Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY
Present: HONORABLE FREDERICK D.R. SAMPSON IAS TERM, PART 31
Justice

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SEONG MIN LIM, SOON JAE LIM and WOO YOUNG LIM,

Plaintiffs,

-against-

FARHAN JILANI,

Defendant.

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Index No: 19364/09
Motion date: 10/6/11
Motion Cal. No: 35 & 36
Motion Seq. No: 1 & 2

The following papers numbered 1 to 23 read on this motion for an order granting plaintiff on the counterclaim Woo Young Lim summary judgment, pursuant to CPLR § 3212, dismissing defendant's counterclaim on the basis that there is no material issue of fact regarding the liability of plaintiff on the counterclaim Woo Young Lim; and on this motion by defendant, for an order granting summary judgment, pursuant to CPLR § 3212, dismissing the pleadings of plaintiffs on the threshold issue.

	PAPERS NUMBERED
Notices of Motion-Affidavits-Exhibits-Memorandum of Law.....	1 - 9
Answering Affidavits-Exhibits.....	10 - 21
Reply.....	22 - 23

Upon the foregoing papers, it is hereby ordered that the motions are disposed of as follows:

It is well established that summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2nd Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party

opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

In the case at bar, plaintiff on the counterclaim Woo Young Lim moves summary judgment on liability, dismissing defendant's counterclaim on the ground that there are no issues of fact to be determined as the result of a rear-end collision. However, as the summary judgment motion by defendant seeking dismissal of the pleadings of all plaintiffs on the threshold issue may be dispositive of the motion of plaintiff on the counterclaim Woo Young Lim, this Court will consider the threshold motion first.

The issue of whether a plaintiff sustained a serious injury is a matter of law to be determined in the first instance by the court. See, Licari v. Elliott, 57 N.Y.2d 230 (1982). The burden is on the defendant to make a prima facie showing that plaintiff's injuries are not serious. Toure v. Avis Rent A Car Sys., 98 N.Y.2d 345 (2002). By submitting the affidavits or affirmations of medical experts, who, through objective medical testing, conclude that plaintiff's injuries are not serious within the meaning of Insurance Law § 5102(d), a defendant can meet his or her prima facie burden. See Margarin v. Krop, 24 A.D.3d 733 (2nd Dept. 2005); Karabchievsky v. Crowder, 24 AD3d 614 (2nd Dept. 2005). The threshold question in determining a summary judgment motion on the issue of serious injury is the sufficiency of the moving papers, with consideration only given to opposing papers once the defendant, as the movant, makes a prima facie showing that plaintiff did not sustain a serious injury. Toure v Avis Rent A Car System, 98 N.Y.2d 345 (2002).

Here, defendant proffers in his moving papers, inter alia, the medical reports of Dr. Ravi Tikoo, a neurologist, who examined plaintiff Seong Min Lim on December 20, 2010; and Dr. Jessica Berkowitz, a radiologist, who reviewed, on November 24, 2010, the MRI film of this plaintiff's knee, lumbar and cervical spine dated January 31, February 7 and 14, 2009. In reference to plaintiff Seong Min Lim, the medical reports of Drs. Tikoo and Berkowitz, standing alone, do not constitute competent evidence on the threshold issue. Dr. Tikoo "set forth no quantified range of motion findings or a qualitative assessment of plaintiff's [spine] on his examination of plaintiff." Acosta v. Alexandre, 70 A.D.3d 735, 736 (2nd Dept. 2010); see, Jean v. Labin-Natochenny, 77 A.D.3d 623 (2nd Dept. 2010); Robinson-Lewis v. Grisafi, 74 A.D.3d 774, (2nd Dept. 2010). Further, as the report fails to indicate the quantified range of motion findings, there were no sufficient comparisons to the normal range of motion for that particular part of the body. "In general, in the absence of an assertion of the normal range of motion, an expert's finding as to the plaintiff's range of motion is insufficient." Djetoumani v. Transit, Inc., 50 A.D.3d 944, 945 (2nd Dept. 2008); see, Frey v. Fedorciuc, 36 A.D.3d 587 (2nd Dept. 2007). Further, the affirmed reports of Dr. Berkowitz, which state in rather conclusory fashion without the benefit of explanation, that "this report is in disagreement with the original radiology report," and finds no causal relationship to the accident, lacks probative value.

