Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IAS PART 6**
Justice

REINALDO RAZZO,

Plaintiff,

-against-

SONU-SEEMA CORP. and MUKHTIAR SINGH,

Defendants.

Index No. 2023/09

Motion
Date February 23, 2010

Motion
Cal. No. 26

Motion
Sequence No. 1

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits..... 1-4
Opposition..... 5-7
Reply..... 8-10

Upon the foregoing papers it is ordered that this motion by plaintiff, Reinaldo Razzo for partial summary judgment against the defendants, Sonu-Seema Corp. and Mukhtiar Singh on the issue of liability, upon the grounds that there are no triable issues of fact and that, as a matter of law, the plaintiff is entitled to such judgment is hereby denied.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]. Even the color of a triable issue forecloses the remedy *(Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form

to establish the existence of a triable issue of fact (*see, Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman,* 278 AD2d 811 [4th Dept 2000]).

Plaintiff established a prima facie case that there are no triable issues of fact. In support of his motion, plaintiff submitted, inter alia, the examination before trial transcript of plaintiff himself and the examination before trial transcript of defendant Mukhtiar Singh. Plaintiff established that this is a personal injury action sustained by plaintiff on January 3, 2009, in connection with an accident that occurred in a taxi cab parking/hold lot at the US Airways Terminal of LaGuardia Airport in Queens, New York. Plaintiff further established that at the time of the accident, the plaintiff had parked his vehicle in said parking lot, walked across the lot to use the restroom, and was in the process of walking back across the lot and returning to his vehicle. A taxi cab operated by the defendant Mukhtiar Singh and owned by defendant Sonu-Seema Corp. had entered the parking/hold lot, but had parked in the wrong location, and therefore had to drive in reverse and enter another lane for taxis waiting to be dispatched. As plaintiff walked back to the lot, suddenly and without warning, defendant Singh put his vehicle into reverse and quickly backed into the plaintiff's person, striking the left side of the plaintiff's body with the rear of his vehicle.

In opposition, defendants submitted evidentiary proof in admissible form sufficient to establish a triable issue of fact. Defendants raised triable issues of fact as to *inter alia*, comparative negligence. Defendants established that the plaintiff was walking in lanes designated exclusively for taxis instead of the pedestrian crosswalk and failed to exercise due care. "In New York, it is well settled that the issue of comparative negligence is a question of fact proper for the jury's determination" (*Olmoz v. Wal-Mart Stores, Inc.*, 816 NYS2d 698 [Sup Ct, Orange County 2006][internal citations omitted]; *see also, Louise B.G. v. New York City Bd. Of Educ.*, 143 AD2d 728 [2d Dept 1988]). "A determination of whether plaintiff is contributory negligent is almost invariably question of fact, and

is for jury to determine in all but clearest cases" (*see, Olmoz, supra* [internal citations omitted]; *see also, Louise B.G., supra*).

On these issues, a trial is needed and the case may not be disposed of summarily. As there remains issues of fact in dispute, plaintiff's motion for summary judgment on liability is denied.

That branch of plaintiff's motion for partial summary judgment against the defendants on the issue of whether or not the plaintiff sustained a serious injury within the meaning of Insurance Law § 5102(d), upon the grounds that there are no triable issues of fact and that, as a matter of law the plaintiff is entitled to such judgment is hereby denied.

This action arises out of an automobile accident that occurred on January 3, 2009. Plaintiff has submitted proof in admissible form in support of the motion for summary judgment, for all categories of serious injury. The plaintiff submitted inter alia, affirmed reports from two independent examining physicians (a neurologist and an orthopedist).

APPLICABLE LAW

Under the "no-fault" law, in order to maintain an action for personal injury, a plaintiff must establish that a "serious injury" has been sustained (*Licari v. Elliot*, 57 NY2d 230 [1982]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v. New York Univ. Medical Center*, 64 NY2d 851 [1985]). In the present action, the burden rests on defendants to establish, by the submission of evidentiary proof in admissible form, that plaintiff has not suffered a "serious injury." (*Lowe v. Bennett*, 122 AD2d 728 [1st Dept 1986], *affd*, 69 NY2d 701, 512 NYS2d 364 [1986]). When a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff to produce prima facie evidence <u>in admissible form</u> to support the claim of serious injury (*Licari v. Elliot*, *supra*; *Lopez v. Senatore*, 65 NY2d 1017 [1985]).

In support of a claim that plaintiff has not sustained a serious injury, a defendant may rely either on the sworn statements of the defendant's examining physician or the unsworn

reports of plaintiff's examining physician (*Pagano v. Kingsbury*, 182 AD2d 268 [2d Dept 1992]). Once the burden shifts, it is incumbent upon plaintiff, in opposition to defendant's motion, to submit proof of serious injury in "admissible form". Unsworn reports of plaintiff's examining doctor or chiropractor will not be sufficient to defeat a motion for summary judgment (*Grasso v. Angerami*, 79 NY2d 813 [1991]). Thus, a medical affirmation or affidavit which is based on a physician's personal examination and observations of plaintiff, is an acceptable method to provide a doctor's opinion regarding the existence and extent of a plaintiff's serious injury (*O'Sullivan v. Atrium Bus Co.*, 246 AD2d 418 [1st Dept 1998]). Unsworn MRI reports are not competent evidence unless both sides rely on those reports (*Gonzalez v. Vasquez*, 301 AD2d 438 [1st Dept 2003]; *Ayzen v. Melendez*, 749 NYS2d 445 [2d Dept 2002]). However, in order to be sufficient to establish a prima facie case of serious physical injury the affirmation or affidavit must contain medical findings, which are based on the physician's own examination, tests and observations and review of the record rather than manifesting only the plaintiff's subjective complaints. It must be noted that a chiropractor is not one of the persons authorized by the CPLR to provide a statement by affirmation, and thus, for a chiropractor, only an affidavit containing the requisite findings will suffice (*see*, CPLR 2106; *Pichardo v. Blum*, 267 AD2d 441 [2d Dept 1999]; *Feintuch v. Grella*, 209 AD2d 377 [2d Dept 2003]).

In any event, the findings, which must be submitted in a competent statement under oath (or affirmation, when permitted) must demonstrate that plaintiff sustained at least one of the categories of "serious injury" as enumerated in Insurance Law § 5102(d) (*Author Marquez v. New York City Transit City*, 259 AD2d 261 [1st Dept 1999]; *Tompkins v. Budnick*, 236 AD2d 708 [3d Dept 1997]; *Parker v. DeFontaine*, 231 AD2d 412 [1st Dept 1996]; *DiLeo v. Blumberg*, 250 AD2d 364 [1st Dept 1998]). For example, in *Parker*, *supra*, it was held that a medical affidavit, which demonstrated that the plaintiff's threshold motion limitations were objectively measured and observed by the physician, was sufficient to establish that plaintiff has suffered a "serious injury" within the meaning of that term as set forth in Article 51 of the Insurance Law. In other words, "[a] physician's observation as to actual limitations qualifies as objective evidence since it is based on the physician's own examinations." Furthermore, in the absence of objective medical evidence in admissible form of serious injury, plaintiff's self-serving affidavit is insufficient to raise a triable issue of fact (*Fisher v. Williams*, 289 AD2d 288 [2d Dept 2001]).

DISCUSSION

A. Plaintiff established a prima facie case that plaintiff suffered a "serious injury" as defined in Section 5102(d), for all categories.

The affirmed report of plaintiff's independent examining neurologist, Aric Hausknecht, M.D., dated March 9, 2009, revealed inter alia, cervical herniations and bulges as well as lumbosacral disc herniations. He opines that the motor vehicle accident of January 3, 2009 is the substantial cause of the condition. Dr. Hausknecht concludes that plaintiff is totally disabled.

The affirmed report of plaintiff's independent examining orthopedist, Robert S. Goldstein, dated October 8, 2009 revealed a diagnosis of, *inter alia*, multiple fractures of the facial bones; cervical bulges and herniations; and lumbar herniations. He opines that the injuries are causally related to the motor vehicle accident of January 3, 2009.

The aforementioned evidence amply satisfied plaintiff's initial burden of demonstrating that plaintiff sustained a "serious injury." Thus, the burden then shifted to defendants to raise a triable issue of fact that a serious injury was not sustained within the meaning of the Insurance Law (*see*, *Gaddy v. Eyler*, 79 NY2d 955 [1992]). Failure to raise a triable issue of fact requires the granting of summary judgment (*see*, *Licari v. Elliott*, *supra*).

B. Defendants raise a triable issue of fact

In opposition to the motion, defendants submitted: an affirmed report of an independent examination by Ignatius Daniel Roger, M.D., a plastic surgeon on October 5, 2009. Dr. Ignatius stated an impression of cosmetically acceptable facial scarring with continued improvement in the appearance of the scar anticipated with the passage of time; and an affirmed report of an independent examination of Marvin Winell, M.D., conducted on September 29, 2009 which indicates an impression of: resolved cervical, lumbar, thoracic, right shoulder, and right hand sprain/strain. He opines that there is no further orthopedic treatment necessary and no need for diagnostic testing or supplies. He further opines that there is no disability as a result of the accident. Dr. Winell concludes that the claimant is capable of performing his usual activities of daily living, and can work without restriction from an orthopedic perspective.

Therefore, defendants' submissions are sufficient to raise a triable issue of fact (*see, Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

Accordingly, that branch of plaintiff's motion for partial summary judgment against the defendants on the issue of whether or not the plaintiff sustained a serious injury within the meaning of Insurance Law § 5102(d), upon the grounds that there are no triable issues of fact and that, as a matter of law the plaintiff is entitled to such judgment is hereby denied.

That branch of plaintiff's motion dismissing the affirmative defenses alleging comparative negligence, contributory negligence and culpable conduct of the plaintiff is hereby denied, as there are triable issues of fact as to, inter alia, whether plaintiff was comparatively negligent or demonstrated any culpable conduct.

That branch of plaintiff's motion dismissing the defendants' affirmative defense alleging that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) is hereby denied.

Dated: May 6, 2010

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Howard G. Lane, J.S.C.