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SHORT FORM ORDER

INDEX No. 07-8738
CAL. No. 09-02805-MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 8-2410
Mot. Seq. # 004 - MotD
005 - XMotD

EVELYN IQUIQUE, JASON IQUIQUE, an infant by his mother and natural guardian, CLARA IQUIQUE, and CLARA IQUIQUE, individually,

Plaintiffs,

- against -

TAXI EL UNIVERSAL INC. and RAFAEL O. ALVAREZ,

Defendants.

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TAXI EL UNIVERSAL INC. and RAFAEL O. ALVAREZ,

Third-Party Plaintiffs,

- against -

ANTHONY VITALE,

Third-Party Defendant.

Upon the following papers numbered 1 to 47 read on this motion and cross-motion renewal of prior summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (004) 1 - 13 ; Notice of Cross-Motion and supporting papers (005) 14-26 ; Answering Affidavits and supporting papers 27-38; 39-42 ; Replying Affidavits and supporting papers 43-46 ; Other 47 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (004) by the defendants, Taxi El Universal, Inc. and Rafael O. Alvarez, pursuant to CPLR 2221 to renew the prior motion which was brought pursuant CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiffs, Evelyn Iquique and Jason Iquique, have failed to sustain serious injury as defined by Insurance Law § 5102(d) is granted as to renewal and upon renewal, is denied; and it is further

ORDERED that this cross-motion (007) by the third-party defendant, Anthony Vitale, pursuant to CPLR §2221 for renewal of the prior motion brought pursuant to CPLR §3212 for summary judgment dismissing the third-party complaint on the issue of liability, or in the alternative that the plaintiffs did not sustain a serious injury as defined by Insurance Law § 5102(d) is granted as to renewal, and upon renewal, is denied.

Pursuant to the order of this Court, dated July 1, 2010, the parties were granted leave to renew their prior motions (002) and (003) within 30 days of the date of the order upon submission of proper papers, inclusive of a compete copy of the complaint of the main action.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiffs, Evelyn Iquique and Jason Iquique, an infant, arising out of a motor vehicle accident which occurred on June 29, 2005, on Fifth Avenue at or near its intersection with Brewster Street, Bay Shore, Suffolk County, New York. It is claimed that at the time of the accident, Evelyn Iquique and Jason Iquique were passengers in the vehicle owned by Taxi El Universal, Inc. (hereinafterTaxi El) which was operated by Rafael O. Alvarez (hereinafter Alvarez). A derivative claim has been asserted by Clara Iquique as parent of Evelyn and Jason Iquique. A third-party action has been asserted by Taxi El and Alvarez against Anthony Vitale (hereinafter Vitale), the operator of the other vehicle involved in the accident.

In motion (004), the defendants, Taxi El and Alvarez, seek summary judgment dismissing the complaint on the basis that the plaintiffs' claimed injuries fail to meet the threshold imposed by Insurance Law §5102(d).

In motion (005), the third-party defendant, Vitale, seeks summary judgment dismissing the third-party complaint on the basis that he bears no liability for the happening of the accident, and in the alternative, further seeks summary judgment dismissing the complaint of the main action on the basis that the plaintiffs did not suffer serious injuries as defined by Insurance Law §5102(d).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof

in admissible form (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]).

Pursuant to Insurance Law § 5102(d), " '[s]erious injury' means 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 medical 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."

The term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102(d), the initial burden is on the defendant to "present evidence in competent form, showing that plaintiff has no cause of action" (***Rodriquez v Goldstein,*** 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (***DeAngelo v Fidel Corp. Services, Inc.***, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268, 587 NYS2d 692 [2nd Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (***Cammarere v Villanova,*** 166 AD2d 760, 562 NYS2d 808, 810 [3rd Dept 1990]).

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight

limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott*** (supra).

It is for the Court to determine in the first instance whether a prima facie showing of "serious injury" has been made out (*see*, ***Tipping-Cestari v Kilhenny***, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). The initial burden is on the defendant "to present evidence, in competent form, showing that the plaintiff has no cause of action" (***Rodriguez v Goldstein,*** 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once defendant has met the burden, plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]).

In support of motion (004), the defendants Taxi El and Alvarez have submitted, inter alia, an attorney's affirmation; copies of the complaint and answer by Taxi El and Alvarez, third-party summons and complaint and answer served by Vitale, and plaintiffs' verified bill of particulars; a copy of the report of the independent neurological examination of Evelyn Iquique by Edward M. Weiland, M.D. dated April 23, 2009; report of the independent radiological review dated November 17, 2008 of the MRI of the lumbar spine dated August 25, 2005 of Evelyn Iquique by David L. Milbauer, M.D.; a copy of the report of the independent neurological examination of Jason Iquique by Edward M. Weiland, M.D. dated April 23, 2009; and copies of the transcripts of the examinations before trial of Evelyn Iquique and Clara Iquique each dated dated March 31, 2009.

In support of motion (005), the third-party defendant Vitale has submitted, inter alia, an attorney's affirmation; copies of the complaint and answer by Taxi El and Alvarez, third-party summons and complaint and answer served by Vitale, and plaintiffs' verified bill of particulars; a copy of an uncertified copy of the MV 104 police accident report; copies of the transcripts of the examinations before trial of Anthony Vitale dated November 24, 2009, Rafael O. Alvarez dated March 31, 2009, and Clara Iquique dated March 31, 2009.

Initially, the Court notes that the unsworn MV-104 police accident report constitutes hearsay and is inadmissible (*see*, ***Lacagnino v Gonzalez***, 306 AD2d 250, 760 NYS2d 533 [2d Dept 2003]; ***Hegy v Coller***, 262 AD2d 606, 692 NYS2d 463 [2d Dept 1999]).

Evelyn Iquique claims in her bill of particulars that as a result of the within accident, she sustained injuries consisting of a herniated disc at L4-5 abutting the anterior aspect of the thecal sac; herniated disc at L5-S1, lumbar sprain, lumbar myofascitis; cervical spine sprain; cervical myofascitis; nasal contusion; and lower lip contusion.

Jason Iquique claims in his bill of particulars that as a result of the within accident, he has sustained injuries consisting of right sided facial lacerations and abrasions to the right peri-orbital area and right forehead areas; scarring and disfigurement to the right side of the forehead area; cervical spine sprain; cervical myofascitis; thoracic myofascitis; and lumbar myofascitis.

Here the defendants in both motions (004) and (005) have failed to demonstrate prima facie entitlement to summary judgment dismissing the complaint as the moving papers raise triable issues of fact which preclude the same.

Vitale has not submitted any reports from any independent medical examinations conducted on his behalf of Evelyn or Jason Iquique and therefore has not met his burden for summary judgment dismissing the complaint on the issue that Evelyn and Jason Iquique did not sustain serious injury within the meaning of Insurance Law §5102. Vitale further may not incorporate by reference into his moving papers those exhibits submitted by Taxi El and Alvarez (see, CPLR §3212).

Accordingly, that part of motion (005) by the third-party defendant Vitale for dismissal of the third-party complaint on the basis that the plaintiffs in the main action did not sustain serious injury as defined by Insurance Law §5102 is denied.

In the bill of particulars, it has been stated that the infant plaintiff, Jason Iquique, sustained facial scarring. A plaintiff is entitled to present his claim involving facial scarring to meet the threshold for serious injury under Insurance Law §5102(d)(iii) (***Rubin v SMS Taxi Corp. et al,*** 71 AD3d 548, 898 NYS2d 110 [1st Dept 2010]). Taxi El and Alvarez, have not submitted a report by a plastic surgeon with regard to the facial scarring claimed by the infant plaintiff and therefore have not demonstrated entitlement to summary judgment dismissing the complaint on the basis that Jason Iquique did not sustain a serious injury within the meaning of Insurance Law §5102.

Nor have Taxi El and Alvarez submitted a report from an orthopedist concerning the injuries claimed by Evelyn Iquique. The report of ..... Milbauer, M.D. concerning his review of the MRI of August 25. 2005 of the lumbar spine of Evelyn Iquique reveals posterior disc herniations at L4-5 and L5-S1, which he states are of uncertain age and etiology. Thus, factual issues are raised in his report which further preclude summary judgment dismissing the complaint on the basis that Evelyn Iquique did not sustain serious injury within the meaning of Insurance Law §5102. These factual issues raised in defendants' moving papers preclude summary judgment and Dr. Milbauer has not ruled out that the herniations were not proximately caused by the accident.

The defendants failed to satisfy their burden of establishing, prima facie, that the plaintiffs, Evelyn Iquique and Jason Iquique, did not sustain a "serious injury" within the meaning of Insurance Law §5102 (d) (*see*, ***Agathe v Tun Chen Wang***, 98 NY2d 345, 746 NYS2d 865 [2006]). In that the reports of the defendants' examining physicians do not exclude the possibility that plaintiffs suffered a serious injury in the accident, the defendants are not entitled to summary judgment (*see*, ***Peschanker v Loporto***, 252 AD2d 485, 675 NYS2d 363 [2d Dept 1998]).

Accordingly, motion (004) by the defendants Taxi El and Alvarez for summary judgment dismissing the complaint on the basis that Evelyn Iquique and Jason Iquique did not sustain serious injury within the meaning of Insurance Law §5102 is denied.

Since the defendants failed to establish entitlement to judgment as a matter of law, it is not necessary to consider whether plaintiff's papers in opposition to defendant's motion were sufficient to raise a triable issue of fact (*see*, ***Agathe v Tun Chen Wang***, *supra*; ***Walters v Papanastassiou***, *supra*).

The Court now turns to that part of motion (005) by defendant Vitale wherein he seeks summary judgment dismissing the third-party complaint on the issue of liability.

Evelyn Iquique testified that she was seated in the rear of the taxi looking out the side view window when she suddenly felt an impact, but did not see the accident as it occurred.

Clara Iquique testified at her examination before trial to the effect that she was a passenger in the rear passenger seat in the Universal Taxi and became aware of the accident with the impact, but did not see the other vehicle prior to the accident.

Rafael O. Alvarez testified at his examination before trial to the effect that on June 29, 2005, he was involved in a motor vehicle accident while driving a taxi owned by Taxi Universal by whom he was employed at the time. He was traveling with four passengers, three in the rear passenger seat and one in the front passenger seat, in a northbound direction on Fifth Avenue for about three minutes, reaching about forty miles per hour at the time the accident occurred. He described Fifth Avenue as having two travel lanes in each direction, north and south. He had traveled in the right northbound lane about less than fifty meters before he moved into the left travel lane. He then traveled in the left northbound travel lane about three hundred meters. As he was "coming out of the bridge" he saw the other vehicle, a pick up truck, involved in the accident "coming out of Sunrise" entering onto Fifth Avenue. The front or the bumper of the pickup truck was on Fifth Avenue at that time, about less than ten meters from his vehicle when he first saw it and tried to brake, lightly at first. His vehicle began slowing. The pick up truck crossed the northbound right lane and then stopped in the left lane in front of him to make a left turn. The pick up was stopped for "seconds" when the front bumper of the taxi struck the rear bumper of the pick up truck. Mr. Alvarez then testified that he was traveling "thirty, thirty-five miles" at the time of the impact, but then stated he did not know his speed when the accident occurred. He continued to brake and "burned his tires." The road was straight and went a little downhill at the site of the accident.

Anthony Vitale testified at his examination before trial to the effect that he was involved in an automobile accident on June 29, 2005 between 11 a.m. and 12. The day was sunny and mild. The accident occurred at the intersection of Fifth Avenue and Sunrise Highway at about Brewster Street. He had been traveling on the Sunrise Highway service road in a westbound direction and merged a wide right turn onto Fifth Avenue, which he described as having two travel lanes in each direction. He entered Fifth Avenue onto the right northbound travel lane and traveled about 300

feet entering the left travel lane, signaling before the lane change. He intended to make a left turn into the gas station. His left directional was on, and he brought his vehicle to a moderate stop just before Brewster Street and remained stopped for about five seconds when the impact to the rear of his vehicle occurred. He saw the other vehicle in his rear view mirror just seconds before as he looked up and estimated it was traveling about over forty miles per hour in the left travel lane behind him. Prior to the accident, he heard no screeching of brakes or the sound of a horn.

"When a rear-end collision occurs, such collision is sufficient to create a prima facie case of liability on the part of defendant and imposes a duty of explanation with respect to the operator of the offending vehicle. When a driver approaches another vehicle from the rear, he is bound to maintain a reasonable safe rate of speed and use reasonable care to avoid colliding with the other vehicle" (***Crociata et al v Vasquez et al,*** 168 AD2d 410, 562 NYS2d 536 [2nd Dept 1990). It is well settled that when a driver of a motor vehicle approaches another automobile from the rear, he or she is bound to maintain a safe rate of speed and has the duty to keep control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (***Chepel v Meyers,*** 306 AD2d 235, 762 NYS2d 95 [2nd Dept 2003]; ***Power v Hupart,*** 260 AD2d 458, 688 NYS2d 194 [2nd Dept 1999]; *see also,* Vehicle and Traffic Law § 1129[a]). Moreover, a rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability regarding the operator of the moving vehicle and imposes a duty of explanation on the operator of the moving vehicle to excuse the collision by providing a non-negligent explanation, such as a mechanical failure, a sudden stop of the vehicle ahead, and unavoidable skidding on a wet pavement or some other reasonable excuse (*see,* ***Rainford v Han,*** 18 AD3d 638; 795 NYS2d 645 [2nd Dept 2005]; ***Thoman v Rivera***, 16 AD3d 667, 792 NYS2d 558 [2nd Dept 2005]; ***Power v Hupart,*** *supra*). 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,* NY Veh. & Traf. Law §1129(a)***; Shamah v Richmond County Ambulance Service, Inc. et al,*** 279 AD2d 564, 719 NYS2d 287 [2nd Dept 2001]).

In the instant action, Taxi El and Alvarez have commenced the action against the vehicle which was struck in the rear. Alvarez testified that he saw the other vehicle enter onto Fifth Avenue as Alvarez was coming out from the bridge and that the other vehicle was about ten meters from the front of his vehicle. Vitale testified that he signaled to change lanes and was stopped in the left travel lane with his left directional on indicating he was to make a left turn, when his vehicle was struck in the rear. Here, there are factual issues which preclude summary judgment. "Where plaintiff's vehicle is struck from behind, evidence that the plaintiff's vehicle stopped abruptly in the left passing lane of an arterial highway is sufficient to raise a triable issue regarding relative degrees of fault" (***Nitzke v Loveland, et al,*** 188 AD2d 1058, 592 NYS2d 165 [4th Dept 1992], see also, ***Chepel v Meyers,*** 306 AD2d 235 [2nd Dept 2003). There are factual issues concerning whether Alvarez took any other evasive action to avoid the accident other than braking lightly at first, and then burning the tires. Here, there are triable issues concerning the degrees of fault of each party.

Accordingly, that part of motion (005) by defendant Vitale for summary judgment dismissing the third-party complaint on the basis he bears no liability in the happening of this accident is denied.

Dated: 11/30/16

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION