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SHORT FORM ORDER

INDEX No. 11-1671
CAL No. 13-00740MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 9-4-13 (#004)
MOTION DATE 10-4-13 (#005)
ADJ. DATE 12-12-13
Mot. Seq. # 004 - MotD
005 - MD

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JOSHUA MULLER,

Plaintiff,

- against -

BENJAMIN S. MARKOWSKI and WILLIAM R. NELSON,

Defendants.

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ROSENBERG & GLUCK, LLP
Attorney for Plaintiff
1176 Portion Road
Holtsville, New York 11742

RUSSO, APOZNANSKI & TAMBASCO
Attorney for Defendants
875 Merrick Avenue
Westbury, New York 11590

Upon the following papers numbered 1 to 33 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (004) 1 - 10; (005) 11-13 (untabbed); Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers 14-29; 30-31; Replying Affidavits and supporting papers 32-33; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (004) by defendant, William R. Nelson, III, pursuant to CPLR 3212 for summary judgment dismissing the complaint and cross claims asserted against him on the basis that he bears no liability for the occurrence of the accident is granted, and the complaint and cross claims for contribution and indemnification asserted against him are dismissed; and for further order dismissing the complaint as asserted against him on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d) has been rendered academic by dismissal of the complaint and cross claims asserted against him on the issue of liability and is denied as moot; and it is further

ORDERED that motion (005) by the defendant, Benjamin S. Markowski, pursuant to CPLR 3212 for summary judgment dismissing the complaint 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, Joshua Muller, seeks damages for personal injuries alleged to have been sustained on April 21, 2010, on Fourth Avenue at or near its intersection with First Street, Town of Smithtown, Suffolk County, New York, when the defendants' vehicles came into contact. The plaintiff was a passenger in the vehicle operated by William Nelson, III.

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]). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***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]).

In support of motion (004), defendant Nelson has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, his answer with cross claim and demands, and plaintiff's verified bill of particulars; transcripts of the examinations before trial of Joshua Muller dated April 16, 2012, Benjamin Markowski dated June 11, 2012, and William R. Nelson: and the report of Steven L. Mendelsohn, M.D. concerning his independent radiologic review of plaintiff's left shoulder MRI dated May 11, 2010.

In support of motion (005),[1] defendant Markowski has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, his answer with cross claim and demands, and plaintiff's verified bill of particulars; transcripts of the examinations before trial of Joshua Muller dated April 16, 2012, and Benjamin Markowski dated June 11, 2012; and the reports of Steven L. Mendelsohn, M.D. concerning his independent radiologic review of plaintiff's left shoulder MRI dated May 11, 2010, and Jimmy Lim, M.D., concerning his independent orthopedic examination of the plaintiff on June 25, 2012. It is noted that motion (005) was served on September 9, 2012. The note of issue and certificate of readiness were filed on April 23, 2012. Pursuant to CPLR 3212, the last date to serve a motion for summary judgment was August 21, 2012. Thus, this motion was not timely served, and the moving defendant offers no excuse for the same, and does not ask permission to serve the motion beyond the statutory 120 days. The plaintiff has not objected to the untimeliness of motion (005). In the interest of

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[1] Counsel has failed to tab and separate the exhibits. In the future, each separate exhibit must be properly tabbed as required, as it makes it difficult for the court to match arguments to documents and to sort through the multitude of pages (*see* ***Youngewirth v Town of Ramapo Town Board***, 29 Misc3d 1221A [Sup Ct, Rockland County 2010]; ***Ro v Noah, ModaMaya Sa De CV. Inc.***, 2009 NY Slip Op 32598U [Sup Ct, New York County].

judicial economy, this Court will consider motion (005) in that it seeks identical relief for summary judgment on the issue of serious injury, as set forth in motion (004) which was timely served (see ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]; ***First Union Auto Finance, Inc.***, 16 AD3d 372, 791 NYS2d 596 [2d Dept 2005; ***Tucci v Colella,*** 26 Misc 3d 1234A, 907 NYS2d 441 [Sup Ct, Kings County 2010]).

LIABILITY

Joshua Muller testified to the extent that he was seated in the front passenger seat of William Nelson's car while they were en route to a meeting at work when the accident occurred. Nelson had been operating his vehicle in a southbound direction on Fourth Avenue for approximately one quarter mile when the accident occurred. Muller described First Street as having one lane in each direction running east and west, and Fourth Avenue as has having one lane in each direction running north and south. There were no traffic control devices on Fourth Avenue controlling the southerly direction of travel. He stated that First Street had a stop sign controlling east and west bound traffic. There was no traffic traveling in front of them on Fourth Avenue. He testified that Nelson's car was less than ten feet, or about a car length, from the intersection when he first saw defendant Markowski's vehicle moving into the intersection from the right. Less than one half of the Markowski vehicle was in the intersection at that point. Just prior to the accident, he saw Nelson look first to the left and then to the right as they approached the intersection. He also looked to the left and saw no cars coming, and then looked to the right and saw a bush, then he saw the Markowski vehicle three seconds later. He did not see the Markowski vehicle stop at any time. The front end of the Nelson vehicle, and the middle towards the rear wheel well of the driver's side of the Markowski vehicle, made contact. Upon impact, the Nelson vehicle came to a stop and the Markowski vehicle spun counterclockwise to the other side of the intersection.

Benjamin Markowski testified to the extent that at the time of the accident on the afternoon of April 21, 2010, he had been operating his 1987 Chevy Monte Carlo for about a half block on First Street, when he came to the corner of the intersection with Fourth Avenue. There was a stop sign at that intersection controlling his travel direction on First Street. Markowski testified that he brought his car to a stop three feet back from the intersection for about five seconds, then later testified that he stopped for five to ten seconds. He looked to his right, then looked to the left for three seconds, and did not see anybody, looked straight ahead, and proceeded forward, going straight on First Street for about one car length. Three to four seconds later the impact occurred. As he looked to his left, he stated, there was shrubbery obstructing his view, permitting him to see only about five car lengths down Fourth Avenue. He did not make a second stop at the intersection or inch forward to observe if there was traffic to his left, he stated. He saw the Nelson vehicle in the intersection to his left in his peripheral vison, from the corner of his eye, when he was almost over to the other side of the road, traveling about five miles per hour. The impact occurred to the left rear driver's side of his vehicle (rear quarter panel), and his vehicle spun one and a half times with the impact. His vehicle came to a rest facing straight again on First Street and had crossed over Fourth Avenue. He continued that the Nelson vehicle crossed over First Street and came to a stop on the other side of Fourth Avenue.

William Nelson testified to the extent that he had been operating a 1999 Nissan Altima south on Fourth Avenue for about one minute. His highest rate of speed was twenty to twenty five miles per hour in the residential neighborhood. The accident occurred about one quarter of a mile from where he entered onto Fourth Avenue at the intersection with First Street. He had no traffic control device for his direction of travel, but before he entered into the intersection, he looked to the right, where he saw a big bush. He was about a third of the way into the intersection when he saw the Markowski vehicle moving directly in front of him a split second prior to the accident, at the middle of the intersection. He stepped on his brakes, but there was not enough time to stop his car. He thought he might have moved his steering wheel to the right. His entire front end of his vehicle, which was in the southbound lane, made contact with the rear quarter panel portion of the Markowski vehicle. Nelson testified that he did not know if Markowski stopped at the stop sign or just rolled through. He felt like the Markowski vehicle kept going.

Vehicle & Traffic Law § 1172 (a) provides in relevant part that, except when directed to proceed by a police officer, every driver of a vehicle approaching a stop sign shall stop at a clearly marked stop line ... at the point nearest the intersecting roadway where the driver has view of the approaching traffic on the intersecting roadway before entering the intersection and the right to proceed shall be subject to the provisions of section eleven hundred forty-two. Vehicle & Traffic Law § 1142 (a) provides in relevant part that, except when directed to proceed by a police officer, every driver of a vehicle approaching a stop sign shall stop as required by section eleven hundred seventy-two and after having stopped shall yield the right of way to any vehicle which has entered the intersection from another highway or which is approaching so closely on said highway as to constitute an immediate hazard during the time when such driver is moving across or within the intersection.

A violation of Vehicle & Traffic Law §§ 1142 (a) and 1172 (a) by failing to yield to another driver's right of way, constitutes negligence as a matter of law. A defendant driver is obligated to see that which by proper use of his senses he should have seen, and a driver with the right-of-way, is entitled to anticipate that the other driver will obey traffic laws that require him to yield (***Johnson v Ahmed***, 63 AD3d 1108, 883 NYS2d 249 [2d Dept 2009]; ***Perez v Paljevic***, 31 AD3d 520, 818 NYS2d 581 [2d Dept 2006]).

In the instant action, it is determined that defendant Markowski failed to see that which by the proper use of his senses he should have seen, namely, the plaintiff's vehicle with the right of way approaching the intersection. Although Markowski stated that when he stopped for the stop sign controlling his direction of travel, there was a bush on the corner which did not permit him to see to his left beyond five car lengths down Fourth Avenue, he did not stop again or inch up to the stop sign at the intersection to see if a vehicle was approaching. Instead, he proceeded into the intersection, and failed to see the plaintiff's vehicle approaching with the right of way to his left. The plaintiff was entitled to anticipate that the defendant would obey the traffic laws and stop sign which required him to stop and yield the right of way. Based upon the failure of defendant to observe the plaintiff's vehicle and yield the right of way to the plaintiff, it is determined as a matter of law that defendant Markowski negligently violated Vehicle & Traffic Law §§ 1142 (a) and 1172 (a), proximately causing the accident. Based upon the foregoing, defendant William Nelson has established prima facie entitlement to summary judgment dismissing the complaint on the basis that he bears no liability for the occurrence of the accident. There has been no evidentiary proof submitted to demonstrate that co-defendant Nelson negligently contributed to the accident. Although counsel for defendant Markowski has submitted an attorney's

affirmation in opposition, mere conclusions or unsubstantiated allegations, even if believable, are not enough to defeat summary judgment (CPLR 3212 [b]; ***S.J. Capelin Associations, Inc. v. Globe Manufacturing Corporation***, 34 NY2d 338, 357 NYS2d 478[1974]).

Accordingly, motion (004) is granted on the issue of liability, rendering that part of defendant Nelson's application for dismissal of the complaint moot on the issue of serious injury, and the complaint and cross claims asserted against defendant William Nelson are dismissed.

SERIOUS INJURY

The remaining defendant, Benjamin Markowski, seeks summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d)

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 verified bill of particulars, the plaintiff alleges that the following injuries were sustained in the subject accident: tear of the labrum of the left shoulder; tear of the anterior and posterior labrum of the left shoulder; tendinosis supraspinatus tendon of the rotator cuff of the left shoulder; impingement of the left shoulder; left shoulder sprain; left shoulder rotator cuff tendinitis; locking and clicking of the left shoulder; decreased range of motion of the left shoulder; pain in the left shoulder; chondromalacia patella of the left knee; internal derangement of the left knee; decreased range of motion of the left knee; pain and swelling of the left knee; sprain of the left wrist; sprain of the left ankle; surgery under general endotracheal anesthesia with left shoulder arthroscopy, left shoulder arthroscopic anterior capsulorraphy, and left shoulder arthroscopic debridement of the rotator cuff tear.

Upon careful review and consideration of the moving party's evidentiary submissions, it is determined that the moving defendant has not established prima facie entitlement to summary judgment dismissing the complaint on the basis that Joshua Muller did not sustain a serious injury in either category as defined by Insurance Law § 5102 (d).

Dr. Lim set forth the materials, records, and reports that he reviewed, including the MRI reports of plaintiff's left shoulder and left knee, and x-ray reports, and the examinations by Dr. Glass dated May 7, 2010 and June 11, 2010, however, none of the records reviewed by the defendants' experts have been submitted. While Dr. Mendelsohn set forth that he reviewed plaintiff's left shoulder MRI, he has not provided a copy of the original report prepared by the plaintiff's radiologist relating such diagnostic study. The general rule in New York is that an expert cannot base an opinion on facts he did not observe and which were not in evidence, and that 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]). Here, the aforementioned records and reports are not in evidence, leaving this court speculate as to the contents thereof.

Dr. Mendelsohn has not provided a copy of his curriculum vitae to qualify as an expert in the field of radiology to render an opinion with regard to his interpretation of the plaintiff's left shoulder MRI films. While plaintiff claimed that he sustained injury to his left knee and had an MRI study of the same, Dr. Mendelsohn has not reviewed such MRI study and offers no opinion regarding the same, leaving this court to speculate with regard to his opinion. It is additionally noted that Dr. Mendelsohn, in his report concerning the plaintiff's left shoulder MRI films, stated that he must "take issue with the interpretation provided by Dr. Hassankhani insofar as I find no evidence of any glenoid labral tears on the MRI study." Dr. Mendelsohn's statement is conclusory as he provides no basis for this opinion and raises a factual issue due to conflicting medical opinions. Further, a copy of the operative report concerning the arthroscopic anterior capsulorraphy and left shoulder arthroscopic debridement of the rotator cuff tear, referred to by

defendants' expert, has not been provided. Dr. Mendelsohn's report is not correlated with a physical examination of the plaintiff's shoulder.

Dr. Lim set forth that the 22-year-old plaintiff sustained injury to his neck, left shoulder, left knee, left ankle, and back in the accident, and that left shoulder surgery was performed allegedly as a result of the accident. He performed an examination of the plaintiff and obtained range of motion findings with regard to plaintiff's cervical spine, thoracolumbar spine, left knee, and left ankle, reporting no limitations when comparing his findings with the normal range of motion values. However, Dr. Lim does not set forth the objective method employed to obtain those range of motion measurements, such as the goniometer, inclinometer or arthroidal protractor, (*see* ***Vomero et al v Gronrous***, 19 Misc3d 1109A, 859 NYS2d 907 [Sup Ct, Nassau County 2008]; ***Martin et al v Pietrzak***, 273 AD2d 361, 709 NYS2d 591 [2d Dept 2000]), leaving this court to speculate as to how he determined such ranges of motion when examining the plaintiff, further precluding summary judgment. While Dr. Lim concluded that there is no objective evidence that the plaintiff suffers an orthopedic disability, he does not comment on the SLAP tear in plaintiff's left shoulder, the arthroscopic surgery to the plaintiff's left shoulder, the findings upon surgical intervention, and whether or not such injury and surgical procedures are causally related to the subject accident. Although Dr. Lim indicated that he reviewed both the MRI report of plaintiff's shoulder dated May 11, 2010, and the left shoulder arthrogram report dated June 8, 2010, he does not dispute the findings set forth in those reports which have not been provided to this court.

It is noted in plaintiff's opposing papers, that the arthrogram procedure report dated June 8, 2010 diagnosed a tear of the superior labrum with anterior extension, with a separate linear component extending anterior to the posterior (SLAP lesion). The operative report by Dr. Cappellino, dated December 9, 2010, demonstrated that the procedure consisted of, inter alia, left shoulder arthroscopic debridement of rotator cuff tear. The defendant's experts reviewed these records and commented upon them, yet did not provide copies of these reports to this court. Thus, even if defendant had demonstrated prima facie entitlement to summary judgment dismissing the complaint, the plaintiff has raised factual issues precluding summary judgment on the issue of whether the plaintiff sustained a serious injury as a matter of law.

Based upon the foregoing, the moving defendant has failed to establish entitlement to summary judgment dismissing the complaint relating to the first category of injury defined by Insurance Law § 5102 (d).

The movant's examining physician did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering the physicians' affidavits 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 his 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 experts offer no opinions 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]). Thus, summary judgment is precluded with regard to this category of injury as well.

Additionally, plaintiff's deposition testimony, submitted by the moving defendant, raises factual issues which preclude summary judgment as to this category of injury as well. The plaintiff testified that he immediately felt pain following the accident, then sought medical care and treatment at St. Catherine of Siena emergency department about a week after the accident due to the pain in his left shoulder and left knee. He followed up for orthopedic care and treatment and underwent surgery in December 2010 to his left shoulder by Dr. Cappellino, after undergoing unsuccessful physical therapy two times a week for five months to his left shoulder and left knee, and an MRI and an arthrogram of his left shoulder. Following the surgery, he had to wear a sling to his left arm for four months, day and night. Thereafter, he attended physical therapy for his left shoulder three times a week for two months. He testified that his shoulder did not feel better after the surgery and physical therapy as he was still experiencing pain at a level of five out of ten. He has pain any time he engages in physical activity such as sleeping, driving, sweeping the house, doing laundry, cleaning, lifting heavy objects, or playing his guitar. He did not return to work for ten months following the accident.

The factual issues raised in the moving papers preclude summary judgment, the moving party having 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 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, motion (005) by defendant Benjamin Markowski for summary judgment on the issue that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d) is denied.

Dated: February 19, 2014

Hon. Joseph Farneti
Acting Justice Supreme Court

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**