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SHORT FORM ORDER

INDEX No. 09-24231
CAL. No. 12-00130MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 3-8-12 (#005 & #006)
MOTION DATE 8-16-12 (#007)
ADJ. DATE 5-29-12 (#005 & #006)
ADJ. DATE 9-18-12 (#007)
Mot. Seq. # 005 - MD
006 - XMD
007 - MD

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BERNARD J. McNEIL, JR.,

Plaintiff,

- against -

HAUPPAUGE UNION FREE SCHOOL DISTRICT, PHILIP MONTANA and WILLIAM J. KOSTIK,

Defendants.

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Upon the following papers numbered 1 to 103 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17; 42 - 69 ; Notice of Cross Motion and supporting papers 18 - 32 ; Answering Affidavits and supporting papers 33 - 40; 70 - 101; 102 - 103 ; Replying Affidavits and supporting papers _____; Other memorandum of law, 41; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#005) by defendants Hauppauge Union Free School District and Philip Montana, the cross motion (#006) by defendant William Kostik, and the motion (#007) by defendant Kostik are consolidated for the purposes of this determination; and it is

ORDERED that the motion (#005) by defendants Hauppauge Union Free School District and Philip Montana for summary judgment dismissing the complaint is denied; and it is

10-11-12

ORDERED that the cross motion (#006) by defendant William Kostik for summary judgment is denied; and it is further

ORDERED that the motion (#007) by defendant William Kostik for summary judgment in his favor on the issue of liability is denied.

This action was commenced by plaintiff Bernard McNeil Jr. to recover damages for injuries allegedly sustained in a multi-vehicle accident that occurred at the intersection of Route 454 and Route 111 in Hauppauge, New York on December 17, 2008 (Action 1). The accident allegedly occurred when a vehicle operated by defendant William Kostik and a van operated by defendant Philip Montana and owned by Hauppauge Union Free School District collided, causing the van to strike plaintiff's vehicle. The bill of particulars alleges that as a result of the subject accident plaintiff suffered various injuries, including a large subcutaneous hematoma to the right knee area and contusion and hematoma to the right scalp. By order dated September 8, 2010, this action was joined for trial with an action assigned index number 10-05959, entitled *William Kostik v Bernard J. McNeil, Jr., Hauppauge Union Free School District, and Philip Montana* (Action 2), and an action assigned index number 10-15313, entitled *Philip Montana v William Kostik* (Action 3). Thereafter, two other related actions, assigned index number CEC 09-10380 (Action 4) and index number 09-36650 (Action 5), were joined for trial with Action 1, Action 2 and Action 3 by order of this Court dated May 27, 2011.

Defendants Hauppauge Union Free School District and Philip Montana (hereinafter collectively known as the Hauppauge defendants) now move for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). The Hauppauge defendants' submissions in support of the motion include, among other things, copies of the pleadings, a transcript of plaintiff's deposition testimony and 50-h hearing, an affirmed medical report of Dr. Isaac Cohen, and magnetic resonance imaging (MRI) reports of Dr. David Fisher. Defendant Kostik cross-moves for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury and adopts all the arguments and evidence concerning serious injury in the co defendants' motion papers.

Plaintiff opposes the motion and cross motion, arguing that the evidence presented in opposition raises a triable issue of fact as to whether he sustained a serious injury as a result of the subject accident. In opposition, plaintiff submits, among other things, his own affidavit, a transcript of his deposition testimony, a photograph of himself, and his medical records from Dr. Beena Patel, which are certified by a receptionist of Dr. Anthony Rizzo, who took over Dr. Patel's practice.

In addition, defendant Kostik moves for summary judgment in his favor on the issue of liability in Action 1, Action 3, and Action 5, arguing that he is not liable for the subject accident. In support of his motion, he submits copies of the pleadings and transcripts of his own deposition testimony and the testimony of plaintiff. The Hauppauge defendants oppose the motion, arguing that a triable issue of fact exists as to who caused the accident. In opposition the Hauppauge defendants submit, among other things, copies of the pleadings, transcripts of the parties' deposition testimony, and a copy of the police

accident report. Plaintiff also opposes defendant Kostik's motion for summary judgment and adopts the arguments of the Hauppauge defendants.

At his 50-h hearing and examination before trial, plaintiff testified that immediately before the subject accident he was stopped in the left turn lane of westbound Route 454. He stated that the left turn signal and the westbound Route 454 traffic signal were red. He testified that he intended to make a left turn onto Route 111 when a van operated by defendant Montana struck the front driver side of his vehicle.

At his examination before trial, defendant Kostik testified that prior to the accident he was driving northbound on the center lane of Route 111 at a speed of 30 to 35 miles per hour. He testified that he observed the van operated by defendant Montana 100 feet before entering the intersection, and that it was traveling at a speed of about 50 to 60 miles per hour. Kostik stated that the traffic signal was green for his lane of travel and that his vehicle was halfway into the intersection when the van also entered the intersection, striking the front left panel of his vehicle. He testified that the van then collided with plaintiff's vehicle, which was located in the opposite lane of travel.

At his examination before trial, defendant Montana testified that he was traveling eastbound on Route 454 at a speed of 40 miles per hour, and that he observed the Kostik vehicle three to four car lengths before it entered the intersection. Montana testified that "he had the light" when he entered the intersection, and that the collision between his vehicle and the Kostik vehicle caused his vehicle to come into contact with plaintiff's vehicle.

Insurance Law § 5102 (d) defines "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, 746 NYS2d 865 [2002]; ***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, i.e., 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 also may 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]; ***Torres v Micheletti***, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]; ***Craft v Brantuk***, 195 AD2d 438,

600 NYS2d 251 [2d Dept 1993]; ***Pagano v Kingsbury***, *supra*). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact (*see* ***Gaddy v Eyler***, *supra*; ***Pagano v Kingsbury***, *supra*; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

Here, defendants failed to establish, prima facie, their entitlement to judgment as a matter of law that plaintiff did not sustain a serious injury as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Astudillo v MV Transp., Inc.***, 84 AD3d 1289, 923 NYS2d 722 [2d Dept 2011]). Notably, the medical report of defendants' expert orthopedist, Dr. Cohen, is deficient, since the normal range of motion measurements that he set forth for plaintiff consists of variable ranges of motion, thereby, leaving the court to speculate as to the normal values and under what circumstances those variable ranges occur (*see* ***McLaughlin v Rizzo***, 38 AD3d 856, 832 NYS2d 666 [2d Dept 2007]; ***Powell v Alade***, 31 AD3d 523, 818 NYS2d 600 [2d Dept 2006]; ***Manceri v Bowe***, 19 AD3d 462, 798 NYS2d 441 [2d Dept 2005]). In addition, the measurements ascribed to plaintiff's knees are at the low end of the so-called "normal" ranges for such movements. Specifically, Dr. Cohen states that range of motion testing of plaintiff's right knee revealed flexion to 130 degrees (normal up to 130 to 150 degrees). It states that an examination of plaintiff's left knee revealed a small healed abrasion, and that range of motion testing revealed flexion to 130 degrees (normal up to 130 to 150 degrees). Dr. Cohen concludes that the examination of plaintiff shows no evidence of any functional disability. Having determined that defendants failed to meet their prima facie burden that plaintiff did not sustain a serious injury within the meaning of the Insurance Law § 5102(d), it is unnecessary for the court to determine whether plaintiff's opposition papers were sufficient to raise a triable issue of fact (*see* ***Umar v Ohrnberger***, 46 AD3d 543, 846 NYS2d 612 [2d Dept 2007]; ***Bluth v World Omni Fin. Corp.***, 38 AD3d 817, 832 NYS2d 640 [2d Dept 2007]; ***Yashayev v Rodriguez***, 28 AD3d 651, 812 NYS2d 367 [2d Dept 2006]).

With regard to defendant Kostik's application for summary judgment in his favor on this issue of liability in Action 1, the conflicting deposition testimony of the parties as to the happening of the accident raises issues of credibility which may not be resolved on a summary judgment motion (*see* ***Gordan v Honig,*** 40 AD3d 925, 837 NYS2d 197 [2d Dept 2007]; ***Ahr v Karolewski,*** 48 AD3d 719, 853 NYS2d 172 [2d Dept 2008]; ***Kolivas v Kirchoff***, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]). Significantly, there is a triable issue of fact as to whether the Kostik vehicle or the Montana vehicle had a green traffic signal (*see* ***Viggiano v Camara***, 250 AD2d 836, 673 NYS2d 714 [2d Dept 1998], ***Santiago v Frito-Lay***, 235 AD2d 528, 653 NYS2d 867 [2d Dept 1997]). Contrary to defendant Kostik's assertion, plaintiff merely testified that the traffic signals for westbound Route 454 were red, and that he did not know the color of the traffic signals for eastbound travel. Therefore, defendant Kostik failed to sustain his initial burden of establishing a prima facie entitlement to judgment as a matter of law on the issue of liability. Accordingly, the branch of defendant Kostik's motion for summary judgment on the issue of liability in Action 1 is denied.

As to the branch of Kostik's motion for summary judgment in Action 3 and Action 5, these actions arising out of the subject motor vehicle accident have been joined for trial and not consolidated. Thus, Kostik's application for summary judgment dismissing the complaint in those actions is inappropriate (*see generally* ***Inspiration Enters. v Inland Credit Corp.***, 57 AD2d 800, 394

NYS2d 701 [1st Dept 1977]). A joint trial is not an organic consolidation and the integrity of each action is preserved by the consolidation for the purpose of a joint trial, allowing each action to retain its separate identity (*see* CPLR 602[b]; ***Whiteman v Parsons Transp. Group of N.Y., Inc.***, 72 AD3d 677, 900 NYS2d 87 [2d Dept 2010]; ***Import Alley of Mid-Is. v Mid-Island Shopping Plaza***, 103 AD2d 797, 477 NYS2d 675 [2d Dept 1984]; ***Champagne v Consolidated R. R. Corp.***, 94 AD2d 738, 462 NYS2d 491 [2d Dept 1983]). Accordingly, the branch of the motion by Kostik seeking summary judgment in Action 3 and Action 5 is denied without prejudice to refiling under the proper index numbers.

Dated: October 10, 2012

W. Gerard Asher
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**