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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Wagner Georges,

Plaintiff,

-against-

Cool Power LLC, Peter Taormina and Rools Deslouches,

Defendants.

Index No.: 15953/2008

Motion Sequence No.: 001; MD
Motion Date: 8/15/11
Submitted: 11/28/11

Motion Sequence No.: 002; XMOT.D
Motion Date: 8/15/11
Submitted: 11/28/11

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Clerk of the Court

Upon the following papers numbered 1 to 42 read upon this motion and cross motion for summary judgment: Notice of Motion and supporting papers, 1 - 14; Notice of Cross Motion and supporting papers, 15 - 22; Answering Affidavits and supporting papers, 23 - 34; Replying Affidavits and supporting papers, 35 - 42.

The instant action seeks to recover damages for personal injuries allegedly sustained by plaintiff as a result of a motor vehicle accident which occurred at the intersection of Motor Parkway and Highland Road in the Town of Islip on January 25, 2006 at approximately 8:40 a.m. Plaintiff Wagner Georges ("Georges") was the front seat passenger in an automobile owned and driven by

defendant Rools Deslouches ("Deslouches") at the time it collided with a vehicle owned by defendant Cool Power LLC ("Cool Power") and driven by defendant Peter Taormina ("Taormina").

By his verified bill of particulars plaintiff alleges that as a result of the subject accident, he sustained serious injuries including, lumbar spine herniation at L5-S1 with impingement on the thecal sac, lumbar spine sprain, cervical spine disc bulges at C3-C4, C4-C5 and C5-C6 with cord impingement, reversal of the cervical lordosis, cervical spine sprain, impingement supraspinatus outlet syndrome, rotator cuff tendinosis and/or tendinitis, right shoulder tendinitis and headaches. Additionally, he claims that he was confined to bed and home for approximately two weeks following the accident. Plaintiff also alleges that he sustained a "serious injury" satisfying the following threshold categories under Insurance Law §5102 (d): 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; and, a medically determined injury or impairment of a non-permanent nature which prevented the him from performing substantially all of the material acts which constitute his usual and customary daily activities for not less than 90 days during the 180 days immediately following the date of the accident.

Defendant Deslouches now moves for summary judgment in his favor dismissing the complaint on the grounds that he did not sustain a "serious injury" as defined in Insurance Law §5102 (d). In support of his motion, defendant submits copies of plaintiff's summons and complaint, his answer, plaintiff's bill of particulars, the transcript of plaintiff's examination before trial dated February 8, 2010, the affirmed report dated April 23, 2010 of defendant's examining orthopedic surgeon, Robert Israel, M.D. based upon his examination of plaintiff on the said date, the affirmed reports dated March 8, 2010 of defendant's radiologist, Alan B. Greenfield, M.D. based upon his review of cervical spine, lumbar spine and right shoulder MRI studies conducted on February 6, 2006, February 27, 2006 and February 6, 2006 respectively and the affirmed report dated July 12, 2006 of the "no-fault" doctor, Harvey Goldberg based upon his examination of plaintiff on the said date.

Insurance Law §5102 (d) defines "serious injury" as "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" (Insurance Law §5102[d]). The Court of Appeals has held that the issue of whether a claimed injury falls within the statutory definition of a "serious injury" is a question of law for the courts in the first instance, which may properly be decided on a motion for summary judgment (see, Licari v. Elliott, 57 NY2d 230 [1982]; Charley v. Goss, 54 AD3d 569 [1st Dept., 2008]).

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 (see, Oberly v. Bangs Ambulance Inc., 96 NY2d 295 [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 objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided or there must be a sufficient description of the "qualitative nature" of the plaintiff's limitations, with an objective basis, correlating the plaintiff's limitations to the normal function, purpose and use of the body part (see, Toure v. Avis Rent A Car Systems, Inc., 98 NY2d 345 [2000]; Mejia v. DeRose, 35 AD3d 407 [2nd Dept., 2006]). 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 [2nd 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 [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 (see, Gaddy v. Eyler, 79 NY2d 955 [1992]).

On April 23, 2010, defendant's examining orthopedic surgeon, Robert Israel, M.D., performed range of motion testing of plaintiff's cervical and lumbar spine and on April 13, 2011 he performed range of motion testing of plaintiff's right shoulder and compared plaintiff's observed results to normal measurements, all of which were within normal limits. Harvey Goldlberg, M.D. performed range of motion testing of plaintiff's cervical and thoracolumbar spine and shoulders in his examination of plaintiff on July 12, 2006 and it is unclear as to whether the results were within normal limits. However, both Dr. Israel and Dr. Goldberg failed to set forth the objective tests that they used to determine range of motion restrictions or to identify what, if any, instrument was used to calculate the measurements (see, Tolstocheev. v. Bajrovic, 28 AD3d 473 [2nd Dept., 2006]). Since defendant failed to establish his *prima facie* entitlement to judgment as a matter of law in the first instance, it is unnecessary to consider whether the opposing papers were sufficient to raise a triable issue of fact (see, Yong Deok Lee v. Singh, 56 AD3d 662 [2nd Dept., 2008]; Joseph v. Hampton, 48 AD3d 638 [2nd Dept., 2008]; Coscia v. 938 Trading Corp., 283 AD2d 538 [2nd Dept., 2001]). Accordingly, the motion for summary judgment dismissing plaintiff's complaint on the ground that he did not sustain a "serious injury" is denied.

