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SHORT FORM ORDER

COPY

INDEX No. 10-40352
CAL. No. 12-00919MV

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 8-27-12
ADJ. DATE 11-2-12
Mot. Seq. # 001 - MotD
002 - MD

GIORGIO DELVECCHIO, Plaintiff, - against - JOANNE SCIACCA, J. SCIACCA-JIMENEZ and KRISTY A. MARSALA, Defendants.	SANDERS, SANDERS, BLOCK, et al. Attorney for Plaintiff 100 Herricks Road Mineola, New York 11501 RUSSO, APOZNANSKI & TAMBASCO Attorney for Defendants Sciacca & Sciacca-Jimenez 875 Merrick Avenue Westbury, New York 11590 MONTFORT, HEALY, McGUIRE & SALLEY Attorney for Defendant Marsala 840 Franklin Avenue, P.O. Box 7677 Garden City, New York 11530-7677

Upon the following papers numbered 1 to 35 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-18; Notice of Cross Motion and supporting papers (002) 19-21; Answering Affidavits and supporting papers 22-23; 26-29; Replying Affidavits and supporting papers 23-25; 30-31; 32-33; 34-35; Other __; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that motion (001) by the defendant, Kristy A. Marsala, pursuant to CPLR 3212 for summary judgment dismissing the complaint and cross claims asserted against her on the basis that she bears no liability for the occurrence of the accident is granted, and the complaint and cross claims asserted by and against her are dismissed; and that branch of the motion (001) which seeks dismissal on the basis that the plaintiff, Giorgio Delvecchio, did not sustain a serious injury as defined by Insurance Law § 5102(d) has been rendered academic by dismissal of the complaint on the issue of liability and is denied as moot; and it is further

ORDERED that motion (002) by the defendant, Joanne Sciacca, s.h.a. J. Sciacca-Jimenez, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Giorgio Delvecchio, did not sustain a serious injury as defined by Insurance Law § 5102 (d) is denied.

The plaintiff seeks damages for personal injuries allegedly sustained in this multi-vehicle, chain-collision accident which occurred on Robert Moses Causeway, at or near its intersection with westbound Ocean Parkway in Suffolk County, New York, on July 8, 2009. It is alleged that the involved vehicles

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were all traveling in a southbound direction on Robert Moses Causeway, through a construction work zone with a left lane closure, when the subject accident occurred. In their respective answers, defendants Sciacca and Marsala have each asserted cross claims against each other wherein they seek judgment over for contribution and/or indemnification.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.***, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

Pursuant to Insurance Law § 5102 (d), "'[s]erious injury' means 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 medical 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."

The term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102(d), the initial burden is on the defendant to "present evidence in competent form, showing that plaintiff has no cause of action" (***Rodriquez v Goldstein***, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (***DeAngelo v Fidel Corp. Services, Inc.***, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (***Cammarere v Villanova***, 166 AD2d 760, 562 NYS2d 808, 810 [3d Dept 1990]).

In order to recover under the "permanent loss of use" category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed 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 (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, *supra*).

In support of motion (001), defendant Marsala has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, and answers with cross claims; plaintiff's verified bill of particulars; an uncertified copy of a police accident report; copies of the unsigned but certified transcripts of the examinations before trial of Giorgio Delvecchio and Joanne Sciacca-Jimenez, each dated August 10, 2011, and Kristy Marsala dated September 16, 2011; and the reports of Antoinette Perrie, D.C. concerning her independent chiropractic examination of the plaintiff, and Anthony Spartaro, M.D. concerning his independent orthopedic examination of plaintiff, both dated September 10, 2009, Denise Shulka, M.D. concerning the independent neurology examination of the plaintiff dated February 19, 2010, and Stephen Lastig, M.D. concerning his independent reviews of the plaintiff's lumbar and cervical spines each dated October 27, 2011.

In support of motion (002), defendant Sciacca has submitted, inter alia, an attorney's affirmation; and untabbed exhibits[1] consisting of copies of the summons and complaint, answer with cross claims; plaintiff's verified bill of particulars; copies of unauthenticated photographs; an uncertified copy of a police accident report; copies of the unsigned but certified transcripts of the examinations before trial of Giorgio Delvecchio and Joanne Sciacca-Jimenez, each dated August 10, 2011, and Kristy Marsala dated September 16, 2011; and the reports of Antoinette Perrie, D.C. concerning her independent chiropractic examination of the plaintiff, Anthony Spartaro, M.D. concerning his independent orthopedic examination of plaintiff, both dated September 10, 2009, Denise Shulka, M.D. concerning her independent neurology examination of the plaintiff dated February 19, 2010, and Stephen Lastig, M.D. concerning his independent reviews of the plaintiff's lumbar and cervical spines each dated October 27, 2011. It is noted that the unsworn MV-104 police accident reports constitute hearsay and are inadmissible (*see*, ***Lacagnino v Gonzalez***, 306 AD2d 250, 760 NYS2d 533 [2d Dept 2003]; ***Hegy v Coller***, 262 AD2d 606, 692 NYS2d 463 [2d Dept 1999]).

Turning to the issue of liability, the adduced testimonies establish that this was a chain-collision accident in the southbound lane of Robert Moses Causeway on the bridge. The weather was described as

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[1] In the future, exhibits must be properly tabbed as required, not just separated with pages, as it makes it difficult for the court to match arguments to documents and to sort through the multitude of pages (see, ***Youngewirth v Town of Ramapo Town Board***, 29 Misc3d 1221A [Supreme Court, Rockland County 2010]; ***Ro v Noah, ModaMaya Sa De CV. Inc.***, 2009 NY Slip Op 32598U [Supreme Court, New York County].

sunny and warm. Traffic was light. There was construction in the southbound travel lanes of Robert Moses, with cones on the roadway, leaving the right travel lane open approaching the bridge.

The Honda Pilot operated by the plaintiff, Giorgio Delvecchio, was at a complete stop for about fifteen seconds when the impact occurred to his vehicle. Delvecchio testified that a split second prior to the impact to the rear of his vehicle, he saw how fast the (Sciacca) vehicle behind him was traveling, and he knew that the driver would not have enough time to brake. There was about a car length's distance separating his vehicle from the rear of the (Bautista) vehicle ahead of him when his vehicle was struck in the rear by the (Sciacca) vehicle approaching from behind. The impact from the Sciacca vehicle caused his vehicle to move forward, and strike the rear of the Bautista vehicle ahead of him. Delvecchio further testified that there was another vehicle, a Mustang, behind the Sciacca vehicle. The Mustang struck the Sciacca vehicle behind him. He did not know if there was then a second impact to his vehicle.

Joanne Sciacca testified that she was operating a Honda Pilot, when seconds before the accident, she saw a black Honda Pilot in front of her. She then struck the rear of that vehicle which was operated by plaintiff Delvecchio. She was traveling about twenty five miles per hour. She did not know if that vehicle in front of her was stopped or moving at the time of the impact. She thought that she was speaking with her son when the accident occurred. Upon impact with the Delvecchio vehicle, her vehicle was struck in the rear by a Mustang operated by defendant Marsala, however, she did not remember that second impact. Sciacca stated that she felt no impact to her vehicle prior to striking the plaintiff's vehicle ahead of her.

Kristy Marsala testified to the extent that on the date of the accident, she was operating her Mustang traveling southbound on Robert Moses Causeway and approaching the bridge at about thirty to thirty five miles per hour. About a car length and a half, to two car lengths ahead of her, she saw a black SUV type vehicle strike the vehicle in front it. She saw no brake lights on the Sciacca vehicle in front of her prior to that impact, but heard its screeching brakes. Upon seeing that accident, she applied her brakes. She could not stop or move out of the lane and struck the Sciacca vehicle in the rear. She was aware of no other impacts ahead of her. Marsala now seeks summary judgment dismissing the complaint against her on the issue of liability.

When a driver approaches another vehicle from the rear, he is bound to maintain a reasonably safe rate of speed and to maintain control of his vehicle and use reasonable care to avoid colliding with the other vehicle (***Chepel v Meyers,*** 306 AD2d 235, 762 NYS2d 95 [2003]; ***Power v Hupart,*** 260 AD2d 458, 688 NYS2d 194 [1999]; *see also,* Vehicle and Traffic Law § 1129[a]). A driver, as a matter of law, is charged with seeing what there is to be seen on the road, that is, what should have been seen, or what is capable of being seen at the time (***People of the State of New York v Anderson,*** 7 Misc3d 1022A, 801 NYS2d 238 [City Ct, Ithaca 2005]). Kristy Marsala has demonstrated prima facie entitlement to summary judgment on the issue of liability by showing that this was a rear-end collision, that the plaintiff's vehicle was stopped at the time of the impact, and that defendant Sciacca failed to maintain control of her vehicle, or to use reasonable care, to avoid colliding with the plaintiffs' vehicle. That impact between the plaintiff's and Sciacca's vehicles occurred prior to Marsala striking the Sciacca vehicle in the rear.

The adduced testimonies do not establish that when the Marsala vehicle struck the Sciacca vehicle, it caused a second impact to the plaintiff's vehicle. Delvecchio did not know if there was second impact to his vehicle after it was struck by the Sciacca vehicle. Sciacca stated that she felt no impact to her

vehicle prior to striking the plaintiff's vehicle. Thus, no liability has been established against Marsala as to proximate cause of the accident or for the injuries to the plaintiff. Marsala testified she saw the impact between the Sciacca vehicle and the plaintiff's vehicle ahead of her prior to her impact with Sciacca's vehicle.

The plaintiff has not opposed this motion and has failed to raise a factual issue. Although defendant Sciacca opposes Marsala's application for summary judgment as to her liability (001), it has been demonstrated prima facie that although Marsala struck the Sciacca vehicle in the rear, she did not proximately cause the accident between the Sciacca vehicle and the plaintiff's vehicle. There is no evidentiary proof to raise a factual issue concerning whether there was a second impact to the plaintiff's vehicle caused by Marsala. Counsel for defendant Sciacca has set forth conclusory arguments and unsupported speculation that there is a factual issue in this regard; however, such argument and speculation are unsupported by the record.

Accordingly, that branch of the motion (001) by defendant Marsala for summary judgment on the issue of liability is granted and the complaint and cross claims for contribution and indemnification asserted by and against her are dismissed. That branch of the motion (001) by Marsala which seeks dismissal on the basis that the plaintiff, Giorgio Delvecchio, did not sustain a serious injury as defined by Insurance Law § 5102(d) has been rendered academic by dismissal of the complaint on the issue of liability and is denied as moot

Turning to the issue of serious injury, it is determined upon careful review of the of the evidentiary submissions, defendant Sciacca has failed to establish prima facie entitlement to summary judgment dismissing the complaint. None of the defendant's experts have submitted copies of their curriculum vitae to qualify as experts. None of the medical records, reports, and diagnostic studies have been submitted in support of the defendant's experts' opinions as required pursuant to ***Friends of Animals v Associated Fur Mfrs***., supra. Expert testimony is limited to facts in evidence. (*see, also,* ***Allen v Uh,*** 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Marzuillo v Isom,*** 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; ***O'Shea v Sarro***, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]; ***Hornbrook v Peak Resorts,*** Inc. 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]). However, in opposing this application, the plaintiff has submitted copies of the cervical and lumbar MRI's, inter alia.

In performing an independent chiropractic examination of the plaintiff, Antoinette Perrie, D.C. failed to compare the range of motion findings relative to the plaintiff's cervical and lumbar spine to the normal range of motion values. Neither Anthony Spataro, M.D. nor Dinesh Shukla, M.D. have set forth range of motion findings of the plaintiff's lumbar and cervical spines obtained on examination, and merely set forth that there is no limitation of motion in any direction of the cervical spine and lumbar spine. These omissions leave it to the court to speculate whether there were deficits found in the ranges of motion (*see* ***Hypolite v International Logistics Mgt., Inc.***, 43 AD3d 461, 842 NYS2d 453 [2d Dept 2007]; ***Somers v Macpherson***, 40 AD3d 742, 836 NYS2d 620 [2d Dept 2007]; ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]; ***Manceri v Bowe***, 19 AD3d 462, 798 NYS2d 441 [2d Dept 2005]; *see also* ***Rodriguez v Schickler***, 229 AD2d 326, 645 NYS2d 31 [1st Dept 1996], *lv denied* 89 NY2d 810, 656 NYS2d 738 [1997]). Dr. Shulka has set forth the injuries sustained in the accident are causally related to the accident. Dr. Spataro stated that if the claimant's history is correct, that a causal relationship exists between the accident and the injuries to the plaintiff's neck, upper back and lower back.

Stephen Lastig, M.D. has set forth in a conclusory and unsupported opinion that the disc herniation at L5-S1 is degenerative in nature in this eighteen year old male. While Dr. Perrie indicated that the cervical MRI report dated July 22, 2009 reveals a tiny disc protrusion at C5-6, Dr. Lastig stated that there are no focal disc herniations or annular bulges identified in the cervical spine MRI, thus raising further factual issue concerning whether or not the plaintiff sustained a herniated cervical disc, and precluding summary judgment from being granted.

It is noted that the defendant's examining physicians did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering the defendant's physicians' affidavits insufficient to demonstrate entitlement to summary judgment on the issue of whether the plaintiff was unable to substantially perform all of the material acts which constituted her usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; *see* ***Uddin v Cooper***, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; ***Toussaint v Claudio,*** 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]), and the experts offer no opinion with regard to this category of serious injury (*see* ***Delayhaye v Caledonia Limo & Car Service, Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]). Based upon the foregoing, it is determined that defendant Sciacca has failed to demonstrate entitlement to summary judgment on this category of injury as well.

Although the plaintiff has not opposed this motion, the factual issues raised in defendants' moving papers preclude summary judgment, as the defendant failed to establish that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) (*see* ***Agathe v Tun Chen Wang***, 98 NY2d 345, 746 NYS2d 865 [2006]); *see also* ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]).

Accordingly, motion (002) by defendant Sciacca, for summary judgment dismissing the complaint as asserted against her on the basis that the plaintiff did not suffer a serious injury as defined by Insurance Law §5102 (d) is denied.

Dated: 12-17-12

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

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION