SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 23A

----------X

Shawn Ackerson,

Index No.: 21201/11E

Plaintiff,

Decision and Order

-against-

Luther E. Barnes and Louis A. Mancini,

Defendants.

----------X

HON. ALEXANDER W. HUNTER, JR.

Two separate motions for summary judgment dismissal were filed by each defendant under motions sequences #1 and #2. Both motions will be decided herein.

Defendant Louis A. Mancini's ("Mancini") motion for an order pursuant to C.P.L.R. 3212, for summary judgment against plaintiff Shawn Ackerson ("Ackerson"), is denied. Defendant Luther E. Barnes' ("Barnes") motion for an order pursuant to C.P.L.R. 3212, for summary judgment against plaintiff Ackerson is denied. Plaintiff's claim under the 90/180-day category is hereby dismissed.

The cause of action is for personal injuries allegedly sustained by plaintiff in a motor vehicle accident that occurred on the Cross Island Parkway in Queens County on August 28, 2010 at approximately 8:00 P.M. Plaintiff was a rear seated passenger in the vehicle, a Yukon Denali, operated by defendant Mancini (the "Mancini vehicle").

On August 28, 2010, the Mancini vehicle was involved in two separate accidents. From the time the Mancini vehicle got onto the Cross Island Parkway to the time of the first accident, traffic was heavy. (Ackerson tr at 27, lines 21-25). In the first accident, the Mancini vehicle struck a vehicle in the rear near the Bell Boulevard exit approximately two or three miles from the Throgs Neck Bridge. (Mancini tr at 44, lines 23-25; at 45, lines 2-5). No part of plaintiff's body came into contact with the interior of the Mancini vehicle as a result of the first accident. (Ackerson tr at 34, lines 2-5). After the first impact, the drivers exited their vehicles in order to exchange information. (Mancini tr at 21, lines 2-12). The headlights, taillights, and the hazard flashers of the Mancini vehicle were illuminated prior to the second accident. (Mancini tr at 29, lines 7-12). There was possibly four to five feet between the right lane of traffic in which the Mancini vehicle was traveling and a guardrail. (Mancini tr at 45, lines 20-25; at 46, line 2). Although the Mancini vehicle tried to pulled off the roadway, approximately half of the Mancini vehicle remained on the roadway. (Mancini tr at 46, lines 3-15). Mancini did not place any traffic cones, flares, or other warning devices behind his vehicle after the first accident. (Mancini tr at 46, lines 16-20).

While the Mancini vehicle was stopped, plaintiff exited the vehicle in order to stretch his legs. (Mancini tr at 22, lines 17-25). Five to ten minutes later, the Mancini vehicle was struck in the rear by the vehicle, a Ford Explorer, operated by defendant Barnes (the "Barnes vehicle"). (Mancini tr at 30, lines 3-7). Barnes testified that he only saw the Mancini vehicle seconds before impact. (Barnes tr at 17, lines 18-20). Barnes could not recall whether the Mancini vehicle was illuminated in any manner. (Barnes tr at 23, lines 7-22). Most of the damage appears to have occurred to the rear passenger side of the Mancini vehicle and the driver's side front of the Barnes vehicle. (Barnes tr at 35, lines 15-23). Plaintiff alleges that the second impact caused him to be knocked over a guardrail and sustain his injuries.

Defendant Mancini argues that he is entitled to summary judgment dismissal of the complaint and all cross-claims against him because plaintiff cannot make out a case of negligence against him. Mancini asserts that the fact that his vehicle was in a position to be struck by the Barnes vehicle cannot be considered a cause of the accident. Instead, his conduct merely furnished the condition or occasion for the occurrence of the accident. Defendant Mancini contends that defendant Barnes' negligence in striking his stationary vehicle was the sole proximate cause of the accident.

Plaintiff does not oppose the branch of defendant Mancini's motion for summary judgment on the issue of liability.

Defendant Barnes opposes Mancini's motion for summary judgment on the issue of liability. Based upon the deposition testimonies of plaintiff and Mancini, Barnes argues that whether the first accident involving the Mancini vehicle merely furnished the condition or occasion for the happening of the second accident is a question of fact for a jury to determine. Issues of fact as to whether 1) Mancini was negligent in leaving his vehicle partially in the right lane of traffic and 2) Mancini's negligence was a proximate cause of the accident remain outstanding. Therefore, Barnes avers that Mancini's motion with respect to liability must be denied.

In reply to Barnes' opposition, Mancini argues that Barnes has overlooked the fact that he pulled his vehicle over to the side of the roadway as far as he could. Mancini asserts that no contrary testimony was given to demonstrate that his actions were unreasonable in light of the circumstances.

In the alternative, defendant Mancini argues that he is entitled to summary judgment because plaintiff did not sustain a serious injury as defined under Insurance Law § 5102. Defendant asserts that there is no evidence to demonstrate that plaintiff has suffered a permanent consequential limitation or a significant limitation of the use of a body organ, member, function or system or any injury that has prevented him from performing substantially all of his usual and customary daily activities for 90 days during the 180 days immediately following the accident.

In support, defendant Mancini submits the affirmed report of Daniel J. Feuer, M.D., dated February 16, 2012. (Mancini's exhibit F). Dr. Feuer conducted a neurological examination and range of motion testing with the use of a goniometer of plaintiff's cervical spine and lumbar spine. Normal ranges of motion were noted. Dr. Feuer states, "Based on a reasonable degree of

clinical certainty, I believe the claimant, Mr. Shawn Ackerson, does not demonstrate any objective neurological disability or neurological permanency, which is not causally related to the accident of August 28, 2010. He is neurologically stable to engage in full active employment as well as the full activities of daily living without restriction. The claimant has reached maximum medical improvement."

Defendant also submits the affirmed report of Robert Israel, M.D., dated February 15, 2012. (Mancini's exhibit G). Dr. Israel conducted an orthopedic examination of plaintiff on February 15, 2012. Ranges of motion were measured with the use of a goniometer. Straight leg raising test was negative bilaterally. Ranges of motion in plaintiff's lumbar spine were within normal ranges. Dr. Israel diagnosed plaintiff with resolved sprain of the lumbar spine. Although plaintiff's diagnosis is causally related to the accident, Dr. Israel states that no further medical treatment is necessary. Dr. Israel further notes that plaintiff is capable of work activities and activities of daily living without restriction.

Defendant Barnes also moves for summary judgment on the threshold issue and he adopts and joins the arguments set forth in Mancini's motion.

In opposition to both motions for summary judgment on the threshold issue, plaintiff asserts that both motions must be denied outright on procedural grounds. Plaintiff notes that neither motion contains a complete set of the pleadings as required under C.P.L.R. 3212. Mancini's motion does not contain defendant Barnes' answer and Barnes' motion does not contain defendant Mancini's answer. In addition, Mancini submits three unsworn, unsigned, and un-notarized deposition transcripts. Plaintiff contends that the deposition transcripts are inadmissible absent proof of compliance with C.P.L.R. 3116.

Should this court overlook the fundamental deficiencies in defendants' respective papers, plaintiff argues that summary judgment should be denied as there are material issues of triable fact as to whether plaintiff sustained a serious injury. Plaintiff submits the affirmed report of Charles J. Blatt, M.D., and the affidavit of Steven Shapiro, D.C. (Plaintiff's exhibits B and C). Dr. Blatt reviewed the MRI study of plaintiff's lumbar spine taken on September 10, 2010. Dr. Blatt states that the MRI film showed evidence of "an acute central focal herniated disc at the level of L3-L4 and L4-L5" and "the presence of marked straightening to the normal lordotic curve secondary to acute muscle spasm." Dr. Blatt also causally linked his findings in the MRI study to the accident.

In his affidavit, Dr. Shapiro indicates that he has been treating plaintiff since September 2, 2010. Dr. Shapiro recounts 41 different office visits. During each visit, he conducted range of motion testing with the use of a goniometer of plaintiff's lumbar spine. Diminished ranges of motion in plaintiff's lumbar spine were noted at each visit. With respect to the MRI study of plaintiff's lumbar spine, Dr. Shapiro opines that Dr. Blatt's findings are consistent with plaintiff's symptomatology. Dr. Shapiro states that as a result of his injuries, plaintiff has limitations in lifting, bending, and standing for extended periods of time. (Shapiro Aff, ¶ 43). Dr. Shapiro concludes that "Mr. Ackerson has suffered a significant limitation of use of his lumbar spine as a result of the August 28, 2010 accident....Moreover, since Mr. Ackerson has displayed these symptoms over the course of several years and many visits, it is my opinion that

this is a permanent condition. Therefore, it is also my opinion with a reasonable degree of chiropractic certainty, that Mr. Ackerson has also sustained a permanent consequential limitation of use of a body organ as a result of the August 28, 2010 accident. (Shapiro Aff, ¶¶ 44, 45).

In his affidavit, plaintiff explains that due to insurance issues, he has had interruptions in treatment. Due to these issues, he has been unable to treat his symptoms as needed. (Ackerson Aff, ¶¶ 7, 8). Plaintiff continues to experience pain and limitations. He asserts that the pain affects nearly every aspect of his life. He must be careful when moving his back, standing, sitting, and walking. He can no longer go to the gym, play softball, or play flag football. (Ackerson Aff, ¶ 9).

Defendant Mancini avers that none of the evidence submitted by plaintiff demonstrates that he sustained a serious injury. Mancini argues that the mere existence of herniated discs, standing alone, does not constitute a serious injury. Moreover, although Dr. Shapiro noted diminished ranges of motion, he does not set forth the ways in which those limitations have impacted plaintiff's life.

Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue of act. **Rotuba Extruders v. Ceppos, 46 N.Y.2d 233 (1978); Andre v. Pomeroy, 35 N.Y.2d 361 (1974); C.P.L.R. 3212(b)**. The court's function on a motion for summary judgment is issue finding rather than issue determination. **Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957)**. For summary judgment to be granted, the moving party must establish his or her cause of action or defense by presenting evidentiary proof in admissible form that would be sufficient to warrant the court in directing judgment in favor of the moving party. **Friends of Animals, Inc. v. Associated Furniture Manuf., Inc., 46 N.Y.2d 1065 (1979)**. Where the moving party fails to make such a showing, the motion must be denied regardless of the sufficiency of the opposition papers. **Winegrad v. New York University Medical Center, 64 N.Y.2d 851 (1985)**. Once the movant has made this showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that would require a trial of the action. **Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980)**. In considering a motion for summary judgment, the evidence must be viewed in the light most favorable to the party opposing the motion. **People v. Grasso, 50 A.D.3d 535 (1st Dept. 2008)**. However, mere conclusory allegations or defenses are insufficient to preclude summary judgment. **Zuckerman, 49 N.Y.2d 557**.

C.P.L.R. 3212(b) provides that a motion for summary judgment must be "supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions." C.P.L.R. 2214(c) provides that the movant must 1) furnish all papers served by him and 2) at the time of the hearing, furnish all other papers not already in the court's possession necessary for the consideration of the motion. Plaintiff incorrectly asserts that defendant Barnes failed to submit a copy of Mancini's answer with his moving papers. Mancini's answer was annexed as exhibit C to his motion. With respect to the sufficiency of Mancini's motion for summary judgment, all papers served by him were submitted in support. At the time of the hearing of this motion, this court has all of the papers necessary for the consideration of both motions.

Contrary to plaintiff's assertion, the deposition transcripts submitted in support are in admissible form. C.P.L.R. 3116(a) provides that a deposition transcript must be "signed by the witness before any officer authorized to administer an oath." If the witness fails to sign and return the transcript within 60 days, then the transcript is treated as if it was properly signed. By letters dated March 6, 2012, Mancini's counsel sent the deposition transcripts of Barnes and plaintiff to their respective counsel for execution. Neither transcript was returned. As such, the depositions will be treated as if they were signed. Moreover, plaintiff's and Barnes' transcripts are notarized and certified by the officer before whom the depositions were taken in compliance with C.P.L.R. 3116(b). This court also notes that plaintiff does not attack or challenge the accuracy of the deposition transcripts.

Generally, the issue of proximate cause is a question of fact for a jury to determine. **Derdiarian v. Felix Cont. Corp., 51 N.Y.2d 308 (1980).** "Where there is any doubt, confusion, or difficulty in deciding whether the issue ought to be decided as a matter of law, the better course is to leave the point for the jury to decide." **White v. Diaz, 49 A.D.3d 134, 139 (1st Dept. 2008).** Based upon the fact that most of the damage occurred to the right passenger side of the Mancini vehicle and the front driver side of the Barnes vehicle, it is unclear to this court how the two vehicles were positioned at the time of the accident. The angle of the Mancini vehicle and whether the Mancini vehicle was parallel with the guardrail are questions of fact for a jury to determine. Mancini also testified that plaintiff was able to open the rear passenger side door three-quarters of the way to exit the vehicle. (Mancini tr at 48, lines 4-23). This raises another question of fact as to whether Mancini moved his car onto the shoulder as far as he possibly could. Contrary to defendant Mancini's arguments, it cannot be said as a matter of law that the positioning of his vehicle merely furnished the occasion for the second accident. When the evidence is viewed in the light most favorable to the non-moving party, a reasonable jury could find that 1) Mancini's action of stopping his fully operational vehicle partially on the roadway in heavy traffic for approximately 5 to 10 minutes was negligent and 2) the positioning of the Mancini vehicle was a concurrent cause of the accident rather than merely furnishing the condition or occasion for the accident. **See, Somersall v. New York Tel. Co., 52 N.Y.2d 157 (1981); White, 49 A.D.3d 134.** In addition, defendant Mancini has failed to make a prima facie showing that he exercised reasonable care in warning other vehicles of the hazard posed by his vehicle stopped partially on the roadway. **See, Axelrod v. Krupinski, 302 N.Y. 367 (1951); Marsicano v. Fabrizio, 61 A.D.3d 941 (2nd Dept. 2009); Gregson v. Terry, 35 A.D.3d 358 (2nd Dept. 2008); Jones v. G & I Homes, Inc., 86 A.D.3d 786 (3rd Dept. 2011).**

A defendant can satisfy the initial burden by submitting sworn or affirmed statements of their examining physician, plaintiff's sworn testimony, or plaintiff's unsworn medical records. **Brown v. Achy, 9 A.D.3d 30 (1st Dept. 2004); Arjona v. Calcano, 7 A.D.3d 279 (1st Dept. 2004); Nelson v. Distant, 308 A.D.2d 338 (1st Dept. 2003).** In opposition, a plaintiff must submit objective medical evidence of a serious injury. **Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345 (2002).** The objective medical findings must include "either a specific percentage of the loss of range of motion or a sufficient description of the qualitative nature of plaintiff's limitations based on the normal function, purpose and use of the body part." **Bent v. Jackson, 15 A.D.3d 46, 49 (1st Dept. 2005) (internal quotations omitted).** A plaintiff's subjective testimony as to his or her own pain or inability to perform specific tasks is insufficient

to sustain a claim of serious injury. **Glover v. Capres Contracting Corp., 61 A.D.3d 549 (1st Dept. 2009).**

Defendants have established their prima facie entitlement to summary judgment as a matter of law with respect to plaintiff's claims of a "permanent consequential limitation" and a "significant limitation of use" of his lumbar spine by the submission of affirmed reports from an orthopedic surgeon and a neurologist. Both Drs. Feuer and Israel "detailed the specific objective tests used in [their] personal examinations, as well as the underlying data from those tests, to show full range of motion" in plaintiff's lumbar spine. **DeJesus v. Paulino, 61 A.D.3d 605, 607 (1st Dept. 2009); see also, Toure, 98 N.Y.2d 345; Porter v. Bajana, 82 A.D.3d 488 (1st Dept. 2011).**

The burden then shifted to plaintiff to set forth sufficient evidence to raise a triable issue of fact to preclude summary judgment. **Gaddy v. Eyler, 79 N.Y.2d 955 (1992).** "[B]ulging or herniated discs are not, in and of themselves, evidence of serious injury without competent objective evidence of the limitations and duration of the disc injury." **DeJesus v. Paulino, 61 A.D.3d 605, 608 (1st Dept. 2009); see also, Pommels v. Perez, 4 N.Y.3d 566, 574 (2005); Noble v. Ackerman, 252 A.D.2d 392 (1st Dept. 1998).** In opposition, plaintiff submitted objective medical evidence sufficient to defeat defendants' motions for summary judgment. Dr. Shapiro found diminished ranges of motion in plaintiff's lumbar spine both shortly after the accident and throughout his course of treatment, a span of more than two years. Dr. Blatt's review of an MRI study taken several weeks after the accident indicates the presence of a herniated disc. Diminished ranges of motion coupled with evidence of a herniated disc are sufficient to raise an issue of fact as to whether plaintiff sustained a significant limitation in use or a permanent consequential limitation of use of his lumbar spine. **Salomon v. Singh, 105 A.D.3d 436 (1st Dept. 2013); Fuentes v. Sanchez, 91 A.D.3d 418 (1st Dept. 2012); Amaro v. American Medical Response of New York, Inc., 99 A.D.3d 563 (1st Dept. 2012); Colon v. Bernabe, 65 A.D.3d 969 (1st Dept. 2009).**

In order to establish a serious injury under the 90/180-day category, the plaintiff "must present objective evidence of 'a medically determined injury or impairment of a non-permanent nature'" that prevented the plaintiff from performing substantially all of his usual and customary daily activities. **Toure, 98 N.Y.2d at 357.** Findings based upon a plaintiff's subjective testimony as to his own pain or inability to perform specific tasks is insufficient to sustain a claim of serious injury. **Brown v. Covington, 82 A.D.3d 406 (1st Dept. 2011).** "When construing the statutory definition of a 90/180-day claim, the words 'substantially all' should be construed to mean that the person has been prevented from performing his usual activities to a great extent, rather than some slight curtailment." **Thompson v. Abassi, 15 A.D.3d 95, 100-101 (1st Dept. 2005).**

Plaintiff's claim under the 90/180-day category is undermined and refuted by his deposition testimony and his verified bill of particulars wherein he stated that he was confined to his bed for approximately one to two weeks after the accident. **Vasquez v. Almanzar, 107 A.D.3d 538 (1st Dept. 2013); Philips v. Tolnep Limo. Inc., 99 A.D.3d 534 (1st Dept. 2012); Ovalles v. Herrera, 89 A.D.3d 636 (1st Dept. 2011).** Plaintiff failed to raise an issue of fact to show that he had "been curtailed from performing his usual activities to a great extent rather than

some slight curtailment." **Licari v. Elliott, 57 N.Y.2d at 236**. Moreover, his claims of not being able to perform various activities are not substantiated by objective medical evidence. **Nelson v. Distant, 308 A.D.2d 338 (1st Dept. 2003)**.

Accordingly, defendant Mancini's motion for summary judgment is denied in its entirety. Defendant Barnes' motion for summary judgment on the threshold issue is denied. Plaintiff's claim under the 90/180-day category is hereby dismissed.

Defendant Mancini is directed to serve a copy of this order with notice of entry on all parties and file proof thereof with the clerk's office.

This constitutes the decision and order of this court.

Dated: September 17, 2013

ENTER:

J.S.C.

ALEXANDER W. HUNTER JR