SHORT FORM ORDER

COPY

INDEX No. 09-47122
CAL No. 11-01701MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 12-29-11 (#001)
MOTION DATE 1-6-12 (#002)
ADJ. DATE 3-2-12
Mot. Seq. # 001 - MG
002 - XMD

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JOSEPH V. MAGGIO,

Plaintiff,

- against -

VINCENT RANDAZZESE and MARIA PASSANTINO,

Defendants.

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Upon the following papers numbered 1 to 35 read on this motion and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10 ; Notice of Cross Motion and supporting papers 11 - 22 ; Answering Affidavits and supporting papers 23 - 33 ; Replying Affidavits and supporting papers 34 - 35 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff Joseph Maggio seeking summary judgment in his favor on the issue of liability is granted; and it is further

ORDERED that the cross motion by defendants Vincent Randazzese and Maria Passantino seeking summary judgment dismissing plaintiff's complaint is denied.

Plaintiff Joseph Maggio commenced this action to recover damages for injuries he allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Hempstead Turnpike and East Meadow Avenue in the Town of Hempstead on June 26, 2009. The accident allegedly occurred when the vehicle operated by defendant Vincent Randazzese and owned by defendant Maria Passantino struck the rear of the vehicle operated by plaintiff while it was stopped at a red traffic light. Plaintiff, by his bill of particulars, alleges, among other things, that he sustained various personal injuries as a result of the subject collision, including a disc herniation at level T6-T7; thoracic radiculopathy; a tear of the posteroinferior aspect of the glenoid labrum; right shoulder impingement/bursitis; and cervical and thoracolumbosacral sprains/strains. Plaintiff alleges that he was confined to his bed and house for approximately one day immediately following the accident and intermittently confined to bed rest for

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three days following the accident as a result of the injuries he sustained. Plaintiff further alleges that he remains partially disabled as a result of the injuries he sustained in the subject collision.

Plaintiff now moves for summary judgment on the issue of liability, arguing that Randazzese's negligent operation of the Passantino vehicle was the sole proximate cause of the subject accident. Specifically, plaintiff asserts that the accident was the result of Randazzese's operation of the Passantino vehicle while intoxicated and in violation of Vehicle and Traffic Law § 1192.3. In support of the motion, plaintiff submits copies of the pleadings, an uncertified copy of the police accident report, and the deposition transcripts of plaintiff and Randazzese. Defendants cross-move for summary judgment on the basis that the injuries sustained by plaintiff as a result of the subject collision do not meet the "serious injury" threshold requirement of Insurance Law § 5102(d). In support of the cross motion, defendants submit copies of the pleadings, an uncertified copy of the police accident report, plaintiff's deposition transcript, and the sworn medical reports of Dr. Howard Reiser and Dr. William Healy, III. At defendants' request, Dr. Reiser conducted an independent neurological examination of plaintiff and Dr. Healy conducted an independent orthopedic examination of plaintiff in December 2011.

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* ***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*).

Based upon the adduced evidence, defendants established, prima facie, their entitlement to judgment as a matter of law on the ground that the injuries allegedly sustained by plaintiff as a result of the subject collision failed to meet the serious injury threshold requirement of the Insurance Law (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Al-Khilwei v Truman***, 82 AD3d 1021, 919 NYS2d 361 [2d Dept 2011]; ***Bamundo v Fiero***, 88 AD3d 831, 931 NYS2d 239 [2d Dept 2011]; ***Pierson v Edwards***, 77 AD3d 642, 909 NYS2d 726 [2d Dept 2010]). Defendants' examining neurologist, Dr. Reiser, states in his medical report that an examination of plaintiff reveals that his thoracic and lumboscaral regions of his spine are nontender, that there is no atrophy or fasciculation, and that the motor examination test is normal. Dr. Reiser states that the straight leg raising test is normal, bilaterally, and that plaintiff's station and gait are normal. Dr. Reiser further states that plaintiff's neurological examination did not reveal any objective deficits and that there are no ongoing symptoms that would suggest that plaintiff is suffering from a neurological disorder causally related to the subject accident. Similarly, defendants' examining orthopedist, Dr. Healy, states in his medical report that an examination of plaintiff reveals that he has full range of motion in his spine, right shoulder and left knee. Dr. Healy states that there are no spasms upon palpitation of the paraspinal muscles, that there are no motor, sensory or reflex deficiencies, and that the straight leg raising test is negative. Dr. Healy opines that the strains plaintiff sustained to his spine and the contusions to his left knee and right shoulder as a result of the subject accident have resolved, and that plaintiff's orthopedic examination is normal. Dr. Healy further states that plaintiff does not require any additional orthopedic intervention, that he has made a full recovery, and that he does not have any limitations in his spine, left knee or right shoulder. 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]).

