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SHORT FORM ORDER

INDEX No. 11-14035
CAL. No. 12-01253MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 8-9-12
ADJ. DATE 11-13-12
Mot. Seq. # 001 - MD

SALVATORE IANELLI, Plaintiff, - against - VILLAGE OF BABYLON and CHARLES KROPHER, Defendants.	LITE & RUSSELL Attorney for Plaintiff 212 Higbie Lane West Islip, New York 11795 SILER & INGBER LLP Attorney for Defendants 301 Mineola Boulevard Mineola, New York 11501

Upon the following papers numbered 1 to __ read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-16; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 17-27; Replying Affidavits and supporting papers 28-29; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (001) by the defendants, Village of Babylon and Charles Kropher, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that they have immunity and bear no liability for the occurrence of the accident pursuant to Vehicle and Traffic Law § 1104 and § 1103 (b) is denied; and on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d) is denied.

In this negligence action, the plaintiff, Salvatore Ianelli, seeks damages for personal injuries allegedly sustained on January 26, 2011, at about 11:43 p.m., on Deer Park Avenue at or near its intersection with George Street in Babylon, New York. It is alleged that the defendant, Charles Kropher, an employee of the Village of Babylon, was driving a truck owned by the Village of Babylon, and backed into the plaintiff's vehicle and a telephone pole, knocking the telephone pole over and causing it to fall on the roof and hood of the plaintiff's vehicle.

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 ***(Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). 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 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 [2d Dept 1981]).

In support of this application, the defendants have submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, defendants' answer, and plaintiff's verified and supplemental verified bills of particular; a copy of the unsigned and uncertified transcript of the 50-h hearing of Salvatore Ianelli dated April 7, 2011 which is not in admissible form (***see Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; ***McDonald v Maus***, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; ***Pina v Flik Intl. Corp.***, 25 AD3d 772, 808 NYS2d 752 [2d Dept 2006]); the unsigned but certified transcript of the examinations before trial of Salvatore Ianelli dated January 31, 2012; the signed and certified transcript of the examination before trial of Charles Kropher dated January 31, 2012 with a poor photocopy of an unidentifiable picture; a copy of a medical record from St. Joseph Hospital emergency room; a letter of medical necessity dated January 28, 2011; uncertified and unauthenticated copies of the MRI reports of plaintiff's lumbar spine dated April 16, 2011, cervical spine dated March 28, 2011; and the sworn report by Joseph P. Stubel, M.D. concerning his independent orthopedic examination of the plaintiff. It is noted that in opposing this motion, the plaintiff has submitted, inter alia, an unsigned copy of the plaintiff's testimony of April 7, 2011 which is considered as adopted by him (***see Ashif v Won Ok Lee,*** 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]). The plaintiff has also submitted his affidavit as well as various medical records.

The defendants seek summary judgment on the basis that, pursuant to Vehicle and Traffic Law § 1103, they are immune from liability in this action because Charles Kropher was not recklessly operating the truck owned by the Village of Babylon when he backed up and struck the or plaintiff's vehicle or the telephone pole, which then fell on the plaintiff's vehicle.

Vehicle and Traffic Law § 1104 exempts emergency vehicles, such as ambulances, police vehicles and fire vehicles, engaged in emergency operations from the rules of the road, subject to specified conditions. Vehicle and Traffic Law § 1103 (b) provides in pertinent part that "[the] foregoing provisions... shall not relieve any person, or team or any operator of a motor vehicle or other equipment while actually engaged in work on a highway from the duty to proceed at all times during all phases of such work with due regard for the safety of all persons nor shall the foregoing provisions protect such persons or teams or such operators of motor vehicles or other equipment from the consequences of their reckless disregard for the safety of others." In ***Riley v County of Broome***, 95 NY2d 455, 719 NYS2d 623 [2000]), the Court affirmed that under N.Y. Veh. & Traf. Law § 1103 (b), "'hazard vehicles" such as snowplows and streetsweepers were exempt from the rules of the road, just as emergency vehicles were exempted. The rule exempted all vehicles actually engaged in work on a highway...." Further, it stated that the recklessness standard was the proper standard of care to apply to such vehicles, and that to recover for injuries caused by such vehicles, it must be shown that the actor has intentionally done an act of an unreasonable character in disregard of a

known or obvious risk that was so great as to make it highly probable that harm would follow, and has done so with conscious indifference to the outcome.

In the instant action, the evidentiary proof establishes that defendant Charles Kropher is now retired from the Village of Babylon where he worked as a truck mechanic. He was involved in an accident on January 26, 2011 while operating a snow plow, a ten-wheel, twenty-eight foot Mack Roll-off, which weighed about 38,000 pounds and was loaded with sand. The accident occurred in the late evening on Deer Park Avenue, near Gino's Pizza, located at the corner of Old Deer Park Avenue and Railroad Avenue. Kropher had started working at 7:00 a.m. on the date of the accident. He had four hours of sleep the evening before the accident. When the accident occurred, he had been plowing for ten hours, and was operating the truck alone, traveling in a southerly direction on Deer Park Avenue, plowing snow on the shoulder of the road which was used for cars to park. As he traveled on the shoulder, while continuing to plow, he noticed a vehicle about twenty feet ahead parked on the side shoulder just north of Gino's Pizza, to his right. He stated that it was his normal practice to drive the plow right up to any cars that were parked in the shoulder so he could move snow. He then testified that he was about twenty to twenty-five feet from the rear of that vehicle when he stopped.

Kropher continued that after he stopped, he backed up, utilizing his rear view mirrors on the side of the truck, and saw no vehicle in back of him. Although it was snowing heavily, he stated he was able to see from his mirrors as the mirrors were heated and were not covered with snow. He rolled backwards at about one mile an hour, and traveled a distance of ten feet when he heard a noise which sounded like a squeal or high pitched sound, and brought his truck to a stop. He did not get out of his vehicle to look where the noise came from, as he thought the front plow might have been dragging and making a noise, which he stated is unusual when backing up. He saw nothing when he looked into his mirrors, so he moved to his left and turned onto the main portion of Deer Park Avenue into the center travel lane and immediately heard something hit, sounding like a telephone pole or a crack, so he pulled up alongside of the car which was parked on the shoulder in front of Gino's Pizza and stopped. From his driver's side rear view mirror, he saw that a telephone pole was down. As he looked into his driver's rear view mirror, he saw a car with a telephone pole on top of it. He did not get out of his vehicle, but notified his superintendent, Skip Gardner, that he struck a telephone pole and that it fell on a car. Gardner, who was around the corner, immediately responded. In the interim, he jumped out of the truck in case there were wires on his truck, as he could see that wires and a transformer were down. Before he got out of the truck, he saw flashes from the transformer which was on fire and was on the car. By then, he saw that the person whose car was struck by the telephone pole had gotten out of his car. The police and his superintendent arrived at the scene. He then testified that he told the police officer that he backed up, heard a noise, moved forward, and his truck hit a pole.

Salvatore Ianelli testified to the extent that on January 26, 2011, at about 11:30 to 11:40 p.m., he was traveling south on Deer Park Avenue which consisted on one travel lane in each direction, and was flat and level. It was snowing, there was snow on the ground, and he was traveling about a car and a half length behind the snow plow at about 25 to 30 miles per hour. There was no one traveling behind him. There was another snow plow traveling westbound on Railroad Avenue at the intersection with Railroad Avenue just ahead. The snowplow in front of him stopped for about two seconds for the other snowplow on Railroad Avenue, and went into reverse, quickly backing up. He thought the snow plow was going to back over his vehicle. The plaintiff testified that he honked his horn at the snowplow when it started backing up, but it

did not stop. The plow then hit the front of his car and a telephone pole located in front of Gino's Pizza. The telephone pole, with the transformer attached, immediately fell hard on the hood of his vehicle. The transformer blew and was sparking, but his vehicle did not catch on fire. He immediately jumped out of his car, ran across the street and called 911.

In ***Bliss v State of New York***, 95 NY2d 011, 719 NYS2d 631 [2000], the Court of Appeals determined that the plaintiff had raised a triable issue as to whether the defendants' driver had driven recklessly while backing up in excess of the maximum safe speed, with only side view mirrors, down a narrow decline, outside the safety cones, without sounding his horn, and with no spotter (see Veh. & Traf. Law § 1211 (a)).[1] In ***Petosa v City of New York***, 52 AD2d 919, 383 NYS2d 397 [2d Dept. 1976]), the court noted that any violation of a statute is "unexcused" unless observance of a statute would subject [one] to more imminent danger. In ***Bliss v State of New York***, 179 Misc2d 549, 686 NYS2d 556 [1998], the court reasoned that the recklessness standard requires more than a showing of lack of due care, but a disregard of a known or obvious risk.

