Rojas v Hernandez
2009 NY Slip Op 30526(U)
March 6, 2009
Supreme Court, New York County
Docket Number: 116253-2004
Judge: Paul Wooten
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SCANNED ON 3/11/2009

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN Justice — PART 22

RAFAEL A. ROJAS and CARMEN ROJAS, Plaintiffs,

- v -

MICHELLE A. HERNANDEZ and MARC C. MITCHELL, Defendants.

INDEX NO. 116253-2004

MOTION DATE

MOTION SEQ. NO. 007

MOTION CAL. NO. 99

The following papers, numbered 1 to 3, were read on this motion by defendants' for summary judgment on the threshold "serious injury" issue.

NUMBERED	PAPERS
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits...	007-1
Answering Affidavits — Exhibits (Memo)	007-2
Replying Affidavits (Reply Memo)	007-3

FILED
MAR 11 2009
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ■ No

Rafael Rojas, (plaintiff), a livery driver brought this action to recover for injuries he allegedly suffered on February 23, 2003, when his vehicle collided with a vehicle operated by Marc C. Mitchell and owned by Michelle A. Hernandez ("defendants"). Plaintiff's vehicle was hit primarily on the passenger side, and his left knee and lower back bore the brunt of the impact. The accident occurred on West 145th Street near its intersection with Amsterdam Avenue, in County, City and State New York[1]. Plaintiff was taken to the Columbia Presbyterian Hospital emergency room, where he was treated and released. The plaintiff commenced this lawsuit on

[1]According to plaintiff's complaint and verified bill of particulars, the accident occurred "on a Private lot named Sunrise Highway, Massapequa at or near the intersection with Amsterdam Avenue, a public street and thoroughfare, in the County, City and State of New York" (defendants' exhibit A, ¶ 8, exhibit D, ¶ 2). The court takes judicial notice that while Amsterdam Avenue is in Manhattan, Massapequa is in Nassau County, and Sunrise Highway – a highway, not a private lot – does not intersect with Amsterdam Avenue in the County of New York. According to plaintiff's supplemental verified bill of particulars, the accident "took place on West 145th Street with its intersection with Amsterdam Avenue, in the County, City and State of New York" (plaintiff's exhibit A, ¶ 2), which is consistent with the police report of the accident (plaintiff's exhibit B).

February 7, 2006, as a result of injuries sustained as a result of the subject accident and included his wife, (Carmen Rojas) claiming loss of consortium. The parties have completed discovery and the Note of Issue is filed.

Defendants now move for an order, pursuant to CPLR § 3212, granting summary judgment and dismissing the complaint based upon the issue of "serious injury" as defined by New York Insurance Law § 5102(d).

SERIOUS INJURY THRESHOLD

Pursuant to the Comprehensive Motor Vehicle Insurance Reparation Act of 1974 (now Insurance Law § 5101, *et seq.* - the "No Fault" statute), a party seeking damages for pain and suffering arising out of a motor vehicle accident must establish that he or she has sustained at least one of the categories of "serious injury" as set forth in Insurance Law § 5102 (d) (*Marquez v New York City Tr. Auth.*, 686 NYS2d 18 [1 Dept 1999]; *DiLeo v Blumberg*, 672 NYS2d 319 [1 Dept 1998]). Also see *Pommells v Perez*, 4 NY3d 566, 571 [2005]

Insurance Law § 5102 (d) defines "serious injury" as, inter alia:

> 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.

Plaintiff alleges that he suffered the following injuries from the February 2003 accident: Herniated Nucleus Pulposus at LS-S1 impinging on the thecal sac, the descending right S1 nerve root and the descending left S1 nerve root; lumbosacral radiculopathy; levolumbar scoliosis and lumbar spine straightening consistent with muscle spasm and pain; straightening

of the normal lordotic curve; sprain of the cervical spine; cerebral concussion; post-concussion syndrome. These injuries caused him pain, loss of feeling, restriction of motion, insomnia, soft tissue injury, arthritis, and curtailment of major activities (Defendants' Motion, Exhibit D, Plaintiff's Bill of Particulars, ¶ 8-9). A little more than two years after the accident, plaintiff suffered a stroke which impaired the right side of his body. He does not claim that the stroke was related to the accident, but it arguably clouds the relevant medical findings at issue.

Thus, it is indisputable that three of the nine categories of serious physical injuries discussed by Insurance Law 5102 (d) are not applicable herein as there is no allegation of death, dismemberment, or a loss of a fetus. Therefore, the court must determine if the injuries to the plaintiff constitute either: (1) significant disfigurement (scarring in the left knee, see Supplemental Bill of Particulars); (2) a fracture; (3) a permanent loss of use of a body organ, member, function, or system; (4) a significant limitation of use of a body function or system; (5) a permanent consequential limitation of use of a body function or system; (6) 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 90 days during the 180 days immediately following the occurrence of the injury or impairment (See defendants' motion, exhibit D, plaintiff's bill of particulars, ¶ 8-9, 16.)

Serious injury is a threshold issue, and thus, a necessary element of plaintiff's prima facie case (*Licari v Elliott*, 57 NY2d 230 [1982]; *Toure v Harrison*, 775 NYS2d 282 [1 Dept 2004]; Insurance Law § 5104 [a]). This is in accord with the purpose of the "No-Fault" law, which was to "'weed out frivolous claims and limit recovery to significant injuries'" (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345 [2002], quoting *Dufel v Green*, 84 NY2d 795, 798 [1995]; *Licari v Elliott*, 57 NY2d 234 [1982]; *Rubensccastro v Alfaro*, 815 NYS2d 514 [1 Dept 2006]).

In order to satisfy the statutory threshold, the plaintiff must submit competent objective medical evidence of his or her injuries, based on the performance of objective tests (*Grossman v Wright*, 707 NYS2d 233 [2 Dept 2000]; *Lopez v Senatore*, 65 NY2d 1017, 1019 [1985]). Subjective complaints alone are insufficient to establish a prima facie case of a serious injury (*Gaddy v Eyler*, 79 NY2d 955, 957 [1992]; *Scheer v Koubek*, 70 NY2d 678, 679 [1987]).

A CT scan or MRI may constitute objective evidence to support subjective complaints (*see Arjona v Calcano*, 776 NYS2d 49 [1 Dept 2004]; *Lesser v Smart Cab Corp.*, 724 NYS2d 49 [1 Dept 2001]). The plaintiff's medical submissions must show when the tests were performed, the objective nature of the tests, what the normal range of motion should be and whether the plaintiff' s limitations were significant (*see Milazzo v Gesner*, 822 NYS2d 49 [1 Dept 2006]; *Vasquez v Reluzco*, 814 NYS2d [1 Dept 2006]).

With respect to the categories of significant limitation of use of a body function or system and permanent consequential limitation of use, "'[w]hether a limitation of use or function is "'significant'" or "'consequential'" (i.e., important . . .) relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part'" (*Toure v Avis Rent A Car Systems, supra* quoting *Dufel v Green, supra*).

Where the plaintiff claims serious injury under the "90/180 category of the Insurance law 5102(d), he must first demonstrate that substantially all his usual activities were curtailed during the requisite time period and Second submit competent credible evidence based on the objective medical findings of a "medically determined" injury or impairment which caused the alleged limitations in his daily activities. See *Toure v Avis Rent A Car Systems, supra; Licari, supra.*

SUMMARY JUDGMENT STANDARD

The issue of whether a claimed injury falls within the statutory definition of "serious

injury" is a question of law for the courts which may decide the issue on a motion for summary judgment (*Perez v Rodriguez*, 809 NYS2d 15 [1 Dept 2006]). On a motion for summary judgment based upon a failure to sustain a serious injury, the defendants bear the initial burden of establishing the absence of a serious injury by tendering evidentiary proof in admissible form eliminating any material issues of fact from the case (*Toure v Avis Rent A Car Sys.*, *supra*; *see also Gaddy v Eyler*, *supra*; *Pirrelli v Long Is. R.R.*, 641 NYS2d 240 [1 Dept 1996]).

Defendant may rely either on the sworn or affirmed statements of their examining physician, plaintiff's deposition testimony and plaintiff's unsworn physician's records (*Fragale v Geiger*, 733 NYS2d 901 [2 Dept 2001]; *Pagano v Kingsbury*, 587 NYS2d 692 [2 Dept 1992]). An affirmed physician's report demonstrating that plaintiff was not suffering from any disability or consequential injury resulting from the accident is sufficient to satisfy a defendant's burden of proof (*see Gaddy v Eyler*, *supra*). In addition, the Courts have unanimously held that a party may not use an unsworn medical report prepared by the parties' own physician on a motion for summary judgment (See *Grasso v Angerami*, 79 NY2d 813 [1991]; *Offman v Singh*, 813 NY2d 56 [1 Dept 2006]). Moreover, CPLR § 2106 requires a physician's statement be affirmed (or sworn) to be true under the penalties of perjury.

Once defendants have made such a showing, the burden shifts to the plaintiff to come forward with prima facie evidence, in admissible form, to rebut the presumption that there is no issue of fact as to the threshold question (*see Pommells v Perez*, 797 NYS2d 380 [2005]; *Gaddy v Eyler*, *supra*; *Perez v Rodriguez*, *supra*). A medical affirmation or affidavit based on a physician's own examination, tests, and review of the record, can support the existence and extent of a plaintiff's serious injury (*O'Sullivan v Atrium Bus Co.*, 668 NYS2d 167 [1 Dept 1998]).

In deciding a summary judgment motion, the court must bear in mind that issue finding rather that issue determination is the key to summary judgment. See *Sillman v Twentieth Century Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 489 (1957). Furthermore, since

summary judgment is a drastic remedy which deprives a litigant of her day in court, the evidence adduced on the motion must be liberally construed in the light most favorable to the opposing party. See *Kesselman v Lever House Restaurant*, 816 NYS2d 13, 29 AD3d 302,, [1 Dept 2006]; *Goldman v Metropolitan Life insurance Company*, 788 NYS2d 25, 13 AD3d 289, [1 Dept 2004].

DISCUSSION

In support of their motion, the defendants submit their attorney's affirmation, the pleadings, plaintiff's deposition (transcript at defendants' exhibit E), and the reports of the independent medical examinations.

Isaac Cohen, M.D., an independent orthopedist, evaluated plaintiff on February 12, 2007, four years after the accident, "in accordance with the restrictive rules concerning an independent medical evaluation" (Cohen Report, p 1, at defendants' exhibit F). As part of his examination, Dr. Cohen performed Compression, Spurling, Percussion, straight leg raise and Babinski tests, all of which were negative (*id.*, p 3). Upon palpation and sensorial examinations of plaintiff's limbs and cervical and thoracolumbar spines, Dr. Cohen found plaintiff had normal range of motion, flexion and curvature. He concluded that although plaintiff was suffering from the sequelae of his stroke, the cervical and lumbosacral strains had been resolved and there was no "evidence of a residual disability related to the previously described motor vehicle accident" (*id.*, pp 3-4).

Maria Audrie DeJesus, M.D. conducted an independent neurological examination of plaintiff on October 3, 2007, almost five years after the accident. She too reported that plaintiff had "post cervical and lumbar sprain/strain, resolved" (DeJesus report, p 4, at defendants' exhibit G), and concluded that at the time of her examination there was "no indication of a neurological disability" and plaintiff could "work and perform all of his usual daily activities without any neurological limitations" (*id.*, p 4). However, unlike Dr. Cohen, who found plaintiff

was "able to walk with a satisfactory gait" (Cohen Report, p 3), Dr. DeJesus "observed [plaintiff] exhibit a slow gait. He was unable to walk on toes and heels and had difficulty in tandem" (DeJesus report, p 3). Dr. DeJesus also observed that plaintiff had a "well-healed abrasion scar over the left knee" (*ibid.*).

On February 28, 2007, A. Robert Tantleff, M.D. conducted an independent review of plaintiff's prior X-Rays, MRI's and CAT scans, and reported separately on each set of images reviewed by him (all Tantleff Reports at defendants' exhibit H). Based on X-rays of the cervical spine taken on February 23, 2003, the date of the accident, Dr. Tantleff found "obvious degenerative discogenic changes at C4/5, C5/6, and C6/7 with ... relative loss of disc space height especially at C6/7.... Degenerative changes of the lateral masses.... [and] lack of movement of the dens; the dens remains fixed relative to the atlas." The CAT scan of the cervical spine also taken the same day "reveals no evidence of odontoid fracture ..., soft tissue mass, soft tissue swelling, fluid collections or hemorrhage. Regional degenerative changes of the cervical spine are as noted." An MRI of plaintiff's lumbar spine, conducted shortly after the accident, on April 1, 2003, showed "degeneration and desiccation with significant loss of height of the L5/S1 intervertebral disc as well as T12/L1";... associated with increased pain with aging"; "first-degree degenerative retrolisthesis of L5 on S1"; "regional facet arthropathy"; and "a bulge/pseudobulge complex identified at L5/S1 due to the malalignment with secondary unroofing of the L5 vertebral body in relation to the S1 vertebral body." In his report, Dr. Tantleff concludes that these anomalies are all unrelated to the accident or sudden trauma, but rather are "chronic longstanding processes requiring years to develop as presented and are consistent with wear-and-tear of the normal aging process ... [and plaintiff's] age." Dr. Tantleff also reviewed an MRA of plaintiff's neck vessels, a CAT scan of plaintiff's brain and an X-ray of plaintiff's chest, all taken November 26, 2006 (the day plaintiff had his stroke), and perceived no abnormalities other than "mild atherosclerotic plaque ... of the left internal carotid" artery,

"[d]egenerative changes of the right shoulder" and "atherosclerosis of the aorta and mild left ventricular prominence with interstitial pulmonary edema."

Defendants have met their burden of proof with respect to plaintiff's claim that he suffered a "serious injury" due to significant disfigurement and fracture. The scar on plaintiff's left knee noted by Dr. DeJesus may be evidence that plaintiff injured that knee in the accident, but it is not the "significant disfigurement" which constitutes a "serious injury" under the statute. "The standard of determining significant disfigurement within the meaning of the Insurance Law is whether a reasonable person would view the condition 'as unattractive, objectionable, or as the subject of pity or scorn'" (*Manrique v Warshaw Woolen Associates, Inc.*, 297 AD2d 519, 526 [1st Dept 2002]; see also *Aguilar v Hicks*, 9 AD3d 318, 319 [1st Dept 2004]; *Hutchinson v Beth Cab Corp.*, 207 AD2d 283 [1st Dept 1994]). No such allegation has been made by plaintiff, who merely notes its existence (see deposition, p 37-38, at plaintiff's exhibit C). Similarly, there is no evidence that plaintiff suffered a fracture; in fact the MRI report submitted by plaintiff specifically states that "[t]here is no evidence of fracture" (plaintiff's exhibit F).

Defendants have also met their initial burden to present evidence that plaintiff did not sustain a "serious injury" due to permanent loss of a body organ, member functions or systems; significant limitations of use of bodily functions or systems; or, permanent consequential limitations of use of body organ and/or member (see *DeAngelo v Fidel Corp. Services, Inc.*, 171 AD2d 588, 589 [1st Dept 1991]). As discussed above, defendants' doctors reported that plaintiff's lumbar and cervical strains had been resolved; his range of motion, although diminished, was within the normal range; and he had no residual disabling conditions from the accident. "A defendant who submits admissible proof that the plaintiff has a full range of motion, and that she or he suffers from no disabilities causally related to the motor vehicle accident, has established a *prima facie* case that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d)" (*Kearse v New York City Transit Authority*, 16

AD3d 45, 49-50 [2d Dept 2005]).

Defendants have come forward with sufficient evidence in admissible form to warrant as a matter of law a finding that plaintiffs have not sustained a "serious injury" within the meaning of Insurance Law § 5102 [d] (*See, Gaddy v Eyler,* 79 NY2d 955, 956-957 [1992]*; Charley v Goss,* 54 AD3d 569, 570 [1st Dept 2008]*; Lowe v Bennett*, 511 NYS2d 603 [1 Dept 1986], *Affd*, 69 NY2d 700 [1 Dept 1986]; *Pagano v Kingsbury*, 587 NYS2d 692 [2 Dept 1992]). Thus, the burden shifts to plaintiffs to produce admissible evidence to demonstrate the existence of a serious injury creating a triable issue of fact. *(See Zuckerman v City of New York*, *supra*; *Forrest v Jewish Guild for the Blind, supra*).

Plaintiff has submitted the affirmation of his treating physician, Dr. Samuel Melamed, who last examined plaintiff shortly before the opposing papers to defendants' motion were filed. Dr. Melamed states that plaintiff still "complained of pain in the lower back extending to the lower extremities with numbness and tingling sensations" (Melamed affirmation, ¶ 7, at plaintiff's exhibit E). Both of defendants' doctors who examined plaintiff also reported that he is still experiencing pain, although they differed in their descriptions. Dr. Cohen, the orthopedist, reported that plaintiff "state[d] that he still has pain into the lumbosacral spine area and some occasional pain into the leg and hip" (Cohen Report, p 2). Dr. DeJesus, the neurologist, reported that plaintiff "has complaints of on and off pain in the neck, lower back, and left knee" (DeJesus Report, p 1). While mere pain does not suffice to raise a triable issue about serious injury (see *Scheer v Koubek*, 70 NY2d 678, 679 [1987]), pain which is substantiated by medical evidence objectively measuring the limitations caused by it "can form the basis of a serious injury ... and ... whether it does is ordinarily a triable issue of fact" (*Hourigan v McGarry*, 106 AD2d 845 [3d Dept 1984]).

Dr. Melamed avers further that he performed objective tests, based on which plaintiff's range of motion is still restricted, and in his "opinion these losses of range of motion are

permanent" (Melamed affirmation, ¶ 7). Based on his examinations of plaintiff and his review of plaintiff's medical records, including those related to his stroke, Dr. Melamed concludes "to a reasonable degree of medical certainly that [plaintiff] sustained the following medically determined injuries as a direct result of the accident of February 23, 2003: Sprain of the cervical spine, post concussion syndrome, lumbar radiculopathy with herniated disc at L5-S1 impinging on the thecal sac and descending S1 nerve roots. The herniated lumbar disc and other injuries are painful and disabling, and a result of the car accident of February 23, 2003, not the aging process" (*id.*, ¶ 8). "[A] medical affidavit which demonstrates that the plaintiff's limitations have been objectively measured or quantified is sufficient" to establish plaintiff's *prima facie* case on a motion for summary judgment. "Further, a physician's observations as to actual, quantified limitations in the plaintiff's ability to use a body function or system qualify as 'objectively measured or quantified' ... since they are based on the doctor's own examination, not the plaintiff's subjective complaints" (*Parker v Defontaine-Stratton*, 231 AD2d 412, 412-413 [1st Dept 1996]).

Dr. Tantleff's contrary opinion that plaintiff suffered from a chronic degenerative condition rather than injuries caused by the accident, even assuming it is true, is not dispositive since the exacerbation of such a condition by the accident could constitute a serious injury under the statute (see *Cebularz v Diorio*, 32 AD3d 975 [2d Dept 2006]). At any rate, when, as here, "conflicting medical evidence is offered on the issue of whether a plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury" (*Martinez v Pioneer Transp. Corp.*, 48 AD3d 306, 307 [1st Dept 2008]). Thus, defendants' motion, to the extent that it seeks dismissal of plaintiff's claims that he suffered 'permanent consequential limitation of use of a body organ or member' and/or a 'significant limitation of use of a body function or system,' "must be denied since the court cannot pass on the credibility of

witnesses on such a motion" (*Hourigan v McGarry*, *supra*, 106 AD2d at 845). Dr. Melamed "provided evidence of injuries to plaintiff's cervical spine and disc, resulting in chronic pain and a decreased range of motion. It was asserted that the injuries were caused by the accident involving th[ese] defendant[s], and were permanent in nature. This evidence, if believed, [i]s plainly sufficient to establish a *prima facie* case of serious injury" (*Noble v Ackerman*, 252 AD2d 392, 394 [1st Dept 1998]). Dr. Melamed's "affirmation is the equivalent of a 'sworn' statement, and the opinion therein is supported by Dr. Melamed's own examination of the patient, as well as by reference to an objective diagnostic test conducted by Dr. [Barax (plaintiff's exhibit F)].... This ... [is] sufficient to defeat defendants' motion for summary judgment" with respect to plaintiff's claims that he suffered a "'serious injury" due to permanent loss or consequential limitation or significant limitation of bodily functions or systems (*Addison v New York City Transit Authority*, 208 AD2d 368 [1st Dept 1994]).

Finally, plaintiff is also claiming a "serious injury" based on his being incapacitated and unable to work for more than 90 of the first 180 days following the accident. "In order to prove 'serious injury' under the 90-out-of-180 day rule, plaintiff must prove that [he] was 'curtailed from performing h[is] usual activities to a great extent rather than some slight curtailment'" (*Gaddy v Eyler*, 79 NY2d 955, 958 [1992], citing *Licari v Elliott*, 57 NY2d 230, 236 [1982]). According to plaintiff, from February 26 through August 30, 2003 he was confined to his home, leaving it only to participate in physical therapy. During this time, he was unable to perform substantially all of his usual daily activities, including work (Rojas affidavit, at plaintiff's exhibit D). His treating physician, Dr. Melamed, who examined plaintiff for "objective signs of injury" (see *Monk v Dupuis*, 287 ad2d 187, 191 [3 Dept 2001] three days after the accident, found his range of motion in the head, neck and spine were highly restrictive. Dr. Melamed's "initial impression was sprain of the cervical spine, post concussion syndrome, and lumbar radiculopathy," for which he prescribed an aggressive course of physical therapy and an

analgesic muscle relaxant. Dr. Melamed also "directed [plaintiff] not to engage in any work requiring prolonged sitting, turning, bending or heavy lifting while he was in therapy he thus could not work" (plaintiff's exhibit E).

Other than a brief mention in the reports of the two independent doctors who examined plaintiff, defendants have not submitted any evidence-based challenge to plaintiff's claim. "The reports of the defense medical experts, based on examinations of plaintiff conducted ... years after the subject automobile accident, addressed plaintiff's condition as of the time of the examination, not during the six months immediately after the accident, and were, accordingly, insufficient to sustain defendant[s'] burden of proof to establish *prima facie* that plaintiff had not sustained serious injury by reason of having been incapacitated from performing substantially all of his customary and daily activities for 90 of the 180 days following the accident" (*Toussaint v Claudio*, 23 AD3d 268, 268 [1st Dept 2005]; *Thompson v Ramnarine*, 40 AD3d 360, 360-361 [1st Dept 2007]). Furthermore, the findings of those doctors on this issue are in direct conflict. Dr. Cohen, who personally interviewed plaintiff "in his native language Spanish" reported that "as a consequence of the accident [plaintiff] lost a few days from work initially" (Cohen Report, p 2). In contrast, Dr. DeJesus reports that plaintiff "was unable to work for six months due to the injuries sustained" (DeJesus report, p 2). This too militates against summary dismissal of plaintiff's claims, since this conflicting evidence merely raises triable issues (*Kawaski v Hertz Corporation*, 199 AD2d 46, 47 [1993]).

Furthermore, "both physicians determined that the injured plaintiff had sustained certain [strains, which Dr. Melamed states] were causally related to the accident, injuries which resolved prior to their examinations. Neither of these physicians expressed an opinion concerning the alleged disabling effect of plaintiff's injuries during the 180-day period immediately following the accident. Accordingly, the moving defendants failed to satisfy their initial burden on the motion" (*Uddin v Cooper*, 32 AD3d 270, 273 [1st Dept 2006], lv den 8

NY3d 808 [2007]).

"As a result, it is unnecessary to reach the question of whether the plaintiff's papers in opposition were sufficient to raise a triable issue of fact" (*Krayn v Torella*, 40 AD3d 588 [2d Dept 2007]). Plaintiff is only required to make out a *prima facie* case that he sustained a serious injury within the ambit of Insurance Law § 5102(d) if defendants first establish through competent evidence that plaintiff does not have a sustainable cause of action (*DeAngelo v Fidel Corp. Services, Inc., supra*, 171 AD2d at 589; *Rubensccastro v Alfaro*, 29 AD3d 436, 437 [1st Dept 2006]).

For these reasons and upon the foregoing papers, it is,

ORDERED that the defendants' motion for summary judgment to dismiss is granted only to plaintiff's claims of "serious injury" based on fracture or significant disfigurement. Defendants' motion is denied in all other respects; and it is further,

ORDERED, plaintiff shall serve a copy of this order with a notice of entry within 30 days; and,

IT IS FURTHER ORDERED that upon service of a copy of this order with notice of entry, the Clerk of the Trial Support Office (Room 158) shall restore this action to its former place on the trial calendar.

This constitutes the Decision and Order of the Court.

Dated: 3-6-09
MAR 0 6 2009

Paul Wooten J.S.C.

Paul Wooten

FILED
MAR 11 2009
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NEW YORK

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