[* 1]

SHORT FORM ORDER

INDEX No. 13559/2015
CAL No. _____

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

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 6-2-17
SUBMIT DATE 12-7-17
Mot. Seq. # 01- MD
X-Mot. Seq. #02- Mot D

----------X

JUDITH A. TAMBURRO and EDWARD TAMBURRO,

Plaintiff(s),

-against-

SUNSET AIRPORT AND LIMOUSINE SERVICE and DAVID M. PENTECOST,

Defendant(s).

----------X

SIBEN & SIBEN, LLP
Attorneys for Plaintiffs in Action 1- Tamburro
90 EAST MAIN ST
BAY SHORE, NY 11706

SERPE, ANDRE & KAUFMAN
Attorneys for Plaintiff in Action 2 & 3- State Farm
149 MAIN ST, PO BOX 165
HUNTINGTON, NY 11743

BAKER, MCEVOY, MORRISEY & MOSKOVITS, PC
Attorneys for Defendants in Actions 1, 2 & 3
330 Old Country Rd, Ste 211
Mineola, NY 11501

Upon the following papers numbered 1 to 65 read on this motion for summary judgment & for joint trial ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15 ; Notice of Cross Motion and supporting papers 16 - 42 ; Answering Affidavits and supporting papers 43 - 46 ; Replying Affidavits and supporting papers 47 - 55 & 56 - 65; ~~Other ; (and after hearing counsel in support and opposed to the motion)~~ it is,

The defendants, Sunset Airport and Limousine Service and David M. Pentecost, move for an order granting summary judgment and dismissing the complaint on the ground that the plaintiff, Judith A. Tamburro, did not sustain a "serious injury" within the meaning of N.Y. Insurance Law § 5102(d). The plaintiffs oppose this application and cross move for an order directing that the above entitled action be tried jointly with the action entitled ***State Farm Mutual Automobile Ins. Co., a/s/o Judith Tamburro v. Sunset Airport and Limousine Service, Inc., and David M. Pentecost***, Index No. 621319/2016; and the action currently pending in Suffolk County District Court, Third District entitled ***State Farm Mutual Automobile Ins. Co., a/s/o Judith Tamburro v. Sunset Airport and Limousine Service, Inc., and David M. Pentecost***, Index No.CV-1083-17/H, upon the grounds that they share common questions of fact and law and for judicial efficiency, and for an order granting summary judgment. The defendants opposed the cross motion for summary judgment but did not oppose the application for a joint trial.

The plaintiffs commenced this action to recover damages for personal injuries allegedly sustained as the result of a motor vehicle accident which occurred on May 17, 2015. According to plaintiff, Judith A. Tamburro, she was operating her vehicle westbound on Howells Road at or near its intersection with Manatuck Boulevard, Town of Islip, Suffolk County, New York, when the defendants'

vehicle failed to stop at a stop sign and collided with the front driver's side of the plaintiff's vehicle. The plaintiff received emergency room treatment at Southside Hospital in Bay Shore, New York.

Motion for Joint Trial

CPLR § 602(a) provides that "[w]hen actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all of the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

Since the actions arise from the same incident and involve common questions of fact, a joint trial is appropriate to avoid inconsistent verdicts.

Accordingly it is,

ORDERED that this unopposed motion by plaintiffs for an order directing that this action be jointly tried with ***State Farm Mutual Automobile Ins. Co., a/s/o Judith Tamburro v. Sunset Airport and Limousine Service, Inc., and David M. Pentecost***, pending before this Court under Index No. 621319/2016, is hereby granted, provided that each joined action is ready for trial when called therefor by Presiding Justice of the Calendar Control Part; and it is further

ORDERED that the matter of ***State Farm Mutual Automobile Ins. Co., a/s/o Judith Tamburro v. Sunset Airport and Limousine Service, Inc., and David M. Pentecost***, pending before this Court under Index No. 621319/2016, is transferred forthwith to the undersigned located in the Supreme Court, Hon. Alan D. Oshrin Court Building, One Court Street, Room A361, Riverhead, New York. That matter being related to the current matter which is assigned to the undersigned; and it is further

ORDERED that this unopposed motion by the plaintiffs for an order directing that this action be jointly tried with the action currently pending in Suffolk County District Court, Third District entitled ***State Farm Mutual Automobile Ins. Co., a/s/o Judith Tamburro v. Sunset Airport and Limousine Service, Inc., and David M. Pentecost***, Index No.CV-1083-17/H, is hereby granted, provided that each joined action is ready for trial when called therefor by Presiding Justice of the Calendar Control Part; and it is further