Here, there are factual issues concerning whether or not the defendant operator of the snow plow was acting in reckless disregard for the safety of others in backing up his vehicle and failing to see the telephone pole or the plaintiff's vehicle before he backed into it. There is a further factual issue as to whether the defendant operator of the snow plow, acted with reckless disregard with and with conscious indifference to the outcome by intentionally moving his vehicle ahead without determining what he had struck or determining the condition which he created (***see Mendoza v Grace Industries, Inc.***, 4 AD3d 272, 772 NYS2d 687 [1st Dept 2004]; ***Sullivan v Town of Vestal***, 301 AD2d 824, 753 NYS2d 607 [3d Dept 2003]). Factual issues also exist as to how fast the defendants' snowplow was traveling when it was backing up, as the defendant testified he was only traveling about one mile an hour, and the plaintiff testified that the snowplow was backing up quickly. There is a further question as to how safely the defendant operated the snow plow in light of plaintiff's testimony that the snowplow only stopped for two seconds prior to backing up and striking his vehicle. Questions exist as to the whether the defendant was operating the snowplow without sufficient sleep and rest, as he had been plowing for ten hours when the accident occurred; whether the lights on the vehicle were properly working and illuminated; and why the defendant did not see the lights from the headlights on plaintiff's vehicle prior to backing up. There are factual issues concerning whether the defendant operator was driving on a travel lane or the shoulder of the road, as the parties' testimonies conflict. There are factual and credibility issues raised concerning why the operator of the snow plow backed up when he testified that he stopped about twenty to twenty-five feet from the parked vehicle, and then backed up to pull onto the road, whereas it was his custom to plow up to a vehicle parked on a shoulder.

Based upon the foregoing, it is determined that the defendants have not established prima facie entitlement to summary judgment dismissing the complaint pursuant to Vehicle & Traffic Law § 1103 and that there are factual issues raised by the plaintiff which further preclude summary judgment from being granted to the defendants.

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[1]Pursuant to the relevant portions of Vehicle & Traffic Law § 1211 (a), a "driver of a vehicle shall not back the same unless such movement can be made with safety and without interfering with other traffic."

Accordingly, that part of motion (001) for summary judgment dismissing the complaint pursuant to Vehicle & Traffic Law § 1103 is denied.

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 [2d 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 [3d Dept 1990]).

In order to recover under the "permanent loss of use" category, a 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*).

By way of the verified bill of particulars, the plaintiff alleges that as a result of this accident, he sustained injuries consisting of left posterolateral disc herniation extruding into the left anterior recess and origin to the left neural foramen at C7-T1; bulging discs at C4-5 and C5-6; subligamentous bulges in the extension position at C2-3 and C3-4; C5-7 radiculopathy; left predominant L5-S1 disc herniation impressing the left thecal sac and impression and posterior displacement on the exiting left S1 nerve root in the foramen; subligamentous L4-5 disc herniation impressing the thecal sac and having peripheral components into the foramen and L5 nerve roots which are abutted prior to their exit from the thecal sac; right lateral

subligamentous disc herniation at L3-4 impressing on the right L3 nerve root in the foramen accompanied by posterior disc bulging; and derangements of the shoulders.

Upon review and consideration of the defendants' evidentiary submissions, it is determined that the defendants have not established prima facie entitlement to summary judgment dismissing the complaint on the basis that Salvatore Ianelli did not sustain a serious injury as defined by Insurance Law § 5102 (d).

