Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Ingrid Smith and Jeffrey Smith,

Plaintiffs,

-against-

Leonard Christopher,

Defendant.

Action No. 1
Index No.: 12672/2012

Attorneys [See **RIDER** Annexed]

National Union Fire Ins. Co. of Pittsburgh
a/s/o Ingrid Smith and David Smith,

Plaintiffs,

-against-

Christopher Leonard,

Defendant.

Action No. 2
Index No.: 00880/2015

Motion Sequence No.: 001; MD
Motion Date: 3/1/17
Submitted: 5/3/17

Kathleen Olesen and Jorgen Olesen,

Plaintiffs,

-against-

Leonard Christopher,

Defendant.

Action No. 3
Index No.: 02924/2015

Kemper Independence Insurance Company
as Subrogee of Ingrid Smith,

Plaintiffs,

-against-

Leonard Christopher,

Defendant.

Action No. 4
Index No.: 02720/2015

Upon the following papers numbered 1 to 26 read upon this motion for summary judgment: Notice of Motion and supporting papers, 1 - 13; Answering Affidavits and supporting papers, 14 - 19; Replying Affidavits and supporting papers, 20 - 24; Other, 25 - 26; it is

ORDERED that this motion by defendant, Leonard Christopher, for an order awarding summary judgment in his favor dismissing the complaint of plaintiffs, Kathleen Olesen and Jorgen Olesen, is denied.

Plaintiffs commenced this action to recover damages for personal injuries allegedly sustained by Kathleen Olesen as a result of a motor vehicle accident that occurred on April 10, 2012. It is alleged that the accident as a result of the negligence of defendant, Leonard Christopher, when defendant Leonard Christopher's vehicle crossed over the median on Route 25A in Smithtown, NY and came into contact with plaintiff's vehicle. In his answer to the complaint, defendant Christopher asserted as a ninth affirmative defense that he "was confronted with an emergency situation that could not have been reasonably anticipated" and as a tenth affirmative defense that the accident was the result of a "sudden medical emergency, in that the defendant suffered a sudden onset of a medical condition which was not, and could not, have been reasonably anticipated. . ." Defendant now moves for an order awarding summary judgment in his favor dismissing the complaint on the ground that the accident occurred as the result of a sudden medical emergency that could not have been reasonably anticipated.

Defendant Christopher testified at a deposition that on April 8, 2012, he became ill during a meal and was taken to St. Catherine's Hospital, where he was seen in the emergency room, complaining of chills, headache, loss of appetite and feeling "flushed." According to defendant's deposition testimony, he was told that he was dehydrated. He did not pass out that day, however, but went to see Dr. Lowell two days later, complaining of shoulder aches, loss of appetite and cold sweats. According to the medical records, he reported that he had been seen in the hospital two days earlier, and that while he felt better at the time of his visit he was "stiol [*sic*] not 100%..." It was noted in the record that his fatigue was "pronounced." Blood work was ordered and taken in a lab facility in the same building as the doctor's office, and the defendant was diagnosed with an "episode of hypotension most likely secondary to dehydration..." Defendant proceeded to drive home from Dr. Lowell's office when the accident occurred.

Defendant also testified that he has no recollection of the accident, but he recalls waking up with his head being cradled in the knees of a young man. He was taken by ambulance to Huntington Hospital, where he was admitted for 4-5 days and was transferred thereafter to New York Presbyterian. MRI tests administered at Huntington Hospital reportedly revealed the existence of a schwannoma at the base of his skull, and the defendant was transferred to NY Presbyterian Hospital. It was defendant's testimony that his surgeon, Dr. Stieg, explained to him that "this tumor was pressing against blood supply to [his] brain" which caused him to pass out. It was also defendant's testimony that he had two prior incidents in which he passed out. One was in 2009, when he called his primary care doctor, Dr. Hillipo, after he passed out and it was explained to him that he may have become dehydrated from flu symptoms. The second incident was in March 2011 when he passed out and was taken to St. Catherine's Hospital, complaining of dizziness and cold sweats. The hospital record indicates that a diagnosis of viral syndrome was made. Defendant testified, however that he was told that he was dehydrated and that he should follow up with his regular doctor. Defendant testified that he saw his cardiologist, Dr. Lituchy, in April 2011,

complaining of feeling run down, achy and nauseous at times. The medical record of his visit with Dr. Lituchy on April 4, 2011 also indicates that Christopher reported that he "had syncope or pre-syncope with diaphoresis and nausea" and that he had been taken to the hospital, where he was examined and it was concluded that he was dehydrated as the result of a viral syndrome. It was defendant's testimony that before April 10, 2012, the day of the accident, he had never had an x-ray, CAT scan, MRI or any other diagnostic test of the area of his neck and skull where the schwannoma ultimately was removed by Dr. Stieg on April 20, 2012.

The common-law emergency doctrine "recognizes that when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context", provided the actor has not created the emergency (***Caristo v Sanzone,*** 96 NY2d 172, 174, 750 NE2d 36, 726 NYS2d 334 [2001], quoting ***Rivera v New York City Tr. Auth.,*** 77 NY2d 322, 327). "The operator of a vehicle who becomes involved in an accident as the result of suffering a sudden medical emergency will not be chargeable with negligence as long as the emergency was unforeseen" (***Van De Merlen v Karpf,*** 147 AD3d 1008, 1008, 47 NYS3d 134 [2d Dept 2017], quoting ***Serpas v Bell,*** 117 AD3d 712, 713, 985 NYS2d 288 [2d Dept 2014]). Defendant must demonstrate his *prima facie* entitlement to judgment as a matter of law by coming forward with competent or expert medical evidence to establish the existence of the claimed medical emergency and its unforeseeable nature (*see* ***Pitt v Mroz,*** 146 AD3d 913, 45 NYS3d 206 [2d Dept 2017]).

In support of his application for summary judgment, defendant Christopher submitted, *inter alia*, the affidavit of Mark R. McLaughlin, M.D., a board-certified neurosurgeon, who reviewed the police accident report, records pertaining to defendant's medical care including the Huntington Hospital emergency room and admission records of April 10, 2012 to April 14, 2012, the New York Presbyterian Hospital records of April 14, 2012 to May 4, 2012, the medical records of Dr. Bruce Lowell, Dr. Phillip Stieg and Dr. Dubner, the records of St. Catherine of Siena Hospital and the defendant's deposition transcript from December 10, 2014. In the opinion of Dr. McLaughlin, the schwannoma tumor "irritated the vagus nerve causing a sudden and unpredictable drop in blood pressure, which then caused a reduction in blood flow to the brain which caused Leonard Christopher to suffer an unanticipated syncope episode immediately prior to the motor vehicle accident." The expert determined the location of the schwannoma in relation to the left vagus nerve "based upon [his] review of the radiology films and reports and the operative report by Dr. Philip Steig [*sic*]." Furthermore, as there were no clinical findings noted by Dr. Lowell to indicate that Christopher was suffering from "viral symptoms" on the day of the accident, in the opinion of Dr. McLaughlin the episode of syncope experienced by Christopher was not related to or caused by "viral symptoms."

To the extent that Kathleen Olesen and Jorgen Olesen, plaintiffs in Action No. 3 under Index Number 02924/2015, have submitted their opposition to the motion under index number 12672/2012, counsel is reminded that actions that are joined for discovery and trial purposes remain independent actions and separate motion papers should be filed under the appropriate index numbers (*see* ***Mars Assoc., Inc. v New York City Educ. Constr. Fund,*** 126 AD2d 178, 513 NYS2d 125 [1st Dept 1987]). Because both actions involve common questions of fact and law, however, no party will suffer prejudice of a substantial right if the procedural irregularity is disregarded (*see* CPLR 2001). Accordingly, this Court will entertain plaintiffs' opposition as it relates to both actions.

Plaintiffs urge the Court to disregard Dr. McLaughlin's affidavit on numerous grounds, including that it was not accompanied by a certificate of conformity, as required under CPLR 2309 (c). Such defect is not fatal, however, as it was rectified in defendant's reply papers and no substantial right of the plaintiffs has been prejudiced (*see* ***Bank of New York Mellon v Vytalingam,*** 144 AD3d 1070, 42 NYS3d 274 [2d Dept 2016]).

In opposition to the defendant's application for summary judgment, plaintiffs submitted the affidavit of Dr. Anthony Chiurco, a board-certified neurosurgeon, who noted that defendant's medical history shows "multiple instances of syncope and collapse while experiencing symptoms from a virus and/or upper respiratory infection" before the underlying motor vehicle accident. In addition, the medical records of Dr. Lowell relating to defendant's visit on the day of the accident indicate that he presented with fatigue, malaise and a cough, symptoms that, in the expert's opinion, are associated with a virus. In his opinion, the cause of the defendant's syncope on the day of the accident "was due to symptoms from a virus and/or upper respiratory infection and his dehydration." It is also Dr. Chiurco's stated opinion, based on his review of the MRI films and diagnostic test reports contained in the hospital record, the anesthesia record for the surgical removal of the schwannoma "does not support the allegation that the schwannoma tumor caused a compression on the vagus nerve", nor is there any mention in the operative reports or radiological studies of the vagus nerve being compressed or irritated by the schwannoma. In reply, defendant argues, with the support of the additional affidavit of Dr. McLaughlin, that the medical records of defendant's visit with Dr. Lowell just prior to the accident do not note clinical findings that would be consistent with an upper respiratory infection. It is also argued that plaintiffs' expert fails to identify a clinical condition that would cause an episode of syncope or the mechanism that would trigger a syncopal episode.

The conflicting expert opinions raise triable issues of fact as to the cause of defendant's syncopal episode as well as to whether the emergency situation was foreseeable (*see* ***Karl v Terbush,*** 63 AD3d 1359, 881 NYS2d 207 [3d Dept 2009]; *see also* ***Ficorilli v Thomsen,*** 262 AD2d 602, 692 NYS2d 673 [2d Dept 1999]). Such issues of fact require a trial (*see* ***McGinn v New York City Transit Auth.,*** 240 AD2d 378, 658 NYS2d 121 [2d Dept 1997]).

Dated: August 3, 2017

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**

RIDER

Clerk of the Court

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