive. He avows that the cervical and lumbar injuries of plaintiff are causally related to the accident of April 14, 2009, that plaintiff sustained significant limitations/restrictions of the cervical and lumbar ranges of motion which are permanent in nature, and that plaintiff sustained a permanent partial disability in connection with the injuries he sustained in the accident.

The Court finds that Dr. Principe substantiated plaintiff's claim of serious injury by ascribing a percentage to the degree of limitation and compared the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (*see, **Toure v Avis Rent A Car Sys.**, supra; see also **Dufel v Green,*** 84 NY2d 795, 622 NYS2d 900 [1995]). Additionally, he indicates that plaintiff sustained permanent and significant injuries to the cervical spine at C5-6 which were not addressed by defendants. A triable issue of fact exists as to whether he sustained a serious injury. Accordingly, defendants' motion for summary judgment dismissing the claims of plaintiff against them on the grounds that he has not satisfied the "serious injury" threshold requirement of Insurance Law §5102(d) is denied.

Upon service of a copy of this order with notice of entry, the Calendar Clerk of this Court is directed to place this action on the Calendar Control Part Calendar for the next available date.

Dated: January 25, 2012

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION