Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE FREDERICK SAMPSON IA Part 31
Justice

VICTORIA LEONE and MICHAEL LEONE, x Plaintiffs, -against- SARMAD ZAHOOR BUTT, 18TH STREET HACKING CORP., FRANK J. KEOUGH, MARIA C. KEOUGH and FRANK J. KEOUGH Defendants. x	Index Number 10963 2010 Motion Date June 7, 2012 Motion Cal. Nos. 9, 10 Motion Seq. Nos. 2, 3

The following papers numbered 1 to 27 read on this motion by defendants Frank Keough and Maria Keough for summary judgment and dismissal of the complaint and any and all cross complaints on the issue of liability; and defendants Sarmad Zahoor Butt and 18th Street Hacking Corp.'s motion for summary judgment on the basis of plaintiffs' failure to satisfy the serious injury requirement of Insurance Law § 5102 (d); and on the cross-motion by the Keough defendants for similar relief.

	Papers Numbered
Notices of Motions - Affidavits - Exhibits	1-8
Notice of Cross Motion - Affidavits - Exhibits	9-11
Affirmations in Opposition - Affidavits - Exhibits	12-23
Reply Papers	24-27

Upon the foregoing papers it is ordered that the motions and cross-motion are determined as follows:

Plaintiffs claim to have suffered serious injuries on May 13, 2007,when they were struck by a vehicle while crossing Canal Street, at the intersection of Canal and Mott Streets in Manhattan, New York. Plaintiffs allege they were lawfully walking across Canal Street at the pedestrian crosswalk, when they were struck by a taxi cab owned by defendant 18th Street Hacking Corp. and being operated by defendant Sarmad Zahoor Butt. The taxi was making a right turn onto Canal Street from Mott Street at the time of the accident. Plaintiff Victoria Leone alleges that the impact of the taxi caused her to be thrown into a vehicle owned by the Keough defendants. At the time of the accident, the Keough defendants' vehicle was being driven by defendant Frank Keough, while defendant Maria Keough was in the front passenger seat. The Keough defendants' vehicle was at a full stop when the accident occurred.

After being thrown into the Keough defendants' vehicle, plaintiff Victoria Leone claims to have bounced off of that vehicle and back onto the hood of the taxi. Plaintiffs allege that the Keough defendants' vehicle was stopped within the pedestrian crosswalk. Plaintiff Michael Leone also claims to have been struck by the taxi, however he does not contend that he was thrown into the Keough defendants' vehicle. Defendant Frank Keough stated during his deposition that no pedestrians came into contact with his vehicle while he was stopped at the intersection. Defendant Butt also denied striking plaintiffs with his vehicle during his deposition.

This court will first address the issue of serious injury, as it may prove dispositive. In seeking summary judgment on the issue of serious injury, defendants bear the burden of establishing a prima facie case by competent medical evidence that demonstrates the plaintiff did not suffer 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, 956-957 [1992]). To successfully rebut defendants' prima facie case, plaintiffs must establish that a triable issue of fact exists as to whether a serious injury was sustained (*see Perl v Meher*, 18 NY3d 208 [2011]; *see also Martinez v Yi Zhong Chen*, 91 AD3d 834, 835-836 [2012]).

Here, plaintiff Victoria Leone alleges several injuries to her cervical and lumbar spines, right knee, and left shoulder. She also alleges several neurological injuries resulting in headaches and difficulty with concentration and memory. Plaintiff Victoria Leone alleges these injuries have resulted in limitations of a permanent and significant nature, and have prevented her from substantially engaging in all of her usual and customary daily activities for at least 90 of the 180 days immediately following the subject accident.

Defendants Butts and 18th Street support their motion with the affirmed reports of Dr. Robert Israel, an orthopedist, and Dr. Robert Fisher, a radiologist, the unexecuted report

of Dr. Kuldip K. Sachdev, as well as the pleadings and deposition testimony. The Keough defendants do not present any affirmations or arguments in their cross-motion, and solely rely on the proof put forth by defendants Butt and 18th Street. Dr. Israel's report recounts the observations and findings of his April 19, 2011 examination of plaintiff Victoria Leone. Therein, Dr. Israel notes that a range of motion test on plaintiff's left shoulder revealed anterior flexion to only 120 degrees, with 180 degrees being normal. This finding of a 60 degree reduction in range of motion raises a triable issue of fact as to whether plaintiff Victoria Leone suffered a permanent or significant limitation which constitutes a serious injury (*Alexander v Gordon*, 95 AD3d 1245 [2012]).

Defendants have also failed to establish their prima facie case as to the 90/180 category, as none of the reports relied upon by defendants sufficiently relate their findings to the 90/180 category (*Alexander,* 95 AD3d at 1246). The fact that plaintiff Victoria Leone was unemployed at the time of the accident, as she admits in her deposition, is insufficient to carry defendants' burden (*see Tinsley v Bah*, 50 AD3d 1019 [2008]). In light of the foregoing, it is unnecessary to consider the sufficiency of plaintiff Victoria Leone's opposition papers (*Wedderburn v Simmons*, 95 AD3d 1304, 1305 [2012]).

Accordingly, the motion by defendants and the cross motion by the Keough defendants for summary judgment on the basis of plaintiff Victoria Leone's failure to satisfy the serious injury requirement of Insurance Law § 5102 (d) are denied.

Plaintiff Michael Leone only alleges to have suffered injuries to his lumbar and cervical spines under the permanent and significant limitation categories of serious injury, and does not put forth an argument under the 90/180 category of serious injury. Defendants rely on the October 25, 2010 affirmed report of Dr. Fisher, wherein he reviewed the MRI films of Plaintiff Michael Leone's lumbar spine taken on July 30, 2008. Dr. Fisher states in this report that he observed only mild degenerative changes to the lumbar spine and found no injuries causally related to the subject accident.

Defendants also rely on the affirmed report of Dr. Israel, wherein he records his observations and findings during an orthopedic examination of plaintiff Michael Leone's lumbar and cervical spines on April 19, 2011. Dr. Israel states that range of motion tests revealed no limitations when compared to normal ranges of motion. The examination also revealed no tenderness, spasms or muscle atrophy. All objective tests conducted by Dr. Israel on plaintiff's cervical and lumbar spines produced negative results. Defendants have thus established their prima facie case as to plaintiff Michael Leone. Defendants Butt and 18th Street also submitted the unexecuted report of Dr. Sachdev. However, as this report is not in a proper form it has not been considered by this court (CPLR 2106).

In opposition, plaintiff Michael Leone relies on the affirmed report of Dr. David Porter. This report refers to examinations conducted on this plaintiff by Dr. Porter on May 25, 2007, July 5, 2007, July 10, 2008, and April 26, 2012. Dr. Porter also references a report by Hackensack Medical and Molecular Imaging regarding a July 30, 2008 MRI taken of plaintiff Michael Leone's lumbar spine. However, Dr. Porter states in his affirmation that he is licensed to practice medicine in the State of New Jersey, rather than New York. Thus, this affirmation is not in accordance with CPLR 2106 and does "not constitute competent evidence" (*Palo v Latt*, 270 AD2d 323, 323 [2000]).

Plaintiff Michael Leone also relies on the report of Dr. Sachdev submitted by defendants Butt and 18th Street. However, in addition to this report being unexecuted, it contains no findings causally connecting any alleged injury to the subject accident. Even if the court were to accept Dr. Sachdev's findings as to plaintiff Michael Leone's range of motion limitations, plaintiff's papers are devoid of any competent medical evidence that demonstrates his alleged injuries are causally related to the subject accident (*Vishnevsky v Glassberg*, 29 AD3d 680, 681 [2006]).

Moreover, there exists an unexplained gap in plaintiff Michael Leone's treatment. When a plaintiff alleges the existence of a serious injury, some reasonable explanation must be proffered for an extended cessation of treatments (*Pommells v Perez*, 4 NY3d 566, 574 [2005]). After Michael Leone's visit to Dr. Porter on July 10, 2008, his next evaluation with Dr. Porter was in April 2012, which followed the submission of this motion. Plaintiff offers no excuse for this gap, nor does he contend that continued treatment would have been merely palliative (*see Jean-Baptiste v Tobias*, 88 AD3d 962, 962-963 [2011]). For these reasons, this plaintiff has failed to sufficiently rebut defendants' prima facie case. Accordingly, defendants' motion and cross motion for summary judgment dismissing the complaint of plaintiff Michael Leone on the issue of serious injury are granted and the complaint of plaintiff Michael Leone hereby is dismissed.

The court will now address the Keogh defendants' motion for summary judgment on the issue of liability. In his deposition, defendant Frank Keough testified that he observed pedestrians walking between vehicles in the vicinity of his vehicle, and between his vehicle and the vehicle located directly in front of him prior to the accident. He also stated that his vehicle was at a full stop at the time of the accident and that he witnessed defendant Butt's taxi strike the pedestrians immediately prior to the taxi's collision with the Keough defendants' vehicle. Defendant Frank Keough stated he observed "this lady draped [sic] herself over the yellow cab."

Plaintiffs contend that the Keough defendants' vehicle was stopped within the pedestrian crosswalk, in violation of Vehicle and Traffic Law § 1202 (a) (1) (2), at the time

of the accident, an allegation the Keough defendants dispute. However, if this fact can be established at trial, the Keough defendants may be subject to liability as the "violation of a standard of care imposed by the Vehicle and Traffic Law constitutes negligence per se" (*Barbieri v Vokoun*, 72 AD3d 853, 856 [2010]). Additionally, despite the fact that a vehicle may be stationary, "owners of improperly-parked vehicles may be held liable to plaintiffs injured by negligent drivers of other vehicles" (*Sieredzinski v McElroy*, 303 AD2d 575, 576 [2003]).

In the instant matter, questions of fact exist as to whether the Keough defendants were illegally stopped within the crosswalk, and which vehicle, if any, struck plaintiffs. Both the Keough defendants and Butt deny striking plaintiffs, yet Plaintiff Victoria Leone claims to have come into contact with both vehicles. As there can be more than one proximate cause in an accident (*Pollack v Margolin*, 84 AD3d 1341, 1342 [2011]), it remains possible that one or all of the defendants could be held liable. To the extent the Keough defendants rely on *Daramboukas v Samlidis* (84 AD3d 719 [2011]) and *E.G. v Medical Exp. Corp.* (11 Misc 3d 1060[A], 2006 NY Slip Op 50320[U] [2006]), there exist significant and material factual differences between those cases and the present matter. As a result, the Keough defendants have failed to establish a prima facie case, and it is thus unnecessary to examine the sufficiency of the opposing papers (*see Wedderburn*, 95 AD3d at 1305). Accordingly, the Keough defendants' motion for summary judgment and dismissal of the complaint and any and all cross complaints against them on the issue of liability is denied.

Dated: August 24, 2012

J.S.C.