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SHORT FORM ORDER

INDEX No. 11-7911
CAL. No. 13-00168MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 5-21-13 (#001)
MOTION DATE 6-20-13 (#002)
MOTION DATE 6-26-13 (#003)
MOTION DATE 8-21-13 (#004)
ADJ. DATE 9-11-13
Mot. Seq. # 001 - MG; # 002 - MD
003 - MG; # 004 - MotD

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ELVIRA DEVIVO and VINCENT JOSEPH DEVIVO,

Plaintiffs,

- against -

TERRENCE J. MCGOWAN, TARGET CORPORATION, INLAND US MANAGEMENT, LLC and INLAND WESTERN RETAIN REAL ESTATE TRUST, INC.,

Defendants.

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BRUCE G. CLARK & ASSOCIATES
Attorney for Plaintiffs
22 South Bayles Avenue
Port Washington, New York 11050

BREEN & CLANCY
Attorney for Defendant McGowan
1355 Motor Parkway, Suite 2
Hauppauge, New York 11749

SIMMONS, JANNACE LLP
Attorney for Defendant Target Corporation
115 Eileen Way, Suite 103
Syosset, New York 11790

CLAUSEN MILLER, P.C.
Attorney for Defendant Inland US Management
One Chase Manhattan Plaza
New York, New York 10005

Upon the following papers numbered 1 to 99 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 23; 24 - 43;44 - 66 ; Notice of Cross Motion and supporting papers 67 - 71 ; Answering Affidavits and supporting papers 72 - 75; 76 - 77 ; Replying Affidavits and supporting papers 78 - 79; 80 - 82; 83 - 84; 85 - 86; Other memoranda of law, 87 - 88; 89 - 92; sur-reply, 93 - 96, 97 - 99 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#001) by defendants Inland US Management, LLC and Inland Western Retain Real Estate Trust, Inc., the motion (#002) by defendant Terrence McGowan, the motion

(#003) by defendant Target Corporation, and the cross motion (#004) by plaintiffs are consolidated for the purposes of this determination; and it is further

ORDERED that the motion (#001) by defendants Inland US Management, LLC and Inland Western Retain Real Estate Trust, Inc. for summary judgment dismissing the complaint and all cross claims against them is granted; and it is further

ORDERED that the motion (#002) by defendant Terrence McGowan for summary judgment dismissing the claim of plaintiff Vincent Joseph Devivo is denied; and it is further

ORDERED that the motion (#003) by defendant Target Corporation for summary judgment dismissing the complaint and all cross claims against it is granted; and it is further

ORDERED that the cross motion (#004) by plaintiffs for, inter alia, summary judgment in their favor is determined as follows.

This action arises out of a motor vehicle accident which occurred on January 21, 2011, at a parking lot in front of a Target store in Bay Shore, New York. The property is owned by defendant Target Corporation, and is maintained by defendants Inland US Management, LLC and Inland Western Retain Real Estate Trust, Inc. The complaint alleges that a vehicle operated by defendant Terrence McGowan struck plaintiffs Elvira Devivo and Vincent Joseph Devivo as they were walking in the parking lot to their vehicle. The complaint alleges that defendants Inland US Management, Inland Western Retain Real Estate Trust (collectively known as "the Inland defendants"), and Target negligently designed and maintained the plaza area in front of the Target store where the subject accident occurred. Specifically, plaintiffs allege that there were no stop signs in the area to warn vehicles to slow down and stop. According to the bill of particulars, plaintiff Vincent Devivo suffered shoulder paralysis and fright terror as a result of seeing his wife's condition after the subject accident. The Inland defendants and defendant Target assert cross claims against each other for contribution and indemnification.

The Inland defendants now move for summary judgment dismissing the complaint and all cross claims against them on the grounds that they did not create a dangerous or defective condition in the parking lot and that they did not have notice of such a condition. The Inland defendants also argue that the condition of the parking lot was not the proximate cause of plaintiffs' injury. In support of their motion, the Inland defendants submit, among other things, copies of the pleadings, transcripts of the parties' deposition testimony, and a photograph of the area where the subject accident occurred.

Defendant McGowan moves for summary judgment dismissing the complaint as to plaintiff Vincent Devivo on the ground that he did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). In support of his motion, defendant McGowan submits, among other things, copies of the pleadings, the police accident report, and an affirmed medical report of Dr. Isaac Cohen and an addendum to a medical report.

Defendant Target moves for summary judgment dismissing the complaint and all cross claims against it on the ground that the design of the parking lot area where the accident occurred was not the proximate cause of plaintiffs' injuries. Target also argues that the Inland defendants were solely responsible for maintenance of the parking lot. In support of their motion, defendant Target submits, among other things, copies of the pleadings, transcripts of the parties' deposition testimony, and a photograph of the area where the subject accident occurred.

Plaintiffs cross-move for summary judgment in their favor against all defendants and for a trial preference. Plaintiffs also oppose defendants' motions for summary judgment on the ground that their expert affidavit from a collision reconstruction expert establishes that defendants were negligent. In support of their cross motion and in opposition to defendants' motion, plaintiffs submit an affidavit of Robert Genna, a collision reconstruction analyst, and an affirmed medical report of Dr. Isaac Cohen.

Defendant Target opposes plaintiffs' cross motion, arguing that no dangerous condition existed, and that codefendant McGowan's negligence in striking plaintiffs with his vehicle was the proximate cause of the accident. The Inland defendants oppose plaintiffs' cross motion, arguing that plaintiffs' cross motion and opposition papers are untimely, and that plaintiffs' expert report should be precluded.

At their examinations before trial, plaintiffs testified that on the day of the subject accident they were struck by a vehicle as they were walking from the Target store to their car. They testified that they did not observe the vehicle that struck them.

