**SUPREME COURT OF THE STATE OF NEW YORK** **Index No.:101631/07**
**COUNTY OF RICHMOND DCM PART 3** **Motion No.: 002 & 003**

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**JUAN CARLOS HERNANDEZ,**

***Plaintiff***

***against***

**MARYANN ROZZA *and***
**ANTONIO G. ROZZA**

***Defendants***

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**DECISION & ORDER**
**HON. JOSEPH J. MALTESE**

**The following items were considered in the review of this motion for summary judgment.**

| Papers | Numbered |
|---|---|
| Notice of Motion and Affidavits Annexed | 1 |
| Notice of Cross-motion and Affidavits Annexed | 4 |
| Answering Affidavits | 2, 5 |
| Replying Affidavits | 3, 6 |
| Exhibits | Attached to Papers |

**Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:**

Defendants move this court for an order pursuant to *CPLR* § 3212 seeking to dismiss plaintiff's complaint on the grounds that the plaintiff has not sustained a serious injury as defined by *Insurance Law* § 5102(d). Plaintiff cross-moves this court for a partial summary judgment order, arguing that by virtue of being struck in the rear by the defendant, the plaintiff is not liable as a matter of law. Defendants' motion is denied in its entirety. Plaintiff's cross-motion is granted in its entirety.

## Facts

This action arises out of a collision that occurred on September 9, 2004 on the Victory Boulevard entrance merge ramp of the Staten Island Expressway, East Bound, in Staten Island, New York. The plaintiff alleges that he has sustained serious injuries as a result of this accident.

Both parties assert that the plaintiff was at a stop when the defendant struck the rear of the plaintiff's vehicle. According to the plaintiff, he was stopped for about 10 seconds before he was rear-ended by the defendant Antonio Rozza. The defendant testified in his examination before trial:

> Q: The vehicle that was in front of you, was that vehicle moving or was that vehicle stopped?
> A: Stopped
> Q. For what amount of time was that vehicle stopped in front of you prior to the contact being made? You can approximate
> A: Three, two seconds.[1]

When asked about what he said to the police after the accident, the defendant stated: "I was in the merge lane and the plaintiff's car was in front of me. He tried to merge into the Staten Island Expressway. A car was coming, he seen the car coming, he knew he was going to get hit, so pulled back into the merge lane and stopped short and that's when I hit him."[2]

## Discussion

### Summary Judgment on Threshold

The defendants seek summary judgment on the ground that the plaintiff has not sustained a "serious injury" as defined by *Insurance Law* § 5102.[3] The serious injury threshold set forth in

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[1] Testimony of Antonio Rozza, July 17, 2008 at 20-21.

[2] *Id.* at 40-41.

[3] A serious injury must be a personal injury, "[W]hich 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 constitutes 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]).

*Insurance Law* § 5104(a) can only be established under these categories.[4] Thus, the mere fact that one has been injured, even seriously, does not establish that a "serious injury" has been sustained.[5] Rather, a plaintiff must show that he or she sustained a personal injury, i.e., bodily injury, sickness, or disease,[6] that results in one of the nine serious injury threshold categories.[7]

Courts have consistently held that the No-Fault Law must be interpreted to fulfill the policies the legislature had in mind.[8] It is for the court to decide in the first instance whether a plaintiff has made a *prima facie* showing of "serious injury."[9]

A defendant can establish that a plaintiff's injuries are not serious within the meaning of *Insurance Law* § 5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim.

The defendants provide the affirmed report of Dr. Hershel Samuels, an orthopedic surgeon, who concluded that the plaintiff had no disability. Dr. Samuels examined the following: the plaintiff's cervical and lumbar spines, right and left shoulders, and right and left knees. Most ranges of motions were normal, with the exception of the lumbar spine. Its extension was at 25 degrees when 10 to 20 degrees is normal, right lateral bending was at 30 degrees when 35 degrees is normal, and left lateral bending was at 30 degrees when 35 degrees is

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[4] *Coon v. Brown*, 192 AD2d 908 [3d Dept 1993]; *Daviero v. Johnson*, 88 AD2d 732 [3d Dept 1982].

[5] *Jones v. Sharpe*, 98 AD2d 859 [3d Dept 1989], *aff'd* 63 NY2d 645 [1984].

[6] 11 NYCRR §65-2.1[e].

[7] *Van Norstrand v. Regina*, 212 AD2d 883 [3d Dept 1995].

[8] *Oberly v. Bangs Ambulance*, 96 NY2d 295 [1991]; *Scheer v. Koubek*, 70 NY2d 678 [1987]; *Maida v. State Farm*, 66 AD2d 852 [2d Dept 1978].

[9] *Licari v. Elliott*, 57 NY2d 230, 237 [1982].

normal). Hence, even the defendants' own reports do not fully establish that the plaintiff does not suffer any injuries. In addition, the plaintiff proffers the affirmed report of Dr. Salvatore J. Sclafani, an orthopedic surgeon. Dr. Sclafani's examination of the plaintiff's lumbar spine revealed marked tenderness in the lumbar area. He also noted that the plaintiff's range of motion was limited from 0 to 70 degrees flexion where 0 to 90 is normal, lateral flexion on both sides were from 0 to 20 degrees where 0 to 25-30 is normal. Dr. Sclafani concluded that the plaintiff does not have full range of motion to the spine due to a muscle spam. Dr. Samuels' and Dr. Sclafani's reports reveal a problem with the plaintiff's lumbar spine. Summary judgment is not appropriate where there is any doubt about the existence of a triable issue; here, such doubt exists regarding the seriousness of the plaintiff's lumbar injury.

**Summary Judgment: Rear End Collision**

The plaintiff argues in his cross-motion that he is entitled to partial summary judgment because the defendant rear-ended his vehicle while the plaintiff was at a stop. An operator of a motor vehicle is negligent as a matter of law when, without the absence of a non-negligent explanation, his vehicle strikes another in the rear.

> It is well settled that a rear-end collision with a stopped vehicle establishes a prima facie case of negligence on the part of the driver of the moving vehicle, requiring the operator of that vehicle to come forward with a non-negligent explanation for the accident. Conclusory assertions of a sudden and unexpected stop are insufficient to rebut the inference of negligence Moreover, vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her car and the car ahead (see, Vehicle and Traffic Law §1129[a]).[10]

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[10] *Shamah v. Richmond County Ambulance Service, Inc*. 279 AD2d 564, 719 NYS2d 287 [2d Dept 2001].

While negligence cases do not generally lend themselves to resolution by motion for summary judgment, such a motion will be granted where the facts clearly point to the negligence of one party without any fault or culpable conduct of the other party.[11]

The burden is on a party opposing summary judgment to produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests.[12] Bald conclusory assertions, general allegations of negligence, expressions of hope, or unsubstantiated allegations or assertions are all insufficient to defeat a motion for summary judgment.[13]

In the instant case, the evidence indisputably establishes that the plaintiff was at a stop before the defendant rear ended his vehicle. The defendants argue that the plaintiff was negligent by indicating that the plaintiff had pulled back into the lane where the defendant was traveling and "stopped short" before the defendant hit him. They cite *Fitzgerald v. New York City Transit Authority*,[14] where the Court denied a summary judgment motion brought by plaintiff, who had made a sudden stop without completing a lane change. As evidenced by his examination before trial, the defendant was aware that the plaintiff had stopped due to traffic conditions. The defendant testified that he knew that the plaintiff was attempting to merge into the freeway, but could not complete the merge because another vehicle was coming. Unlike the *Fitzgerald* plaintiff, the plaintiff in this case did not make a sudden stop. Additionally, the defendant was able to see the stopped car for at least two seconds before hitting him. The defendant fails to present a non-negligence explanation to relieve him of his culpability. As such, partial summary judgment in regards to liability is proper.

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[11] *Goldberg v. Nelson*, 202 AD2d 390, 608 NYS2d 685 [2d Dept. 1994].

[12] *Gilbert Frank Corp. V. Federal Insurance Co.*, 70 NY2d 966, 525 NYS2d 793 [1988]; *Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980].

[13] *Spaulding v. Benenati*, 57 NY2d 418, 456 NYS2d 733 [1982].

[14] *Fitzgerald v. New York City Tr. Auth.*, 2 AD3d 577 [2d Dept. 2003].

**Conclusion**

Plaintiff, through the use of objective evidence, raises an issue of fact with respect to whether his injuries are permanent and meet the "serious injury" threshold as defined by statute. Defendants failed to demonstrate to this court that the plaintiff did not suffer a permanent injury as a matter of law.

The plaintiff has adequately demonstrated that he was rear-ended by the defendant's vehicle while the plaintiff's vehicle was at a stop. In absence of any non-negligent explanation, this court must find that there is no material issue of fact sufficient to deny summary judgment to the plaintiff on the issue of liability.

Accordingly, it is hereby:

ORDERED, that the defendants' motion for summary judgment and to dismiss the plaintiff's complaint on the ground that the plaintiff did not sustain a "serious injury" is denied in its entirety; it is further

ORDERED, that the plaintiff's motion to.grant partial summary on the basis that there is no material issue of fact regarding the liability of the defendants is granted in its entirety; and it is further

ORDERED, that the remaining parties shall return to DCM Part 3 on **March 26, 2009 at 9:30 A.M.** for a Compliance Conference.

ENTER,

DATED: January 30, 2009

Joseph J. Maltese
Justice of the Supreme Court