SHORT FORM ORDER

INDEX No. 13-24008
CAL. No. 14-01797MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 3-3-15 (#001)
MOTION DATE 4-21-15 (#002)
ADJ. DATE 6-2-15
Mot. Seq. # 001 - MD
002 - XMG

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SALVATORE P. CATANIA and GRACE CATANIA,

Plaintiffs,

- against -

NEW YORK STYLE LIMOUSINE, INC., a/k/a NY LIMO STYLE, and JESUS ORTIZVERA,

Defendants.

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RAND P. SCHWARTZ, ESQ.
Attorney for Plaintiffs
1000 Park Boulevard, Suite 205
Massapequa Park, New York 11762

CAMPOLO, MIDDLETON & MCCORMICK
Attorney for Defendants
4175 Veterans Mem Highway, Suite 400
Ronkonkoma, New York 11779

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendants, dated February 3, 2015, and supporting papers (including Memorandum of Law dated February 3, 2015); (2) Notice of Cross Motion by the plaintiffs, dated April 20, 205, supporting papers; (3) Affirmation in Opposition by the defendants, dated May 13, 2015, and supporting papers; (4) Reply Affirmation by the plaintiffs, dated June 1, 2015, and supporting papers; (5) Other ___ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the branch of the motion by the defendants for summary judgment dismissing the complaint on the ground that plaintiff Salvatore Catania did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied; and it is further

ORDERED that the branch of the motion by the defendants for summary judgment dismissing the complaint on the issue of liability is denied; and it is further

ORDERED that the cross motion by the plaintiffs for summary judgment in their favor on the issue of liability is granted.

This is an action to recover damages, personally and derivatively, for injuries allegedly sustained by plaintiff Salvatore Catania, a passenger in a taxi owned by New York Style Limousine, Inc., a/k/a NY Limo Style ("NYS Limousine"), and operated by defendant Jesus Ortizvera, arising out of a single-car accident when Ortizvera lost control of his vehicle, causing it to spin and come to rest on the guardrail. The accident occurred on an off-ramp of the Sagtikos Parkway in Smithtown, New York, on January 21, 2012 at approximate 9:20 a.m. At the time of the accident, Salvatore Catania and Grace Catania were riding as passengers in the defendants' taxi.

By their bill of particulars, the plaintiffs allege that, as a result of the subject accident, Salvatore Catania sustained serious injuries including herniated discs at L3-L4 and L5-S1; an osteophyte at L1-L2; stenosis at L2-L3 and L4-L5; lumbar radiculopathy; and post-traumatic pain and tenderness in his left hip.

The defendants now move for summary judgment dismissing the complaint on the ground that Salvatore Catania did not sustain a "serious injury" as defined in Insurance Law § 5102 (d).

Insurance Law § 5102 (d) defines "serious injury" as "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 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."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance***, 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 a "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 (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Akhtar v Santos***, 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff's deposition testimony and the affirmed medical report of the defendant's own examining physician (*see* ***Moore v Edison***, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; ***Farozes v Kamran***, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency

of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

On November 4, 2013, approximately one year and nine months after the subject accident, the moving defendants' examining orthopedist, Dr. John Waller, examined Salvatore Catania using certain orthopedic and neurologic tests including straight leg raising test. Dr. Waller found that all the test results were negative or normal, and that there was no spasm in Salvatore Catania's lumbar spine, although there was a complaint of mild tenderness. Dr. Waller performed range of motion testing on Salvatore Catania's lumbar spine using a goniometer, and found that he had range of motion restrictions in his lumbar spine: 40 degrees flexion (60 degrees normal) and 20 degrees extension (25 degrees normal).

On November 11, 2013, the moving defendants' examining anesthesiologist with a specialty in pain management, Dr. Phillip Fyman, examined Salvatore Catania using certain orthopedic and neurologic tests including straight leg raising test. Dr. Fyman found that all the test results were negative or normal. Dr. Fyman performed range of motion testing on Salvatore Catania's lumbosacral spine using a goniometer, and found that he had full range of motion in his lumbosacral spine: 90 degrees flexion (90 degrees normal) and 30 degrees extension (30 degrees normal).

On August 11, 2014, approximately two years and seven months after the subject accident, the moving defendants' examining orthopedist, Dr. Marc Chernoff, examined Salvatore Catania using certain orthopedic and neurologic tests including straight leg raising test. Dr. Chernoff found that all the test results were negative or normal. Dr. Chernoff performed range of motion testing on Salvatore Catania's lumbar spine and left hip using a goniometer, and found that he had range of motion restrictions: 90 degrees flexion (90 degrees normal) and 25 degrees extension (30 degrees normal) in his lumbar spine and 40 degrees external rotation (45 degrees normal) and 20 degrees internal rotation (40 degrees normal) in his left hip. Dr. Chernoff concluded that Salvatore Catania's back injury was not causally related to the subject accident because he had a "preexistent degenerative condition" in his lower back prior the subject accident. However, Dr. Chernoff failed to provide any evidence, including said MRI report, demonstrating that Salvatore Catania's back injury was not causally related to the subject accident (*see* ***Chang v Cardone***, 113 AD3d 582, 977 NYS2d 911 [2d Dept 2014]; ***Liautaud v Joseph***, 59 AD3d 394, 871 NYS2d 920 [2d Dept 2009]).

Here, the defendants failed to make a prima facie showing that Salvatore Catania did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see* ***Reitz v Seagate Trucking, Inc.***, 71 AD3d 975, 898 NYS2d 173 [2d Dept 2010]). While Dr. Waller found that Salvatore Catania had 40 degrees flexion and 20 degrees extension in his lumbar spine, Dr. Fyman found that Salvatore Catania had 90 degrees flexion and 30 degrees extension in the lumbar spine. The conflicting medical opinions of the experts raise issues of credibility to be resolved by a jury (*see* ***Romano v Persky***, 117 AD3d 814, 985 NYS2d 633 [2d Dept 2014]; ***Kalpakis v County of Nassau***, 289 AD2d 453, 735 NYS2d 427 [2d Dept 2001]). It is also noted that whereas Dr. Waller considered 60 degrees and 25 degrees to be the normal range of lumbar flexion and extension, Dr. Fyman and Dr. Chernoff considered 90 degrees and 30 degrees to be normal for the flexion and the extension respectively. When the measurements that the defendants' examining physicians considered normal for their range of motion testing differ (*see* ***Sanon***

v Moskowitz, 44 AD3d 926, 843 NYS2d 510 [2d Dept 2007]), the Court is left to speculate as to which is the correct normal value (*see* ***Cracchiolo v Omerza***, 87 AD3d 674, 928 NYS2d 644 [2d Dept 2011]; ***Frey v Fedorciuc***, 36 AD3d 587, 828 NYS2d 454 [2d Dept 2007]). Moreover, Dr. Waller failed to provide any specific range of motion testing results for right and left rotation of Salvatore Catania's lumbar spine (*see* ***Barrera v MTA Long Island Bus***, 52 AD3d 446, 859 NYS2d 483 [2d Dept 2008]). Dr. Fyman and Dr. Chernoff failed to provide any specific range of motion testing results for right and left lateral flexion and rotation of Salvatore Catania's lumbar spine. The reports of Dr. Waller, Dr. Fyman and Dr. Chernoff are insufficient to sustain the defendants' prima facie burden.

Inasmuch as the defendants failed to meet their prima facie burden, it is unnecessary to consider whether the papers submitted by the plaintiffs in opposition to the motion were sufficient to raise a triable issue of fact (*see* ***McMillian v Naparano***, 61 AD3d 943, 879 NYS2d 152 [2d Dept 2009]; ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]). Accordingly, the branch of the defendants' motion for summary judgment on the issue of serious injury is denied.

The defendants also seek summary judgment dismissing the complaint on the ground that they were not liable for the accident, that Ortizvera acted reasonably in the face of an emergency situation, and that he did not cause or contribute to the accident. In support, the defendants submit, *inter alia*, the pleadings, the bill of particulars, and the transcripts of the deposition testimony of Salvatore Catania and Ortizvera.

The plaintiffs cross-move for summary judgment in their favor on the issue of liability on the ground that they were not liable for the accident, and that the subject accident was solely the result of Ortizvera's failure to control his vehicle. In support, the plaintiffs submit, *inter alia*, the pleadings, the bill of particulars, and the transcripts of the deposition testimony of Salvatore Catania and Ortizvera.

The plaintiffs' cross motion for summary judgment is untimely inasmuch as it was not served within 120 days of the filing of the note of issue on October 24, 2014 (*see* CPLR 3212 [a]). Instead, it appears from the affirmation of service that the cross motion was made on April 20, 2015 (*see* CPLR 2211). The plaintiffs have provided no explanation or "good cause" for making the cross motion 58 days late. Nevertheless, an untimely cross motion for summary judgment may be considered by the court where, as here, a timely motion for summary judgment was made on nearly identical grounds (*see* ***Alexander v Gordon***, 95 AD3d 1245, 945 NYS2d 397 [2d Dept 2012]; ***Grande v Peteroy***, 39 AD3d 590, 833 NYS2d 615 [2d Dept 2007]). Under the circumstances, the issues raised by the untimely cross motion are already properly before the court and thus, the nearly identical nature of the grounds may provide the requisite good cause (*see* CPLR 3212 [b]) to review the untimely cross motion on the merits (*see* ***Alexander v Gordon***, *supra*).

At his deposition, Ortizvera testified that he is employed as a driver by NYS Limousine, a car service company. When he picked the plaintiffs up at their house in Smithtown, a mixture of snow and rain was falling, and the roads were slippery. Ortizvera had traveled in the right southbound lane of the Sagtikos Parkway, which was covered by snow. As he exited the roadway onto the exit ramp, he maintained the same speed, which was about 20 or 25 miles per hour. He testified that he did not accelerate at that time. When his vehicle suddenly started to spin around, his "foot [was] on the gas."

Although he released the gas pedal and attempted to turn his vehicle to the left, it kept sliding and ended up on the guardrail. He testified that there was a one to two inch accumulation of snow in the area where the vehicle started spinning.

At his deposition, Salvatore Catania testified that on the morning of the accident, freezing rain or sleet started to fall, and the roads were icy. He testified that just before the vehicle in which he was riding as a passenger, began to spin, the driver of the vehicle accelerated from 20 miles per hour to 30 miles per hour.

An innocent passenger who, in support of his or her motion for summary judgment, submits evidence that the accident resulted from the driver losing control of the vehicle, shifts the burden to the driver to come forward with an exculpatory explanation (*see* ***Johnson v Braun***, 120 AD3d 765, 991 NYS2d 351 [2d Dept 2014]; ***Mughal v Rajput***, 106 AD3d 886, 965 NYS2d 545 [2d Dept 2013]; ***Siegel v Terrusa***, 222 AD2d 428, 635 NYS2d 52 [2d Dept 1995]).

Here, the plaintiffs have made a prima facie showing of their entitlement to judgment as a matter of law by submitting evidence that this was a one-car accident which occurred when Ortizvera lost control of the vehicle he was driving (*see* ***Mughal v Rajput***, *supra*; ***Pandey v Parikh***, 57 AD3d 634, 635, 870 NYS2d 367 [2d Dept 2008]; ***Felberbaum v Weinberger***, 40 AD3d 808, 809, 837 NYS2d 664 [2d Dept 2007]). Contrary to the defendants' allegation that the plaintiffs did not establish that Ortizvera was speeding, the plaintiffs were not required to present evidence that the driver was speeding (*see* ***Pandey v Parikh***, *supra*; ***Felberbaum v Weinberger***, *supra*).

In opposition, the defendants contend that Ortizvera acted reasonably in the face of an emergency situation, and that he did not cause or contribute to the accident. The defendants failed to raise an issue of fact sufficient to defeat summary judgment. Since Ortizvera acknowledged in his deposition that it was snowing at the time of his accident, and that he was aware of wet and icy road conditions, the emergency doctrine is inapplicable (*see* ***Caristo v Sanzone***, 96 NY2d 172, 726 NYS2d 334 [2001]; ***Mughal v Rajput***, *supra*; ***Muye v Liben***, 282 AD2d 661, 723 NYS2d 510 [2d Dept 2001]). Furthermore, his testimony that he maintained the same speed, about 20 or 25 miles per hour, as he entered the exit ramp, and that he did not accelerate before his vehicle skidded, is insufficient to establish that he was driving with reasonable care, and thus, the defendants have failed to raise a triable issue of fact as to whether the skid was unavoidable (*see* ***Johnson v Braun***, *supra*; ***Mughal v Rajput***, *supra*; ***Faul v Reilly***, 29 AD3d 626, 816 NYS2d 502 [2d Dept 2006]).

Accordingly, the cross motion by the plaintiffs for summary judgment in their favor on the issue of liability is granted, and the branch of the defendants' motion for summary judgment on the issue of liability is denied.

Dated: January 29, 2016

PETER H. MAYER, J.S.C.