SHORT FORM ORDER

INDEX No. 06-8402
CAL. No. 07-01279-MV

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 7-24-07
ADJ. DATE 8-24-07
Mot. Seq. # 001 - MD

ROBERT SCHALL,	:	DAVID W. McCARTHY, ESQ.
	:	Attorney for Plaintiff
Plaintiff,	:	33 Walt Whitman Road, Suite 204
	:	Huntington Station, New York 11746
- against -	:	
	:	MICHAEL E. PRESSMAN, ESQ.
ALICE CURRY and MICHAEL MARTINEZ,	:	Attorney for Defendants
	:	125 Maiden Lane
Defendants.	:	New York, New York 10038-4956

Upon the following papers numbered 1 to 15 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers ____; Replying Affidavits and supporting papers ___; Other__; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants for an order granting them summary judgment dismissing the complaint is denied.

This is an action to recover damages for injuries allegedly sustained by the then 35 year old plaintiff on February 27, 2004 at approximately 4 p.m. when his vehicle was struck by a vehicle operated by defendant Alice Curry (Curry) and owned by defendant Michael Martinez (Martinez) at the intersection of Johnson Avenue and the service road of Sunrise Highway (Route 27) in Islip, New York. In his complaint, plaintiff alleges that as a result of the subject accident, he sustained serious injuries as defined in Insurance Law § 5102 (d) as well as economic loss in excess of basic economic loss as defined in Insurance Law § 5102 (a).

Defendants now move for summary judgment dismissing plaintiff's complaint on the grounds that they did not cause or contribute to the subject accident and that plaintiff was the sole proximate cause of the accident, having run through a red light at the intersection of Johnson Avenue and the Sunrise Highway service road. In support of their motion, defendants submit, among other things, the unsworn MV-104 police accident report; the deposition transcripts of plaintiff, defendant Curry and non-party witnesses Lori Neadle and her husband Kenneth Scardino; and the affidavit of service of the instant motion. Plaintiff has not submitted any opposition to the instant motion.

A party seeking summary judgment must establish their position by evidentiary proof in admissible form sufficient to warrant judgment for them as a matter of law (*see*, ***Zuckerman v City of New York***, 49 NY2d 557, 562, 427 NYS2d 595 [1980]). If the proponent of such motion does not tender evidence which would eliminate material issues of fact, the motion must be denied, regardless of the sufficiency of the opposition (*see*, ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]).

"[A]n operator who has the right of way is entitled to anticipate that other vehicles will obey the traffic laws that require them to yield" (***Namisnak v Martin***, 244 AD2d 258, 260, 664 NYS2d 435, 437 [1st Dept 1997] cited by ***Barile v Carroll***, 280 AD2d 988, 720 NYS2d 674 [4th Dept 2001]). However, even where a vehicle enters an intersection with a green light, the driver may nevertheless be found negligent if he or she fails to use "reasonable care when proceeding into the intersection" (***Doctor v Juliana***, 277 AD2d 1013, 1014,716 NYS2d 196 [4th Dept 2000]; *see*, Vehicle and Traffic Law §§ 1180 [a], [e]; 1113 [b]; ***Strasburg v Campbell***, 28 AD3d 1131, 816 N YS2d 627 [4th Dept 2006]).

Initially, the Court notes that the unsworn MV-104 police accident report constitutes hearsay and is inadmissible (*see*, ***Lacagnino v Gonzalez***, 306 AD2d 250, 760 NYS2d 533 [2d Dept 2003]; ***Hegy v Coller***, 262 AD2d 606, 692 NYS2d 463 [2d Dept 1999]).

Plaintiff's deposition testimony reveals that at the time of the accident, the sun was going down, it was clear and the roads were dry and plaintiff was operating his Dodge pickup truck southbound on Johnson Avenue. In addition, plaintiff testified that he was proceeding in the right hand lane of the two southbound lanes of Johnson Avenue approaching the intersection with the Sunrise Highway service road. Plaintiff also testified that there was a traffic light controlling said intersection and as he approached the intersection at a speed of no more than 30 miles per hour the light was green. According to plaintiff, the traffic light at the intersection controlling the southbound traffic changed to yellow as he was entering the intersection. Plaintiff further testified that as he was going through the intersection he first observed the vehicle that struck his vehicle five seconds prior to the collision and said vehicle was in the left lane of the two westbound lanes of the Sunrise Highway service road moving at about 30 miles per hour. Plaintiff described the overall traffic conditions at the time of the accident as light to medium. According to plaintiff, the westbound traffic was stopped and the northbound traffic was starting to come to a stop. Plaintiff testified that at the time of the collision the other vehicle was entirely within the left southbound lane of Johnson Avenue; plaintiff applied his brakes and his swerved to the right; one medium to heavy impact occurred; and the driver's side front quarter panel of plaintiff's vehicle collided with the front and right side of the other vehicle.

Defendant Curry testified at her deposition that just prior to the subject accident she was operating a Toyota Corolla owned by defendant Martinez; the weather was clear; and she was on the westbound service road of Sunrise Highway going approximately 35 miles per hour. In addition, defendant Curry testified that prior to the intersection of the Sunrise Highway service road with Johnson Avenue she moved from the westbound left hand lane of the service road to the westbound right hand lane at which time she saw that the traffic light was red. According to defendant Curry, her vehicle was the first vehicle stopped at the light in the right hand lane of the service road and five seconds later the traffic light turned green, she looked both ways twice, and on the right on Johnson Avenue she only saw one vehicle stopped at the traffic light in the southbound right hand lane of Johnson Avenue. Defendant Curry also testified that she had proceeded slowly about 10 to 15 miles per hour into the intersection and about two car lengths when she first saw the pick up truck that collided with her vehicle. According to defendant Curry, when she first

observed the pickup truck it was moving fast, at about 50 miles per hour, in the southbound left hand lane of Johnson Avenue and had not yet entered the intersection and defendant Curry lifted her foot from the gas pedal. Defendant Curry described the impact with the pick up truck as heavy.

Non-party witness Lori Neadle (Ms. Neadle) testified at her deposition that immediately prior to the subject accident she and her husband were in their vehicle directly behind defendant Curry's Toyota Corolla in the right hand lane of the westbound Sunrise Highway service road and they were all stopped at the red traffic light at the intersection with Johnson Avenue. In addition, Ms. Neadle testified that she observed the traffic light change from red to green and saw defendant Curry start to proceed through the intersection and their vehicle followed hers into the intersection. Ms. Neadle also testified that she observed the subject collision and saw a Dodge SUV that came from her right side southbound and that defendant Curry's vehicle had traveled "a couple of feet at the most" when the front bumper of the Dodge made contact with the front passenger fender of defendant Curry's Corolla. According to Ms. Neadle, as the Dodge approached the intersection it did not slow down or change its speed in any way and she described the impact as moderate.

Non-party witness Kenneth Scardino (Mr. Scardino) testified at his deposition that he was seated in the front passenger seat of the vehicle owned and operated by his wife, Ms. Neadle, and that the vehicle that was hit, a Corolla, was the first vehicle stopped at the red light prior to the accident and his wife's vehicle was either directly behind the Corolla or one vehicle behind it. In addition, Mr. Scardino testified that he observed the traffic light change from red to green and that the Toyota had gone at least halfway through the intersection and his wife's vehicle had just entered the intersection when a southbound SUV went through the red light on Johnson Avenue at a speed above 30 miles per hour and the collision occurred. According to Mr. Scardino, the SUV was traveling in the left southbound lane of Johnson Avenue and he did not observe the SUV prior to its entrance into the intersection and he observed the SUV hit the Toyota in the right westbound lane of the Sunrise Highway service road.

Said deposition testimony raises issues of fact as to, among other things, whether the traffic light was yellow or red when plaintiff entered the intersection (*see*, Vehicle and Traffic Law § 1110; *see generally*, ***Rojas v Epstein***, 304 AD2d 740, 757 NYS2d 769 [2d Dept 2003]; ***Texido v S & R Car Rentals Toronto***, 244 AD2d 949, 665 NYS2d 179 [4th Dept 1997], *lv to appeal dismissed* 91 NY2d 938, 670 NYS2d 402 [1998]). Inasmuch as the deponents presented conflicting evidence as to the circumstances surrounding the accident, the proffered proof raises questions of fact regarding their credibility such that defendants failed to make a prima facie showing of their entitlement to judgment as a matter of law (*see*, ***Martinez v Mendon Leasing Corp.***, 295 AD2d 408, 744 NYS2d 44 [2 Dept 2002]; *see also*, ***S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]). Thus, defendants' motion for summary judgment on the grounds that they were not liable for the subject accident must be denied, regardless of the sufficiency of the opposition papers (*see*, ***Winegrad v New York Univ. Med. Ctr.***, *supra*).

In the alternative, defendants move for summary judgment in their favor dismissing the complaint on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). In support of their request, defendants submit, among other things, the summons and verified complaint, defendants' answer; plaintiff's verified bill of particulars; plaintiff's deposition transcript; the report dated April 5, 2004 of plaintiff's treating neurologist, Richard A. Pearl, M.D., based on a neurological consultation on April 2, 2004 together with the results of a subsequent electrodiagnostic examination; a report on an MRI of plaintiff's cervical spine performed on April 12, 2004 upon referral

by plaintiff's neurologist; the affirmed report dated January 10, 2007 of defendants' examining neurologist, Noah S. Finkel, M.D., based on his examination of plaintiff on said date; and the affirmed report dated June 6, 2007 of defendants' examining radiologist, Sondra Pfeffer, M.D., who reviewed plaintiff's cervical spine MRI films performed on April 12, 2004.

Insurance Law § 5102 (d) defines "serious injury" 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 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."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see*, ***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 722 [2d Dept 2006]).

It is for the court to determine in the first instance whether a prima facie showing of "serious injury" has been made out (*see*, ***Tipping-Cestari v Kilhenny***, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). The initial burden is on the defendant "to present evidence, in competent form, showing that the plaintiff has no cause of action" (***Rodriguez v Goldstein,*** 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once defendant has met the burden, plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). Such proof, in order to be in a competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the nonmoving party, here, the plaintiff (***Cammarere v Villanova,*** 166 AD2d 760, 562 NYS2d 808 [3d Dept 1990]).

By his bill of particulars, plaintiff alleges that as a result of the subject accident he sustained the following injuries, pseudo disc bulging at C4-5 resulting in cord flattening; straightening of the normal cervical lordosis with reversal at C4-5; limitation of movement of cervical spine; neck extension; neck pain; ulnar neuropathy which may require surgery in the future; mild focal entrapment left ulnar nerve at the elbow; numbness and weakness in left arm; lumbar radiculopathy which may require surgery in the future; and lumbosacral sprain. In addition, plaintiff alleges that he was treated and released from the Brookhaven Memorial Hospital emergency room on the date of the accident and that he was confined to bed and to home for approximately two days thereafter. Plaintiff adds that at the time of the subject accident he was employed by Festo Corp. located at 395 Moreland Road in Hauppauge, New York.

Plaintiff also alleges in his bill of particulars that his injuries constitute serious injuries under the following categories of Insurance Law § 5102 (d), "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 testified at his deposition that approximately one week to a week and a half after his receiving treatment at the Hospital emergency room, he went to see his family physician with complaints relating to his neck, chest and back. In addition, plaintiff testified that his family physician gave him muscle relaxants and referred him to Dr. Pearl whom plaintiff saw two or three times after the accident until about March or April of 2004. According to plaintiff, Dr. Pearl ordered an MRI of the neck and performed an EMG test and then referred plaintiff for physical therapy. Plaintiff explained that he went to physical therapy two times the first week, then he went again during the second week but that he had to stop because the physical therapy was making his condition worse and he could not afford the therapy because No-Fault had stopped payment. Plaintiff also testified that at the present time he did not have any appointments to see any physicians or therapists with respect to the claimed injuries from the subject accident. Plaintiff further testified that at the time of the accident he was employed as a production manager, a desk job, and did not lose time from work and continued to perform the same duties. When asked what activities he could no longer perform as a result of the subject accident, plaintiff responded repairing his cars, playing and coaching soccer, painting inside his home, and taking care of the front and back yards, specifically, raking leaves, planting flowers and caring for their pond.

When plaintiff's treating neurologist examined plaintiff a little over one month after the subject accident, his reported findings included, normal shoulder shrug; motor examination 5/5 in all extremities with normal tone; no Babinski sign; negative Romberg test; and no noted atrophy or fasciculations. Plaintiff's treating neurologist indicated that plaintiff's sensory examination was intact to pinprick, light touch, vibration and joint position sense except for decreased pin prick sensibility over the fourth and fifth fingers of both hands. In addition, he indicated that plaintiff's gait was normal and plaintiff's neck was supple and that no carotid bruits were noted. Plaintiff's treating neurologist reported that plaintiff had limitation of movement of the cervical spine to 70 degrees to the right and 75 degrees to the left and that plaintiff had pain on palpation of the paraspinal muscles in the cervical and lumbosacral region with some perceptible spasm. He diagnosed cervical radiculopathy and lumbosacral sprain and indicated that he was sending plaintiff for a cervical MRI as well as EMG and nerve conduction studies of the upper extremities to differentiate between ulnar neuropathy and cervical radiculopathy. The subsequent electrodiagnostic testing results revealed that the NCV test indicated that plaintiff had a very mild focal slowing of the left ulnar motor CV across the elbow; the EMG needle examination was normal; and the diagnosis was very mild left cubital tunnel syndrome with no electrical evidence of cervical radiculopathy or carpal tunnel syndrome. Plaintiff was referred by Dr. Pearl for a cervical MRI and the resulting report indicated straightening of the normal cervical lordosis with minimal reversal at C4-5 and pseudo disc bulging resulting in minimal cord flattening.

Defendants' examining orthopedic surgeon examined plaintiff almost three years after the subject accident and in his affirmed report he indicated that plaintiff's complaints consisted of constant pain in his neck, intermittent numbness in the left finger, and a constant dull ache and pain in his lower back, and

provided the results of his examination. Plaintiff's cervical spine range of motion testing revealed right and left rotation 70/70 (normal) degrees; extension 25/30 (normal) degrees; forward flexion 40/45 (normal) degrees. Defendants' examining orthopedic surgeon indicated that there was no palpable paraspinal spasm even though plaintiff stated that he had discomfort from palpation at the base of the neck bilaterally. He added that plaintiff complained of subjective discomfort at the extremes of the range of motion positions. With respect to examination of plaintiff's shoulders, defendants' examining orthopedic surgeon found full range of motion in all planes of abduction, flexion, extension, and internal and external rotation. In addition, he found full range of motion of the elbows, forearms, wrists and fingers and a negative Tinel's sign at the elbow and at the wrist. Defendants' examining orthopedic surgeon concluded that there was no evidence of neurological deficit in the upper extremities adding that there was some questionable dysesthesias along the ulnar border of the fifth finger and the ulnar border of the forearm which was not particularly reproducible and that there was no altered sensation on the ulnar or radial border of the fourth finger. As for plaintiff's lumbar spine examination, defendants' examining orthopedic surgeon performed range of motion testing with the following results, extension 35/35 (normal) degrees, forward flexion 30/40 (normal) degrees, and lateral bending 35/35 (normal) degrees bilaterally. He noted that there was no local tenderness to palpation and no paraspinal spasm or pelvic asymmetry. He also stated that plaintiff had full range of motion of the hips, knees and lower extremity articulations. Defendants' examining orthopedic surgeon diagnosed resolved cervical and lumbosacral strain and opined that there was no clinical orthopedic evidence of ulnar nerve entrapment at the elbow. He concluded that plaintiff had no ongoing sequelae or orthopedic disability secondary to the subject accident.

Defendants' examining radiologist reviewed the original cervical MRI films and opined in her affirmed report that the films revealed early degenerative disc disease, that is, mild disc desiccation at C2-3, C3-4, C4-5 and C5-6 and minor circumferential disc bulging at C4-5 and C5-6. In addition, she opined that there were no trauma-related discal or vertebral injuries. Defendants' examining radiologist found no cord or nerve root compression at any level to account for any contended long-term neurological deficits or disabilities.

Here, defendants' examining orthopedic surgeon set forth in his affirmed report bilateral range of motion findings with respect to plaintiff's cervical and lumbar spine, some of which findings were not bilaterally equal, and failed to compare those findings to the normal numerical bilateral ranges of motion and to explain how the bilaterally unequal findings could be normal (*see*, ***McNulty v Buglino***, 40 AD3d 591, 836 NYS2d 198 [2d Dept 2007]). Absent a comparative quantification of those limitations to what is normal, it cannot be concluded that the decreased ranges of motion in plaintiff's cervical spine extension and forward flexion and lumbar spine forward flexion, as indicated by defendants' examining orthopedic surgeon, are mild, minor, or slight so as to be considered insignificant within the meaning of the no-fault statute (*see*, ***Harman v Busch***, 37 AD3d 537, 829 NYS2d 680 [2d Dept 2007]). In addition, what appeared to be restrictions in plaintiff's cervical ranges of motion were not attributed by defendants' examining orthopedic surgeon to pre-existing degenerative changes subsequently noted by defendants' examining radiologist on the original cervical MRI films rather than causally related to the subject accident (*compare*, ***Lea v Cucuzza***, 43 AD3d 882, 842 NYS2d 468 [2d Dept 2007]). Moreover, defendants failed to submit proof that plaintiff had full range of motion of the cervical and lumbar spine, and that he suffered from no disabilities causally related to the motor vehicle accident so as to establish a prima facie case that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d), despite the existence of an MRI showing bulging discs (*compare*, ***Kearse v New York City Transit Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]). Thus, defendants failed to demonstrate that plaintiff did not sustain

a "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see*, ***Hypolite v International Logistics Mgt., Inc.***, 43 AD3d 461, 842 NYS2d 453 [2d Dept 2007]).

Since defendants failed to meet their initial burden of establishing a prima facie case, the sufficiency of plaintiff's opposition papers need not be considered (*see*, ***Paulino v Dedios***, 24 AD3d 741, 807 NYS2d 397 [2d Dept 2005]; ***Birnbaum v Constanza***, 17 AD3d 304, 791 NYS2d 853 [2d Dept 2005]). Therefore, defendants' request for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied.

Accordingly, the instant motion is denied.

Dated: NOV 3 0 2007

J.S.C.

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