

SHORT FORM ORDER
NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. JOSEPH P. DORSA IAS PART 12
Justice

- - - - - x

BENJAMIN SLOWLEY,

Plaintiff,

Index No.: 10929/05

- against -

Motion Date: 2/21/07

FRANKLIN ALONZO CHESTNUT, THE HERTZ
CORPORATION,

Motion No.: 31

Defendant.

- - - - - x

The following papers numbered 1 to 16 on this motion:

	<u>Papers Numbered</u>
Plaintiff's Notice of Motion-Affirmation- Affidavit(s)-Service-Exhibit(s)	1-4
Defendants Chestnut & Hertz Corporation's Affirmation in Opposition-Affidavit(s)-Exhibit(s)	5-7
Plaintiff's Reply Affirmation-Exhibit(s)	8-9
Defendants' Notice of Cross-Motion-Affirmation- Affidavit(s)-Service-Exhibit(s)	10-13
Plaintiff's Affirmation in Opposition-Affid(s) Exhibit(s)	14-16

By notice of motion, plaintiff seeks an order of the Court, granting him partial summary judgment on the issue of liability pursuant to CPLR § 3212.

Defendants file an affirmation in opposition and cross-move for summary judgment and dismissal pursuant to CPLR § 3212, on the grounds that plaintiff failed to sustain a serious injury within the meaning of NY Ins. Law §§ 5102(d) and 5104.

Plaintiff opposes the cross-motion and files a reply to defendants' opposition.

The underlying cause of action is a claim by plaintiff for personal injuries alleged to have been sustained in a motor

vehicle accident on January 1, 2005, on Pitkin Avenue, at or near the intersection of Chester Street, Kings County, New York, when plaintiff alleges that the vehicle owned by the Hertz Corporation (Hertz) and operated by Franklin Alonzo Chestnutt, crossed over a double yellow line into the opposing lane of traffic hitting plaintiff's vehicle head on.

In opposition to plaintiff's motion for summary judgment on the issue of liability, defendant argues that when the accident occurred, he was proceeding around a vehicle which was double parked and blocking his lane of traffic. Defendant argues further that plaintiff's testimony that he saw defendant's vehicle a split second before the impact suggests that plaintiff wasn't looking, therefore concluding that he hadn't seen what there was to be seen to avoid the accident.

The submissions by plaintiff herein establish his prima facie entitlement to summary judgment on the issue of liability and defendant fails to submit any admissible evidence to raise a triable issue of fact. Guevara v. Zaharakis, 303 AD2d 555, 556 (2d Dep't 2003).

In support of their motion for summary judgment and dismissal, defendants submit the affirmed report of Dr. Diego J. Herbstein, based upon an examination conducted on April 5, 2006; and, the affirmed report of Dr. Leon Sultan, based upon an examination conducted on April 10, 2005.

In opposition to the motion for summary judgment, plaintiff submits the affirmed reports of Dr. Jeffrey Klein, plaintiff's orthopaedic surgeon (plaintiff's Exh. B); the affirmed report of Dr. Yolande F. Bernard, plaintiff's treating physician (plaintiff's Exh. C); the affirmed MRI report of February 9, 2005, of plaintiff's lumbar spine (plaintiff's Exh. D); and, the affirmed report of Dr. Wayne Kerness, based upon an examination conducted on February 25, 2006 (plaintiff's Exh. D). Dr. Kerness performed an independent medical examination of plaintiff on behalf of the Worker's Compensation carrier.

Plaintiff maintains that he suffered serious injury to his lumbar and cervical spine, with pain radiating to his lower extremities constituting 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.

Based upon the foregoing papers the motion is denied as the papers present issues of fact requiring a trial. Specifically, conflicting affidavits establish that issues exist as to whether the plaintiff's injuries to his lumbar and cervical spine are causally related to the accident as well as the nature and extent of said injuries. (See, Insurance Law §5102[d]; Toure v. Avis Rent A Car Systems, Inc., 98 NY2d 345, Meyer v. Guido, 260 AD2d 556; see also, Jones v. Norwich City Sch. Dist., 283 AD2d 809; McKinney v. Corby, 261 AD2d 454; Wolfram v. Vassilou, 239 AD2d 340; Flanagan v. Hoeg, 212 AD2d 756).

In their cross-motion, defendant Hertz alone, seeks dismissal of plaintiff's claim for punitive damages against them as owner of the vehicle. Defendant does not deny that he was arrested at the scene of the accident for driving while intoxicated.

It is well established that the owner of a vehicle in these circumstances is only vicariously liable for the damages alleged to have been suffered by plaintiff as a result of the collision, and "...thus cannot be liable for punitive damages." O'Conoor v. Kuzmicki, 14 AD3d 498, 499 (2d Dep't 2005); Hale v. Saltamocchia, 28 AD3d 715 (2d Dep't 2006).

Accordingly, upon all of the foregoing, it is hereby

ORDERED, that defendant The Hertz Corporation's motion for summary judgment on the claim for punitive damages is granted and the claim for punitive damages is hereby severed and dismissed as against defendant Hertz, and the Clerk is directed to enter judgment in favor of said defendant on that claim; and, it is further

ORDERED, that the remainder of the action shall continue; and, it is further

ORDERED, that plaintiff's motion is granted to the extent of granting partial summary judgment in favor of plaintiff and against defendant on the issue of liability and the issue of the amount of a judgment to be entered thereon shall be determined at the trial herein.

Dated: Jamaica, New York
April 9, 2007

JOSEPH P. DORSA
J.S.C.