Consequently, defendant failed to meet his initial burden of making a prima facie showing that plaintiff Seong Min Lim did not sustain a serious injury within the meaning of Insurance Law

§ 5102(d). See, Baez v. Rahamatali, 6 N.Y.3d 868 (2006); Zhang v. Wang, 24 A.D.3d 611 (2005); Pommells v. Perez, 4 N.Y.3d 566 (2005); Rodriguez v. Huerfano, 46 A.D.3d 794 (2nd Dept. 2007); Burgos v Vargas, 33 A.D.3d 579 (2nd Dept. 2006); Batista v Olivo, 17 A.D.3d 494 (2nd Dept. 2005); Sainte-Aime v Ho, 274 A.D.2d 569 (2nd Dept. 2000). Defendant thus failed to establish his entitlement to summary judgment dismissing the complaint insofar as asserted by plaintiff Seong Min Lim on the threshold issue. See, Baez v. Rahamatali, 6 N.Y.3d 868 (2006); Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345 (2002); Gaddy v. Eyler, 79 N.Y.2d 955 (1992); Licari v. Elliott, 57 N.Y.2d 230 (1982); Djetoumani v. Transit, Inc., 50 A.D.3d 944 (2nd Dept. 2008). "Only after the defendant has satisfied [the] threshold burden will the court examine the sufficiency of the plaintiff's opposition (citations omitted)." Doherty v. Smithtown Cent. School Dist., 49 A.D.3d 801 (2nd Dept. 2008); see, also, Negassi v. Royle, 65 A.D. 3d 1311 (2nd Dept. 2009); Ismail v. Tejeda, 65 A.D. 3d 518 (2nd Dept. 2009); Neuburger v. Sidoruk, 60 A.D. 3d 650 (2nd Dept. 2009); Seabury v. County of Dutchess, 38 A.D.3d 752 (2nd Dept. 2007); Yioves v. T.J. Maxx, Inc., 29 A.D.3d 572 (2nd Dept. 2006). As defendant failed to meet his burden, denial of the motion is required regardless of the sufficiency of the opposing papers. See, Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853 (1985); Velez v. South Nine Realty Corp., 57 A.D.3d 889 (2nd Dept. 2008). Accordingly, the motion for summary judgment dismissing the complaint of plaintiff Seong Min Lim on the ground that he failed to sustain a "serious injury," is denied.

With regard to plaintiffs Soon Jae Lim and Woo Young Lim ("Lim plaintiffs"), through the submission of the affirmed medical reports of defendant's experts, who conducted orthopedic, neurologic and radiologic examinations of the Lim plaintiffs and found no abnormalities causally related to the accident, coupled with their own admissions, defendant's evidence was sufficient to make a prima facie showing that neither plaintiff sustained a serious injury within the meaning of Insurance Law § 5102(d). See, Baez v. Rahamatali, 6 N.Y.3d 868 (2006); Zhang v. Wang, 24 A.D.3d 611 (2005); Pommells v. Perez, 4 N.Y.3d 566 (2005); Rodriguez v. Huerfano, 46 A.D.3d 794 (2nd Dept. 2007); Burgos v Vargas, 33 A.D.3d 579 (2nd Dept. 2006); Batista v Olivo, 17 A.D.3d 494 (2nd Dept. 2005); Sainte-Aime v Ho, 274 A.D.2d 569 (2nd Dept. 2000). Defendant established, prima facie, that the Lim plaintiffs suffered no limitation of motion as a result of the accident, and no medically determined injury or impairment of a non-permanent nature which prevented them from performing substantially all of the material acts which constituted their customary daily activities for not less than ninety days during the one hundred eighty days immediately following his alleged injury or impairment. Defendant thus established his entitlement to summary judgment dismissing the complaint insofar as asserted by these plaintiffs on the threshold issue. See, Baez v. Rahamatali, 6 N.Y.3d 868 (2006); Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345 (2002); Gaddy v. Eyler, 79 N.Y.2d 955 (1992); Licari v. Elliott, 57 N.Y.2d 230 (1982); Djetoumani v. Transit, Inc., 50 A.D.3d 944 (2nd Dept. 2008). The burden then shifted to the Lim plaintiffs to demonstrate the existence of a triable issue of fact as to whether they sustained serious injury. See Gaddy v. Eyler, 79 N.Y.2d 955 (1992).