ORDERED that the plaintiffs shall promptly serve a copy of this Order by overnight mail upon all appearing parties in each joined action, and shall promptly thereafter file the affidavit(s) of service with the Suffolk County Clerk; and it is further

ORDERED that the plaintiffs are directed to serve a copy of this order on the Clerk of this Court and upon the Clerk of the District Court of Suffolk County, Third District, who shall transfer the court file in the action entitled ***State Farm Mutual Automobile Ins. Co., a/s/o Judith Tamburro v.***

Sunset Airport and Limousine Service, Inc., and David M. Pentecost, Index No.CV-1083-17/H, to the Clerk of the Supreme Court, Suffolk County; and it is further

ORDERED that the parties shall proceed expeditiously to complete discovery proceedings and all parties shall exchange any materials previously received through pretrial disclosure with any party so demanding; and it is further

ORDERED that within 30 days from the date of this order, the plaintiff in the action currently pending in Suffolk County District Court, Third District entitled ***State Farm Mutual Automobile Ins. Co., a/s/o Judith Tamburro v. Sunset Airport and Limousine Service, Inc., and David M. Pentecost***, Index No.CV-1083-17/H, is directed to file an RJI and a request for a preliminary conference for such action (*see* 22 NYCRR §§202.3(b) and 202.6; *see also* 22 NYCRR § 202.12); and it is further

ORDERED that each action joined for trial shall retain a separate caption and separate court costs shall be paid in each action, including those costs attendant with the filing of motions, Notes of Issue and Certificates of Readiness for Trial; and it is further

ORDERED that all motions interposed in each joined action shall bear a single caption reflecting the action in which said motion is made; however, all motions shall be served upon counsel for all parties appearing in each joined action; and it is further

ORDERED that a compliance conference is hereby scheduled to be held on **Thursday, March 8, 2018** at 9:30 a.m., in the courtroom of the undersigned located in the Supreme Court, One Court Street, Room A-361, Riverhead, New York. Counsel for the respective parties in each joined action are directed to appear at that time prepared to discuss the joined actions and set a joint discovery schedule. A failure to appear may result in a default being granted.

Defendants' Motion for Summary Judgment

In order to effectuate the purpose of no-fault legislation to reduce litigation, a court is required to decide, in the first instance, whether a plaintiff has made out a *prima facie* case of "serious injury" sufficient to satisfy the statutory requirements (***Licari v Elliott,*** 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088 [1982]; ***Brown v Stark,*** 205 AD2d 725, 613 NYS2d 705 [2d Dept 1994]). If it is found that the injury sustained does not fit within the definition of "serious injury" under Insurance Law § 5102(d), then the plaintiff has no judicial remedy and the action must be dismissed (***Licari v Elliott,*** *supra,* at 57 NY2d 238; ***Velez v Cohan,*** 203 AD2d 156, 610 NYS2d 257 [1st Dept 1994]). A "serious injury" is defined 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 constitutes 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." (Insurance Law § 5102 [d]).

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 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]).

The defendants submitted the sworn report of Jeffrey Neil Guttman, M.D. concerning his independent orthopedic examination of the plaintiff. This report, however, fails to establish that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d) as to either category of injury. Dr. Guttman performed range of motion values for plaintiff's cervical spine, and reported flexion to 30 degrees (50 degrees normal), extension to 30 degrees (60 degrees normal), left and right lateral bending 45 degrees (45 degrees normal), and left and right rotation 80 degrees (80 degrees normal). Dr. Guttman performed range of motion values for plaintiff's left shoulder, and reported forward elevation to 170 degrees (180 degrees normal), backward elevation to 40 degrees (40 degrees normal), abduction to 150 degrees (180 degrees normal), adduction to 20 degrees (30 degrees normal),external rotation to 40 degrees (90 degrees normal), and internal rotation 30 degrees (80 degrees normal). Dr. Guttman diagnosed "Alleged injury to the cervical spine, resolved" and "alleged injury to the left shoulder, resolved". He opined that there "is no evidence of a disability or permanent injury" and that the "decreased ranges of motion in the cervical spine and left shoulder were the result of claimant guarding and were not supported by objective examination findings."

Dr. Guttman offered no opinion (*see* ***Delayhaye v Caledonia Limo & Car Service, Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]) as to whether the plaintiff was incapacitated from substantially performing the usual activities of daily living for a period of ninety days in the 180 days following the accident, and did not examine the plaintiff during that statutory period (*see* ***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; *see* ***Uddin v Cooper***, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; ***Toussaint v Claudio***, 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]), precluding summary judgment on this category of injury.

The factual issues raised in defendants' moving papers preclude summary judgment as the defendants failed to satisfy the burden of establishing, prima facie, that plaintiff did not sustain a "serious injury", within the meaning of Insurance Law § 5102 (d) (*see* ***Agathe v Tun Chen Wang***, 98 NY2d 345, 746 NYS2d 865 [2006]); *see also* ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]). Inasmuch as the moving parties failed to establish prima facie entitlement to judgment as a matter of law, it is unnecessary to consider whether the opposing papers are sufficient to raise a triable issue of fact (*see* ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]); ***Krayn v Torella***, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; ***Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]), as the burden has not shifted to the plaintiff.

Accordingly, the defendants' motion for summary dismissal of the complaint premised on the plaintiff's claim of serious injury as defined by Insurance Law § 5102 (d) is denied.

Plaintiffs' Motion for Summary Judgment

CPLR §3212(b) states that a motion for summary judgment "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission." If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion by summary judgment (***Olan v. Farrell Lines, Inc.***, 105 AD 2d 653, 481 NYS 2d 370 (1st Dept., 1984; aff'd 64 NY 2d 1092, 489 NYS 2d 884 (1985); ***Spearman v. Times Square Stores Corp.***, 96 AD 2d 552, 465 NYS 2d 230 (2nd Dept., 1983); Weinstein-Korn-Miller, ***New York Civil Practice*** Sec. 3212.09)).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" CPLR3212 [b]; ***Gilbert Frank Corp. v Federal Insurance Co.,*** 70 NY2d 966, 525 NYS2d 793, 520 NE2d 512 [1988]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]). Furthermore, the evidence submitted in connection with a motion for summary judgment should be viewed in the light most favorable to the party opposing the motion (***Robinson v Strong Memorial Hospital,*** 98 AD2d 976, 470 NYS2d 239 [4th Dept 1983]).

On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue (*see* ***S.J. Capelin Associates v Globe Mfg. Corp.,*** 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [1974]). However, the court must also determine whether the factual issues presented are genuine or unsubstantiated (***Prunty v Keltie's Bum Steer,*** 163 AD2d 595, 559 NYS2d 354 [2d Dept 1990]). If the issue claimed to exist is not genuine but is feigned and there is nothing to be tried, then summary judgment should be granted (***Prunty v Keltie's Bum Steer,*** *supra*, citing ***Glick & Dolleck v Tri-Pac Export Corp.,*** 22 NY2d 439, 293 NYS2d 93, 239 NE2d 725 [1968]; ***Columbus Trust Co. v Campolo,*** 110 AD2d 616, 487 NYS2d 105 [2d Dept 1985], *affd*, 66 NY2d 701, 496 NYS2d 425, 487 NE2d 282).

The plaintiff contends that she was operating her vehicle westbound on Howells Road at or near its intersection with Manatuck Boulevard, Town of Islip, Suffolk County, New York, when the defendants' vehicle failed to stop at a stop sign and collided with the front driver's side of the plaintiff's vehicle. In opposition, defendant David M. Pentecost argues that he was driving with a passenger in his vehicle when he "was rendered unconscious as a result of the accident and believes that his passenger struck him in the back of the head in an attempt to rob defendant and that this attack was the

cause of the accident." The defendant does not remember seeing a stop sign or the plaintiff's vehicle prior to impact.

Here, the plaintiffs established a prima facie entitlement to judgment as a matter of law. The defendants were then required to proffer evidence in admissible form to show facts sufficient to require a trial of any issue of fact. In opposition to the motion, the defendants have rebutted the prima facie showing of the plaintiff by submitting an affidavit in opposition based upon the personal knowledge of the events giving rise to the cause of action.

Thus the Court concludes that there are material and triable issues of fact presented as to the defendant, David M. Pentecost, being the sole cause of the accident and therefore the motion for summary judgment must be denied.

The foregoing constitutes the decision and Order of this Court.

Dated: January 19, 2018

HON. JOSEPH A. SANTORELLI
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION