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NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 24

Case Disposed	❑
Settle Order	❑
Schedule Appearance	❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

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NUNEZ,HECTOR

Index Nº. **0024664/2006**

-against-

Hon. **PATRICIA ANNE WILLIAMS** ,

ZHAGUI,LUIS R.

Justice.

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The following papers numbered 1 to _____ Read on this motion, **SUMMARY JUDGEMENTDEFENDANT**
Noticed on **March 122008** and duly submitted as No. ____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this motion is decided in accordance with the annexed decision and order of the same date.

RECEIVED
BRONX COUNTY CLERK'S OFFICE
AUG 0[illegible]2008
PAID ☐ NO FEE ☐

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 7/31/2008

Hon. [signature]
PATRICIA ANNE WILLIAMS, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX: CIVIL TERM: IA PART 24

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HECTOR NUNEZ,

Plaintiff, **Index No. 24664/2006**

- against - **Decision and Order**

LUIS R. ZHAGUI,

Defendant.

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WILLIAMS, PATRICIA ANNE, J.

The defendant has moved, pursuant to Rule 3212 of the Civil Practice Law and Rules (the "CPLR") for an Order granting him summary judgment on the grounds that the plaintiff cannot make out that he has sustained a "serious injury" as defined in Section 5102(d) of the New York State Insurance Law. The plaintiff has responded in opposition to the instant motion and the defendant has submitted a reply. The plaintiff has also cross-moved for the same relief premised upon the fact of a rear-end accident. For the reasons set forth hereinafter, both motions are denied.

This is an action seeking damages for injuries allegedly sustained as the result of a February 8, 2006 rear-end motor vehicle accident which took place in the left hand eastbound lane of Queens Boulevard at or near its intersection with 67th Avenue in Queens County. Plaintiff commenced the instant action by the filing of a Summons and Verified Complaint with the Office of the County Clerk of the County of the Bronx on December 28, 2006. Issue was joined by the service of the defendant's Verified Answer on February 2, 2007. Plaintiff filed his Verified Bill of Particulars on April 2, 2007 alleging, inter alia, herniated discs in his cervical spine with post-traumatic cervical radiculopathy, bulging discs in the lumbar spine with post-traumatic lumbar radiculopathy, and joint effusion of the

left knee with a possible lateral meniscal tear. Both parties were deposed on July 26, 2007 and the instant motion was filed on February 14, 2008.

FACTS

(A) The accident

The parties, through their depositions agree on the most basic fact, but disagree on various significant details. Hence, both parties agree that the accident occurred on February 8, 2006 at approximately 5:00 p.m. in the eastbound lanes of Queens Boulevard. They also agree that it was still light out, and that the weather was cool and dry. However, the plaintiff claims that the traffic was "busy" while the defendant claims that it was "light."

With respect to the accident itself, the parties are equally at odds. The plaintiff claims that he had been traveling in the lefthand eastbound lane on Queens Boulevard when he was stopped at the light at 67th Avenue. It was his intention to make a left hand turn when the light permitted. He had been stopped at the light for some four to five seconds when he was rear-ended by the defendant's vehicle with sufficient force to detach his muffler, dislodge his spare tire and dent his rear bumper. The impact resulted in his left knee hitting an area of the car's interior right next to the steering wheel and his head apparently also made contact with something inside the car. After the accident, he observed that the defendant's car had its entire front bumper damaged and that the hood of the car was up.

The defendant's version of the events is that he was traveling in the left hand eastbound lane of Queens Boulevard where he had been located for some ten or more blocks. When he was at the middle of the block before the intersection with 67th Avenue,

he saw that the light was green but was aware that it was about to change. It was at this point in time, some three or four car lengths before the intersection, that the plaintiff cut into his lane and then slowed down. Because the Mitsubishi Montero Sport that the plaintiff was driving was much taller than the defendant's Lincoln Continental, the defendant was unable to observe the condition of the light; and although there was approximately a one-half car length between his car and that of the plaintiff he was unable to stop before he hit it. He testified that he attempted to move to the left but that the plaintiff also moved to the left. After the collision, the defendant observed that his bumper was damaged but observed no damage to the plaintiff's vehicle.

(B) The Medical Evidence

Plaintiff did not seek medical treatment until approximately 5-7 days after the accident. Although he felt sore in his neck, lower back and left knee on the day following the accident, he treated himself with over the counter medications, specifically Tylenol, until he realized that the pain was not going away. After consulting with his primary care physician, Dr. Ortiz, the plaintiff was referred to the Washington Heights Medical Rehabilitation Center for physical therapy. According to the plaintiff's deposition he saw a Dr. Elena Robert there who treated him and underwent physical therapy three times a week for a period of five to six months – or until approximately August or September, 2006. Plaintiff was also treated by a Dr. Douglas Unis to whom he was referred by Dr. Robert and who he saw approximately three times. Finally, plaintiff also saw a psychiatrist at the Washington Heights Center once a month for some five months – this was also based upon a referral from Dr. Robert. According to the plaintiff's deposition testimony in July 2007, he had not seen any physician or received any medical treatment since the fall of

2006 and did not then have an appointment to do so.

This sworn testimony is contradicted in part by the affirmation of Dr. Robert submitted in opposition to the instant motion. Thus, Dr. Robert, swearing to the facts in April, 2008 states that the plaintiff "began treatment with me on or about March 13, 2006 up to the present time," thereby inferring that there has been a substantially unbroken course of treatment over the entire period of two (2) years following the accident. While counsel for the plaintiff inserts information intended to explain what would appear from the plaintiff's deposition to be a gap in treatment, there is no such information provided by the plaintiff himself.

The affirmation of Dr. Robert is also somewhat vague as to the plaintiff's initial presentment to her in March, 2006 and what specific examinations were performed as well as what they revealed. Indeed, Dr. Robert makes no mention of any treatment she provided over the last two years. However, Dr. Robert does opine upon three separate MRIs performed upon the plaintiff in 2006 as well as one performed in February, 2008. Based upon these imaging studies, and her treatment of the plaintiff not only in 2006 but also upon her "reexamination" of him on March 20, 2008, Dr. Robert opines that the injuries to plaintiff's lower back and left knee are permanent,[1] with the latter likely to require surgery in the future.

It was Dr. Robert who referred plaintiff to the Manhattan Stand-Up MRI, P.C. in 2006 and on March 22, 2006, Dr. Robert Diamond, a Board Certified Radiologist performed

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[1]It should be noted that although there are no ranges of motion whatsoever referred to by Dr. Robert with respect to her initial examination of the plaintiff in 2006 or during any period of her treatment of him, she does list specific losses of range of motion as noted from her examination of the plaintiff in March, 2008

MRIs of the plaintiff's cervical and lumbar spine. Dr. Diamond's report on the MRI of the plaintiff's cervical spine lists his impression as follows:

> Kyphotic cervical curvature.
> C3/4 through C5/6 Posterior disc herniations with ventral CSF impression as well as central canal stenosis.
> Narrowing of the right C3/4 and Right C5/6 Foramina.
> Left greater than right maxillary sinusitic change.

Dr. Diamond's report on the MRI of the plaintiff's lumbar spine lists his impressions as follows:

> Straightening of the lumbar lordosis.
> L2/3 posterior disc bulge extending to flatten the ventral thecal sac.
> L3/4 through L5/S1 posterior more prominent disc bulges with foraminal narrowing anterioinferiorly at L3/4 and L4/5.

Thereafter, on April 14, 2006 an MRI of plaintiff's left knee was performed – this time on the recommendation of Dr. Unis. This MRI was performed by Dr. Jeffrey Chess, a Board Certified radiologist practicing with Andrew Carothers, M.D. P.C. in Manhattan. Dr. Chess reported no evidence of a fracture and found no dislocation. He did find what he characterized as "a small knee joint effusion," and noted that the "anterior cruciate ligament, posterior cruciate ligament, medial collateral ligament, and the lateral and collateral ligamentous complex are intact." In addition, Dr. Chess found no evidence of a tear of the medial or lateral menisci. His impression reads *in toto* as follows: "There is a small knee joint effusion. Clinical correlation is recommended to evaluate the presence of internal derangement."

On February 2, 2008, this time on the referral of a Dr. Luba Karlin at the Washington Heights Center, Dr. Diamond conducted an MRI of plaintiff's left knee. This MRI had

significantly different results than the previous one. Dr. Diamond's impression on this occasion was as follows:

> Synovial effusion with posteromedial popliteal cyst.
> Lateral patellofemoral joint compartment narrowing
> with patellofemoral chondromalacia.

Thereafter, on May 2, 2008 plaintiff underwent arthroscopic surgery on his left knee to remove the areas of synovitis and chondral lesion. This surgery was performed by Dr. Steven Struhl, a Board Certified Orthopedic Surgeon,[2] at the Westchester Ambulatory Surgery Center in White Plains.

The defendant had its physicians also examine the plaintiff. Those examinations occurred on January 9, 2008 by Dr. Edward M. Weiland, a Board Certified Neurologist, at Neuromuscular Rehabilitation Services, P.C. in Hampton Bays, New York. Plaintiff was also examined by Dr. Michael J. Katz, a Board Certified Orthopedic Surgeon on January 16, 2008 at his office in the Bronx. Neither of these physicians were provided with any authenticated medical records for the plaintiff and therefore their examinations are premised entirely on the history as provided to them by the plaintiff and their own examinations of him.

Dr. Weiland saw the plaintiff at the offices of Neurologic Consultation in Bronx County on January 9, 2008. Dr. Weiland took a detailed history from the plaintiff during which he said that he had restarted physical therapy at the Washington Heights Center in

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[2] Dr. Struhl first saw the plaintiff on March 18, 2008 and his physical examination revealed "a range of motion from 0-135°, with pain on forced flexion and forced extension. There is tenderness on the medial joint line and also the anterior joint line. There is clicking and poppin between 70° and 90° of flexion. There is no significant effusion." Dr. Struhl's assessment was that there was chondral debris in the patellofemoral joint as confirmed by the February 2, 2008 MRI.

October, 2007 where he attended three times a week. Dr. Weiland listed plaintiff's then current complaints as

> ...periodic neck pain radiating into the left shoulder area. He complains of muscle spasms in this region with activities of daily living and weight bearing maneuvers. He complains of more persistent lower back pain without any radicular component involving the lower limbs. From time to time, he also complains of left knee pain with weight bearing maneuvers.

Dr. Weiland's examination notes that all ranges of motion were normal and provides the specific numbers as well as the names of tests utilized. However, Dr. Weiland also notes

> There were subjective complaints of pain with range of motion activities of the left shoulder and the left knee. However, the claimant could perform this activity without limitations or restrictions. No joint crepitus or effusions were noted with range of motion activities of the left shoulder of the left knee.

Dr. Weiland's impression was that there was "no objective evidence of any neuromuscular abnormality...identified during this neurologic examination to correlate with the reported complaints."

Dr. Katz, as indicated supra, examined the plaintiff on January 16, 2008. His report reflects a complete examination of not only the cervical and lumbosacral spine and the left knee, but also the left and right shoulders, the right and left ankles, and both the upper and lower extremities. The specific tests utilized are set forth as well as the ranges of motion as determined by the use of a goniometer. Dr. Katz found all ranges of motion to be within normal parameters. With respect to the plaintiff's left knee, Dr. Katz's examination revealed no swelling about the knee, no effusion within the knee, the range of motion was normal (0-135) and there was no medial or lateral joint line tenderness. All other tests

were negative. Dr. Katz's impression was:

> Cervical strain with radiculitis resolved.
> Lumbosacral strain with radiculitis resolved.
> Bilateral shoulder contusion resolved.
> Left knee contusion resolved.
> Bilateral ankle contusion resolved.

DISCUSSION

At the outset, it is axiomatic that the granting of summary judgment is an extreme form of relief that is the procedural equivalent of a trial. Therefore, such a grant is only appropriate when the evidence adduced leaves no material issue of fact unresolved. [*See Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974).] Thus, in order to obtain summary judgment it is necessary that the movant establish a cause of action or defense sufficient to warrant the court as a matter of law in directing judgment in his favor. *Friends of Animals v. Associated Fur Mfrs.*, 46 N.Y.2d 1065, 1067-1068, 416 N.Y.S.2d 790 (1979); see *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395,162 N.Y.S.2d 498. (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The movant must show entitlement as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact. *Zuckerman v. City of New York*, 49 N.Y.2d at 562.

Despite the heavy burden thus imposed upon the moving party, once that party has made a prima facie showing of entitlement to summary judgment, the burden shifts to the opposing party, who must produce sufficient evidence to require a trial of any issue of fact. *Zuckerman v. City of New York*, 49 N.Y.2d at 562. Summary judgment is not appropriate where there is any doubt as to the existence of triable and material issues of

fact. Moreover, summary judgment requires that the Court engage in an exercise of issue finding rather than issue determination. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d at 404. In addition, in making its determination, the court must scrutinize the papers on the motion carefully in the light most favorable to the party opposing summary judgment and should draw all reasonable inferences in favor of the non-moving party. *Sosnoff v. Jason D. Carter, et al.*, 165 A.D.2d 486, 492, 568 N.Y.S.2d 43, 47 (1st Dept. 1991); *Assaf, et al. v. Ropog Cab Corp., et al.*, 153 A.D.2d 520, 521, 544 N.Y.S.2d 834, 835 (1st Dept. 1989).

In order to maintain an action for personal injury pursuant to the "no-fault" Insurance Law, the plaintiff must establish that he sustained a "serious injury" as that term is defined in Insurance Law § 5102(d)[3]. On a motion for summary judgment where the issue is whether the plaintiff suffered "serious injury" the defendant bears the initial burden of presenting evidence, in competent form, to establish that the plaintiff has no cause of action as a matter of law. The plaintiff does not have to present proof that he sustained a serious injury unless the defendant meets its initial burden. *Cassagnol v. Williamsburg Plaza Taxi Inc.*, 234 A.D.2d 208, 651 N.Y.S.2d 518 (1st Dept. 1996). However, where the defendant's moving papers are sufficient to raise the issue of whether a "serious injury" has

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[3] "Serious injury" is defined 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. Insurance Law § 5102(d).

been sustained, the burden shifts to the plaintiff to come forward with *prima facie* evidence in admissible form to establish that he sustained a serious injury pursuant to Insurance Law § 5102(d). *Gaddy v. Eyler*, 79 N.Y.2d 955, 582 N.Y.S.2d 990 (1992).

In support of his claim that plaintiff has not sustained a serious injury, the defendant may rely either upon the sworn statements of the defendant's examining physicians or the unsworn reports of plaintiff's examining physician. See, *Pagano v. Kingsbury*, 182 A.D.2d 268, 587 N.Y.S.2d 692 (2nd Dept 1992). In the instant matter the defendant has met his burden of proof by submitting the affirmed reports of two physicians, each Board Certified in his specialty, who based upon specific examinations and tests have found an absence of serious injury to the plaintiff. Accordingly, the burden of proof on this motion now shifts to the plaintiff.

Plaintiff has also met his burden. Although the affirmation of Dr. Robert is general with respect to the results of whatever range of motion tests she conducted in 2006, she does rely upon and interpret the MRI examinations of Drs. Diamond and Chess as well as the report of Dr. Struhl who examined the plaintiff shortly prior to the date of Dr. Robert's affirmation. That evidence is sufficient to meet his burden of establishing an issue of fact with respect to the existence of serious injury. Accordingly, the motion of the defendant for summary judgment based upon the absence of serious injury is denied in all respects.

The plaintiff's cross-motion is also denied. Although a rear-end collision is more often than not the basis for a finding of liability as a matter of law, that is not always the case. Thus, the law is clear that in rear-end motor vehicle cases

> A rear-end collision with a stopped automobile establishes a *prima facie* case of negligence on the part of the operator of the moving vehicle and imposes a duty on the operator of

> that vehicle to explain how the accident occurred. The operator of the moving vehicle is required to rebut the inference of negligence created by an unexplained rear-end collision because he or she is in the best position to explain whether the collision was due to some reasonable cause. If the operator of the moving vehicle cannot come forward with any evidence to rebut the inference of negligence, the plaintiff may properly be awarded judgment as a matter of law. (see *Leal v. Wolff*, 224 A.D.2d 392, 638 N.Y.S.2d 110; *Barile v. Lazzarini*, 222 A.D.2d 635, 635 N.Y.S.2d 694; *Abramowicz v. Roberto*, 220 A.D.2d 374, 631 N.Y.S.2d 442).
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> *Chiaia v. Bostic*, 279 A.D.2d 495, 719 N.Y.S.2d 277 (2nd Dept. 2001).

Although the defendant has not filed a formal opposition to the cross-motion, his deposition testimony is sufficient to rebut the claims of the plaintiff's deposition testimony. The defendant claims that the plaintiff cut in front of him from the middle lane and then slowed down and that he was therefore unable to stop in time to avoid the collision. Thus, the defendant claims that the plaintiff's vehicle was not stopped, but was still moving. Accordingly, the defendant has provided a reasonable cause for the accident which serves to rebut the inference of negligence generally available in a rear-end collision case. Therefore, the cross-motion of the plaintiff for summary judgment on the issue of liability is also denied in its entirety.

CONCLUSION

The foregoing constitutes the decision and order of this Court.

DATED: JULY 31, 2008

PATRICIA ANNE WILLIAMS
ACTING JUSTICE OF THE
SUPREME COURT