SHORT FORM ORDER

INDEX No. 621039-2016
CAL. No. _____

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY

PRESENT:

HON. LINDA KEVINS
Justice of the Supreme Court

MOTION DATE: 12/7/2020
ADJ. DATE: 12/8/2020
Mot. Seq. # 004 - MG

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KEVIN CLEARY,

Plaintiff,

- against -

JACQUELINE CARBERRY, LORETTA CARBERRY.

Defendants.

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Upon the following papers e-filed and read on this motion for summary judgment : Notice of Motion and supporting papers by plaintiff , dated November 13, 2020 ; Answering Affidavits and supporting papers by defendant, dated December 2, 2020 ; Replying Affidavits and supporting papers by plaintiff, dated December 2, 2020 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that plaintiff's motion for an order granting summary judgment in his favor on the issue of liability and the threshold issue of serious injury is granted; and it is further

ORDERED that if this Order has not already been entered, plaintiff is directed to promptly serve a certified copy of this Order, pursuant to CPLR §§8019(c) and 2105, upon the Suffolk County Clerk who is directed to hereby enter such order; and it is further

ORDERED that upon Entry of this Order, plaintiff is directed to promptly serve a copy of this Order with Notice of Entry upon all parties and to promptly file the affidavits of service with the Clerk of the Court.

Plaintiff commenced this action to recover damages for personal injuries he allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Rocky Point Road and Whiskey Road in the Town of Brookhaven, New York on July 21, 2016. Plaintiff alleges that the accident happened when a vehicle driven by defendant Jacqueline Carberry and owned by defendant Loretta Carberry made a left turn into the intersection without yielding the right of way to his vehicle as it was proceeding through the intersection.

Plaintiff now moves for summary judgment in his favor on the issue of liability and on the threshold issue of serious injury alleging that as a result of the accident the transverse processes of his vertebrae in his lumbar region were fractured; specifically, L1, L2 and L3. In support of the motion, plaintiff submits copies of the pleadings; a verified bill of particulars; a certified police accident report; transcripts of the parties' deposition testimony; certified hospital records from Stony Brook University Hospital; a report by Kathryn Ko, M.D. and a report by Marc Katzman, M.D.

At his deposition, plaintiff testified that on the date of the accident, at approximately 4:00 p.m. he was traveling northbound on Rocky Point Road. He testified that it was a clear, sunny day, and that he was traveling at a rate of speed of 40 mph and slowed his vehicle down to 30 mph when he got closer to the intersection of Whiskey Road. Plaintiff testified that he observed a red traffic signal at the subject intersection when he was a quarter of a mile from it, and he slowed his vehicle down to a rate of 30 mph. He testified that as he approached the intersection the light turned green, so he accelerated his vehicle to proceed straight through the intersection. Plaintiff testified that he observed two vehicles on the opposite side of the intersection which were stopped in the left turning lane. He testified that the first car turned left on to Whiskey Road as he was proceeding through the intersection, and it was approximately five car lengths in front of him, so he took his foot off of the accelerator and depressed the brake pedal. Plaintiff testified that a second car, a white Nissan, started moving up into the intersection to turn left on to Whiskey Road as he was proceeding through it, and it struck his vehicle. He testified that the accident happened within a fraction of a second, and that he did not have the chance to sound his horn or depress the brake pedal but he turned slightly to the right to try to avoid the accident.

Plaintiff testified that the impact was heavy, and at the driver's side of his vehicle, and that the white Nissan had damage to the front of the vehicle. He testified that his vehicle was pushed into a blue van that was on Whiskey Road. Plaintiff testified that he was taken by ambulance to Stony Brook University Hospital with complaints of back pain, and that he was admitted for one night for observation. He testified that an x-ray examination was performed, and that he was told he had fractured three of his vertebrae. Plaintiff testified that he was released the following day with prescriptions for pain medication, and that he presented to an orthopedist, Dr. Ranna, a week or two after the accident. He testified that Dr. Ranna conducted an x-ray examination and reviewed the hospital records and x-ray images, and that he told plaintiff he sustained three fractured vertebras from the subject accident.

Plaintiff testified that he treated with Dr. Ranna once per month for a period of six months and underwent physical therapy for a year and half. He testified that he was instructed to rest and not to work or perform any strenuous activities for six months. Plaintiff testified that x-ray examinations were performed each month to observe the fractures.

Defendant testified that on the date of the accident she was on her way to work and was traveling southbound on Rocky Point Road and intended to turn left onto Whiskey Road. She testified that before the accident she was stopped at the traffic signal, and her left turn signal was activated. She testified that she looked straight ahead, which where there was a low-incline hill on Rocky Point Road, that her view was unobstructed, and she did not observe any vehicles in that direction. Defendant testified that when the light turned green, she looked to her left, and proceeded to turn left, and that as she was halfway through the turn, a collision occurred. She testified that from the time she started turning her vehicle until

the impact, only a second had passed. Defendant testified that she never observed plaintiff's vehicle, and that her vehicle sustained damage to the front bumper and front quarter panel of the passenger's side.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Once such a showing has been made, 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, 508 NYS2d 923; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595).

The Vehicle and Traffic Law establishes standards of care for motorists, and an unexcused violation of such standards of care constitutes negligence per se (***Ming-Fai Jon v Wager***, 165 AD3d 1253, 87 NYS3d 82 [2d Dept 2018]; ***Katikireddy v Espinal***, 137 AD3d 866, 26 NYS3d 77 [2d Dept 2016]; ***Vainer v DiSalvo***, 79 AD3d 1023, 914 NYS2d 236 [2d Dept 2010]). Vehicle and Traffic Law §1141 provides "[t]he driver of a vehicle intending to turn to the left within an intersection or into an alley, private road, or driveway shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard." The operator of the right-of-way vehicle is entitled to assume that the oncoming vehicle will obey the traffic laws and yield the right of way (***Gobin v Delgado***, 142 AD3d 1134, 38 NYS3d 63 [2d Dept 2016]; ***Kassim v Uddin***, 119 AD3d 529, 987 NYS2d 878 [2d Dept 2014]). However, every driver must operate his or her vehicle in a reasonable manner, and even a right-of-way driver has an obligation to use his or her senses to avoid colliding with other vehicles (***Frey v Richmond Hill Lbr. & Supply***, 132 AD3d 803, 18 NYS3d 407 [2d Dept 2015]). Notwithstanding, a driver with a right-of-way who has only seconds to react is not at fault in the happening of the accident (*see* ***Balladares v City of New York***, 177 AD3d 942, 114 NYS3d 448 [2d Dept 2019]).

Here, plaintiff established his prima facie entitlement to summary judgment on the issue of liability against defendant by demonstrating that the Carberry vehicle failed to yield the-right-of way to plaintiff's vehicle by making a left turn into the path of oncoming traffic when it was not reasonably safe to do so in violation of Vehicle and Traffic Law § 1141 (***Shashaty v Gavitt***,158 AD3d 830, 71 NYS3d 560 [2d Dept 2018]). Furthermore, plaintiff testified that the accident happened within a fraction of a second leaving no time to react and avoid the collision. Therefore, the burden shifted to defendants to proffer evidence in admissible form sufficient to raise a triable issue of fact (CPLR 3212 [b]; ***Zuckerman v City of New York,*** 49 NY2d 557, 427 NYS2d 595).

In opposition, defendants submit an affirmation of counsel. In his affirmation, counsel speculates that defendant was unable to observe plaintiff's vehicle because it was driving down the hill. It is well settled that an affirmation of an attorney who lacks personal knowledge of the facts has no probative value (*see* ***Cullin v Spiess***, 122 AD3d 792, 997 NYS2d 460 [2d Dept 2014]). Furthermore, counsel's assertions are conclusory and speculative in nature and are insufficient to raise a triable issue of fact (*see* ***Skura v Wojtlowski***, 164 AD3d 1196, 87 NYS3d 100 [2d Dept 2018]). Additionally, defendant did not testify that she looked towards the hill as she was turning; rather, she testified that she looked towards that

direction while she was stopped in the turning lane, and that when she was driving through the intersection, she was looking towards the left, to Whiskey Road, in the direction she was turning. Additionally, defendant was asked whether her view was obstructed because of the incline in the opposite direction, and she answered in the negative.

Counsel further argues that the transcript of plaintiff's deposition testimony is inadmissible as it is unsigned and unattested. However, the deposition transcript is certified as accurate by the court reporter and no challenge has been made to its accuracy (*see* ***Rosenblatt v St. George Health & Racquetball Assoc., LLC***, 119 AD3d 45, 984 NYS2d 401 [2d Dept 2014]; ***Femia v Graphic Arts Mut. Ins. Co.***, 100 AD3d 954, 954 NYS2d 632 [2d Dept 2012]; ***Rodriguez v Ryder Truck, Inc.***, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]). Having failed to submit competent proof sufficient to raise a triable issue of fact, plaintiff's motion for summary judgment on the issue of liability is granted.

Plaintiff also moves for summary judgment on the threshold issue of serious injury. By bill of particulars, plaintiff alleges that he sustained fractures to his vertebrae, among other things. In support of the motion, plaintiff submits, among other things, certified hospital records from Stony Brook University Hospital, an affirmation by Dr. Kathryn Ko who performed an independent medical examination on plaintiff, and a report by defendant's expert witness, Dr. Marc Katzman.

To recover for non-economic loss resulting from an automobile accident under Insurance Law § 5104, the plaintiff must establish, as a threshold matter, that the injury suffered was a "serious injury" within the meaning of the statute. Serious injury is defined by Insurance Law § 5102 (d) to include:

> 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.

Plaintiff alleges that he sustained a serious injury in the fracture category. A plaintiff moving for summary judgment on the issue of serious injury must establish, prima facie, that he or she sustained a serious injury within the meaning of Insurance Law § 5102 (d), and that such injury was causally related to the accident (***Nicholson v Bader***, 105 AD3d 719, 962 NYS2d 350 [2d Dept 2013]; ***Alexander v Gordon***, 95 AD3d 1245 [2d Dept 2012]; ***Kapeleris v Riordan***, 89 AD3d 903, 933 NYS2d 92 [2d Dept 2011]). Objective medical proof of the plaintiff's injury is required to satisfy the serious injury threshold (***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865[2002]).

Here, plaintiff submits an affirmation from Dr. Kathryn Ko who performed an independent medical examination on plaintiff at defendant's request and concludes that an x-ray film of the lumbar vertebrae revealed fractures in the left transverse process of L1, L2 and L3 and concludes that the fractures were caused by the subject accident. Plaintiff also submits a report prepared by defendants' expert witness Dr. March Katzman who reviewed a CT scan of plaintiff's lumbar spine performed at Stony Brook University Hospital on July 21, 2016. Dr. Katzman affirms that on May 27, 2020, he reviewed the radiological imaging study performed on plaintiff on July 21, 2016 at Stony Brook University Hospital, and he states that the CT scan of the lumbar spine revealed, among other things, "acute non-displaced fractures involving the left sided transverse processes of L1, L2, and L3."

Plaintiff's submissions establish, prima facie, that he sustained a serious injury casually related to the subject accident. As plaintiff established that at least some of his injuries meet the no-fault threshold, it is unnecessary to address whether his proof with respect to other injuries he allegedly sustained is sufficient (*see* ***Linton v Nawaz***, 14 NY3d 821, 900 NYS2d 239 [2010]; ***Nussbaum v Chase***, 166 AD3d 638, 87 NYS3d 120 [2d Dept 2018]; ***Uribe v Jimenez***, 133 AD3d 844, 20 NYS3d 555 [2d Dept 2015]). Therefore, the burden shifts to defendant to raise a triable issue of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595[1980]).

In opposition to plaintiff's motion, defendants submits an affirmation by counsel which lacks probative value and is insufficient to defeat plaintiff's motion (*see* ***Cullin v Spiess***, 122 AD3d 792, 997 NYS2d 460 [2d Dept 2014]). Furthermore, to defeat a motion for summary judgment, a party opposing such motion must lay bare his proof, in evidentiary form. Conclusory allegations are insufficient to defeat the motion (*see* ***Friends of Animals, Inc. v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]; ***Burns v City of Poughkeepsie***, 293 AD2d 435, 739 NYS2d 458 [2d Dept 2002]). Here, defendant has failed to proffer competent proof to raise a triable issue of fact as to whether plaintiff sustained a serious injury within the meaning of Insurance Law § 5102(d). Having failed to submit competent medical evidence sufficient to raise a triable issue of fact that the plaintiff did not sustain a fracture as a result of the subject accident (*see* ***Knight v James***, 183 AD3d 709, 121 NYS3d 907 [2d Dept 2020]), the branch of plaintiff's motion for summary judgment on the threshold issue of serious injury is also granted.

Anything not specifically granted herein is hereby denied.

This constitutes the decision and Order of the Court.

Dated: 3/17/21

HON. LINDA KEVINS

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**