To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

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KIRK JACKSON,

Plaintiff, Index No. 50128/2017

– against – Sequence No. 1 & 2

ERIC RICCIO and DAKOTA SUPPLY CORP., **DECISION & ORDER**

Defendants.

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In an action to recover damages for personal injuries (1) the plaintiff moves for partial summary judgment on the issue of liability, pursuant to CPLR 3212; and (2) the defendants move for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102(d):

Papers Considered

1. Notice of Motion/Affirmation of Renata Vizental, Esq./Exhibits A-H;
2. Notice of Motion/Affirmation of Faizan T. Habeeb, Esq./Exhibits A-Q;
3. Affirmation of Renata Vizental, Esq. in Opposition/Exhibits A-C;
4. Affirmation of Faizan T. Habeeb, Esq. in Opposition;
5. Reply Affirmation of Renata Vizental, Esq.;
6. Reply Affirmation of Faizan T. Habeeb, Esq./Exhibits R-U.

Factual and Procedural Background

Plaintiff commenced this action to recover damages for personal injuries as a result of a motor vehicle accident that occurred on August 24, 2016, on Railroad Avenue in Croton-On-Hudson. The complaint alleges that the defendant Eric Riccio was operating a cement mixer truck which suddenly reversed and struck his vehicle.

Liability

Plaintiff moves for summary judgment on the issues of liability arguing that defendants were negligent by backing up the cement mixer without first ascertaining whether it was safe to do so.

Plaintiff testified that he was stopped at a stop sign. A cement truck was in front of him making a right turn. Upon looking both ways, plaintiff began to travel approximately

5 mph into the intersection and stopped. The cement truck began to reverse and struck plaintiff's vehicle. Plaintiff testified that he sounded his horn but did not hear any back up alarm from the cement truck.

Plaintiff complained of pain to his chest, shoulder, and back. He was transported by ambulance to Phelps Memorial Hospital where X-rays of his chest, shoulder, and back were performed. Plaintiff was instructed to see his primary care physician. Thereafter, he treated with Dr. Emil Stracar who prescribed physical therapy three times a week. Plaintiff also treated with Dr. Randall V. Ehrlich for a tear in his right shoulder identified on an MRI. Dr. Ehrlich performed surgery for the tear on December 13, 2016. Plaintiff continued to treat with Dr. Ehrlich until a month prior to his deposition, in June 2017, with complaints of pain in his shoulder. Dr. Ehrlich referred him for physical therapy.

Plaintiff testified that immediately after the accident he missed a week of work. After his return to work, he thereafter missed two months due to the surgery. Plaintiff testified that he was not taking any pain medications and had received a cortisone injection in his back to relieve pain.

Defendant Eric Riccio testified that he was employed by Dakota Supply Corp. as a cement truck driver. He was operating a cement mixer at the time of the accident and was delivering cement to the MTA. After making the delivery, Riccio was stopped at a stop sign intending to make a right turn onto Croton Point Avenue. He did not notice any vehicles behind him. After waiting a couple seconds and looking both ways, Riccio proceeded to make a right-hand turn, however, he was not able to complete the turn due to the size of the truck and the angle of the intersection. He turned about three-quarters of the way, completely past the stop sign, stopped for a couple seconds and then reversed so he could complete the turn. Riccio testified that he looked in his mirrors to see if anyone was behind him prior to putting the truck in reverse. He did not see any vehicles and began to reverse when the accident occurred. Riccio testified that the back-up alarm and lights on the cement truck were functioning. He did not hear plaintiff's horn until after the accident.

In opposition to plaintiff's motion, defendants argue that plaintiff failed to establish that they were negligent as a matter of law.

Serious Injury

Defendants also move for summary judgment dismissing the complaint on the grounds that plaintiff did not sustain a serious injury within the meaning of Insurance Law 5101(d).

On October 17, 2017, plaintiff appeared for an independent neurological medical examination by Rene Elkin, M.D.; and on October 23, 2017, plaintiff appeared for an independent orthopedic medical examination by Bradley D. Wiener, M.D. Defendants submit affirmed reports of Dr. Elkin and Dr. Wiener in support of their motion.

Dr. Elkin avers that at the time of the examination, plaintiff's primary complaint was right shoulder pain that was worse with movement. Plaintiff also reported lower back pain with movement radiating into his leg. Examination revealed full range of motion on forward flexion to 50 degrees, with 50 being normal, retroflexion limited to 30 degrees, with 60 being normal, right lateral rotation of 50 degrees and left lateral rotation of 70 degrees with 80 being normal. Examination of the right shoulder revealed full range of motion on elevation and abduction to 90 degrees, with 180 being normal. There was tenderness to palpation and no objective inflammation. The left shoulder examination was normal. Examination of the plaintiff's lower back revealed restriction of forward flexion to 30 degrees, with normal being 60, unable to retroflex, with normal of 25 degrees, lateral bending to the right was to 10 degrees and to the left was 20 degrees, with 25 being normal.

According to Dr. Elkin, there were no objective findings on the neurological physical examination for any neurological injury as a result of the accident. Dr. Elkin noted that in the ER on the day of the accident, there were no complaints and no abnormal findings referable to the cervical and lumbar spines which would mitigate strongly against any acute injury attributable to the accident. The plaintiff's symptoms regarding the neck and lower back were consistent with cervical and lumbar muscle sprain. The degenerative changes and disc pathology reported on the MRIs were degenerative in nature and not caused by the accident. In Dr. Elkin's opinion, the degenerative changes would be a cause for the observed restriction of range of motion and the pain. Dr. Elkin opined that there were no objective findings for neurological injury that would prevent plaintiff from functioning at his pre-accident level without restriction. There were also no objective findings for neurological permanency or disability.

Defendants also submit an affirmed report of Bradley D. Wiener, MD. At the time of the examination performed by Dr. Wiener, plaintiff complained of stiffness in his neck and lower back. He denied any numbness or tingling and noted discomfort with range of motion involving the right arm. Dr. Wiener's examination of the cervical spine revealed flexion of 40 degrees, with normal being 50-60; extension of 30 degrees, with normal of 50-60; lateral rotation to both the right and left side of 70 degrees with normal being 70-80; and 40 degrees of tilt to both the right and left side, with normal being 40-50.

Dr. Wiener's examination of the right shoulder revealed 80 degrees of forward elevation with normal being 170-180; 80 degrees of abduction, with normal being 170-180; internal rotation to the buttock, with normal being T7. Dr. Wiener noted 10 degrees of external rotation, with normal being 80-90. There was no weakness on resisted internal rotation and mild restriction to adduction and extension. Dr. Wiener noted that the plaintiff made no effort at performing the range of motion tests. Dr. Wiener's examination of the lumbar spine revealed flexion of 50 degrees with normal being 70-90; and 10 degrees of extension, with normal being 20-30.

Dr. Wiener diagnosed the plaintiff with cervical strain, superimposed on pre-existing degenerative disc disease; lumbosacral strain, superimposed on pre-existing

degenerative disc disease; right shoulder arthralgia status post-surgical intervention; and symptom magnification.

Dr. Wiener opined, with a reasonable degree of medical certainty, that the plaintiff did not sustain a serious or significant injury to the cervical spine as a result of the motor vehicle accident. There was no evidence of a permanent limitation in function or use of the cervical spine. Plaintiff offered subjective complaints of lower back pain that would be consistent with a pre-existing multilevel degenerative condition, which could be considered unrelated to the accident. According to Dr. Wiener, the plaintiff's cervical examination was negative with the exception of subjective complaints of discomfort. Dr. Wiener opined that the plaintiff did not sustain a serious of significant injury or a permanent limitation to the cervical spine as a result of the accident. Plaintiff offered subjective complaints of lower back pain consistent with a pre-existing multilevel degenerative condition, unrelated to the accident. Dr. Wiener noted that although plaintiff offered persistent subjective complaints of pain, upon distraction, the physical examination was essentially normal. Dr. Wiener also opined that plaintiff did not sustain a serious or significant injury to the lumbosacral spine. He opined that it is inconceivable that plaintiff would be capable of returning to work within one week after the accident and continue to work as a car inspector and mechanic if he in fact had sustained significant injuries to the cervical and lumbar regions.

With respect to the right shoulder, Dr. Wiener opined that there was no causal relationship between subjective complaints, the MRI findings from October 19, 2016, and the accident. There was no described mechanism of injury to the right shoulder and it is biomechanically impossible for plaintiff to have sustained significant internal derangement of the right shoulder based on the so-called jerking motion he described. There is no mechanism of injury across the acromioclavicular joint based on the accident. Moreover, at the time of evaluation by Dr. Ehrlich on April 5, 2017, plaintiff demonstrated active range of motion that included 165 degrees of forward elevation, 120 degrees of abduction, and passive range of motion that was even greater. Dr. Wiener opined that plaintiff did not demonstrate evidence of a causally related disability based on the accident and would be capable of work activities without restrictions.

In opposition, plaintiff argues that defendants failed to demonstrate a prima face case of entitlement to summary judgment. In any event, plaintiff argues that issues of fact exist.

Plaintiff submits the affirmed report of Randall V. Ehrlich, M.D. Dr. Ehrlich opined that defendant's injuries to his right shoulder were caused by the accident and are permanent in nature. Dr. Ehrlich's range of motion tests revealed forward elevation to 110 degrees with 180 being normal; external rotation to 70 degrees, with 70 being normal; internal rotation to L3, normal and contralateral to T9; and abduction to 100 degrees, normal and contralateral to 150. Dr. Ehrlich's testing also found forward elevation to 165 degrees, normal and contralateral to 180; external rotation to 70 degrees, normal and

contralateral to 70; and abduction to 105 degrees, normal and contralateral to 150, limited by pain and spasm.

Plaintiff also submitted an affirmed report of Ross Nochimson, D.O. Dr. Nochimson noted the following limitations of range of motion of the lumbar spine: flexion of 30 degrees, with 60 being normal; extension 20 degrees, with 25 being normal, side bending right of 18 degrees and left of 15 degrees with 25 being normal. The range of motion of the right shoulder extension was restricted to 35 degrees, with 60 being normal, posterior rotation of 30 degrees, abduction of 60 degrees, with 180 being normal, and external rotation of 15 degrees with 90 being normal.

Dr. Nochimson opined that plaintiff's functional abilities significantly diminished as a result of the accident and his condition is chronic and permanent.

Discussion

The proponent of a motion for summary judgment 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 (*see Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d at 853).

"Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Zuckerman v City of New York*, 49 NY2d at 562). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat a prima facie showing of entitlement to summary judgment (*see Zuckerman v New York*, 49 NY2d at 562).

I. Liability

Plaintiff argues that defendant violated Vehicle and Traffic Law 1211(a) as a matter of law by backing up the cement truck without first ascertaining whether it was safe to do so.

Vehicle and Traffic Law 1211 provides, in pertinent part, that "[t]he driver of a vehicle shall not back the same unless such movement can be made with safety and without interfering with other traffic" (Veh & Tr § 1211[a]).

Plaintiff established his prima facie entitlement to judgment as a matter of law by presenting uncontroverted evidence that defendant backed up the cement truck without first ascertaining whether there was a vehicle behind him (*see Garcia v Verizon N.Y.*, Inc., 10 AD3d 339 [1st Dept 2004]). A violation of the Vehicle and Traffic Law constitutes negligence as a matter of law (*see Vainer v DiSalvo*, 79 AD3d 1023 [2d Dept 2010]; *Botero v Erraez*, 289 AD2d 274 [2d Dept 2001]). In opposition, defendants failed to raise

a triable issue of fact. Defendants' argument that the differing accounts of the accident raise triable issues of fact is without merit. Accepting the evidence in the light most favorable to the non-moving party, even if the back-up alarm sounded on the cement truck as it reversed, the evidence still establishes that defendants violated VTL 1211(a) by failing to ascertain whether it was safe to reverse the truck.

II. Serious Injury

On a motion for summary judgment in a personal injury action arising from a motor vehicle accident, the defendants are required to establish that the plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102(d) (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955 [1992]; *Licari v Elliott*, 57 NY2d 230 [1982]).

Defendants have failed to meet their prima facie burden of demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955, 955-956 [1992]). The evidence demonstrates that defendants' experts found significant limitations in the range of motion in the right shoulder and the cervical and lumbar regions of the plaintiff's spine (*see Mercado v Mendoza*, 133 AD3d 833 [2d Dep't 2015]). Defendants' expert failed to adequately explain that the restrictions in the range of motion were objectively resolved (*see India v O'Connor*, 97 AD3d 796 [2d Dep't 2012] *c.f. Gonzales v Fiallo*, 47 AD3d 760 [2d Dept. 2008]).

Since defendants failed to meet their prima facie burden, it is unnecessary to determine whether the papers submitted by the plaintiff in opposition were sufficient to raise a triable issue of fact (*see Mercado v Mendoza*, 133 AD3d 833; *Che Hong Kim v Kossoff*, 90 AD3d 969 [2d Dep't 2011]).

Accordingly, the plaintiff's motion for partial summary judgment on the issue of liability, pursuant to CPLR 3212, is GRANTED (motion sequence #1); and the defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law 5102(d) is DENIED (motion sequence #2).

The parties are directed to appear in the Settlement Conference Part, room 1600, on **September 18, 2018, at 9:15 a.m.** for further proceedings.

Dated: White Plains, New York
August 21, 2018

HON. WILLIAM J. GIACOMO, J.S.C.

H: ALPHABETICAL MASTER LIST – WESTCHESTER/Jackson v. Riccio