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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MICHAEL D. STALLMAN Justice PART 21

Index Number : 109699/2009
SANTANA, EMILIO P.
VS.
TRANSIT AUTHORITY
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. 109699/09
MOTION DATE 10/18/11
MOTION SEQ. NO. 002
MOTION CAL. NO. 115

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A-E	1-2
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion for summary judgment by plaintiff is decided in accordance with the annexed memorandum decision and order.

FILED

DEC 20 2011

NEW YORK
COUNTY CLERK'S OFFICE

HON. MICHAEL D. STALLMAN

Dated: 12/12/11

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

----------X

EMILIO SANTANA,

Plaintiff,

Index No. 109699/2009

- against -

NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY and GILBERT RIVERA,

Decision and Order

Defendants.

----------X

HON. MICHAEL D. STALLMAN, J.:

In this personal injury action arising out of a motor vehicle accident, plaintiff moves for partial summary judgment on the issue of liability in her favor, and to strike the affirmative defense of comparative negligence. (Motion Seq. No. 002.) Defendants separately move for summary judgment dismissing the action on the ground that plaintiff has not suffered a serious injury within the meaning of Insurance Law § 5102 (d). (Motion Seq. No. 003.) This decision addresses both motions.

BACKGROUND

Plaintiff alleges that, on December 19, 2008, at approximately 12:30 p.m., he was a passenger on a BX6 bus allegedly owned by defendants and operated by defendant Gilbert Rivera, heading eastbound on West 155th Street in Manhattan towards the McCombs Dam Bridge and Yankee Stadium. According to plaintiff , the bus rear-ended a 2003 Chevrolet bearing New York State registration DWJ4992, allegedly owned and operated by non-party Carlton Cornelius, on West 155th Street. Rivera testified at his deposition that there was heavy snow on the day of the accident.

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(Cortelli Affirm., Ex C [Rivera EBT], at 17.) He testified that, after he pulled out of the bus stop at St. Nicholas Avenue, "I apply my brakes because I saw my, one of the dispatchers coming up the hill. I apply my brakes and as I apply my brakes I start sliding." (*Id.* at 37.) Rivera testified that he tried to turn the wheel to the left "to turn like into St. Nick, but the bus just kept on going straight." (*Id.* at 39.) He stated, "I just held onto the steering wheel and kept my foot on the brake and hit the car in front." (*Id.*) According to Rivera, the bus came into contact with a stopped car, and that the vehicle was stopped when he first saw it. (*Id.* at 44.) Plaintiff testified at his statutory hearing that "the bus crashed into the cars that were parked at the light." (Cortelli Affirm., Ex A, at 11.)

Plaintiff testified at his deposition that he was holding onto a pole inside the bus with his left hand when the impact occurred, and he lost his grip on that pole and fell backwards towards the front of the bus. (Feinstein Affirm., Ex F, at 27, 31.) Plaintiff stated that his left knee hit a pole or a seat, and then his shoulder, neck, and head struck the floor of the bus. (*Id.* at 32.) Plaintiff testified that "Briefly, I was out, but I wasn't knocked out for a long time." (*Id.* at 33.)

Paragraph 10 of the bill of particulars alleges that plaintiff suffered, among other injuries, a tear of the glenoid labrum of the right shoulder; right shoulder impingement and bursitis, acromioclavicular joint arthritis; an ACL tear of his left knee; cervical disc bulges impinging upon the thecal sac; cervical pain radiating into both shoulders with numbness and tingling into his left arm and hand; a lumbar disc herniation impinging upon the thecal sac; left shoulder pain and internal derangement; left hip injury; cerebral concussion and post-concussional syndrome. (Feinstein Affirm., Ex A.) Plaintiff allegedly underwent surgery on his left knee on June 11, 2009, and surgery on his right shoulder on August 8, 2009.

Plaintiff appeared for an orthopedic medical examination on August 9, 2010 by Dr. Lisa Nason, M.D. Plaintiff also appeared for a neurologic medical examination on the same day by Dr. Jean-Robert Desrouleaux, M.D. Dr. Joseph Truvia performed a radiology review of MRIs that plaintiff provided.

DISCUSSION

The No-Fault Law "bars recovery in automobile accident cases for 'non-economic loss' (e.g., pain and suffering) unless the plaintiff has a 'serious injury' as defined in the statute. . . ." (*Perl v Meher*, ___ NY3d ___, 2011 WL 5838721 [2011].)

> "Of the several categories of 'serious injury' listed in the statutory definition, three are relevant here: 'permanent consequential limitation of use of a body organ or member'; 'significant limitation of use of a body function or system'; and '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' (Insurance Law § 5102[d])."

(*Id.*)

Defendants submitted affirmed reports from Dr. Nason and Dr. Desrouleaux finding almost all normal ranges of motion, objectively measured by a goniometer, as well as the report of Dr. Truvia. (Feinstein Affirm., Exs N, O, P.) Dr. Truvia reviewed the MRI of plaintiff's left knee taken on February 9, 2009, and found that "Both anterior and posterior cruciate ligaments are normal." (Feinstein Affirm., Ex P.) Dr. Truvia also opined that the "minimal posterior disc bulge" at L4-L5 was "consistent with chronic degenerative spinal diseases, which is a preexisting condition." Dr. Truvia also reviewed the MRI of plaintiff's right shoulder taken on March 21, 2009, and found "There is no joint effusion. . . The rotator cuff muscles and tendons are intact, there is no tear or

tendinitis. The glenoid labrum is intact, images degraded by motion." (*Id.*) Based on these submissions, defendants made a prima facie showing of entitlement to summary judgment dismissing plaintiff's claims of a "permanent consequential limitation of use" or "significant limitation of use" of plaintiff's cervical and lumbar spine, right shoulder, and left knee. (*Eteng v Dajos Transp.*, ____ AD3d ___, 932 NYS2d 58 [1st Dept 2011].)

In opposition, plaintiff submitted the affidavit of his chiropractor, Dr. Zeren, D.C., together with reports from his radiologists, Dr. Jacob Lichy, M.D. and Dr. Thomas Kolb, M.D.; his orthopedist, Dr. David T. Neuman, M.D.; his neurosurgeon, Dr. Richard J. Radna, M.D.; and physiatrist, Dr. Yoland Bernard, among others. (*See* Cortelli Opp. Affirm., Exs B-K, M). Plaintiff's chiropractor relied on, among other things contemporaneous and current range of motion tests, measured by an inclimoter and protractor, positive results on straight leg and other objective tests, and observation of spasms. Like Dr. Truvia, Dr. Lichy reviewed the MRI films of plaintiff's left knee taken on February 9, 2009 and the MRI films of plaintiff's right shoulder taken on March 21, 2009. However, Dr. Lichy concluded that the MRI films of plaintiff's knee indicate "Partial thickness tear of the anterior cruciate ligament. Intrasubstance tear of the posterior horn of the medial meniscus" and the MRI films of plaintiff's right shoulder indicate "Tear of the anterior glenoid labrum. Joint effusion." (Cortelli Opp. Affirm., Ex D.) On the issue of causation, Dr. Neuman opined, with a reasonable degree of medical certainty, that plaintiff's injuries were as a result of the bus accident on December 19, 2008. (Cortelli Opp. Affirm., Ex H.) All these submissions were sufficient to raise a triable issue of fact as to injury of cervical and lumbar spine, right shoulder, and left knee. (*Lavali v Lavali,* ___ AD3d___ 2011 WL 5574029, *1 [1st Dept 2011]; *Eteng v Dajos Transp.*, 923 NYS2d 58, *supra.*)

Defendants failed to meet their prima facie burden of summary judgment as to plaintiff's claim of serious injury under the 90/180 day category. Defendants argued only that plaintiff presented no objective evidence to support his claim. However, defendants "cannot obtain summary judgment by pointing to gaps in plaintiff['s] proof." (*Coastal Sheet Metal Corp. v Martin Assocs., Inc.*, 63 AD3d 617, 618 [1st Dept 2009], citing *Torres v Industrial Container*, 305 AD2d 136 [1st Dept 2003].)

Therefore, defendants' motion for summary judgment is denied.

Plaintiff's motion for summary judgment is granted without opposition. "It is well settled that a driver is expected to drive at a sufficiently safe speed and to maintain enough distance between himself and cars ahead of him so as to avoid collisions with stopped vehicles, taking into account the weather and road conditions. . . ." (*Francisco v Schoepfer*, 30 AD3d 275, 275-276 [1st Dept 2006][internal citations omitted]).

> "It is well settled that a rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle, and imposes a duty on the part of the operator of the moving vehicle to come forward with an adequate nonnegligent explanation for the accident."

(*Cabrera v Rodriguez*, 72 AD3d 553 [1st Dept 2010]; *Avant v Cepin Livery Corp.*, 74 AD3d 533 [1st Dept 2010].) "Wet, slippery roadway conditions do not, alone, constitute an adequate non-negligent explanation, absent proof that the condition was unanticipated." (*Stringari v Peerless Importers,* 304 AD2d 413, 413 [1st Dept 2003].) Because defendants have not come forth with any nonnegligent explanation for the rear end collision, and because plaintiff, as an innocent passenger in the bus, cannot possibly be found at fault under the circumstances (*see Garcia v Tri-County Ambulette Serv.*, 282 AD2d 206, 207 [1st Dept 2001]), plaintiff's motion for summary judgment

as to liability in his favor is granted, and the first affirmative defense of the answer, pleading plaintiff's culpable conduct, is dismissed.

The issue of whether plaintiff met the serious injury threshold remains for trial, along with damages, if serious injury is established. (*See Reid v Brown*, 308 AD2d 331, 332 [1st Dept 2003].)

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment (Motion Seq. No. 002) is granted without opposition, and plaintiff is granted summary judgment as to liability only against defendants, and the first affirmative defense of defendants' answer is stricken; and it is further

ORDERED that defendants' motion for summary judgment (Motion Seq. No. 003) is denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: December 12, 2011
New York, New York

ENTER:

J.S.C.

HON. MICHAEL D. STALLMAN