Plaintiff opposes defendants' cross motion on the grounds that he sustained injuries within the "limitations of use" categories and the "90/180" category of § 5102(d) of the Insurance Law as a result of the subject accident. In opposition to the cross motion, plaintiff submits his own affidavit, the sworn medical report of Dr. Walter Guadino, the affidavit of Dr. Carl Hardy, and unsworn copies of his medical records from Nassau University Medical Center's emergency room. Plaintiff also submits the sworn medical reports of Dr. Edward Mills, Dr. Nicholas Barvaro, and Dr. Robert Marks. At the request of plaintiff's No Fault insurance provider, Dr. Mills, Dr. Bavaro, and Dr. Marks conducted independent examinations of plaintiff in September 2009 and January 2010.

A plaintiff claiming a significant limitation of use of a body function or system must substantiate his or her complaints with objective medical evidence showing the extent or degree of the limitation caused by the injury and its duration (*see* ***Ferraro v Ridge Car Serv.***, 49 AD3d 498, 854 NYS2d 408 [2d Dept 2008]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 772 [2d Dept 2006]; ***Laruffa v Yui Ming Lau***,

32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). Whether a limitation of use or function is 'significant' or 'consequential' (i.e. important . . .), relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (***Dufel v Green***, *supra* at 798). To prove the extent or degree of physical limitation with respect to the "limitations of use" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided 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* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]; ***Toure v Avis Rent A Car Systems, Inc.***, *supra* at 350; *see also* ***Valera v Singh***, 89 AD3d 929, 923 NYS2d 530 [2d Dept 2011]; ***Rovelo v Volcy***, 83 AD3d 1034, 921 NYS2d 322 [2d Dept 2011]). 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]). However, evidence of contemporaneous range of motion limitations is not a prerequisite to recovery (*see* ***Perl v Meher***, *supra*; ***Paulino v Rodriguez***, 91 AD3d 559, 937 NYS2d 198 [1st Dept 2012]).

In opposition, plaintiff has raised a triable issue of fact as to whether he sustained a "serious injury" within the meaning of Insurance Law § 5102(d) as a result of the subject accident (*see* ***Walker v Esses***, 72 AD3d 938, 899 NYS2d 321 [2d Dept 2010]; ***Yeong Hee Kwak v Villamar***, 71 AD3d 762; 894 NYS2d 916 [2d Dept 2010]; ***Parker v Singh***, 71 AD3d 750, 896 NYS2d 437 [2d Dept 2010]; ***Sanevich v Lyubomir***, 66 AD3d 665, 885 NYS2d 635 [2d Dept 2009]). The affidavit of plaintiff's treating chiropractor, Dr. Hardy, reveals that plaintiff had significant range of motion limitations contemporaneous with the accident, and that significant limitations still were present when plaintiff was examined approximately twenty-one months after the accident. Dr. Hardy opined that plaintiff sustained trauma to multiple areas of his musculoskeletal system as a result of the accident, that there has been an overall weakening of his general supportive tissue structures in his spinal column, and that the trauma that he sustained predisposes him to further problems and prematurely accelerated degenerative changes of his spinal column. Dr. Hardy further states that the range of motion limitations that he observed during his own examinations are causally related to the subject accident. In addition, plaintiff submitted the affirmed medical report of his treating physician, Dr. Guadino, in which he states that plaintiff had no prior history of cervical, thoracic or lumbar symptoms prior to the subject accident, and that the injuries plaintiff sustained were traumatically induced and the result of the subject accident. Dr. Guadino opines that plaintiff has the potential for recurrence of a herniation of the thoracic spine at level T6-T7, because once a disc is herniated, it is susceptible to further damage, and accelerated degenerative changes. Thus, plaintiff's submissions are sufficient to raise a triable issue of fact as to whether plaintiff sustained a serious injury within the limitations of use categories of the Insurance Law as a result as a result of the subject accident (*see* ***Park v He Jung Lee***, 84 AD3d 904, 922 NYS2d 564 [2d Dept 2011]; ***Jalloh v Bah***, 81 AD3d 604, 915 NYS2d 636 [2d Dept 2011]; ***Evans v Pitt***, 77 AD3d 611, 908 NYS2d 729 [2d Dept 2010], *lv denied* 16 NY3d 736, 917 NYS2d 100 [2011]). Accordingly, defendants' cross motion for summary judgment dismissing plaintiff's complaint is denied.

Regarding, plaintiff's motion for summary judgment on the issue of liability, it is well settled that a driver approaching a vehicle from the rear is bound to maintain a reasonably safe rate of speed and

control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (*see* Vehicle and Traffic Law § 1129[a]; *see also* ***Nsiah-Ababio v Hunter***, 73 AD3d 672, 913 NYS2d 659 [2d Dept 2010]). A rear-end collision with a stopped vehicle creates a prima facie case of negligence against the operator of the moving vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision (*see* ***Cortes v Whelan***, 83 AD3d 763, 922 NYS2d 410 [2d Dept 2011]; ***Ramirez v Konstanzer***, 61 AD3d 837, 837 NYS2d 381 [2d Dept 2009]; ***Hakakian v McCabe***, 38 AD3d 493, 833 NYS2d 106 [2d Dept 2007]). However, the lead vehicle also has a duty not to stop suddenly or slow down without proper signaling so as to avoid a collision (***Chepel v Meyers***, 306 AD2d 235, 237, 762 NYS2d 95 [2d Dept 2003]; *see* ***Carhuayano v J&R Hacking***, 28 AD3d 413, 813 NYS2d 162 [2d Dept 2006]; ***Gaeta v Carter***, 6 AD3d 576, 775 NYS2d 86 [2d Dept 2004]; ***Purcell v Axelsen***, 286 AD2d 379, 729 NYS2d 495 [2d Dept 2001]; ***Colonna v Suarez***, 278 AD2d 355, 718 NYS2d 618 [2d Dept 2000]; *see also* Vehicle and Traffic Law § 1163). A non-negligent explanation for the collision, such as mechanical failure or the sudden and abrupt stop of the vehicle ahead is sufficient to overcome the inference of negligence and preclude an award of summary judgment (***Danner v Campbell***, 302 AD2d 859, 859, 754 NYS2d 484 [4th Dept 2003]; *see* ***Davidoff v Mullokandov***, 74 AD3d 862, 903 NYS2d 107 [2d Dept 2010]; ***Carhuayano v J&R Hacking***, 28 AD3d 413, 812 NYS2d 162 [2d Dept 2006]); ***Rodriguez-Johnson v Hunt***, 279 AD2d 781, 718 NYS2d 501 [3d Dept 2001]).

Here, plaintiff, at his deposition, testified that he had been stopped at a red light at the intersection of Hempstead Turnpike and East Meadow Avenue for approximately 20 seconds when his vehicle was struck in the rear by defendants' vehicle. This testimony established plaintiff's prima facie entitlement to judgment as a matter of law that he was not a proximate cause of the subject accident (*see* ***Kastritsios v Marcello***, 84 AD3d 1174, 923 NYS2d 863 [2d Dept 2011]; ***Ballatore v HUB Truck Rental Corp.***, 83 AD3d 978, 922 NYS2d 180 [2d Dept 2011]; ***Plummer v Nourddine***, 82 AD3d 1069, 919 NYS2d 187 [2d Dept 2011]; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). In opposition, defendants have failed to raise any triable issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). In fact, Randazzese, at his deposition, testified that he struck plaintiff's vehicle in the rear and that he also side-swiped another vehicle that was stopped at the same traffic light. He testified that he observed plaintiff's vehicle prior to the accident and that he anticipated that plaintiff's vehicle would travel through the yellow light at the intersection. He further testified that he does not recall if plaintiff's vehicle was stopped or moving when he struck the vehicle, and that he was arrested for driving while intoxicated. Therefore, defendants have failed to come forward with a non-negligent explanation for the subject accident's occurrence (*see* ***Perez v Roberts***, 91 AD3d 620, 936 NYS2d 259 [2d Dept 2012]; ***Scheker v Brown***, 85 AD3d 1007, 925 NYS2d 528 [2d Dept 2011]; ***Blasso v Parente***, 79 AD3d 923, 913 NYS2d 306 [2d Dept 2010]). Accordingly, plaintiff's motion for summary judgment in his favor on the issue of liability is granted.

Dated: June 8, 2012

Hon. Denise F. Molia
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION