SHORT FORM ORDER

INDEX No. 10-10964
CAL No. 12-00358 MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 48 - SUFFOLK COUNTY

PRESENT:

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE 4-27-12 (#002 & #003)
MOTION DATE 5-1-12 (#004)
ADJ. DATE 7-3-12
Mot. Seq. # 002 - MD
003 - XMD
004 - XMotD

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LEIGHTON HIBBERT,

Plaintiff,

- against -

JOSEPH F. PALMIERI, LARAESHELL T.L. GREEN, and J & J TOWING PLUS, INC.,

Defendants.

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Upon the following papers numbered 1 to 38 read on this motion and cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15; Notice of Cross Motion and supporting papers 16 - 22; 23 - 36; Answering Affidavits and supporting papers 37 - 38; Replying Affidavits and supporting papers __; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (# 002) by defendant Laraeshell Green for an order granting summary judgment dismissing the complaint against her on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied; and it is further

ORDERED that the cross motion (# 003) by defendants Joseph Palmieri and J & J Towing Plus, Inc. for an order granting summary judgment dismissing the complaint against them on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied; and it is further

ORDERED that the cross motion (# 004) by plaintiff for an order granting summary judgment in his favor on the issue of his liability for the accident is decided as follows.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, Leighton Hibbert, when the vehicle in which he was a passenger collided with a vehicle owned by defendant J & J Towing Plus, Inc. and operated by defendant Joseph Palmieri. The accident allegedly occurred on June 23, 2008 at approximately 12:30 p.m. at the intersection of Barcellona Place and Great Neck Road in the Town of Babylon, New York. At the time of the accident, plaintiff was a front-seat passenger in a vehicle owned and operated by defendant Laraeshell Green.

It is undisputed that Great Neck Road, a two-way road, runs north and south, and that Barcellona Place, a two-way road, runs east and west and terminates at a T-intersection with Great Neck Road. On the day of the accident, Barcellona Place was controlled by a stop sign.

By his bill of particulars, plaintiff alleges that, as a result of the subject accident, he sustained serious injuries including herniated discs at C4-C5 and C5-C6; straightening of the cervical spine; cervical facet syndrome; cervical disc displacement; cervical discogenic syndrome; cervical myofascial pain and dysfunction syndrome; cervical sprain/strain; stiffness in the cervical spine; left proximal neuropathy; left cubital tunnel syndrome; left ulnar neuropraxia; and stiffness or numbness in ulnar nerve distribution, left upper extremity, arm, hand and fingers.

Defendant Laraeshell Green now moves for an order granting summary judgment dismissing the complaint against her on the ground that plaintiff has not sustained a "serious injury" as defined in Insurance Law § 5102 (d).

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."

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***, 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 a "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 (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Akhtar v Santos*** 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff's own deposition testimony and the affirmed medical report of the defendant's own examining physician (*see* ***Moore v Edison***, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; ***Farozes v Kamran*** 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Here, defendant Green failed to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see* ***Reitz v Seagate Trucking, Inc.***, 71 AD3d 975, 898 NYS2d 173 [2d Dept 2010]). On July 20, 2011, approximately three years and one month after the subject accident, defendant Green's examining orthopedist, Dr. Barry Katzman, examined plaintiff, using certain orthopedic and neurological tests including Spurling's maneuver, Neer and Hawkins impingement signs, and Apprehension sign. All the test results were negative. Dr. Katzman performed range of motion testing on plaintiff's cervical spine, shoulders and right elbow using a goniometer. He found that, although plaintiff had full range of motion in his shoulders, he had range of motion restriction: 70 degrees rotation (90 degrees normal) in his cervical spine and 110 degrees flexion (150 degrees normal) in his left elbow (*see* ***Jean v New York City Tr. Auth.***, 85 AD3d 972, 925 NYS2d 657 [2d Dept 2011]; ***Reitz v Seagate Trucking, Inc.***, 71 AD3d 975, 898 NYS2d 173 [2d Dept 2010]). Moreover, although plaintiff claimed in the bill of particulars that he sustained stiffness or numbness in his cervical spine, left upper extremity, arm, hand and fingers as a result of this accident, defendant Green has not submitted a report from a neurologist who examined plaintiff ruling out the claimed neurological injury (*see* ***McFadden v Barry***, 63 AD3d 1120, 883 NYS2d 83 [2d Dept 2009]; ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]; ***Lawyer v Albany OK Cab Co.***, 142 AD2d 871, 530 NYS2d 904 [3d Dept 1988]; ***Faber v Gaugler***, 2011 NY Slip Op 32623U, 2011 NY Misc Lexis 4742 [Sup Ct, Suffolk County, 2011]).

Inasmuch as defendant Green failed to meet her prima facie burden, it is unnecessary to consider whether the papers submitted by plaintiff in opposition to defendant Green's motion for summary judgment were sufficient to raise a triable issue of fact (*see* ***McMillian v Naparano***, 61 AD3d 943, 879 NYS2d 152 [2d Dept 2009]; ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]). Thus, defendant Green's motion is denied.

Defendants Joseph Palmieri and J & J Towing Plus, Inc. cross-move for an order granting summary judgment dismissing the complaint against them on the ground that plaintiff has not sustained a "serious injury" as defined in Insurance Law § 5102 (d). In support, they submits the pleadings, an affidavit of one of their attorneys which attempts to "join in" the motion by defendant Green, and the affirmed MRI report dated March 19, 2012 of their examining radiologist, Dr. Alan Greenfield.

On March 19, 2012, Dr. Greenfield reviewed the MRI examination of plaintiff's cervical spine, performed on August 11, 2008. Dr. Greenfield found that there were degenerative disc bulging and small

degenerative bone spurs at C4-C5 and C5-C6, and concluded that plaintiff's degenerative disc changes in his cervical spine were pre-existing and causally unrelated to the subject accident. Dr. Greenfield's report does not constitute competent medical evidence herein as the physician merely "reviewed" the MRI examination of the plaintiff's cervical spine (*see* ***Patterson v Fives***, 2010 NY Slip Op 31232U, 2010 NY Misc Lexis 2330 [2010]). Dr. Greenfield's MRI report was not paired with his observations of the plaintiff during a physical examination (*see* ***Perl v Meher***, *supra*). Thus, the cross motion by defendants Joseph Palmieri and J & J Towing Plus, Inc. is denied, as discussed above.

Plaintiff cross-moves for summary judgment in his favor on the issue of liability. In support, plaintiff submits, *inter alia*, the pleadings and the transcripts of the deposition testimony given by plaintiff and defendants Laraeshell Green and Joseph Palmieri.

At her examination before trial, defendant Green testified to the effect that, when she exited a parking lot which is on the corner of Barcellona Place and Great Neck Road, she made a left turn onto Barcellona Place and traveled eastbound "a couple car lengths." When she stopped at the stop sign for approximately one minute at the intersection with Great Neck Road, she observed a UPS truck traveling southbound on Great Neck Road, which is a two-way road with two lanes in each direction. The truck was in the right lane before the intersection, and the truck driver was "letting [her] go." When she was "creeping forward" to make a left turn onto Great Neck Road, she saw the Palmieri vehicle traveling southbound on Great Neck Road coming toward her. She applied her brakes, but was unable to avoid the collision.

At his deposition, plaintiff testified to the effect that, while he was traveling eastbound as a front seat passenger in a vehicle driven by defendant Green, the vehicle was struck on the driver side by the Palmieri vehicle at the intersection with Great Neck Road. Plaintiff testified that, immediately prior to the collision, defendant Green stopped her vehicle and yelled out, and he just tried to brace himself.

At his deposition, defendant Palmieri testified to the effect that he had been traveling southbound on Great Neck Road, which has one lane of travel in each direction, as well as a center turning lane. While he was traveling in the center turning lane almost one block away from the intersection with Barcellona Place, he was passing a Verizon truck which stopped in the southbound lane of Great Neck Road. Before passing the Verizon truck, he was driving at about 10 miles per hour, and first saw the Green vehicle, which stopped at the stop sign on Barcellona Place. Thereafter, when he observed the Green vehicle coming through the stop sign, he applied his brakes and sounded his horn, but collided with the vehicle.

It is well settled that the right of an innocent passenger to summary judgment on the issue of whether he or she was at fault in the happening of an accident is not restricted by potential issues of comparative negligence as between two defendant drivers (*see* CPLR 3212 [g]; ***Medina v Rodriguez***, 92 AD3d 850, 939 NYS2d 514 [2d Dept 2012]; ***Conigliaro v Premier Poultry, Inc.***, 67 AD3d 954, 888 NYS2d 779 [2d Dept 2009]).

Here, plaintiff established his prima facie entitlement to summary judgment by demonstrating that he did not engage in any culpable conduct that contributed to the happening of the accident (*see* ***Medina v Rodriquez***, *supra*), notwithstanding the outstanding issues as to any comparative negligence on the part of the defendants.

In opposition, defendant Green submits only the affirmations of one of her attorneys. The affirmation from an attorney having no personal knowledge of the facts is without evidentiary value and, thus, is insufficient to raise a triable issue of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Hubbard v County of Madison***, 93 AD3d 939, 939 NYS2d 619 [3d Dept 2012]; ***Sanabria v Paduch***, 61 AD3d 839, 876 NYS2d 874 [2d Dept 2009]; ***Prince v Accardo***, 54 AD3d 837, 863 NYS2d 819 [2d Dept 2008]). Although defendant Green contends that she is not liable for the subject accident, and that defendant Palmieri's negligence was the sole proximate cause of the accident, the evidence submitted in opposition is insufficient to raise a triable issue of fact as to the plaintiff's negligence. Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to raise a triable issue of fact (*see* ***Zuckerman v City of New York***, *supra*; ***Javaheri v Old Cedar Devel. Corp.***, 84 AD3d 881, 923 NYS2d 140 [2d Dept 2011]; ***Pandey v Parikh***, *supra*). In addition, defendant Palmieri has not opposed the plaintiff's motion.

Accordingly, plaintiff's cross motion for summary judgment is granted to the extent that it is determined that he is not liable for the happening of the accident, and plaintiff's remaining arguments regarding any comparative negligence on the part of the defendants are factual issues for the trial court to determine.

The foregoing constitutes the Order of this Court.

Dated: September 18, 2012
Central Islip, NY

HON. HECTOR D. LASALLE, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION