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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Kenneth Sanfilippo,

Plaintiff,

-against-

Susan Tomasino,

Defendant.

Index No.: 22673/2009

Motion Sequence No.: 001; MG
Motion Date: 9/9/11
Submitted: 3/28/12

Motion Sequence No.: 002; MD
Motion Date: 10/26/11
Submitted: 3/28/12

Attorney for Plaintiff:

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Attorney for Defendant:

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Clerk of the Court

Upon the following papers numbered 1 to 23 read upon this motion and cross motion for summary judgment: Notice of Motion and supporting papers (001), 1 - 9; Notice of Cross Motion and supporting papers (002), 10 - 19; Answering Affidavits and supporting papers, 20 - 21; Replying Affidavits and supporting papers, 22 - 23.

Kenneth Sanfilippo seeks damages for personal injuries he alleges to have sustained in a motor vehicle accident on November 3, 2007, at Route 110 at or near its intersection with Jefferson Avenue in Babylon, New York, when his vehicle, which was stopped for a red light, was struck in the rear by a vehicle operated by the defendant Susan Tomasino.

In his motion (001), the plaintiff seeks summary judgment against the defendant on the asserted basis that she bears responsibility for the occurrence of the accident. The defendant cross moves for dismissal of the complaint on the asserted basis that the plaintiff did not sustain a serious injury as defined by Insurance Law §5102 (d).

Pursuant to Insurance Law §5102(d), " [s]erious 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 medical 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" (Insurance Law §5102(d)). 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 [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 [1st Dept., 1992]). Once the defendant has met that burden the plaintiff then must establish by competent proof, a *prima facie* case that such serious injury exists (see, DeAngelo v. Fidel Corp. Servs., 171 AD2d 588 [1st Dept., 1991]). In order to be in competent or admissible form such proof must consist of affidavits or affirmations (see, Pagano v. Kingsbury, 182 AD2d 268 [2nd Dept., 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (see, Cammarere v. Villanova, 166 AD2d 760 [3rd Dept., 1990]).

In order to recover under the "permanent loss of use" category of §5102(d), plaintiff must demonstrate a total loss of use of a body organ, member, function or system (see, Oberly v. Bangs Ambulance, 96 NY2d 295 [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 (see, Toure v. Avis Rent A Car Systems, Inc., 98 NY2d 345 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (see, Licari v Elliott, 57 NY2d 230 [1982]).

In support of his motion, the plaintiff has submitted, *inter alia*, an attorney's affirmation; copies of the summons and complaint, defendant's answer and plaintiff's verified bill of particulars; a copy of the unsigned but certified transcript of his examination before trial dated October 27, 2010, which is considered as adopted as accurate by the moving party (see, Ashif v. Won Ok Lee, 57 AD3d

700 [2nd Dept., 2008]); a signed copy of the transcript of Susan Tomasino dated April 5, 2011 and a copy of the accident report dated November 9, 2011 signed by Susan Tomasino.

Kenneth Sanfilippo testified as follows: He was involved in an automobile accident on November 3, 2007 at approximately 6:30 p.m. The weather was cold and clear and it was dark outside. The roads were dry. He was traveling south on Route 110, which he described as having two southbound travel lanes. As he approached the intersection with Jefferson Street while traveling in the right travel lane, the traffic signal light turned red. He brought his vehicle to a stop behind four cars, also in the right lane, and remained stopped for the duration of the red light. There were vehicles stopped in the left travel lane as well. About a second or two prior to the heavy impact to the rear of his vehicle, he saw the defendant's vehicle approaching "pretty fast" without its lights on. The impact to the rear of his vehicle caused his vehicle to strike the rear of the vehicle in front of him in the right lane; he testified that his vehicle had been stopped about five feet in back of that vehicle before his vehicle hit it. When he approached the defendant's vehicle after the accident, she told him that she thought the traffic light was green. However, he stated at the time her vehicle struck his vehicle in the rear, the light just turned green and one of the four cars in front of him had started moving forward, but that his foot was still on his brake.

Susan Tomasino testified to the effect that she was operating her car on November 3, 2007 at 6:30 p.m. when it was involved in the accident on Route 110, near her apartment, at the traffic light at the intersection of Route 110 with Jefferson Avenue to the left and Maryland Avenue to the right of the intersection as one travels south on Route 110. She was on dinner break from work and had to be back by 6:30 p.m. She testified that it was a damp, miserable day and she did not have her windshield wipers on but her headlights were on. She stated she traveled south on Route 110 (also known as Broadway) for about two blocks in the right travel lane at about "fifteen, twenty, tops." When she first turned onto Route 110 she could see the traffic signal light was green. She did not see the plaintiff's vehicle or the vehicle in front of his vehicle at any time prior to the accident. She became aware of the plaintiff's vehicle when she felt "a terrible rocking sensation." She did not know whether the plaintiff's vehicle was stopped or moving at the time of the impact. She thought that after she turned onto Broadway, she had been looking off to the side and did not look up quick enough. She stated that somehow her head was down, then she looked up at the light and then there was the impact. She observed no vehicles ahead of her as she traveled on Route 110/Broadway prior to the accident. She testified that the front of her vehicle struck the rear of the plaintiff's vehicle.

Based upon the adduced testimonies, the plaintiff has established entitlement to summary judgment on the issue of liability as a matter of law. When a driver approaches another vehicle from the rear, he is bound to maintain a reasonably safe rate of speed and to maintain control of his vehicle and use reasonable care to avoid colliding with the other vehicle (see, Chepel v. Meyers, 306 AD2d 235 [2nd Dept., 2003]; Power v. Hupart, 260 AD2d 458 [2nd Dept., 1999]; see also, Vehicle and Traffic Law §1129[a]). The plaintiff has demonstrated that this was a rear-end collision, that his vehicle was stopped at the time of the impact and that the defendant failed to maintain control of her vehicle or to use reasonable care to avoid colliding with the plaintiffs' vehicle and failed to see the plaintiff's vehicle prior to striking it. 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 (see, People v. Anderson, 7 Misc3d 1022A [City Court, Ithaca 2005]). Here, the defendant testified that she never saw the plaintiff's vehicle prior to striking it in the rear with the front of her vehicle. She had her head down and then looked up to the light when the impact occurred. She did not observe any vehicles in front of her prior to the impact. The motion by plaintiff is granted.

In support of the cross motion, the defendant Tomasino has submitted, *inter alia*, an attorney's affirmation; a copy of the MV 104 Police Accident Report dated November 3, 2007, which constitutes hearsay and is inadmissible (see, Lacagnino v. Gonzalez, 306 AD2d 250 [2nd Dept., 2003]; Hegy v. Coller, 262 AD2d 606 [2nd Dept., 1999]); a copy of the summons and complaint and plaintiff's verified bill of particulars; a copy of plaintiff's deposition transcript dated October 27, 2010 and defendant's transcript dated April 5, 2011; a copy of plaintiff's medical record by Neil J. Dash, M.D.; the signed report of Isaac Cohen, M.D. dated June 9, 2011concerning his independent orthopedic evaluation of the plaintiff; and the report of Melissa Sapan Cohn, M.D. dated January 3, 2010 concerning her independent radiological review of the x-rays of the plaintiff's cervical spine.

In his bill of particulars, the plaintiff alleges that, as a result of this accident, he suffered severe cerebral concussion; post traumatic cerebral concussion syndrome and headaches of long duration; straightening of the cervical spine; C6-7 intravertebral disc space narrowing; sprain/strain of the cervical spine; severe pain radiating across both shoulders with numbness in both upper extremities; sprain/strain of the thoracic, lumbar and lumbosacral spine; brachial plexus syndrome of the lumbar spine with paresthesia and muscle spasm; associated tearing and stretching of the muscles ligaments and soft tissue in the neck and back; permanent restriction in range of motion of the neck and back; and the inability to walk, stand, lift or bear weight without constant and continuous pain in the neck and back and with increasing pain upon prolonging said activities.

The plaintiff's treating physician, Dr. Dash, examined the plaintiff on November 13, 2007. He set forth that the plaintiff had been seen at New Island Hospital emergency room on November 4, 2007, then followed up with a physical therapist on November 5, 2007. The plaintiff complained of low back pain to the right and left of T2-T4, tingling and pain in the upper extremities with full range of motion. His impression was that the plaintiff had brachial plexus syndrome, paresthesia, muscle spasm, headaches and low back pain. On November 27, 2007, the plaintiff's complaints to Dr. Dash were the same with positive tenderness to the right and left of T2-T4 area of the paraspinal with positive muscle spasm. The findings were positive for numbness and tingling in the right and left upper extremities. On February 26, 2008, the plaintiff was found to still have lower back pain radiating to the bilateral lower extremities, tenderness at L2-4 and was diagnosed with parethesia, brachial plexus syndrome and lower back pain.

It is noted that neither Dr. Sapan Cohn nor Dr. Cohen have submitted copies of their *curriculum vitae* to qualify as experts in this matter. Although Dr. Cohen set forth the multiple records and reports he reviewed including the x-ray reports of plaintiff's cervical spine from November 9, 2007, dorsal spine dated November 12, 2007 and lumbar spine dated November 4,

2007, those x-ray reports and multiple records have not been provided with the moving papers. Dr. Sapan Cohn has submitted a report concerning her review of the plaintiff's cervical spine x-ray but has not submitted a copy of 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 that expert testimony is limited to facts in evidence (see, Allen v. Uh, 82 AD3d 1025 [2nd Dept., 2011]; Marzuillo v. Isom, 277 AD2d 362 [2nd Dept., 2000]; Stringile v. Rothman, 142 AD2d 637 [2nd Dept., 1988]; O'Shea v. Sarro, 106 AD2d 435 [2nd Dept., 1984]; Hornbrook v. Peak Resorts, 194 Misc2d 273 [Sup. Ct., Tomkins County, May 29, 2002]). It is further noted that Dr. Sapan Cohn has not submitted a report or opinion concerning the findings relating to the plaintiff's lumbar and dorsal spine x-rays, raising factual issues and leaving this Court to speculate as to those findings. Additionally, the plaintiff testified that he was sent by Dr. Nash for MRI studies, which studies have not been provided and concerning which the defendant's experts do not comment.

The plaintiff has claimed to have sustained paresthesia with radiating pain down the bilateral lower extremities, cerebral concussion, post cerebral concussion syndrome, brachial plexus syndrome and headaches, however, no report from a neurologist who examined the plaintiff on behalf of the moving defendant has been submitted to rule out these claimed neurological or radiating pain injuries (see, Browdame v. Candura, 25 AD3d 747 [2nd Dept., 2006]), thus leaving it to this Court to speculate as to those claimed injuries and raising further factual issues which preclude summary judgment (see, Coleman v. Shangri-La Taxi, Inc., 49 AD3d 587 [2nd Dept., 2008]; Hughes v. Bo Cai, 31 AD3d 385 [2nd Dept., 2006]; Matthews v. Cupie Transp. Corp., 302 AD2d 566 [2nd Dept., 2003]; Lowell v. Peters, 3 AD3d 778 [3rd Dept., 2004]). The plaintiff testified that he received care and treatment from a neurologist and received a CT scan for the numbness to the side of his face which developed after the accident and which he testified he is claiming as an injury in this action. In addition, he states he suffered from headaches for close to a year after the accident.

Defendant's examining physicians did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering defendant physicians' affidavits insufficient to demonstrate entitlement to summary judgment on the issue of whether the plaintiff was unable to substantially perform all of the material acts which constituted his usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (see, Furrs v. Griffith, 43 AD3d 389 [2nd Dept., 2007]; Blanchard v. Wilcox, 283 AD2d 821 [3rd Dept., 2001]; see, Uddin v. Cooper, 32 AD3d 270 [1st Dept., 2006]; Toussaint v. Claudio, 23 AD3d 268 [1st Dept., 2005]; Lin v. New York City Transit Auth., 2009 NY Slip Op 30488U [Sup. Ct., Queens County, February 23, 2009]) and they do not opine on that category of injury. The plaintiff testified that he underwent physical therapy from November 2007 through April 2008, three times a week. Plaintiff states that since the accident, he cannot play basketball with his friends because his legs get numb and that he used to go to the batting range and play baseball but cannot do that any more because a couple swings of the bat cause his shoulders to start getting tight. Plaintiff also claims that he cannot stand for very long.

Based upon the foregoing, it is determined that the defendant failed to satisfy the burden of establishing, *prima facie*, that plaintiff did not sustain a "serious injury" within the meaning of

Insurance Law §5102 (d) as to either category of injury (see, Agathe v. Tun Chen Wang, 33 AD3d 737 [2nd Dept., 2006]); see also, Walters v. Papanastassiou, 31 AD3d 439 [2nd 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 [2nd Dept., 2008]); Krayn v. Torella, 40 AD3d 588 [2nd Dept., 2007]; Walker v. Village of Ossining, 18 AD3d 867 [2nd Dept., 2005]) as the burden has not shifted. The cross motion by the defendant is denied.

Accordingly, it is

ORDERED, that motion by the plaintiff, Kenneth Sanfilippo, for an order granting summary judgment in his favor on the issue of liability is granted; and the plaintiff is directed to 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 place this matter on the ready trial calendar for a trial on damages forthwith; and it is further

ORDERED, that cross motion by the defendant, Susan Tomasino, for an order granting summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury is denied.

Dated: 6/7/2012

William B Rebolini

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

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