Cool Power and Taormina now cross move for an order pursuant to CPLR §3212 dismissing the complaint and all cross claims asserted against them on the ground that they are not responsible for the plaintiffs' injuries because the actions of defendant Deslouches were the sole proximate cause of the accident. In support of their motion, defendants Cool Power and Taormina submit, *inter alia*, copies of defendant Taormina's February 8, 2010 examination before trial transcript and of defendant Deslouches' December 6, 2010 examination before trial transcript and an uncertified copy of the police accident report dated January 25, 2006. The plaintiff alleges that defendants Deslouches, Cool Power and Taormina were negligent, careless and reckless in the ownership, operation, management, maintenance, supervision, use and control of their motor vehicles. Specifically, plaintiff alleges in his verified bill of particulars that defendants were negligent in

operating their vehicles at excessive rates of speed, in failing to obey the rules of the road, to keep a proper lookout, to stop at a stop sign, to timely and properly apply brakes, to turn steering mechanisms, sound horn, give any signal, notice or warning of said vehicles' approach, to yield the right of way, to avoid the other vehicle and to take steps and/or actions necessary to avoid the accident. Plaintiff and co-defendant Deslouches oppose the motion and maintain that the defendants Cool Power and Taormina contributed to the happening of the accident and must be found comparatively negligent.

During his examination before trial, plaintiff indicated that although he was a front seat passenger in defendant Deslouches' vehicle on the date of the accident, he was reading something and not paying attention to the driving at the time of the collision. Therefore, he did not observe the Cool Power/Taormina vehicle prior to the accident. Defendant Deslouches testified, at his December 6, 2010 deposition, that while in the process of crossing over Motor Parkway to enter the Long Island Expressway he was involved in an accident with the vehicle owned by defendant Cool Power and driven by defendant Taormina. He indicated that it was a clear day with no precipitation coming down or on the ground and that traffic was not heavy as he observed it. Defendant Deslouches contended that he stopped at a stop sign on Highland Road at its intersection with Motor Parkway and that he was stopped there for 2 to 3 seconds during which time he "looked quickly twice" in each direction and that nothing was blocking his vision. He proceeded across the two southbound lanes safely, across the first "left" or northbound lane, then "when [he] got to the next lane where traffic was coming onto the right that is when [his] car got hit." He did not see the Cool Power/Taormina vehicle before getting hit and indicated that he was accelerating at the time of the impact. His intention was to drop plaintiff off and to go to school at St. Joseph's College in Patchogue at 9 a.m. were it not for the accident which occurred at approximately 8:40 a.m. The front and portions of the rear, passenger side of his vehicle were damaged in the collision. Finally, defendant Taormina testified that he was proceeding in a northerly direction on Motor Parkway on a dry, clear day when he was involved in an accident with the Deslouches' vehicle. Taormina first observed the Deslouches' vehicle when it was passing the middle shoulder of Motor Parkway at the intersection with Highland Road. When he first saw the other vehicle, which was perpendicular to his vehicle, Taormina "hit [his] brakes, put [his] hand on the horn and went slightly right." He indicated that this was all done in one second and that his car skidded before impact. Taormina testified that the other vehicle did not stop immediately prior to the collision and that the Deslouches' vehicle "came from [his] left and hit into [him]." The driver's side of his vehicle was damaged as a result of the accident.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (see, Rotuba Extruders, Inc. v. Ceppos, 46 NY2d 223[1978]; Andre v. Pomeroy, 35 NY2d 361 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (see, Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (see,

S.J. Capelin Assocs., Inc. v. Globe Mfg. Corp., 34 NY2d 338 [1974]) and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (see, Benincasa v. Garrubbo, 141 AD2d 636 [2nd Dept., 1988]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]).

Vehicle and Traffic Law §1172 (a) provides, in relevant part, that an operator of any vehicle approaching a stop sign shall stop "at the point nearest the intersecting roadway where the driver has a view of the approaching traffic on the intersecting roadway," and that the driver must comply with Vehicle and Traffic Law §1142 before proceeding into the intersection. Further, Vehicle and Traffic Law §1142 (a) requires a driver of a motor vehicle approaching a stop sign to stop and yield the right of way to any vehicle that has entered the intersection or is approaching so closely as to constitute an immediate hazard (see, Willis v. Finks, 7 AD3d 519 [2nd Dept., 2004]; Szczotka v. Adler, 291 AD2d 444 [2nd Dept., 2002]), and vehicles traveling on a through highway have a preferential right of way (Vehicle and Traffic Law §149). A driver who fails to yield the right of way in violation of Vehicle and Traffic Law §1142 (a) is negligent as a matter of law (see, Goemans v. County of Suffolk, 57 AD3d 478 [2nd Dept., 2008]; Maliza v. Puerto-Rican Transp. Corp., 50 AD3d 650 [2nd Dept., 2008]; Exime v. Williams, 45 AD3d 633 [2nd Dept., 2007]). Of course, there can be more than one proximate cause of an accident, and evidence that one driver was negligent does not preclude a finding that the comparative negligence of another driver contributed to an accident (see, Exime v. Williams, 45 AD3d 633 [2nd Dept., 2007]; Cox v. Nunez, 23 AD3d 427 [2nd Dept., 2005]). Thus, a driver who lawfully enters an intersection may be found partially at fault for an accident if he or she failed to use reasonable care to avoid colliding with another vehicle in the intersection (see, Gorham v. Methun, 57 AD3d 480 [2nd Dept., 2008]; Exime v. Williams, 45 AD3d 633 [2nd Dept., 2007]; Siegel v. Sweeney, 266 AD2d 200 [2nd Dept., 1999]).

Here, defendants Cool Power and Taormina established *prima facie* their entitlement to summary judgment on the issue of liability. The evidence showed that after stopping at the stop sign Deslouches proceeded into the intersection without having observed the Cool Power/Taormina vehicle (despite the fact that it was a clear day, nothing was blocking his vision, and he could see 1000 feet ahead), was accelerating at the time of the collision and failed to yield the right of way to co-defendants' oncoming vehicle in violation of Vehicle and Traffic Law §1142 (see, Batts v. Page, 51 AD3d 833 [2nd Dept., 2008]; Exime v. Williams, 45 AD3d 633 [2nd Dept., 2007]; Hull v. Spagnoli, 44 AD3d 1007 [2nd Dept., 2007]; McCain v. Larosa, 41 AD3d 792 [2nd Dept., 2007]; McKeaveney v. Reiffert, 268 AD2d 411 [2nd Dept., 2000]).

The burden, therefore, shifted to plaintiff and co-defendant Deslouches to raise a triable issue of fact as to whether Cool Power and Taormina were negligent and, if so, whether such negligence was a proximate cause of the accident (see, Maliza v. Puerto-Rican Transp. Corp., 50 AD3d 650 [2nd Dept., 2008]; McNamara v. Fishkowitz, 18 AD3d 721 [2nd Dept., 2005]; see generally, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]). Neither plaintiff nor defendant Deslouches presented proof raising a triable issue of fact. Significantly, there is no evidence in the record supporting the

conclusory assertions that Cool Power and Taormina contributed to the causation of the accident since defendant Deslouches was under an obligation to yield the right of way to oncoming vehicles (see, Goemans v. County of Suffolk, 57 AD3d 478 [2nd Dept., 2008]; Maliza v. Puerto-Rican Transp. Corp., 50 AD3d 650 [2nd Dept., 2008]; Exime v. Williams, 45 AD3d 633 [2nd Dept., 2007]) or that defendant Taormina could have avoided the collision (see, Carpio v. Leahy Mech. Corp., 30 AD3d 554 [2nd Dept., 2006]; Ishak v. Guzman, 12 AD3d 409 [2nd Dept., 2004]; Meliarenne v. Prisco, 9 AD3d 353 [2nd Dept., 2004]), and defendants Cool Power and Taormina had a preferential right of way (Vehicle and Traffic Law §149). Since plaintiff did not observe the accident and defendant Deslouches did not see the Cool Power/Taormina vehicle until the accident occurred, neither has rebutted the testimony of defendant Taormina which indicated that he attempted to avoid the collision by hitting his brakes, sounding his horn and turning to the right immediately prior to the collision. Accordingly, as the undisputed evidence shows defendant Deslouches failed to yield the right of way to the approaching vehicle driven by Taormina, the portion of the motion for partial summary judgment on the issue of liability is granted. In light of the foregoing, the portion of the cross motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury as defined in Insurance Law §5102 (d) is denied as moot.

Based on the foregoing, it is

ORDERED that the motion by defendant Rools Deslouches for an order pursuant to CPLR §3212 granting summary judgment in his favor dismissing plaintiff's complaint on the ground that he did not sustain a "serious injury" as defined in Insurance Law §5102 (d) is denied; and, it is further

ORDERED that the portion of the cross motion by defendants Cool Power LLC and Peter Taormina for an order pursuant to CPLR §3212 granting summary judgment in their favor dismissing plaintiff's complaint and all cross claims interposed against them on the issue of liability is granted and the portion of the cross motion by defendants Cool Power LLC and Peter Taormina for an order pursuant to CPLR §3212 granting summary judgment in their favor dismissing plaintiff's complaint on the ground that he did not sustain a "serious injury" as defined in Insurance Law §5102 (d) is denied as moot.

Dated: 2/8/2012

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION