SHORT FORM ORDER

INDEX No. 06-16506
CAL. No. 07-02396-MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

P R E S E N T :

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 11-16-07
ADJ. DATE 1-31-08
Mot. Seq. # 001 - MG
002 - XMD

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JOHN CAPORASO,

Plaintiff,

- against -

JAMES ROTUNDA, HERTZ RENTAL & HERTZ CORPORATION,

Defendants.

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Upon the following papers numbered 1 to 54 read on this motion and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13 ; Notice of Cross Motion and supporting papers 14 - 33 ; Answering Affidavits and supporting papers 34 - 47 ; Replying Affidavits and supporting papers 48 - 54 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by plaintiff John Caporaso for summary judgment in his favor on the issue of liability is granted.

ORDERED that this cross motion by defendants James Rotunda, Hertz Rental and Hertz Corporation for summary judgment dismissing the plaintiff's complaint on the basis that plaintiff has not suffered a serious injury as defined by Insurance Law §5102 is denied.

This action emanates from a motor vehicle accident that occurred on November 4, 2005. Plaintiff was traveling on Jericho Turnpike in the left hand lane some distance from an intersection and stopped his vehicle when a car ahead of him stopped to allow opposing traffic to pass so that it could make a left hand turn into a car dealership. After stopping, plaintiff's vehicle was struck in the rear by a vehicle operated by defendant Rotunda and owned by defendants Hertz Rental and Hertz Corporation ("Hertz"). Plaintiff has demonstrated that at the time of the occurrence he was completely stopped when he was struck in the

rear by the vehicle operated by defendant. Thus, plaintiff has made out a prima facie case of negligence, shifting the burden to defendants to provide a non-negligent excuse for the happening of the subject accident (*see, **Chepel v Meyer**s*, 306 AD2d 235, 762 NYS2d 95 [2003]; ***Power v Hupart***, 260 AD2d 458, 688 NYS2d 194 [1999]; ***Neimiec v Jones***, 237 AD2d 267, 654 NYS2d 163 [1997]). Defendants, in opposition, failed to demonstrate a triable issue of fact. Defendant Rotunda in his examination before trial admitted that he did not see the plaintiff's vehicle prior to making contact with it, but upon seeing the stopped vehicle he immediately slammed on his breaks. Thus, defendant Rotunda's statement that plaintiff's vehicle came to a sudden stop is unsupported by his own deposition testimony (*see, **Higgins v Ridgewood Sav. Bank***, 262 AD2d 357, 358, 691 NYS2d 175 [1999]). Moreover, defendant Rotunda was under a duty to maintain a safe distance between his vehicle and plaintiff's vehicle, and to be aware of the traffic conditions ahead of him, in order to avoid colliding with plaintiff's vehicle (*see, **Karkowska v Niksa***, 298 AD2d 561, 749 NYS2d 55 [2002]; Vehicle and Traffic Law §1129 [a]). Therefore, defendant Rotunda has failed to come forth with a non-negligent excuse for the happening of the subject accident (*see, **Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [1991]). Accordingly, plaintiff's motion for summary judgment on the issue of liability is granted.

Defendants cross move for summary judgment on the basis that plaintiff has not suffered a serious injury as defined by Insurance Law § 5102 (d). In support, defendants submit the pleadings, transcripts of plaintiff and defendant Rotunda's deposition testimony, and the affirmed radiological reports from Veterans Administration Hospital. Defendants also submit the sworn medical reports prepared by Dr. Jimmy Lim and Dr. Arthur Bernhang. At defendants' request, Dr. Lim, a neurologist, and Dr. Bernhang, an orthopedist, conducted independent examinations of plaintiff August and September of 2007. Both Dr. Lim and Dr. Bernhang also reviewed the medical records relating to plaintiff's injuries allegedly sustained as a result of the subject accident, as well as various other medical reports regarding injuries plaintiff previously sustained to his spine, knees, and shoulders.

On a motion for summary judgment where the proponent of the motion has presented a prima facie case that the plaintiff's claimed injury is not a "serious injury" by the statutory definition, the burden then shifts to the plaintiff to demonstrate that a "serious injury" was sustained by the plaintiff or that questions of fact exist as to whether the injury sustained was "serious" (*see, **Martin v Schwartz***, 308 AD2d 318, 766 NYS2d 13 [2003]; ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [1992]; ***Lowe v Bennett***, 122 AD2d 728, 511 NYS2d 603 [1986]). A defendant seeking summary judgment based on lack of a serious injury who relies on the findings of the defendant's own witnesses must submit those findings in admissible form, not through unsworn reports, in order to demonstrate entitlement to judgment as a matter of law (*see, **Pagano v Kingsbury***, *supra*). A defendant may also establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see, **Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2001]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [1997]; ***Torres v Micheletti***, 208 AD2d 519,616 NYS2d 1006 [1994]). Once defendant has met this burden, plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see, **Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [2003]; ***Dufel v Green***, 84 NY2d 795, 622 NYS2d 900 [1995]; ***Pagano v Kingsbury***, *supra*). However, if a defendant does not establish a prima facie case that the plaintiff's injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff's opposition papers (*see*, ***Burns v Stranger***, 31 AD3d 360, 819 NYS2d 60 [2006]; ***Rich-Wing v Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2005]; *see*

generally, ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Plaintiff was involved in a number of motor vehicle accidents prior to the subject accident and he previously sustained spinal, lumbar and thoracic injuries. He was unemployed but was a volunteer with the Salvation Army at the time of the accident. He is receiving Workers Compensation based upon injuries he sustained to his hip in 1993. By his Bill of Particulars plaintiff alleges he sustained various personal injuries as a result of the accident as well as the aggravation of all preexisting injuries.

Plaintiff opposes defendants' motion on the grounds that defendants have not met their prima facie burden, and because plaintiff has provided objective evidence to show that he did sustain a serious injury as a result of the subject motor vehicle accident. Plaintiff submits the pleadings, transcripts of deposition testimony, the certified hospital records from Huntington Hospital, the affirmed medical report, and the affidavit of Dr. Patrick Hannan, and the affirmed medical reports of Dr. Lim. Plaintiff also submits the certified medical report from North Shore University Hospital at Syosset, the affirmed medical reports of Dr. Joseph Perez, the police accident report, and the plaintiff's affidavit.

The proof submitted by defendants has failed to establish a prima facie showing that plaintiff sustained a serious injury as required by Insurance Law § 5102 (d) (*see, **Gaddy v Eyler***, *supra*). While defendants' examining orthopedist and neurologist, respectively, found limitations in plaintiff's cervical and lumbar ranges of motion, the findings were not adequately quantified or qualified to establish the absence of a significant limitation of motion (*see*, ***Bentivegna v Stein***, 42 AD3d 555, 841 NYS2d 316 [2007]; ***Wade v Allied Bldg. Products Corp.***, 41 AD3d 466, 837 NYS2d 302 [2007]; ***Tchjevskaia v Chase***, 15 AD3d 389, 790 NYS2d 175 [2005]. In addition, defendants failed to demonstrate that the injuries sustained by plaintiff as a result of prior accidents or conditions predating the subject accident were not exacerbated by the subject accident or necessitated by the surgery plaintiff underwent (*see, **Scarano v Wehrens***, 46 AD3d 797, 847 NYS2d 644 [2007]; ***Gentile v Snook***, 20 AD3d 399, 799 NYS2d 230 [2005]).

Dr. Bernhang's report states that, "while there may have been a traumatic aggravation of a pre-existing shoulder problem, the accident certainly did not cause it." Dr. Bernhang concludes his report by stating that he finds no evidence of causally related injuries to the cervical, thoracic or lumbar spine, although plaintiff may have sustained soft tissue injuries and a "traumatic aggravation of pre-existing injuries of wedge fracture of the lower thoracic spine[,] (which would explain the report of pain on percussion of the lumbar spine)" as a result of the subject accident; and that "whatever injuries were sustained [as a result of the subject accident], appear to have resolved without residua". Despite the fact that the range of motion tests conducted during Dr. Bernhang's examination of plaintiff, which took place two years after the subject accident, revealed significant and various levels of decreased ranges of motion in plaintiff's cervical spine region, Dr. Bernhang failed to establish any basis upon which it might be concluded that such decreases were not the result of or exacerbated by the subject accident (*see, **Joissaint v Starrett-1 Inc.***, 46 AD3d 622, 848 NYS2d 259 [2007]; ***Sullivan v Johnson***, 40 AD3d 624, 835 NYS2d 367 [2007]; ***McLaughlin v Rizzo***, 38 AD3d 856, 832 NYS2d 666 [2007]). In addition, Dr. Bernhang's report is deficient in that the standard of comparison used fails to comport with the normal range of motion for a person of plaintiff's age, weight, and height, and thereby leaves the Court to speculate as to the meaning of such comparisons (*see, **Powell v Alade***, 31 AD3d 523, 818 NYS2d 600 [2006]; ***Somers v Macpherson***, 40 AD3d 742, 836 NYS2d 620 [2007]).

Lastly, defendants' papers failed to address plaintiff's claim, which was clearly set forth in his supplemental bill of particulars, that he sustained a medically-determined injury or impairment of a

nonpermanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident (***Daddio v Shapiro***, 44 AD3d 699, 699, 844 NYS2d 76 [2007]). Inasmuch as defendants have failed to establish their prima facie burden, it is unnecessary for the Court to consider whether plaintiff's papers submitted in opposition to the motion were sufficient to raise a triable issue of fact (*see*, ***Ayotte v Gervasio***, 81 NY2d 1062, 601 NYS2d 463 [1993]; ***Coscia v 938 Trading Corp.***, 283 AD2d 538, 725 NYS2d 349 [2001]). Accordingly, defendants' cross motion for summary judgment is denied.

Upon service of a copy of this order with notice of entry the Calendar Clerk of this Court is directed to place this action on the CCP Calendar for the next available date.

Dated: 9 April 2008

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION