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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH _____ PART 22

Justice

Index Number : 104032/2010
GARCIA, JOSE
vs.
FEIGELSON, EUGENE B.
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to 4 **, were read on this motion to/for** SJ

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** 1

Answering Affidavits — Exhibits Notice of X-m **No(s).** 2, 3

Replying Affidavits + cross motion and **No(s).** 4

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

FILED

OCT 24 2013

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 10/16/13

_____, J.S.C.
HON. ARLENE P. BLUTH

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NY
COUNTY OF NEW YORK: PART 22

Index No.:104032/2010
Motion Seq.002

JOSE GARCIA and RAFAEL H. DIAZ

Plaintiff,

-against-

EUGENE B. FEIGELSON

Defendants.

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

Plaintiffs' motion for summary judgment in their favor on the issue of liability, and for dismissal of the defendant's first affirmative defense (culpable conduct) is granted. Defendant's cross motion for summary judgment dismissing the complaint for failure of plaintiff Garcia to satisfy the serious injury threshold is granted.

In this action, plaintiff Jose Garcia alleges that on January 6, 2009, at approximately 1:40 p.m., while he was stopped at a red light at West 40th Street and 12th Avenue in Manhattan, he was rear-ended by defendant. Plaintiff alleges that he sustained personal injuries resulting from the collision. Plaintiff Rafael Diaz, owner of the car who was not in it at the time of the accident, asserts a property damage claim and has not been deposed.

In order to prevail on a motion for summary judgment, a movant (here, plaintiffs) must make a prima facie showing of entitlement to judgment as a matter of law through admissible evidence, eliminating all material issues of fact. *Alvarez v. Prospect Hospital*, 68 NY2d 320,324, 508 NYS2d 923 (1986). Once the movant demonstrates entitlement to judgment, the burden shifts to the opponent to rebut that prima facie showing. *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872, 433 NYS2d 1015 (1980). In opposing such a motion, the adversary party "must

lay bare its evidentiary proof. Conclusory allegations are insufficient to defeat the motion; the opponent must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact". *Zuckerman v. City of New York*, 49 NY2d 557 at 562, 427 NYS2d 595 (1980).

In deciding the motion, the court must draw all reasonable inferences in favor of the non-moving party and must not decide credibility issues. *Dauman Displays, Inc. v Masturzo,* 168 AD2d 204, 562 NYS2d 89 (1st Dept 1990), *lv. denied* 77 NY2d 939, 569 NYS2d 612 (1991). As summary judgment is a drastic remedy which deprives a party of being heard, it should not be granted where there is any doubt as to the existence of a triable issue of fact. *Chemical Bank v West 95th Street Development Corp.,* 161 AD2d 218, 219, 554 NYS2d 604 (1st Dept 1990), or where the issue is even arguable or debatable. *Stone v Goodson,* 8 NY2d 8, 12, 200 NYS2d 627 (1960).

Liability

It is well settled that a rear-end collision with a stopped or stopping vehicle creates a presumption that the operator of the following vehicle was negligent; in order to rebut that presumption, the following vehicle's operator must proffer a non-negligent explanation for his or her involvement in the accident. *Corrigan v Porter Cab Corp.*, 101 AD3d 471, 471-472 955 NYS2d 336 (1st Dept 2012); *Agramonte v City of New York*, 288 AD2d 75, 76, 732 NYS2d 414 [1st Dept 2001]).

In his deposition, plaintiff Garcia testified that he was stopped at a red light for 10 to 15 seconds, with his foot on the brake when he was rear-ended. In his deposition, defendant fails to

offer a non-negligent reason for rear-ending plaintiff and has not submitted an affidavit in opposition to this motion.

Defendant's attorney's argument, that Diaz's testimony is necessary to oppose the motion, is without merit. Diaz was not there and was not a witness. Nor can Diaz provide for defendant a non-negligent explanation for defendant rear-ending a stopped car. The only person with any relevant information about why defendant rear-ended plaintiff is the defendant himself, and he has chosen not to offer a non-negligent explanation. Therefore, plaintiff is granted summary judgment as to liability against defendant. As liability has been determined, the first affirmative defense (contributory negligence) is also dismissed.

