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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

Dwayne Alcala,

Plaintiff,

-against-

William P. Roth, Shea Trucking Corp., All Corporate Transport, Ismael Diaz, Universal Shielding and Karl E. Thompson,

Defendants.

Index No.: 16523/2010

Attorneys [See Rider Annexed]

Motion Sequence No.: 003; MD
Motion Date: 8/29/11
Submitted: 3/28/12

Motion Sequence No.: 004; XMD
Motion Date: 10/5/11
Submitted: 3/28/12

Motion Sequence No.: 005; MD
Motion Date: 10/26/11
Submitted: 3/28/12

Motion Sequence No.: 006; XMG
Motion Date: 12/7/11
Submitted: 3/28/12

Upon the following papers numbered 1 to 70 read upon these motions and cross motion for summary judgment: Notice of Motion and supporting papers, 1 - 12; 25 - 37; Notice of Cross Motion and supporting papers, 13 - 24; 38 - 51; Answering Affidavits and supporting papers, 52 - 59; 65 - 66; 67 - 68; 69 - 70; Replying Affidavits and supporting papers, 61 - 62; 63 - 64, these applications are determined as follows:

The plaintiff Dwayne Alcala 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 Pine Aire Drive and Madison Avenue in the Town of Islip on September 22, 2008. The accident allegedly occurred when the vehicle operated by Daniel Fawcett, now deceased, and owned by the defendant All Corporate Transport attempted to pass the vehicle owned by the defendant Shea Trucking Corp. and operated by the defendant William Roth. The All Corporate Transport vehicle then struck the

front of the Shea Trucking Corp. vehicle and spun into oncoming traffic. The All Corporate Transport vehicle crossed the double yellow line into oncoming traffic and struck the vehicle owned by the defendant Universal Shielding and operated by the defendant Ismael Diaz. Following the second collision, the defendant Universal Shielding vehicle struck the vehicle operated by the defendant Karl E. Thompson, which was traveling in the right westbound lane of Pine Aire Drive. At the time of the accident, the plaintiff was a front seat passenger in the vehicle operated by the defendant Thompson.

The plaintiff alleges in his bill of particulars, among other things, that he sustained a disc bulge at L4/L5, lumbar radiculitis, lumbar spine strain, and internal derangement of the left knee. The plaintiff further alleges that as a result of the injuries he sustained in the accident he was confined to his bed and home for approximately two and a half weeks.

The defendant All Corporate Transport Inc. now moves for summary judgment on the basis that the injuries allegedly sustained by the plaintiff fail to meet the "serious injury" threshold requirement of Insurance Law §5102(d). Defendant Karl E. Thompson has made a cross-motion, and defendants Ismael Diaz and Universal Shielding Inc. have made a separate motion, deemed herein to be a cross-motion, for identical relief. Defendants have submitted copies of the pleadings, the plaintiff's deposition transcript, and the medical reports of Dr. Edward Weiland, Dr. John Denton, and Dr. Robert Tantleff.

The plaintiff opposes the applications on the ground that the defendants failed to meet their *prima facie* burden of demonstrating that plaintiff did not sustain a "serious injury" within the meeting of the Insurance Law as a result of the accident. In addition, plaintiff has submitted the medical report of Dr. Hargovind DeWal, as well as his own deposition transcript.

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 [1995]; *see* ***Toure v Avis Rent A Car Sys.,*** 98 NY2d 345 [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 [1982]; ***Porcano v Lehman***, 255 AD2d 430 [2nd Dept 1988]; ***Nolan v Ford***, 100 AD2d 579 [2nd Dept 1984], *aff'd* 64 NY2d 681 [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.***, 98 NY2d 345 [2002]; ***Gaddy v Eyler***, 79 NY2d 955 [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 [2nd 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 [2nd Dept 2001]; ***Grossman v Wright***, 268 AD2d 79 [2nd Dept 2000]; ***Vignola v Varrichio***, 243 AD2d 464 [2nd Dept 1997]; ***Torres v Micheletti***, 208 AD2d 519 [2nd 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***, 84 NY2d 795, 798 [1995]; ***Tornabene v Pawlewski***, 305 AD2d 1025 [4th Dept 2003]; ***Pagano v Kingsbury***, 182 AD2d 268 [2nd Dept 1992]).

The defendants' examining neurologist, Dr. Weiland, reported that his examination of the plaintiff on February 24, 2011 revealed that he has full range of motion in his lumbar spine and left knee. Dr. Weiland stated that upon palpation of the plaintiff's paraspinal muscles there were no spasms or crepitus, that the straight leg raising test was normal and that the motor examination revealed 5/5 "power resistance throughout." Dr. Weiland opined that there was no evidence of any "lateralizing neurological deficits," that there is no need for any further neurological treatments and that the plaintiff is able to perform his daily living activities without any restrictions.

The defendants' examining orthopedist, Dr. Denton, indicated in his report that an examination of the plaintiff on January 10, 2011 revealed mild muscle spasm and tenderness upon palpation of the paralumbar muscles bilaterally. Dr. Denton stated that the plaintiff has decreased range of motion in flexion at 20/60 degrees and extension at 10/25 degrees in his lumbar spine, that he has decreased range of motion in flexion in his right knee at 125/150 degrees without evidence of erythema or crepitus. In Dr. Denton's opinion, the lumbar spine sprain and right knee sprain have resolved and there is no evidence of permanent orthopedic disability.

The defendants' radiologist, Dr. Tantleff, reviewed a lumbar spine MRI taken on October 9, 2008 and reported that it showed that the plaintiff suffers from degenerative discogenic changes of the lower thoracic and upper lumbar spine. In his opinion, the changes are not inconsistent with the plaintiff's age, they are of no definitive clinical significance, and the findings are not causally related to the subject accident.

Based upon the evidence before this Court, the defendants failed to show *prima facie* that the plaintiff did not sustain a "serious injury" within the meaning of the Insurance Law 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]; ***Wedderburn v Simmons***, 95 AD3d 1304 [2nd Dept 2012]). Although each of the defendants' experts concluded that the plaintiff did not sustain a "serious injury" to his lumbar spine as a result of the subject accident, Dr. Denton recounted in his affirmed medical report that the range of motion testing that he performed on the plaintiff more than two years after the accident revealed the existence of a significant range of motion limitation in his spine, as well as muscle spasm and tenderness in his lumbar spine (*see* ***Jones v Anderson***, 93 AD3d 640 [2nd Dept 2012]; *see also* ***Cues v Tavarone***, 85 AD3d 846 [2nd Dept 2011]; ***Fields v Hildago***, 74 AD3d 740 [2d Dept 2010]). Moreover, Dr. Denton failed to provide any range of motion measurements for the plaintiff's left knee, which the plaintiff clearly claims in his bill of particulars to have injured as a result of the accident. However, Dr. Denton did provide range of motion measurements for the plaintiff's right knee and found that there were significant range of motion limitations in the plaintiff's right knee. Thus, Dr. Denton's findings belie his conclusions and call into question Dr. Weiland's conclusions that the plaintiff's complaints were subjective in nature (*see* ***Sparks v Detterline***, 86 AD3d 601 [2nd Dept 2011]; ***Astudillo v MV Transp., Inc.***, 84 AD3d 1289 [2nd Dept 2011]; ***Washington v Delossantos***, 44 AD3d 748 [2nd Dept 2007]). Furthermore, the defendants' submissions were contradictory in that Dr. Weiland stated that the plaintiff has full range of motion in his lumbar spine, whereas Dr. Denton stated that the plaintiff has decreased range of motion in his lumbar spine. 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, an issue of credibility for the jury has been presented (*see* ***Barrett v New York City Tr. Auth.,*** 80 AD3d 550 [2nd Dept 2011]; ***Jacobs v Rolon***, 76 AD3d 905 [1st Dept 2010]; ***Mercado-Arif v Garcia***, 74 AD3d 446 [1st Dept 2010]; ***Martinez v Pioneer Transp. Corp.***, 48 AD3d 306 [1st Dept 2008]; ***Garcia v. Long Island MTA***, 2 AD3d 675 [2nd Dept 2003]).

Inasmuch as the defendants failed to meet their *prima facie* burden, the Court need not consider whether the plaintiff's opposition papers are sufficient to raise a triable issue of fact (*see* ***Scott v Gresio,*** 90 AD3d 736 [2nd Dept 2011]; ***Walter v Walch***, 88 AD3d 872 [2nd Dept 2011]).

The defendant Thompson has also cross-moved for an order granting summary judgment in his favor on the issue of liability. In support of the motion, the defendant Thompson submits copies of the pleadings, a certified copy of the police accident report, the parties' deposition transcripts and the deposition transcript of nonparty witness, Leon Laroche.

The defendant Thompson testified at an examination before trial that as he was traveling in the right lane of the westbound side of Pine Aire Drive he heard a "bang" on the eastbound side of Pine Aire Drive. Immediately after hearing the "bang," his vehicle was struck by the Universal Shielding vehicle, which was traveling next to his vehicle in the left lane of the westbound traffic. The defendant Thompson further testified that the Universal Shielding vehicle was pushed into his vehicle after it had been struck by the All Corporate Transport vehicle which had been traveling eastbound on Pine Aire Drive.

The defendant Ismael Diaz testified at an examination before trial that he was traveling westbound on Pine Aire Drive when he observed the All Corporate Transport vehicle traveling on the eastbound shoulder, along the right side of the Shea Trucking vehicle. The defendant Diaz explained that the "extreme left" of the All Corporate Transport vehicle struck the "extreme right" of the Shea Trucking vehicle, causing the All Corporate Transport vehicle to cross over the double yellow line into the westbound traffic. It then struck the front of the Universal Shielding vehicle that Diaz was operating. The defendant Diaz further testified that he never saw the Thompson vehicle prior to the accident.

The defendant Roth testified at an examination before trial that he was operating the Shea Trucking vehicle when he heard an engine revving, and upon checking his right passenger side mirror he observed the All Corporate Transport vehicle traveling partially on the shoulder and partially on the roadway of Pine Aire Drive. The defendant Roth testified that immediately upon noticing the other vehicle, he eased his foot off the accelerator but was unable to prevent the collision. The left rear quarter panel of the All Corporate Transport vehicle struck the right front passenger side bumper of the Shea Trucking vehicle and, as a result, the All Corporate Transport "spun 360 degrees" into the oncoming traffic and was impacted by the Universal Shielding vehicle. The defendant Roth further testified that the accident happened within seconds of him first observing the All Corporate Transport vehicle.

The nonparty witness Leon Laroche testified at an examination before trial that he was traveling eastbound on Pine Aire Drive and that the accident occurred behind his vehicle. Laroche testified that he looked into his rearview mirror and observed the All Corporate Transport vehicle traveling on the shoulder of the road along the right side of the Shea Trucking vehicle, and that it was traveling very fast. Laroche testified that prior to the accident's occurrence one-third of the All Corporate Transport vehicle had passed the front portion of the Shea Trucking vehicle, and that the accident occurred when the All Corporate Transport vehicle's driver "tried to cut in front of the [Shea Trucking vehicle]," in order to avoid hitting a telephone pole. Laroche further testified that prior to the accident's occurrence he did not hear any horns blowing.

"Crossing a double yellow line into the opposing lane of traffic, in violation of Vehicle and Traffic Law §1126 (a), constitutes negligence as a matter of law, unless justified by an emergency situation not of the driver's own making" (***Foster v Sanchez***, 17 AD3d 312, 313 [2nd Dept 2005]; *see* ***Barbaruolo v DiFede***, 73 AD3d 957 [2nd Dept 2010]; ***Sullivan v Mandato***, 58 AD3d 714 [2nd Dept 2009]; ***Brown v Castillo***, 288 AD2d 415 [2nd Dept 2001]). Furthermore, a driver is not required to anticipate that an automobile going in the opposite direction will cross over into oncoming traffic (***see Barbaruolo v DiFede***, 73 AD3d 957 [2nd Dept 2010]).

The evidence before this Court establishes the defendant Thompson's *prima facie* entitlement to judgment as a matter of law (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851 [1985]; *see also* ***Zuckerman v City of New York***, 49 NY2d 557 [1980]). In opposition, neither the plaintiff nor any of the defendants have submitted evidence sufficient to raise a triable issue of fact or to

demonstrate that any negligence on the part of the defendant Thompson caused the subject accident (*see* ***Bongiovi v Hoffman,*** 18 AD3d 686 [2nd Dept 2005]).

Accordingly, it is

ORDERED that the motion by the defendant, All Corporate Transport Inc. and the cross-motions by the defendant, Karl E. Thompson, and the defendants, Ismael Diaz and Universal Shielding Inc., for an order awarding summary judgment dismissing the plaintiff's complaint for failure to sustain a "serious injury" within the meaning of the Insurance Law are denied; and it is further

ORDERED that the cross-motion by the defendant Karl E. Thompson for an order awarding summary judgment in his favor on the issue of liability dismissing the plaintiff's complaint and all cross-claims against him is granted.

Dated: 7/9/2012

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

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

RIDER

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