In opposition, the Lim plaintiffs submitted their affidavits, the affirmation of their attorney, the affirmations of Drs. Michael Trimba and Ayoobi Khodadadi. From the outset, it is noted that plaintiffs' attorney's affirmation is insufficient to show that either plaintiff sustained a serious injury,

as it is well recognized that an attorney's affirmation that is not based upon personal knowledge is of no probative or evidentiary significance. See, Codrington v. Ahmad, 40 A.D.3d 799 (2nd Dept. 2007); Warrington v. Ryder Truck Rental, Inc., 35 A.D.3d 455 (2nd Dept. 2006); Zuckerman v. City of New York, 49 N.Y.2d 557, 563 (1980). Similarly, although plaintiffs describe persistent pain and limitations, the self-serving affidavits of the Lim plaintiffs also are insufficient to raise a triable issue of fact as to whether they sustained serious injury. Carrillo v. DiPaola, 56 A.D.3d 712 (2nd Dept. 2008); Gastaldi v. Chen, 56 A.D.3d 420 (2nd Dept. 2008); Silla v. Mohammad, 52 A.D.3d 681 (2nd Dept. 2008); Hargrove v. New York City Transit Authority, 49 A.D.3d 692 (2nd Dept. 2008); Verette v. Zia, 44 A.D.3d 747 (2nd Dept. 2007); Iusmen v. Konopka, 38 A.D.3d 608 (2nd Dept. 2007); Mejia v. DeRose, 35 A.D.3d 407 (2nd Dept. 2006).

With regard to their medical evidence, Dr. Khodadadi, a Radiologist, affirmed that he review the respective MRI films of each plaintiff. Dr. Khodadadi agreed with the findings that the films of both plaintiffs revealed bulges and herniations in their cervical and lumbar spines. Further, the MRI of the right knee of plaintiff Soon Jae Lim revealed tears to the medial and lateral meniscus, and intrasubstance tears to the anterior and posterior cruciate ligaments. Moreover, Dr. Khodadadi confirmed that the MRI of the left shoulder of plaintiff Woo Young Lim revealed tendinopathy of the supraspinatus tendon and a partial tear of the subscapularis tendon. Although the mere existence of a herniation or bulging disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration [(Pommells v. Perez, 4 N.Y.3d 566, 574 (2005); Sutton v. Yener, 65 A.D.3d 625, 626 (2nd Dept. 2009); Chanda v. Varughese, 67 A.D.3d 947 (2nd Dept. 2009); Cerisier v. Thibiu, 29 A.D.3d 507 (2nd Dept. 2006)], the requisite objective evidence was presented by Dr. Trima, who using a goniometer to conduct range of motion tests, found limited range of motion in his initial examinations of plaintiffs on December 31, 2008, as well as his follow-up examinations on March 23, 2011. Specifically, the reduced range of motion in the Lim plaintiffs' cervical spine and lumbar spine, as well as the tears in plaintiff Soon Jae Lim's right knee and plaintiff Woo Young Lim's left shoulder, correlated with the MRI results. Dr. Trima stated, based upon the records and his clinical evaluations of each plaintiff, that they suffer from a partial disability to their cervical spine, lumbar spine, right knee and left shoulder, which is permanent in nature, and causally related to the automobile accident of December 31, 2008, which he found to be a competent producing cause of the Lim plaintiffs' injuries and disabilities.

Consequently, the Lim plaintiffs' opposition to defendant's summary judgment motion presents competent medical evidence sufficient to raise a triable issue of fact. As set forth above, while the "mere existence of a herniated or bulging disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury, as well as its duration (citations omitted)"[Stevens v. Sampson, 72 A.D.3d 793 (2nd Dept. 2010)], here, plaintiffs' experts presented objective evidence of plaintiffs' physical limitations, as well as their durations. See, Chanda v. Varughese, 67 A.D.3d 947 (2nd Dept. 2009). Further, plaintiffs, through their treating doctors, proffered competent medical evidence that revealed the existence of significant limitations in the cervical and lumbar regions of their spines, left shoulder and right knee that were contemporaneous with the subject accident. See, Eusebio v. Yannetti, 68

A.D.3d 919 (2nd Dept. 2009); Bleszcz v. Hiscock 69 A.D.3d 890 (2nd Dept. 2010). Morever, where, as here, there are conflicting opinions of experts, such conflicts may not be resolved on a motion for summary judgment. See, Tolpygina v. Teper, 44 A.D.3d 747 (2nd Dept. 2007); Dandrea v. Hertz, 23 A.D. 3d 332 (2nd Dept. 2005). This evidence was sufficient to raise a triable issue of fact as to whether the Lim plaintiffs sustained a serious injury. See, Desir v. Castillo, 59 A.D.3d 659 (2nd Dept. 2009). Accordingly, the motion for summary judgment dismissing the complaint of plaintiffs Soon Jae Lim and Woo Young Lim on the ground that they failed to sustain "serious injury" is likewise denied.

With regard to the motion by plaintiff on the counterclaim Woo Young Lim for summary judgment on the issue of liability and dismissing all counterclaims asserted by defendant, it is well established that summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2nd Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

"A rear-end collision with a stopped vehicle creates a prima facie case of negligence with respect to the operator of the moving vehicle and imposes a duty on 'that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision' (citations omitted)." Reitz v. Seagate Trucking, Inc.,71 A.D.3d 975 (2nd Dept. 2010); Ortiz v. Fage USA Corp., 69 A.D.3d 914 (2nd Dept. 2010); Lampkin v. Chan, 68 A.D.3d 727 (2nd Dept. 2009); see, Oguzturk v. General Elec. Co., 65 A.D.3d 1110 (2nd Dept. 2009); Ramirez v. Konstanzer, 61 A.D.3d 837 (2nd Dept. 2009); Johnston v. Spoto, 47 A.D.3d 888 (2nd Dept. 2008); Emil Norsic & Son, Inc. v. L.P. Transp., Inc., 30 A.D.3d 368 (2nd Dept. 2006); Milskiy v Solanky, 8 A.D.3d 353 (2nd Dept.2004); see, also, Tutrani v. County of Suffolk, 10 N.Y.3d 906 (2008). The operator of the moving vehicle is required to rebut the inference of negligence created by an unexplained rear-end collision as the operator is in the best position to explain whether the collision was due to a mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on a wet pavement, or some other reasonable cause. See, Emil Norsic & Son, Inc. v. L.P. Transp., Inc., 30 A.D.3d 368 (2nd Dept. 2006); Gross v. Marc, 2 A.D.3d 681 (2nd Dept. 2003). If the operator cannot come forward with any evidence to rebut the inference of negligence, the moving party may properly be awarded judgment as a matter of law on the issue of liability. See, Mandel v. Benn, 67 A.D.3d 746 (2nd Dept. 2009); Zdenek v. Safety Consultants, Inc., 63 A.D.3d 918 (2nd Dept. 2009).

In the instant matter, plaintiff on the counterclaim Lim alleges that the accident occurred as the result of his vehicle being struck in the rear by the vehicle owned and operated by defendant. Once, as here, the moving party makes a prima facie showing of entitlement to summary judgment

in their favor, it is incumbent upon the opposing party to come forth with evidentiary proof in admissible form sufficient to demonstrate the existence of triable issues of fact. Chalasani v. State Bank of India, New York Branch, 283 A.D.2d 601 (2nd Dept. 2001); Pagan v. Advance Storage and Moving, 287 A.D.2d 605 (2nd Dept. 2001); Gardener v. New York City Transit Authority, 282 A.D.2d 430 (2nd Dept. 2001). As defendant interposed no opposition to the motion, he failed to meet his burden of demonstrating the existence of a triable issue of fact as to whether there was a reasonable, non-negligent cause of the accident. Accordingly, the motion by plaintiff on the counterclaim Woo Young Lim, pursuant to CPLR § 3212, granting summary judgment on the issue of liability and dismissing all counterclaims asserted against him, is granted, and all counterclaims hereby are dismissed as to him.

Dated: December 1, 2011

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J.S.C.