Short Form Order

COPY

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Laron Jones,	Index No.: 47014/2009
Plaintiff,	Attorneys [See Rider Annexed]
-against-	Motion Sequence No.: 005; MD Motion Date: 10/12/12
Uptown Caterers, Inc., Jonathan Weigelt, William Schwartz, Tamia J. Hardy and Edward Hardy, Jr.,	Submitted: 2/13/13
Defendants.	Motion Sequence No.: 006; MD Motion Date: 10/12/12 Submitted: 2/13/13

Upon the following papers numbered 1 to 24 read upon these motions for summary judgment: Notice of Motion and supporting papers (005), 1 - 10; (006) 11 - 20; Answering Affidavits and supporting papers, 21 - 22; Replying Affidavits and supporting papers, 23 - 24; it is

ORDERED that motion (005) by the defendants, Uptown Caterers, Inc. and Jonathan Weigelt, for summary judgment on the basis that the plaintiff, Laron Jones, has not sustained a serious injury as defined by Insurance Law § 5102, is denied; and it is further

ORDERED that motion (006) by the defendant, William Schwartz, for summary judgment on the basis that the plaintiff, Laron Jones, has not sustained a serious injury as defined by Insurance Law § 5102, is denied.

In this action, the plaintiff, Laron Jones, seeks damages for injuries alleged to have been sustained on September 9, 2009, on Wellwood Avenue at or near the intersection with Pinelawn Entrance, in Babylon, New York, in this multi-car chain collision accident. It is alleged that the front end of the vehicle operated by defendant William Schwartz made contact with the rear-end of the vehicle operated by defendant Jonathan Weigelt. The front end of the vehicle operated by Jonathan Weigelt made contact with the rear-end of the vehicle operated by defendant Edward Hardy. The front of the Hardy vehicle then made contact with the rear-end of the plaintiff's vehicle.

While motion (006) was served on September 28, 2012, beyond the 120 days from filing the Note of Issue, dated May 16, 2012, as proscribed by CPLR 3212, and such untimeliness has been acknowledged by counsel for William Schwartz, this motion is considered as it contains issues identical to those raised by motion (005) with respect to whether or not the plaintiff sustained a serious injury as defined by Insurance Law § 5102 (d) (***Brill v City of New York,*** 2 NY3d 648, 781 NYS2d 261 [2004]).

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

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 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."

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 partially legible verified bill of particulars, the plaintiff alleges that as a result of the subject accident, the following injuries have been sustained: herniated disc at C3-4 impinging upon the anterior aspect of the spinal cord; herniated disc at C4-5 abutting the anterior aspect of the spinal cord; cervical spine sprain; bulging discs at L4-5 and L5-S1 impinging upon the anterior aspect of the spinal cord; and lumbar spine sprain.

In support of motion (005), the defendants have submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, answers served by Uptown Caterers and Weigelt with cross claim asserted against the co-defendants, and William Schwartz with cross claims asserted against co-defendants, each cross claim for judgment over; plaintiff's bill of particulars; signed reports of Marc Chernoff, M.D. concerning his independent orthopedic examination of the plaintiff dated March 19, 2012, and Steven W. Lastig, M.D. dated March 19, 2012 concerning his independent radiological review of the plaintiff's lumbar MRI and cervical MRI, both on September 16, 2009; and the transcript of the examination before trial of Laron Jones dated August 9, 2011.

In support of motion (006), the defendants have submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, answers served by Uptown Caterers and Weigelt with cross claim asserted against the co-defendants, and William Schwartz with cross claim asserted against co-defendants, each cross claim for judgment over, and the answer served by the Hardy defendants without a cross claim; plaintiff's bill of particulars; signed reports of A. Robert Tantleff, M.D. dated April 23, 2010 concerning his independent radiological reviews of the plaintiff's lumbar MRI and cervical MRI, both of September 16, 2009; and the transcript of the examination before trial of Laron Jones dated August 9, 2011. Defendants incorporate by reference those exhibits/evidentiary submissions submitted in support of motion (005).

Based upon review and consideration of the evidentiary submissions in motions (005) and (006), it is determined that the moving defendants have failed to establish prima facie entitlement

to summary judgment on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d).

None of the expert physicians have submitted copies of their respective curriculum vitae to qualify as experts in this action. None of the medical records or diagnostic studies reviewed by Marc Chernoff, M.D. have been provided in support of the moving defendants' expert opinion. Although the plaintiff had MRIs taken of his neck and lower back, and EMG and NCV studies conducted, Dr. Chernoff did not comment or rule in or out those findings contained in the initial reports, leaving this court to speculate as to the same. Neither Dr. Tantleff nor Dr. Lastig have submitted the copies of the reports prepared by the plaintiff's treating physicians concerning the initial MRI studies of the plaintiff's cervical and lumbar spine, which films the defendants' experts reviewed. Expert testimony is limited to facts in evidence (*see* ***Allen v Uh,*** 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Marzuillo v Isom,*** 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; ***O'Shea v Sarro***, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]; ***Hornbrook v Peak Resorts,*** Inc. 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]).

The plaintiff underwent EMG and NCV studies, however, defendants' examining physicians have not ruled out that the cited left sensory median neuropathy at the wrist and right C5 cervical radiculopathy are causally related to the accident, and no report from an examining neurologist concerning these neurological injuries and complaints has been submitted by the defendants (*see* ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]), thus, raising factual issues leaving this court to speculate as to whether or not the plaintiff sustained such neurological injuries and if they were proximately caused by the subject accident.

While Dr. Chernoff set forth his range of motion findings concerning the plaintiff's cervical spine and lumbar spine, he has failed to include the range of motion for cervical and lumbar: flexion, bilateral rotation and bilateral flexion, leaving this court to speculate as to his findings. Dr. Chernoff diagnosed the plaintiff as having cervical and lumbar sprains-resolved, however, he does not comment as to whether or not the cervical disc herniations and lumbar disc bulges are causally related to the subject accident. Dr. Lastig set forth the findings upon his review of the plaintiff's lumbar spine as mild smooth disc bulging at the L4-5 level, however, Dr. Chernoff set forth that the lumbar MRI report of September 16, 2009 revealed disc bulges at L4-5 and L5-S1, raising factual issues between the two interpretations, precluding summary judgment. Dr. Chernoff noted that the plaintiff's cervical MRI revealed subligamentous posterior disc herniations at C3-4 and C4-5, whereas, Dr. Lastig diagnosed mild smooth posterior disc bulging at the C3-4, 4-5, 5-6 and 6-7 disc spaces, creating further factual issues, precluding summary judgment. Additionally, Dr. Tantleff set forth in his radiological review of the plaintiff's cervical MRI study of September 16, 2009, that at C3-4, 4-5,and 6-7, there are minimal focal disc protrusions, most pronounced at C4-5 and to a lesser extent at C3-4, however, he does not classify such protrusions either by measurement or by nomination as either bulging or herniated. Dr Tantleff's differing opinion, likewise, precludes the granting of summary judgment.

The defendants' experts have offered no opinion as to whether the plaintiff was incapacitated from substantially performing the activities of daily living for a period of ninety days in the 180 days following the accident, and they did not examine the plaintiff during that statutory period (*see* ***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]; ***Delayhaye v Caledonia Limo & Car Service, Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]). The plaintiff, a then thirty-four year old laborer/driver with Babylon Town, was out of work for a year and a half after the accident, and was treated with physical therapy for approximately six months following the accident. At the time of the accident, he also had part-time seasonal employment with DeGenaro's Landscaping, which he could no longer do following the accident. Prior to September 9, 2009, he had no conditions or injuries relative to his neck or back, and since the accident, has not re-injured those parts of his body.

Based upon the foregoing, the defendants have failed to establish prima facie entitlement to summary judgment as to either category of injury defined in § 5102 (d). Inasmuch as the moving parties have failed to establish their 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) as to either category of injury, 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, motions (005) and (006) for summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as to either category of injury defined in Insurance Law § 5102 (d) are denied.

Dated: 3/15/2013

William B. Rebolini

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

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**

RIDER

Attorney for Plaintiff:

Siben & Siben, LLP
90 East Main Street
Bay Shore, NY 11706

Attorney for Defendants
Uptown Caterers, Inc. and Jonathan Weigelt:

Nicolini, Paradise, Ferretti & Sabella, PLLC
114 Old Country Road, Suite 500
Mineola, NY 11501

Attorney for Defendant William Schwartz:

Law Offices of Robert P. Tusa
898 Veterans Memorial Hwy., Suite 320
Hauppauge, NY 11788

Attorney for Defendants
Tamia J. Hardy and Edward Hardy, Jr.:

Martin, Fallon & Mulle, Esqs.
100 East Carver Street
Huntington, NY 11743

Clerk of the Court