At his examination before trial, defendant McGowan testified that he was driving his vehicle in the Target parking lot looking for a parking spot at the time of the accident. He testified that he did not observe any stop signs in the parking lot, and that when he made a left turn, his vehicle came into contact with plaintiffs. He testified that he did not observe plaintiffs walking past his vehicle, and that there was nothing obstructing his view of the area in front of his vehicle.

Plaintiffs' expert, Robert Genna, opines with a reasonable degree of professional certainty that the injuries sustained by plaintiffs were proximately caused by the negligence of the defendants. He concludes that the Inland defendants and defendant Target were negligent in failing to have a person at the pavement plaza at the entrance of the Target store directing traffic, in failing to have meaningful markings on the pavement, in failing to place speed bumps at a location which would cause a motor vehicle operator to slow his vehicle before entering the paved plaza area, and in placing minuscule stop signs in a location where they were not visible to vehicles entering the plaza area.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden shifts to the opposing party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for

summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

Here, defendant Target and the Inland defendants have established prima facie that the condition and design of the plaza area was not the proximate cause of plaintiffs' injuries. "Evidence of negligence is not enough by itself to establish liability. It must be proved that the negligence was the cause of the event which produced the harm." (***Sheehan v City of New York***, 40 NY2d 496, 501, 387 NYS2d 92 [1976]). Moreover, "there will ordinarily be no duty imposed on a defendant to prevent a third-party from causing harm to another unless the intervening act which caused the plaintiff's injuries was a normal or foreseeable consequence of the situation created by the defendant's negligence (***Rivera v Goldstein***, 152 AD2d 556, 557, 543 NYS2d 159 [2d Dept 1989]; *see* ***Comolli v 81 & 13 Cortland Assocs. L.P.***, 285 AD2d 863, 727 NYS2d 795 [3d Dept 2001]). Under the circumstances, the accident occurred as a result of defendant McGowan's failure to control his vehicle, and the plaza area "merely furnished the condition or occasion for the occurrence of the event rather than one of its causes" (***Margolin v Friedman***, 43 NY2d 982, 983, 404 NYS2d 553 [1978]; *see* ***Castillo v Amjack Leasing Corp.***, 84 AD3d 1298, 924 NYS2d 156 [2d Dept 2011]; ***Vayser v Waldbaum, Inc.***, 225 AD2d 761, 640 NYS2d 177 [2d Dept 1996]).

In opposition, plaintiffs failed to raise a triable issue of fact. Significantly, the expert affidavit submitted by plaintiffs consisted of mere speculative and conclusory assertions unsupported by adequate foundational facts and accepted industry standards (*see* ***Rabon-Willimack v Robert Mondavi Corp.***, 73 AD3d 1007, 905 NYS2d 190 [2d Dept 2010]; ***Pappas v Cherry Cr., Inc.***, 66 AD3d 658, 888 NYS2d 511 [2d Dept 2009]; ***DeLeon v State of New York***, 22 AD3d 786, 803 NYS2d 692 [2d Dept 2005]). Accordingly, the motions by defendant Target and the Inland defendants for summary judgment dismissing the complaint and all cross claims against them are granted.

As to defendant McGowan's motion for summary judgment, 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*)

Here, defendant McGowan has failed to establish his prima facie entitlement to judgment as a matter of law as he has failed to submit sufficient medical evidence that plaintiff Vincent Devivo did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see* ***Pommells Perez***, 4 NY3d

566, 797 NYS2d 380 [2005]; ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]). Significantly, defendant McGowan submits an addendum to a medical report prepared by Dr. Cohen, who conducted an independent medical evaluation of Vincent Devivo, but fails to submit the medical report itself. The addendum merely states that plaintiff Vincent Devivo has a satisfactory functional capacity of the upper and lower extremities, and concludes that he was performing his normal activities in an unrestricted fashion and was not receiving any form of treatment. Accordingly, defendant McGowan's motion for summary judgment dismissing the complaint as to plaintiff Vincent Devivo is denied.

The cross motion by plaintiffs is denied. CPLR 3212(a) provides that if no date for making a summary judgment motion has been set by the court, such a motion "shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown." Absent a showing of good cause for the delay in filing a summary judgment motion, a court lacks the authority to consider even a meritorious, non-prejudicial application for such relief (*see* ***Miceli v State Farm Mut. Auto. Ins. Co.***, 3 NY3d 725, 786 NYS2d 379 [2004]; ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]). Although the statutory 120-day period for making a summary judgment motion in this case expired on May 25, 2013, plaintiffs did not make their cross motion for summary judgment until August 12, 2013. As there is no explanation in the cross-moving papers for plaintiffs' delay in seeking summary judgment, the branch of the cross motion seeking such relief must be denied as untimely (*see* ***Miceli v State Farm Mut. Auto. Ins. Co.***, 3 NY3d 725, 786 NYS2d 379; ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261; ***Bivona v Bob's Discount Furniture of N.Y., LLC***, 90 AD3d 796, 935 NYS2d 605 [2d Dept 2011]; ***Ofman v Ginsberg***, 89 AD3d 908, 933 NYS2d 103 [2d Dept 2011]; ***Castillo v Valente***, 85 AD3d 1080, 926 NYS2d 304 [2d Dept 2011]; ***Brewi-Bijoux v City of New York***, 73 AD3d 1112, 900 NYS2d 885 [2d Dept 2010]).

Finally, as to plaintiffs' application for a trial preference, CPLR 3403(a)(4) provides that "in any action upon the application of a party who has reached the age of seventy years," such action "shall be entitled to a preference." Here, plaintiffs failed to submit proof in admissible form demonstrating that they are over 70 years of age. Accordingly, plaintiffs' application for a trial preference is denied at this time, without prejudice.

Dated: 13 Dec. 2013

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION