SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

HERMINIO CRUZ,

Plaintiff,

- against -

MICHELLE A. WILKINS, STACEY JOHNSON and JOSE RIVERA,

Defendants.

- x

Index No.: 16798/2008

Motion Date: 12/08/2011

Motion No.: 7

Motion Seq.: 1

The following papers numbered 1 to 12 were read on this motion by defendant, JOSE RIVERA, for an order pursuant to CPLR 3212 granting said defendant summary judgment and dismissing the complaint of HERMINIO CRUZ and all cross-claims against him on the ground that JOSE RIVERA is not responsible for the happening of the accident and on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

	Papers Numbered
Notice of Motion-Affidavits-Exhibits-Memorandum of Law	1 - 5
Affirmation in Opposition-Affidavits-Exhibits	6 - 10
Reply Affirmation	11 - 12

This is a personal injury action in which plaintiff, HERMINIO CRUZ, seeks to recover damages for injuries he sustained as a result of a motor vehicle accident that occurred on February 7, 2007, at the intersection of Mother Gaston Boulevard and Liberty Avenue, Brooklyn, New York.

At the time of the accident, the plaintiff was a front seat passenger in the vehicle operated by defendant, Jose Rivera. The Rivera vehicle was proceeding northbound on Mother Gaston

Boulevard when it was struck on the driver's side door by the vehicle owned by defendant, Michelle A. Wilkins and operated by defendant Stacey Johnson. Johnson's vehicle was coming from the southbound direction on Mother Gaston and was attempting to make a left turn onto Liberty Avenue when the impact occurred. As a result of the accident the plaintiff allegedly sustained injuries to his left rotator cuff requiring arthroscopic surgery and injuries to his cervical and lumbar spines.

The plaintiff commenced this action by filing a summons and complaint on July 7, 2008. Issue was joined by service of defendant Rivera's verified answer dated August 8, 2008. Defendants Wilkins and Johnson have not filed an answer or appeared in the action. According to Rivera's attorney, the plaintiff's action was settled as to defendants Wilkins and Johnson prior to the filing of an answer.

Defendant Rivera now moves for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the plaintiff's complaint on the grounds that (1) Rivera is not liable for the causation of the accident and (2) plaintiff did not suffer a serious injury as defined by Insurance Law § 5102.

In support of the motion, defendant submits an affirmation from counsel, Anne Marie Garcia, Esq.; a copy of the pleadings; plaintiff's verified bill of particulars; a copy of the transcript of the plaintiff's examination under oath for New York Central Mutual with regard to no fault benefits; a copy of the transcript of plaintiff's examination before trial taken on August 4, 2010; a copy of the examination under oath of defendant Jose Rivera for New York Mutual Insurance Company taken on September 17, 2007; the examination before trial of defendant Rivera taken on August 4, 2010; and the affirmed medical report of orthopedist, Dr. Robert J. Orlandi.

Liability

In his examination under oath for New York Mutual Insurance Company, defendant, Jose Rivera, testified that on the date of the accident he was proceeding northbound on Mother Gaston crossing the intersection at Liberty Avenue. Plaintiff, Herminio Cruz, was his front seat passenger. Rivera stated that the light was green in his direction. He stated that the Johnson vehicle was proceeding southbound on Mother Gaston Boulevard intending to make a left turn onto Liberty Avenue when it struck his vehicle in the middle of the intersection. In his examination before trial, taken on August 4, 2010, Rivera again stated that he was proceeding through the intersection at Mother Gaston and Liberty

at a speed of 5 - 10 miles per hour, with the green light in his favor, when the Johnson vehicle, intending to make a left turn, did not wait for the intersection to clear and hit his vehicle. Rivera stated that the Johnson vehicle quickly entered the intersection, did not have a turn signal in use, did not stop prior to making the left turn and struck his vehicle in the middle of the driver's door with the front of his vehicle.

In his examination under oath for New York Mutual taken on September 21, 2007, plaintiff stated that on the date of the accident he was a front seat passenger in the vehicle owned and operated by Jose Rivera. They were traveling to the plaintiff's daughter's apartment on Mother Gaston Boulevard. Mother Gaston consists of two lanes of moving traffic, one lane in each direction, separated by a solid while line. There is also a parking lane on each side. Plaintiff stated that as they approached the intersection of Liberty Avenue that the traffic light was in their favor. He stated that the accident occurred immediately after they passed the intersection at Liberty Avenue when the vehicle operated by Johnson came out of a parking spot on the opposite side of traffic tried to make a turn onto Liberty and struck plaintiff's vehicle on the driver's door. Cruz testified that as a result of the impact he injured his left shoulder, his back and his neck. In his examination before trial taken on August 4, 2010, Cruz reiterated that after they passed the intersection, the front of the Johnson vehicle struck Rivera's vehicle on the driver's side door.

Rivera's's counsel contends that the actions of Mr. Johnson in attempting to make a left turn without yielding to the Rivera vehicle, which had the right of way, was the sole proximate cause of the accident. Counsel contends that Johnson's actions violated VTL § 1141 which requires a driver of a vehicle intending to turn left within an intersection to yield the right of way to any vehicle approaching from the opposite direction. Counsel contends that the actions of Johnson in turning his vehicle directly into the path of Rivera's oncoming vehicle constitutes negligence as a matter of law. Moreover, counsel contends that Rivera had the right to assume that the Johnson vehicle would not disobey the traffic rules (citing Ahern v Lanaia, 85 AD3d 696 [2d Dept. 2011]; Mohammad v Ning, 72 AD3d 913 [2d Dept. 2010; Polamo v Pozzi, 57 AD3d 498 [2d Dept. 2008]; Spivak v Erickson, 40 AD3d 962 [2d Dept. 2007]).

In opposition to that branch of the motion concerning liability, plaintiff's counsel argues that there are inconsistencies in the pre-trial testimony of Rivera and the plaintiff which fail to eliminate all questions of fact regarding

the happening of the accident and the comparative negligence of the Rivera vehicle.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position (see Zuckerman v. City of New York, 49 NY2d 557[1980]).

Vehicle and Traffic Law § 1141 requires that "[t]he driver of a vehicle intending to turn to the left within an intersection . . . yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard." A driver with the right of way is entitled to anticipate that the other driver will obey traffic laws that require him to yield (see Kann v Maggies Paratransit Corp., 63 AD3d 792 [2d Dept. 2009]; Palomo v Pozzi, 57 AD3d 498 [2d Dept. 2009]; Berner v Koegel, 31 AD3d 591[2d Dept. 2006]; Gabler v Marley Bldg. Supply Corp., 27 AD3d 519[2d Dept. 2006]).

Here, defendant Rivera established his prima facie entitlement to judgment as a matter of law through the submission of his deposition testimony and the pre-trial testimony of the plaintiff passenger. Since the Johnson vehicle made a left turn into the path of the Rivera vehicle without yielding the right of way prior to initiating the left turn, the testimony established that Johnson failed to yield to the Rivera vehicle as he proceeded lawfully through the intersection and Johnson was therefore negligent as a matter of law (see Heath v Liberato,82 AD3d 841 [2d Dept. 2011]; Kucar v Town of Huntington, 81 AD3d 784 [2d Dept. 2011]; Loch v Garber, 69 AD3d 814 [2d Dept. 2010]; Gabler v Marly Bldg. Supply Corp., 27 AD3d at 520 [2d Dept. 2006]; Bolta v Lohan, 242 AD2d 356 [2d Dept. 1997]). Defendant Rivera, who had the right-of-way, was entitled to anticipate that the Johnson vehicle would obey the traffic law which required him to yield, and therefore his violation of Vehicle and Traffic Law § 1141 was a proximate cause of the accident (see Torro v Schiller, 8 AD3d 364 [2d Dept. 2004]). The evidence submitted demonstrates that Johnson was negligent in failing to see that which, under the circumstances, he should have seen, and in attempting to make the left turn when it was hazardous to do so (see Salce v Check, 23 AD3d 451 [2d Dept. 2005]). Further, the movant established, prima facie, his entitlement to judgment as a matter of law as the evidence submitted in support of his motion demonstrated that the subject motor vehicle accident was not

proximately caused by any negligence on the part of the movant (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]).

In opposition to Rivera's prima facie showing, the plaintiff failed to raise a material question of fact as to whether Rivera was comparatively negligent (see Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; see Moreno v Gomez, 58 AD3d 611, 612 [2d Dept. 2009]; Moreback v Mesquita, 17 AD3d 420, 421 [2d Dept. 2005]).

Although there were minor differences in the plaintiff and Rivera's accounts as to the precise manner in which how the accident occurred, both accounts showed that Johnson was negligent and none of the differences in the accounts was sufficient to demonstrate the existence of a triable issue of fact as to whether the Rivera was comparatively negligent (see Kucar v Town of Huntington, 81 AD3d 784 [2d Dept. 2011]).

SERIOUS PHYSICAL INJURY

Plaintiff contends that he sustained a serious injury as defined in Insurance Law § 5102(d)in that he sustained a permanent loss of use of a body organ, member function or system; a permanent consequential limitation or 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 the plaintiff from performing substantially all of the material acts which constitute his 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.

In his verified bill of particulars, plaintiff states that as a result of the accident he sustained, inter alia, a torn rotator cuff of the left shoulder requiring arthroscopic surgery; disc herniation at C3-4; and a disc bulge at L5-S1. Plaintiff, who was retired at the time of the accident, states that he was confined to bed and home intermittently.

Dr. Robert J. Orlandi, a board certified orthopedic surgeon, retained by the defendants, examined Mr. Cruz on September 15, 2010. Plaintiff presented with cervical and low back pain and was post left shoulder arthroscopy. Dr. Orlandi performed quantified and comparative range of motion tests. He found that the plaintiff had no limitations of range of motion in the cervical spine, lumbar spine and left shoulder. He concluded that the plaintiff had cervical and lumbar strains - resolved. He also

concluded that in his opinion the minute tear of the rotator cuff would not have required left shoulder arthroscopy. In any event, he found no clinical residuals post surgery. Moreover, he states that the arthroscopy is not related to the accident of 2/7/07 as the tear did not suggest recent trauma. He states that the plaintiff has no musculoskeletal disability relating to the subject accident and he has no permanent residuals.

In his pre-trial testimony, the plaintiff testified that he was initially examined by Dr. Portillo. He began a course of physical therapy and acupuncture. His main complaints were with respect to his left shoulder, neck and back. After undergoing an MRI he was referred to a surgeon at East Tremont Medical Center where he underwent arthroscopic surgery on his left shoulder on April 16 2007. He continued treatments at a rate of 3-5 times per week until they ended on May 7,2007 when no-fault discontinued payments. He stated that the pain in his back never subsided although his neck pain has subsided. When asked if there is anything he can no longer do as a result of the accident he responded that there was nothing.

Defendant's counsel contends that the medical report of Dr. Orlandi as well as the plaintiff's deposition testimony is sufficient to establish, prima facie, that the plaintiff has not sustained a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute his 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.

In opposition to the threshold motion, plaintiff submits the affirmed report of Dr. Remer, an orthopedic surgeon who performed arthroscopic surgery on the plaintiff's left shoulder. In addition, the plaintiff submits the uncertified and unaffirmed records of plaintiff's treating physician, Dr. Benjamin Cortijo, the unaffirmed radiological reports of Dr. Chess, and the unaffirmed and uncertified records of Benjamin Medical Care.

Dr. Remer's affirmed operative report states that on April 16, 2007 he performed arthroscopic surgery of the plaintiff's left shoulder. At the time of the surgery he observed a partial tear of the rotator cuff which was repaired. Dr. Remer also submits a report stating that he examined plaintiff initially on March 15, 2007. At that time he had limited range of motion. He was reevaluatued by Dr. Remer on August 17, 2011, at which time he exhibited less

than 12% limitation of range of motion of the left shoulder. He stated that in his opinion the plaintiff had some improvement with surgery although he does have permanence due to his injuries.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (Wadford v. Gruz, 35 AD3d 258 [1st Dept. 2006]). "[A] defendant can establish that a plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (Grossman v Wright, 268 AD2d 79 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

Initially, it is defendant's obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). Where defendants' motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v. Eyler, 79 NY2d 955 [1992]; Zuckerman v. City of New York, 49 NY2d 557[1980]; Grossman v. Wright, 268 AD2d 79 [2d Dept 2000]).

Here, the proof submitted by defendant Rivera, including the affirmed medical report of Dr. Orlandi and the pre-trial testimony of the plaintiff was sufficient to meet its prima facie burden by demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler,79 NY2d 955 [1992]).

In opposition, plaintiff failed to raise a triable issue of fact (see Zuckerman v City of New York, 49 NY2d 557, [1980]; Cohen v A One Prods., Inc., 34 AD3d 517 006]). In his medical report Dr. Remer indicates that at his most recent examination the plaintiff demonstrated less than a 12% range of motion

limitation of the left shoulder and did not quantify any range of motion limitations of the neck or back. Such minor limitations of range of motion are insufficient to raise a triable issue of fact as to whether the plaintiff sustained a significant injury (see McLoud v Reyes, 82 AD3d 848 [2d Dept. 2011][12% limitation in range of motion was insignificant within the meaning of the no-fault statute]; McMullin v Walker, 68 AD3d 943 [2d Dept. 2009]; Trotter v Hart, 285 AD2d 772 [3rd Dept. 2001]).

Lastly, the plaintiff failed to submit competent medical evidence that the injuries allegedly sustained by him as a result of the subject accident rendered him unable to perform substantially all of his daily activities for not less than 90 days of the first 180 days following the accident (see Valera v Singh, 89 ad3d 929 [2d Dept. 2011]; Nieves v Michael, 73 AD3d 716 [2d Dept. 2010]; Joseph v A & H Livery, 58 AD3d 688 [2d Dept. 2009]).

Accordingly, for the reasons set forth above, it is hereby

ORDERED, that the motion of defendant JOSE RIVERA for an order granting summary judgment dismissing plaintiff's complaint is granted, and the complaint of plaintiff HERMINIO CRUZ is dismissed as against defendant JOSE RIVERA.

The clerk is directed to enter judgment accordingly.

Dated: February 28, 2012
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.