Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **LAWRENCE V. CULLEN** IA Part 6
Justice

JUAN CARLOS POLO,	Index Number 12342 2005
Plaintiff,	Motion Date January 23, 2007
- against-	
ALBERTO R. BESO, et al.,	Motion Cal. Number 32
Defendants.	Motion Seq. No. 1

The following papers numbered 1 to 22 read on this motion by Li- In Wu to dismiss the complaint on the ground that plaintiff did not sustain a serious injury pursuant to Insurance Law § 5102[d], cross motion by Alberto R. Beso and Biassi Plants and Flowers, Inc. (B&B defendants), to dismiss the complaint on the ground that plaintiff did not sustain a serious injury and for summary judgment in their favor on the issue of liability, and cross motion by plaintiff for summary judgment in his favor on the issue of liability.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-4
Notices of Cross Motions - Affidavits - Exhibits ..	5-14
Answering Affidavits - Exhibits	15-17
Reply Affidavits	18-22

Upon the foregoing papers it is ordered that the motion is denied. The branch of the cross motion by the B&B defendants which seeks summary judgment in their favor on the issue of liability is granted; the branch of the cross motion which seeks to dismiss the complaint on the ground that plaintiff did not sustain a serious injury is denied. The cross motion by plaintiff for summary judgment in his favor on the issue of liability is granted.

Plaintiff in this negligence action seeks damages for personal injuries sustained in an automobile accident on March 25, 2003 on 43rd Avenue at the intersection of 102nd Street, in

Queens. The record indicates that plaintiff's vehicle was stopped at a traffic light when a vehicle operated by Li-In Wu collided into the stopped vehicle owned by Biassi Plants and Flowers and operated by Alberto R. Beso, propelling the B&B vehicle into plaintiff's vehicle. In the verified bill of particulars, plaintiff alleges injuries which include the following: Grade I intra-substance tear in the posterior pole of the medial meniscus of the right knee; L5- 1 disc herniation with ventral impingement on thecal sac; straightening of the lumbar lordotic curve; right knee contusion with intra-articular derangement; acute lumbosacral musculo- ligamentous strain with herniated disc; and acute cervical musculo- ligamentous strain and sprain. Wu and B&B contend that the alleged injuries are not causally-related to the subject accident. Plaintiff opposes the motion and cross-moves for summary judgment in his favor on the issue of liability. B&B also cross-moves for summary judgment in their favor on the issue of liability.

Serious Injury

It is well settled that the proponent of a motion for summary judgment, where the issue is whether a plaintiff has sustained a serious injury as defined by Insurance Law § 5102[d], has the initial burden of establishing, by competent evidence, that a plaintiff did not sustain a serious injury causally related to the subject accident (Franchini v Palmieri, 1 NY3d 536 [2003]). In support of the motion and cross motion, defendants relied upon the affirmed reports of Drs. Jayaram, Kerness and Heiden.

Plaintiff was examined by Dr. Sarasavani Jayaram, a neurologist, on August 31, 2006. After reviewing plaintiff's medical records and taking an oral history from plaintiff, Dr. Jayaram found no evidence of impairment, disability or permanency resulting from the subject motor vehicle accident.

Plaintiff was examined by Dr. Wayne Kerness, an orthopedist, on August 31, 2006. Dr. Kerness also reviewed plaintiff's medical records and took an oral history. The examination revealed that plaintiff has no limitation of range of motion in his neck, back or right knee, that plaintiff has no orthopedic disability as a result of the subject accident; and that all of the objective testing were negative. Based thereon, Dr. Kerness concluded that the neck and back sprain which plaintiff sustained in the subject accident have completely resolved.

Finally, Dr. Richard A. Heiden, a radiologist, reviewed the magnetic resonance imaging (MRI) film taken of plaintiff's right knee and lumbar spine shortly after the accident. With respect to the right knee MRI taken four days after the accident, Dr.

Heiden opined that the study is entirely normal. Regarding the lumbar spine MRI taken on April 25, 2003, approximately one month after the subject accident, Dr. Heiden opines that the MRI indicates dehydration and left paracentral L5-S1 disc herniation which is degenerative in nature and not attributable to the subject accident.

Based upon these reports, the moving defendants have made a prima facie showing that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102[d]. Therefore, it is incumbent upon plaintiff to provide evidentiary proof in admissible form sufficient to raise a triable issue of fact on serious injury in order to avoid summary judgment (Franchini v Palmieri, supra; Rosenberg v Rockville Centre Soccer Club, 166 AD2d 570 [1990]). In opposition to the motion, plaintiff submitted the affirmed report of Dr. Frieda Goldin, a physician board-certified in physical medicine and rehabilitation. The court finds that this report raises a triable issue of fact.

On November 17, 2006, Dr. Goldin conducted a number of tests on plaintiff including a spinal examination. Based upon the tests, Dr. Goldin reports as follows:

"Palpation revealed mild paravertebral tenderness with mild muscle spasm in the region of the cervical and lumbar spine, the right knee over the medial lateral aspect. The tests further revealed positive cervical foraminal compression test on the left, positive straight leg raising test on the right in the supine and sitting position, positive Lasegue's test, crossed leg test and McMurray's test. Range of motion testing, administered using a digital inclinometer according to American Medical Association Guidelines, revealed the following: 45% limitation in the cervical extension and lateral bending, 25% limitation in cervical rotation. Range of motion testing of the lumbar region revealed a 33% limitation in extension, lateral bending and rotation and a 50% flexion limitation.

In addition, the magnetic resonance imaging (MRI) film taken of plaintiff's lumbar spine on April 25, 2003, revealed straightening of the lumbar lordotic curve consistent with muscle spasm and L5-S1 disc herniation with ventral impingement of thecal sac compression. The MRI of plaintiff's right knee taken on March 29, 2003 revealed grade I intra-substance tear in the posterior pole of the medial meniscus. Based upon this examination of plaintiff, Dr. Goldin concludes that plaintiff sustained "post traumatic cervical sprain/strain, chronic cervicalgia, status post right knee contusion, chronic low back pain, status post traumatic lumbosacral spine sprain/strain, disc herniation at L5-S1, and medial meniscal tear right knee," and

that these injuries are causally-related to the subject accident.

While a diagnosis of a bulging or herniated disc, by itself, does not constitute a serious injury (Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]), a diagnosis of a meniscus tear creates an issue of fact as to whether the injured plaintiff suffered a serious injury (see Papadonikolakis v First Fid. Leasing Group, 283 AD2d 470 [2001]). Also, conflicting medical evidence as to permanency and significance of plaintiff's injury warrant denial of summary judgment (Noble v Ackerman, 252 AD2d 392 [1998]; Cassaanol v Williamsburg Plaza Taxi, 234 AD2d 208 [1996]). The question of "dueling experts" in this case should properly be resolved at trial, when the learned physicians will be required to defend their respective conclusions.

In view of the objective evidence of serious injury under the no-fault law adduced by plaintiff, he has sufficiently demonstrated the existence of triable issues of fact as to the seriousness of his injuries to avoid summary judgment (see Gaddy v Eyler, 79 NY2d 955 [1992]; Risbrook v Coronamos Cab Corp., 244 AD2d 397 [1997]; Kim v Cohen, 208 AD2d 807 [1994]). Accordingly, the motion by Wu and the branch of the cross motion by defendants B&B to dismiss the complaint on the ground that the injuries sustained by plaintiff are not serious are denied.

B&B Cross Motion: Liability

The branch of the cross motion by B&B for summary judgment in their favor on the issue of liability is granted. It is well settled that a rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability with respect to the operator of the moving vehicle, and imposes a duty on the operator of the moving vehicle to come forward with an adequate, non- negligent explanation for the accident (see Neidereger v Misuraca, 27 AD3d 537 [2006]; Garces v Karabelas, 17 AD3d 633 [2005]; Niyazov v Bradford, 13 AD3d 501 [2004]; Dickie v Pei Xiang Shi, 304 AD2d 786 [2003]). B&B sustained their burden of establishing a prima facie case of negligence by submitting the affidavit of Beso, who averred that his vehicle was at a complete stop approximately six feet behind the car in front of him for approximately six seconds when his vehicle was impacted in the rear by Wu's vehicle; and that the impact from Wu's vehicle propelled the B&B vehicle into plaintiff's vehicle (see Niyazov v Bradford, supra; Dickie v Pei Xiang Shi, supra; Bucceri v Frazer , 297 AD2d 304 [2002]). Wu's contention that the B&B vehicle might have struck plaintiff's vehicle first and that the B&B vehicle was swerving back and forth as it traveled down the road, is insufficient to rebut the presumption of negligence created by the rear-end collision, and raise a triable issue of fact to defeat summary judgment (see Neidereger v Misuraca, supra; Dickie

v Pei Xiang Shi, supra; Irmiyayeva v Thompson, 296 AD2d 439 [2002]; Reed v New York City Tr. Auth., 299 AD2d 330 [2002]; Geschwind v Hoffman, 285 AD2d 448 [2001]).

Plaintiff's Cross Motion

Plaintiff's cross motion for summary judgment in his favor on the issue of liability is granted. The undisputed record indicates that plaintiff's vehicle was stopped at a red light when it was struck in the rear by the B&B van. On this unrefuted evidence, plaintiff established prima facie entitlement to summary judgment, as his vehicle was a stationary vehicle involved in a rear-end collision (see Garcia v Bakemark Ingredients (E.) Inc., 19 AD3d 224 [2005]). The burden then shifted to defendants to rebut the inference of negligence by offering a non-negligent explanation for the contact (Ferguson v Honda Lease Trust, 34 AD3d 356 [2006]). Defendants failed to provide such an explanation, or to demonstrate culpable negligence on the part of plaintiff. Therefore, plaintiff's motion for summary judgment in his favor on the issue of liability is granted.

Conclusion

The motion and branch of the cross motion by B&B to dismiss the complaint on the ground that the plaintiff did not sustain a serious injury in the subject accident are denied. The branch of the cross motion by B&B for summary judgment in their favor on the issue of liability is granted. Plaintiff's cross motion for summary judgment in his favor on the issue of liability is granted.

Dated: March 23, 2007

LAWRENCE V. CULLEN, J.S.C.