SUPREME COURT OF THE STATE OF NEW YORK
Present: **HON. MICHELE M. WOODARD**
JUSTICE

_____X

SHELDON H. CHARTER

TRIAL/IAS PART 14

Plaintiff,

Index No. 12233/07
Motion Seqs. #1,2
Submit Date: 11/14/09

- against-

RACHEL C. LING and MARGARET T. LING

DECISION AND ORDER

Defendants.

_____X

The following paper were read on this motion:

1. Notice of Motion dated August 4, 2008
2. Affirmation in Support dated August 4, 2008
3. Notice of Cross-motion dated October 17, 2008
4. Affirmation in Support dated October 17, 2008
5. Affirmation in Reply dated October 24, 2008
6. Affirmation in Reply dated November 3, 2008

Relief Requested:

The defendants, Rachel and Margaret Ling, move pursuant to CPLR §3212 seeking an order dismissing the plaintiff's complaint on the basis that the plaintiff, Sheldon Charter, has not sustained a serious injury within the ambit of Insurance Law §5102(d).

The plaintiff Sheldon Carter cross-moves for the following forms of relief: an order pursuant to CPLR §3212 granting summary judgment as to the issue of liability; an order

pursuant to CPLR §3212 granting summary judgment that the plaintiff has sustained a serious injury; and for an order pursuant to CPLR §3211 striking the first and second affirmative defenses contained in the defendant's answer.

Factual Background:

The underlying cause of action results from an automobile accident which occurred on March 29, 2007. The plaintiff alleges that the vehicle that he was driving was struck in the rear by the vehicle operated by defendant Rachel Ling and owned by defendant Margaret Ling. The plaintiff alleges that as a consequence thereof, he has sustained serious injuries as defined in Article 51 of the New York State Insurance Law.

Defendants' Motion for Summary Judgment

In support of the instant application the defendants contend that the injuries the plaintiff claims to have sustained do not fall within any of the categories of serious injury as are defined in §5102(d) of the Insurance Law. The defendants additionally argue that the medical submissions proffered by the plaintiff to defeat the instant application are insufficient to establish that he sustained a serious injury.

Defendants' Medical Submissions

As evidentiary support for the within application, the defendants provide three affirmed independent medical reports of Drs. Chacko, Cohen and Tantleff. Dr. Chacko, a neurologist, conducted an examination of the plaintiff on May 14, 2008. Said examination included an evaluation of the plaintiff's cervical and lumbosacral spines which revealed restricted ranges of motion in both spinal regions. Dr. Chacko additionally stated that straight leg raising testing was between 60 and 70 degrees bilaterally, where 90 degrees would be a normal finding. He stated

that the plaintiff symptoms were causally related to the subject accident but cautioned that the plaintiff had recited a history of lower back disc herniations as well as pain in that region. Dr. Chacko ultimately concluded that the plaintiff was not disabled and there was no evidence of neurological sequelae attributable to the accident of March 29, 2007.

Dr. Cohen conducted an independent orthopedic examination of the plaintiff on May 7, 2008 which included an evaluation of the plaintiff's cervical spine, lumbar spine, upper and lower extremities and left shoulder. Range of motion testing revealed restrictions in the cervical spine. With respect to the lumbar spine, range of motion testing revealed "satisfactory normal" findings. Dr. Cohen concluded that the plaintiff had sustained mild soft tissue injuries as a consequence of the subject accident, which have resolved. Dr. Cohen particularly rendered a diagnosis of "cervical and lumbosacral sprain resolved" and "left shoulder contusion, resolved" .

Dr. Tantleff conducted an independent radiologic review of the various post-accident MRI studies conducted relative to the plaintiff's cervical, lumbar and thoracic spines. With respect to the cervical spine the MRI studies revealed disc bulges and herniations, the presence of which Dr. Tantleff expressly attributed as being consistent with the plaintiff's age and unrelated to the accident of March 29, 2007. As to lumbar spine, the MRI studies indicated the existence of disc bulges and herniations, which again, Dr. Tantleff found to be unrelated to the subject accident and consistent with the patients age. Finally, as to the thoracic spine, the MRI study revealed discogenic changes and a degenerative disc bulge at T7-8. Dr. Tantleff, opined that these findings were not related to the subject accident and consistent with an individual of the plaintiff's age.

It is well settled that a motion for summary judgment is a drastic remedy that should not

be granted where there is any doubt as the existence of a triable issue of fact (*Sillman v Twentieth Century Fox*, 3 NY2d [1957]; *Bhatti v Roche*, 140 AD2d 660 [2d Dept 1998]). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof in admissible form sufficient to warrant the Court, as a matter of law, to direct judgment in the movant's favor. Such evidence may include deposition transcripts as well as other proof annexed to an attorney's affirmation(CPLR §3212 [b]; *Olan v Farrell Lines,* 64 NY2d 1092 [1985]).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. It is incumbent upon the non-moving party to lay bare all of the facts which bear on the issues raised in the motion (*Mgrditchian v Donato*, 141 AD2d 513 [2d Dept 1998]). Conclusory allegations are insufficient to defeat the application and the opposing party must provide more than a mere reiteration of those facts contained in the pleadings (*Toth v Carver Street Associates*, 191 AD2d 631 [2d Dept 1993]). When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist (*Barr v County of Albany*, 50 NY2d 247; *Daliendo v Johnson*, 147 AD2d 312).

Within the particular context of a threshold motion which seeks dismissal of a personal injury complaint, the movant bears a specific burden of establishing that the plaintiff did not sustain a "serious injury" as enumerated in Article 51 of the Insurance Law §5102(d) (*Gaddy v Eyler*, 79 NY2d 955 [1992]). Upon such a showing, it becomes incumbent upon the nonmoving

party to come forth with sufficient evidence in admissible form to raise an issue of fact as to the existence of a "serious injury"(*Licari v Elliott*, 57 NY2d 230 [1982]).

Having reviewed the record, the Court finds that the defendants have failed to demonstrate that the plaintiff did not sustain a "serious injury" (*Gaddy vEyler,* 79 NY2d 955 [1992], *supra*). Upon review of the medical reports submitted in support of the within application, the defendant's examining neurologist clearly noted limitations in both the plaintiff's cervical and lumbar spines and summary judgment is therefore inappropriate (*Zamaniyan v Vrabeck*, 41 AD3d 472 [2d Dept 2007]; *Bentivegna v Stein*, 42 AD3d 555 [2d Dept 2007]; *Morales v Theagene*, 46 AD3d 775 [2d Dept 2007]). Since the defendants have failed to establish their *prima facie* burden, it is unnecessary to consider whether the papers submitted in opposition were sufficient to raise a triable issue of fact (*Mariaca-Olmos v Mizrhy*, 226 AD2d 437 [2d Dept 1996]).

Based upon the foregoing, the defendants' motion made pursuant to CPLR 3212 and which seeks dismissal of the plaintiff's complaint is hereby DENIED. (Sequence #001).

Plaintiff's Cross-Motion:

The Court now addressed the plaintiff's cross-motion interposed pursuant to CPLR §3212 and which seeks and order determining that the plaintiff has is fact sustained a serious injury and for an order granting summary judgment as to the issue of liability. The plaintiff additionally seeks an order dismissing the defendants' first and second affirmative defenses as are contained in their answer.

In support of that branch of the application seeking judgment as to the existence of a serious injury, the plaintiff has submitted, *inter alia*, the following medical reports: affirmed MRI

studies conducted as to the plaintiff's cervical, lumbar and thoracic spines; "certified" reports from the plaintiff's chiropractor, Dr. Grushack; two affirmed medical reports from Dr. Parker, an orthopedist, who examined the plaintiff on April 19, 2007 and May 10, 2007; and two affirmed reports from Dr. Hausknecht, a neurologist, who examined the plaintiff on April 18, 2007 and May 7, 2007; and an affirmed EMG report from Dr. Hausknecht who conducted electrodiagnostic studies on May 7, 2007.

The Court begins its review of the plaintiff's medical submissions with the series of MRI reports which were taken both pre and post accident. Specifically, the plaintiff has provided the following: [1] MRI's of the cervical spine dated April 3, 2007 which indicate the presence of disc herniations at C3-C4, disc degeneration and broad based disc herniation at C4-C5, C5-C6, C6-C7 and a small central posterior herniation at C7-T1; [2] a pre-accident MRI taken of the cervical spine of May 15, 2007 and which revealed degenerative changes from C3-C4 through C6-C6; [3] a pre-accident MRI of the lumbar spine taken on September 21, 2004, which indicates herniations at L1-L2 and L4-5 and disc bulges at L5-S1; [4] an additional MRI taken post-accident on May 7, 2007, which indicates the presence of disc herniations at L1-L2, bulges at L2-L3 and L3-L4, disc herniations at L4-L5, disc degeneration and herniatons at L5-S1; [5] an MRI of the thoracic spine dated June 19, 2007 which indicates the presence of herniations at T4-5, T8- T9, T9-T10, T11-T12, as well as degenerative disc disease at "multiple levels".

The affirmed reports from Dr. Parker indicate that he examined the plaintiff on April 19, 2007 and again on May 10, 2007. Upon examination, Dr. Parker found restricted range of motion in the plaintiff's lumbar and cervical spines and opined that the plaintiff's condition was causally related to the subject accident of March 29, 2007.

Dr. Hausknecht, conducted an neurological examination of the plaintiff on April 18, 2007 and May 7, 2007 respectively. On both occasions he noted limited ranges of motion in the cervical and lumbar spines. Dr. Hausknecht also concluded that the plaintiff' injuries were the result of the subject automobile accident.

In addition to the foregoing, the plaintiff submits a report from Dr. Grushack who, as best can be determined by the voluminous records submitted by the plaintiff, initially examined the plaintiff on March 30, 2007, whereupon he found restrictions in the ranges of motion as to both the plaintiff's cervical and lumbar spines. An additional examination followed on October 13, 2007 where upon range of motion testing was repeated the results of which again revealed restrictions in the cervical and lumbar spines. Dr. Grushack reiterated his opinion that the plaintiff's injuries were causally related to the automobile accident of March 29, 2007 and stated that said injuries were permanent in nature and that the plaintiff had reached maximum improvement. The plaintiff was last seen on August 19, 2008 where restrictions were again observed in the plaintiff's cervical and lumbar spines. Dr. Grushack opined that the plaintiff suffers from a permanent partial disability and that such disability is a direct result of the subject automobile accident.

In cases wherein a plaintiff is alleging a serious injury, while a herniated or bulging disc or the presence of a radiculopathy may constitute a serious injury within the ambit of Insurance Law §5102(d), a plaintiff is required to provide, *inter alia*, objective medical evidence contemporaneous with the subject accident, which demonstrates the extent and degree of the alleged physical limitation resulting from the disc injury and its duration (*Ifrach v Neiman,* 306 AD2d 380 [2d Dept 2003]; *Jason v Danar,* 1 AD3d 398 [2d Dept 2003]; *Felix v New York City*

Tr. Auth., 32 AD3d 527 [2d Dept 2006];*Garcia v Sobles*, 41 AD3d 426 [2d Dept 2007]; *Bestman v Seymour*, 41 AD3d 629 [2d Dept 2007]; *Marrache v Akron Taxi Corp.*, 50 AD3d 973 [2d Dept 2008]).

When examining medical evidence offered by a plaintiff on a threshold motion, the court must insure that the evidence is objective in nature and that a plaintiff's subjective claims as to pain or limitation of motion are sustained by verified objective medical findings (*Grossman v Wright*, 268 AD2d 79 [2d Dept 2000]). Further, in addition to providing medical proof contemporaneous with the subject accident, the plaintiff must also provide competent medical evidence containing verified objective findings based upon a recent examination wherein the expert must provide an opinion as to the significance of the injury (*Kauderer v Penta*, 261 AD2d 365[2d Dept 1999]; *Constantinou v Surinder*, 8 AD3d 323 [2d Dept 2004]; *Brown v Tairi Hacking Corp.*, 23 AD3d 325 [2d Dept 2005]).

The Court has carefully reviewed the numerous medical reports submitted in support of that branch of the plaintiff's motion which seeks summary judgment determining that he has sustained a serious injury. Upon said review, the Court finds that the plaintiff has failed to establish his entitlement to judgment as a matter of law (*Sillman v Twentieth Century Fox*, 3 NY2d [1957], *supra*).

Initially, and with respect to the submitted radiologist reports, nowhere therein contained is there an opinion of causality and thus the reports of limited probative utility. Further, there is evidence therein which demonstrates the existence of a pre-existing lumbar injury at L1-L2 and L4-5 and disc bulges at L5-S1. As to the medical report of Dr. Parker, as well as the reports of Dr. Hausknecht and Dr. Grushack, the Court notes that inasmuch as each medical professional

personally conducted the physical examination of the plaintiff, said reports can accordingly be deemed objective medical evidence (*Grossman v Wright*, 268 AD2d 79 [2d Dept 2000], *supra*). Moreover, these medical reports are all predicated on examinations that were done contemporaneous with the subject accident and do include specific findings as to the initial degree of range of motion restrictions suffered by the plaintiff (*Ifrach v Neiman, 306 AD2d 380* [2d Dept 2003], *supra; Jason v Danar,* 1 AD3d [2d Dept 2003],*supra*; *Felix v New York City Tr. Auth.*, 32 AD3d 529 [2d Dept 2006], *supra*; *Garcia v Sobles*, 41 AD3d 426 [2d Dept 2007], *supra*; *Bestman v Seymour*, 41 AD3d 629 [2d Dept 2007], *supra* ; *Marrache v Akron Taxi Corp.*, 2008 WL 1823286 [2d Dept 2008],*supra*). However, what deprives Dr. Parker's report of probative value, is that while noting that the plaintiff has a history of prior injury to the lumbar region, nowhere therein does he opine as to what effect, if any, the pre-existing lower back problems have had on his current physical condition (*Pommells v Perez*, 4 NY3d 566). The report of Dr. Hausknecht suffers from a similar infirmity. While Dr. Hausknecht, clearly acknowledges that the plaintiff "has a history of prior back problems" he does not specifically state how and to *what extent* those prior problems have effected the plaintiff's current physical status (*id.*).

Additionally, with respect to Dr. Grushack's initial examination of the plaintiff, other than stating in a conculsory fashion that the plaintiff's injuries "are causally related to the motor vehicle accident of 3/29/ 2007, except those that were pre-existing as outlined in the previous Lumbar MRI of 9/21/2004" and that the plaintiff has been "asymptomatic for more that 2 ½ prior to the motor vehicle accident 3/29/2007", no opinion is offered as to the degree to which said pre-existing condition has impacted upon the plaintiff's physical condition post-accident (*id.*).

Therefore, based upon the foregoing, the plaintiff's cross-motion made pursuant to CPLR §3212 and which seeks an order granting summary judgment declaring that the plaintiff has sustained a serious injury is hereby denied.

The Court now turns to that branch of the plaintiff's application which seeks summary judgment as to the issue of liability. During his examination before trial, the plaintiff testified that his vehicle was stopped at a red light for approximately ten seconds when it was impacted from behind by the vehicle operated by defendant.

Defendant, Rachel Ling, testified that prior to the collision, she observed the plaintiff's vehicle in front of her and that it was slowing down and the brake lights were illuminated. The defendant stated that as between her vehicle and that of the plaintiff "there was a good space between us and then he broke fast, braked fast, and that's when we hit." She further testified that when the vehicles ultimately collided, it was the front of her vehicle that came into contact with the rear end of the plaintiff's vehicle.

A rear-end collision with a stopped or stopping vehicle created a *prima facie* case of negligence against the operator of the rear most vehicle, thereby obligating the driver thereof to come forth with a non-negligent explanation for the accident (*Harrington v Kern*, 52 AD3d 473 [2d Dept 2008]; *Klopchin v Masri*, 45 AD3d 737 [2d Dept 2007], *Johnson v Spoto*, 47 AD3d 888 [2d Dept 2008]).

In the instant matter, the plaintiff has demonstrated his *prime facie* entitlement to judgment by submitting evidence that his vehicle was stopping for a red light, in opposition to which the defendant failed to raise a triable issue of fact (*id.*). The defendant clearly testified that she observed the plaintiff's vehicle slowing down and braking. Further, the defendant's opinion

that the plaintiff made a "short stop" is insufficient to raise a triable issue of fact inasmuch as drivers are under a duty to maintain a safe distance between their vehicle and the one in front of them (VTL §1129; *Harrington v Kern*, 52 AD3d 473 [2d Dept 2008], *supra*; *Johnson v Spoto*, 47 AD3d 888 [2d Dept 2008], *supra*; *see also Reed v New York City Transit Authority,* 299 AD2d 330 [2d Dept 2002]).

Based upon the foregoing, that branch of the plaintiff's motion made pursuant to CPLR §3212 and which seeks an order granting summary judgment as to the issue of serious injury is hereby DENIED and that branch of the plaintiff's application made pursuant to CPLR §3212 and which seeks an order for summary judgment as to the issue of liability is hereby GRANTED. (Sequence #002).

This constitutes the Decision and Order of the Court.

All relief not specifically addressed herein is deemed Denied.

DATED: Mineola, New York
January 29, 2009

Michele M. Woodard
J.S.C.