Serious Injury

To prevail on a motion for summary judgment, the defendant has the initial burden to present competent evidence showing that the plaintiff has not suffered a "serious injury" (*see Rodriguez v Goldstein*, 182 AD2d 396, 582 N.Y.S.2d [1st Dept 1992]). Such evidence includes "affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" *Shinn v Catanzaro*, 1 AD3d 195, 197, 761 N.Y.S.2d (1st Dept 2003), quoting *Grossman v Wright*, 268 AD2d 79, 84, 707 N.Y.S. 2d 233 (2d Dept 2000). Where there is objective proof of injury, the defendant may meet his or her burden upon the submission of expert affidavits indicating that plaintiff's injury was caused by a pre-existing condition and not the accident. *Farrington v Go On Time Car Serv.*, 76 AD3d 818, 907 N.Y.S. 479 (1st Dept 2010), citing *Pommells v Perez*, 4 NY3d 566, 797 N.Y.S. 2d 380 (2005).

Once the defendant meets his or her initial burden, the plaintiff must then demonstrate a

triable issue of fact as to whether he or she sustained a serious injury (*see Shinn*, 1 AD3d at 197). A plaintiff's expert may provide a qualitative assessment that has an objective basis and compares plaintiff's limitations with normal function in the context of the limb or body system's use and purpose, or a quantitative assessment that assigns a numeric percentage to plaintiff's loss of range of motion. *Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350-351, 746 N.Y.S.2d 865 (2002). Further, where the defendant has established a pre-existing condition, the plaintiff's expert must address causation (*see Valentin v Pomilla*, 59 AD3d 184, 873 N.Y.S.2d [1st Dept 2009]; *Style v Joseph*, 32 AD3d 212, 214, 820 N.Y.S.2d [1st Dept 2006]).

In his bill of particulars (exh C to cross-motion), claims injuries to his right shoulder (including rotator cuff and labrum tears with surgery in August 2010), neck (herniations at C3-4, 4-5 and 5-6), back (L4-5 herniation with May 2010 diskectomy), right knee and hip, headaches, nervousness, anxiety, etc. Garcia also makes a 90/180 claim in response 11 in the bill of particulars, stating that he was confined to home for approximately 3 months and 3 weeks after the accident.

Defendant's showing

In his cross-motion for dismissal, defendant asserts that the injuries plaintiff claims here were not caused by the subject accident. Rather, these were pre-existing degenerative conditions and/or plaintiff's injuries were caused by a 2006 accident that took place three years before the subject accident. Thus, causation is at issue.

In support, defendant submits the affirmation of Lewis Rothman, MD, a radiologist. Because of the prior accident, Dr. Rothman was able to compare MRIs taken before the subject accident (in 2006) to MRIs taken after this accident in 2009. Dr. Rothman states that plaintiff's

cervical spine MRI of 2006 revealed chronic degenerative disc disease and herniations at C3-4, 4-5 and 6-7 and the 2009 MRI "showed no interval change from the 2006 MRI". Dr. Rothman states that plaintiff's **lumbar spine** MRI of 2006 also revealed chronic degenerative disc disease and a herniation at L4-5 and the 2009 MRI showed a slight decrease in the size of the L4-5 herniation. Dr. Rothman states that plaintiff's 2006 **right shoulder** MRI revealed supraspinatus tendinosis and the 2009 MRI "showed no interval change from the 2006 MRI".

Dr. Rothman concludes, with a reasonable degree of medical certainty, after comparing the pre- and post- accident MRIs, that (1) there is no radiological evidence that plaintiff's claimed injuries to his cervical spine, lumbar spine or right shoulder are proximately related to the subject accident (para. 4), (2) there is no radiological evidence that plaintiff sustained an aggravation or exacerbation of a pre-existing condition to his cervical spine, lumbar spine or right shoulder as a result of the subject accident, (3) there is no radiological evidence of post-accident trauma in the 2009 MRIs of plaintiff's cervical spine, lumbar spine or right shoulder.

Defendant also submits the affirmed reports of P. Leo Varriale, MD, an orthopedist, and Daniel J. Feuer, MD, a neurologist. Each conducted an IME and each reported that plaintiff had full range of motion and no disability.

Plaintiff's showing

The only relevant admissible evidence plaintiff submitted in opposition is the affirmed report of Shahid Mian, M.D., an orthopedist.[1] The radiology reports of Jacob Lichy (exh B), printouts from Dr. Cabatu (exh C) and Beth Israel operative report (exh D) are unaffirmed and

[1]The Court overlooks that he affirms pursuant to CPLR 2105 (should be 2106).

were not considered by the Court.

Dr. Mian first saw plaintiff on February 18, 2010; this was more than a year after the subject January 2009 subject accident. At that time, plaintiff did not advise Dr. Mian of the 2006 accident and the resulting claimed injuries; Dr. Mian states on page 2 of his 11/20/12 report under "past history" "A motor vehicle accident in 1998 with no injury". Certainly, Dr. Mian cannot opine on causation when he first saw the plaintiff one year after the subject accident and did not even know about the 2006 accident. Significantly, plaintiff has not submitted any report from any doctor who examined him shortly after the accident. "Absent admissible contemporaneous evidence of alleged limitations, plaintiff cannot raise an inference that his injuries were caused by the accident" *Shu Chi Lam v Wang Dong*, 84 AD3d 515, 922 NYS2d 381 (1st Dept 2011). Additionally, while Dr. Mian refers to the findings of MRI reports of plaintiff's various body parts, he does not say that he reviewed the films himself and the radiology reports submitted are not affirmed. Dr. Mian's recitation of the findings in the unaffirmed reports does not put the findings of those of inadmissible reports before the Court. See *Malupa v Oppong*, 106 AD3d 538, 966 NYS2d 9 (1st Dept 2013). There is nothing in Dr. Mian's 3/20/12 affirmation to establish that any of plaintiff's physical conditions were caused by the subject accident.

In an attempt to overcome Dr. Rothman's affirmation, Dr. Mian submitted another affirmation dated 3/12/13. Now Dr. Mian mentions the 2006 accident and claims that the 2009 accident aggravated the injuries. There is no basis for this conclusion and he does not state that it is made with a reasonable degree of medical certainty. Relying on Dr. Rothman's comparison of the shoulder MRIs, Dr. Mian says the tear in the rotator cuff had to be from the second accident because it was not found in the MRI after the first accident. But Dr. Rothman never saw a tear in

the right shoulder rotator cuff in the MRI after the 2009 accident. There is simply no proof that a rotator cuff tear was traumatically caused by the 2009 accident and therefore no basis for Dr. Mian's conclusion.

Likewise, Dr. Mian's statement that the surgeries to plaintiff's right shoulder and lumbar spine were causally related to the subject accident are without any basis whatsoever. There is simply no explanation or support for that statement, which is not made with any degree of medical certainty. Nowhere does he state that what he found when he operated was indicative of one and a half year-old trauma or anything else remotely capable of supporting his conclusion that the 2009 accident - and not degeneration or the 2006 accident - caused the plaintiff's injuries.

Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment on the issue of liability, and for dismissal of the first affirmative defense (contributory negligence) contained in the answer, is granted and it is further

ORDERED that defendant's motion to dismiss the claims of plaintiff JOSE GARCIA is granted and those claims are dismissed, and it is further

ORDERED that the property damage claim of plaintiff Rafael H. Diaz continues. The parties are to appear for a discovery conference with respect to Diaz's claims on December 2, 2013, 9:30 AM, part 22 DCM.

This is the Decision and Order of the Court.

Dated: October 16, 2013
New York, New York

ARLENE P. BLUTH, JSC