Defendants' expert, Dr. Stubel, has not submitted a copy of his curriculum vitae to qualify as an expert, other than stating he is licensed to practice medicine in New York. Although he reviewed the plaintiff's cervical and lumbar MRIs, he only set forth partial findings in his report, when his findings are compared to the actual reports submitted by the defendants. With reference to the lumbar MRI, Dr. Stubel did not include the findings of the impression and posterior displacement on the exiting left S1 nerve root as it exits the thecal sac, and the left lateral component into the left neural foramen abutting the left L5 nerve root; L2-3 bulging encroaching into the foramen; retrolisthesis at L2-3 through L4-5; or abutment of the L5 nerve roots from the L4-5 disc herniation. With reference to the cervical MRI, Dr. Stubel fails to mention that the posterior disc bulges impress the thecal sac at C4-5 and C5-6; or the left posterolateral disc herniation at C7-T1. These omissions are significant in that the plaintiff has pleaded cervical and lumbar radiculopathy, and such injury has not been ruled out by Dr. Stubel. Additionally, no report from an examining neurologist has been submitted to address the radicular injuries claimed by the plaintiff, thus further raising factual issues which preclude summary judgment (***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]; ***Rodriguez v Schickler***, 229 AD2d 326, 645 NYS2d 31 [1st Dept 1996]).

Although Dr. Stubel set forth range of motion findings relative to his examination of the plaintiff's lumbar and cervical spine and compared those findings to the normal range of motion values, he has failed to set forth the method employed to obtain such measurements, such as the goniometer, inclinometer or arthroidal protractor (***see Martin v Pietrzak***, 273 AD2d 361, 709 NYS2d 591 [2d Dept 2000]; ***Vomero v Gronrous***, 19 Misc3d 1109A, 859 NYS2d 907 [Sup Ct, Nassau County 2008]), leaving it to this court to speculate as to how he determined such ranges of motions when examining the plaintiff. Disc herniation and limited range of motion based on objective findings may constitute evidence of serious injury (***Jankowsky v Smith,*** 294 AD2d 540, 742 NYS2d 876 [2d Dept 2011]). Although Dr. Stubel has diagnosed the plaintiff with neck and back sprains, he failed to address the claimed cervical and lumbar disc herniations and has not ruled out that they are causally related to the subject accident. Dr. Stubel does mention, however, that the plaintiff had no pre-existing conditions, raising a questions whether such injuries are causally related to the accident. These factual issues concerning how the range of motion measurements were obtained, and whether or not the plaintiff sustained the claimed herniated and bulging discs as a result of the accident, preclude the granting of summary judgment.

It is noted that the defendants' examining physician did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering the defendants' physician's affidavit insufficient to demonstrate entitlement to summary judgment on the issue of whether the plaintiff was unable to substantially perform all of the material acts which constituted her usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; *see* ***Uddin v Cooper***, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; ***Toussaint v Claudio,*** 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]), and the expert offers

no opinion with regard to this category of serious injury (*see* ***Delayhaye v Caledonia Limo & Car Service, Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]). Additionally, the plaintiff testified to the extent at his hearing in April, 2011, that he was receiving physical therapy five days a week since the day after the accident. He testified that he has trouble sleeping on his back, lifting heavy cases at work, and that he cannot play the drums as he used to, as sitting makes his back hurt. Getting dressed is painful, as the mere physical bending necessary to put on his clothes and groom himself cause him to have neck and back pain to the point that multiple breaks are necessary before completing the task. While driving more than several minutes, he develops pain and has to stop, pull over, and get out of the car to stop the pain. With regard to his job as a butcher at Pathmark, he can no longer perform the physical requirements due to pain, and he needs help to lift or move meat, break down deliveries, or set up display counters due to the bending. He cannot cut meat for longer than ten minutes or lift and move heavy boxes, and does light duty due to his limitations. He stated that he has to spend several hours a week in therapy to keep the pain down and that he struggles to overcome the pain while doing everyday, simple activities. Prior to the accident, he stated, he was a 25 year old butcher with no pain to overcome, and now he struggles to perform the most basic of tasks due to the pain. Based upon the foregoing, it is determined that the defendant has not demonstrated prima facie entitlement to summary judgment on this category of injury.

The factual issues raised in defendants' moving papers preclude summary judgment. The defendants have failed to satisfy the burden of establishing, prima facie, that plaintiff 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]); *see also* ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]). Inasmuch as the moving party has failed to establish prima facie entitlement to judgment as a matter of law in the first instance on the issue of "serious injury" within the meaning of Insurance Law § 5102 (d), 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, 867 NYS2d 339 [2d Dept 2008]); ***Krayn v Torella***, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; ***Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]).

Accordingly, that part of motion (001) by the defendants for summary judgment dismissing the complaint on the basis that the plaintiff did not suffer a serious injury as defined by Insurance Law §5102 (d) is denied.

Dated: January 22, 2013

J.S.C.

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION