

**Conrad v Ahmed**

2014 NY Slip Op 31145(U)

April 23, 2014

Supreme Court, Suffolk County

Docket Number: 11-14034

Judge: Jerry Garguilo

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**ORDERED** that cross motion (007) by the defendant, David M. Sperling, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Jay Conrad, has not sustained a serious injury as defined by Insurance Law § 5102 (d), is denied, and it is further

**ORDERED** that the plaintiff is directed to serve a copy of this order with notice of entry upon all parties and upon the Clerk of the Calendar Department, Supreme Court, Riverhead, within thirty days of entry of this order with the Clerk of Suffolk County, and the Clerk of the Calendar Department is directed to schedule this matter for a hearing on damages forthwith.

This action arises out of an automobile accident which occurred on October 5, 2010, on CR 17 (Carleton Avenue) at or near the intersection of Nassau Street, in the Town of Islip, New York, when the vehicle operated by the plaintiff, Jay Conrad, and the vehicles operated by defendants Parvez Ahmed and David M. Sperling, came into contact in a chain collision accident. The plaintiff's vehicle was the first in the chain. The plaintiff alleges that as a result of this accident he sustained a serious injury as defined by Insurance Law § 5102 (d).

In motions (005) and (007), the defendants seek summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d). It is noted in the court's computer, however, that the note of issue and certificate of readiness were filed on April 5, 2013. Pursuant to CPLR 3212, motions for summary judgment were to be made by August 3, 2013, within 120 days from April 5, 2013. Cross motion (007) is untimely in that it was not served until August 5, 2013. Counsel for defendant Sperling offers no excuse for the untimely submission of cross motion (007). "Good cause" in CPLR 3212 (a) requires a showing of good cause for the delay in making the motion—a satisfactory explanation for the untimeliness—rather than simply permitting meritorious, non-prejudicial filings, however tardy. No excuse at all, or a perfunctory excuse, cannot be "good cause" (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]). Based upon the movant's failure to offer any excuse for the late service of this motion beyond 120 days, good cause has not been demonstrated. However, in that motion (005) was timely served and seeks identical determination with regard to the issue of whether plaintiff sustained a serious injury as defined by Insurance Law § 5102 (d), defendant Sperling's motion will be considered.

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*,

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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 (005), defendant Ahmed has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, his answer with cross claim against defendant Sperling, his demands, Sperling's answer and demands, and plaintiff's verified bill of particulars and supplemental verified bill of particulars with plaintiff's cervical MRI report of January 8, 2010 annexed; order dated June 5, 2012 (Rebolini, J.) granting a joint trial of both actions; and the transcripts of Jay Conrad, Parvez Ahmed, and David M. Sperling; the sworn report of Michael J. Katz, M.D. dated November 27, 2012 concerning his independent orthopedic examination of the plaintiff.

In support of cross motion (007), defendant Sperling has submitted only an attorney's affirmation and adopts the procedural history and exhibits set forth in motion (005).

In support of motion (006), the plaintiff has submitted, inter alia, an attorney's affirmation; an uncertified copy of the MV 104 Police Accident Report; copies of the summons and complaint, defendants' answers, plaintiff's verified bill of particulars and supplemental verified bill of particulars; and transcript of the examination before trial of Parvez Ahmed. Initially, the Court notes that the unsworn MV-104 police accident report constitutes hearsay and is inadmissible (*see Lacagnino v Gonzalez*, 306 AD2d 250, 760 NYS2d 533 [2d Dept 2006]; *Hegy v Coller*, 262 AD2d 606, 692 NYS2d 463 [2d Dept 1999]).

#### LIABILITY

Jay Conrad testified to the extent that he was involved in an automobile accident on October 5, 2010. He was traveling southbound on Carleton Avenue, and stopped with his turn signal on for about ten seconds, waiting for traffic to clear in the intersection, to make a left turn onto Nassau Road, when his vehicle was struck in the rear, causing it to move ahead about one hundred feet. He did not notice any vehicles behind his while he was waiting to turn. When he got out of his vehicle after the collision, he saw two vehicles in the intersection: one which was damaged in the front and the rear; and the other which was severely damaged in the front.

Parvez Ahmed testified to the extent that he was involved in the subject motor vehicle accident and was driving a Toyota at about 7:10 in the evening. There was still natural lighting, some street lights were on, and he had his headlights turned on. He was traveling on Carleton Avenue, which he described as having one travel lane in each direction. He continued that his vehicle was stopped at the intersection at the traffic light which was red. He was traveling about 30 to 35 miles per hour when he saw the traffic light was red about 50 feet ahead. He brought his vehicle to a stop behind a white truck which was stopped ahead of him. He was stopped for about ten seconds, when "it felt like a shark" and his vehicle was hit in the rear, very hard. The impact to the rear of his vehicle pushed the front of his vehicle into the rear of the truck in front of him, causing a second impact to his vehicle.

David Sperling, an attorney, testified to the extent that he was involved in the subject accident in the late afternoon, early evening. There was natural lighting out. He was driving an Acura on Carleton Avenue south of the stoplight at Motor Parkway. He was exiting the parking lot at the Bank of America, but did not recall if he intended to travel to the north or south on Carleton Avenue. He stated he came to a complete stop before beginning to execute his turn, but did not recall how long he was stopped for. He did not recall looking to the right or to the left. He did not recall checking traffic. He stated that he was in the process of turning, but did not know if he had completed his turn prior to the accident. He did not know if any of his vehicle was in the parking lot at the time of impact. He could not remember what traffic conditions were like, if he had turned on his signal to turn, or which way he turned. He stated he was traveling about five miles per hour at the time of the collision. He did not know where he was looking at the time of impact. He believed the front of his vehicle was involved in the accident, but he did not know what part of the other car he collided with, except to state that it was the rear of the other car, but he did not know specifically where. He stated that the Toyota was moving about five miles per hour on Carleton Avenue in a northbound direction, but testified that he did not see the Toyota prior to the accident. It was his perception that the traffic pattern was slowing down before the stop light. He did not recall if he applied his brakes prior to the impact. He did not recall attempting to stop his vehicle, or maneuver it in any direction prior to the collision. He characterized the impact as very slight. He did not see the impact, only felt it. After the accident, he backed his vehicle into the parking lot. Then the Toyota came into the parking lot. The driver of the Toyota was not Caucasian. After that, a pickup truck pulled into the parking lot, however, he didn't know at the time that it had been involved in the accident. He did not recall if there was damage to his vehicle, and he did not recall if he had any repairs done to it, but about a month after the accident, he gave it to his friend Palomino, who has an auto body shop. He continued that it was an old car. In November following the accident, he leased another vehicle. He did not inspect the other vehicles for damage and did not know that there was any damage to them. When asked if it was possible that the accident occurred in the southbound travel lane of Carleton Avenue, he stated that he did not know. He did not know if the Toyota struck the pickup truck in front of it. He did not see the pickup truck prior to the accident.

Vehicle and Traffic Law § 1143 provides that “[t]he driver of a vehicle about to enter or cross a roadway from any place other than another roadway shall yield the right of way to all vehicles approaching on the roadway to be entered or crossed” (*see also Gandolfo v DeMasi*, 28 AD3d 606, 813 NYS2d 527 [2d Dept 2006]). It is well settled that the violation of a statute which establishes a specific standard of care may result in either absolute liability or a finding of negligence per se (*Ciatto v Lieberman*, 266 AD2d 494, 698 NYS2d 54 [2d Dept 1999]; *Zupnick v Certified Lumber Corp.*, 17 Misc3d 1122A, 851 NYS2d 75 [Sup Ct, Kings County 2007]). As a rule, violation of a state statute that imposes a specific duty constitutes negligence per se, or may even create absolute liability (*Elliott v City of New York*, 95 NY2d 730, 724 NYS2d 397 [2001]). Violation of a statute constituting negligence per se places a duty on a party to provide a reasonable excuse for its failure to comply with the statutorily imposed standard of care (*Dalas v City of New York*, 262 AD2d 596, 692 NYS2d 468 [2d Dept 1999]; *Cordero v City of New York*, 112 AD2d 914, 492 NYS2d 914 [1985]). The standard to be applied in deciding a motion for judgment as a matter of law is whether the trial court could find that by no rational process could the trier of fact base a finding in favor of the party opposing the motion (*Burns v Mastroianni*, 173 AD2d 754, 570 NYS2d 629 [2d Dept 1991]). In the instant action, defendant Sperling testified that he pulled out of the Bank of America parking lot onto Carleton Avenue, when the front of

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his vehicle struck the rear of defendant Ahmed's vehicle. He did not see the impact and did not see Ahmed's vehicle strike the plaintiff's vehicle and did not know that plaintiff's vehicle was involved in the accident. Thus, by Sperling's own admission, he entered onto Carleton Avenue, without any reasonable excuse for his failure to comply with Vehicle and Traffic Law § 1143, and the duty to exercise reasonable care to avoid striking Ahmed's vehicle in the rear, which was already on Carleton Avenue. By no rational process could the trier of fact base a finding in favor of defendant Sperling. It is determined as a matter of law that Sperling's actions in causing the subject accident constitutes negligence per se.

Drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident (*Fillippazzo v Santiago*, 277 AD2d 419, 716 NYS2d 710 [2000]). A driver, as a matter of law, is charged with seeing what there is to be seen on the road, that is, what should have been seen, or what is capable of being seen at the time (*People of the State of New York v Anderson*, 7 Misc3d 1022A, 801 NYS2d 238 [City Ct, Ithaca 2005]). Defendant Sperling clearly admitted that he did not see defendant Ahmed's vehicle prior to striking it in the rear. Sperling offered no excuse for having failed to see Ahmed's vehicle, which was capable of being seen, as Sperling testified he had no obstructions to his view. He did not know which way he was turning and did not know in what lane the accident occurred. Based upon the foregoing, it is determined as a matter of law that Sperling failed to see Ahmed's vehicle and failed to exercise reasonable care under the circumstances to avoid the accident.

When a driver approaches another vehicle from the rear, he is bound to maintain a reasonably safe rate of speed and to maintain control of his vehicle and use reasonable care to avoid colliding with the other vehicle (*Chepel v Meyers*, 306 AD2d 235, 762 NYS2d 95 [2006]; *Power v Hupart*, 260 AD2d 458, 688 NYS2d 194 [1999]; *see also* Vehicle and Traffic Law § 1129[a]). Here, the plaintiff has demonstrated prima facie entitlement to summary judgment on the issue of liability by showing that this was a rear-end collision, that the plaintiff's vehicle was stopped at the time of the impact, and that the defendant Sperling failed to maintain control of his vehicle or to use reasonable care to avoid colliding with defendant Ahmed's vehicle, which then struck plaintiff's vehicle in the rear. In opposition, defendant Sperling has failed to raise a factual issue or to come forward with a non-negligent explanation for the occurrence of the accident and his failure to see Ahmed's vehicle or the plaintiff's vehicle prior to causing the rear-end collisions. It is determined as a matter of law that defendant Sperling failed to maintain a safe rate of speed to maintain control of his vehicle, and failed to use reasonable care to avoid causing the collision. Defendant Sperling, with his evasive answers and failed memory, has failed to meet the burden of establishing through admissible evidentiary proof, the existence of a triable issue of fact sufficient to defeat the summary judgment motion by plaintiff.

Additionally, in searching the record, it is undisputed that both plaintiff's vehicle and the vehicle operated by defendant Ahmed were stopped when the impact to the rear of the Ahmed vehicle occurred. It is determined that once the plaintiff's vehicle and Ahmed's vehicle were stopped for approximately ten seconds prior to the first impact by Sperling, neither plaintiff nor defendant Ahmed were the proximate cause of the rear-end collision between the plaintiff's vehicle and the vehicle operated by defendant Ahmed (*see Chamberlain v Suffolk County Labor Department*, 221 AD2d 580; 634 NYS2d 202 [2d Dept 1995]). Thus, based upon the adduced testimonies and evidentiary proof, and in searching

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the record, summary judgment is granted on the issue of liability in favor of both plaintiff Conrad and to co-defendant Ahmed.

Accordingly, motion (006) is granted in favor of the plaintiff on the issue of liability against defendant Sperling, and, in searching the record, the complaint as asserted against defendant Ahmed, and the cross claim asserted by defendant Ahmed for judgment over as against defendant Sperling are dismissed.

## SERIOUS INJURY

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 90 days during the 180 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

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minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v Elliott*, *supra*).

By way of the plaintiff's bills of particulars, the plaintiff alleges that as a result of this accident, the following injuries were sustained: straightening of the cervical curvature; C3-4 through C6-7 subligamentous disc herniations; diminished disc height at C5-6 with anterior disc extensions and spur formation with retraction of end plate changes; C3-4 level subligamentous disc herniation has a left paramedian component abutting the cord and a left posterolateral component that extends into the left anterior recess and left neural foramen; C4-5 broad left predominant subligamentous disc herniation with surrounding spur formation having left greater than right posterolateral components extending into the anterior recess, compressing the cord more on the left than on the right, and narrowing at both neural foramen with neural foramina narrowing slightly greater on the right than the left; C5-6 broad band left predominant subligamentous disc herniation with surrounding spur formation impressing on the cord more so on the left than the right and extending peripherally into the left anterior recess and neural foramen to a lesser extent, the right anterior recess; C6-7 broad subligamentous disc herniation that abuts the ventral margin of the cord and extends peripherally to encroach into the neural foramen bilaterally; slight cervical lordosis; slight reversal of the cervical lordosis having its apex at C5-6; lumbar curvature straightening; L3-4 and L4-5 disc hydration loss and posterior disc bulges that impress on the thecal sac with anterior disc extension; superimposed at L4-5 right posterolateral focal subligamentous disc herniation into the right neural foramen associated with a radial annular tear; lateral epicondylitis of the right elbow; small elbow joint effusion of the right elbow; effusion of the right knee; patellar ballotment with crepitus of the right knee; and bilateral shoulder derangement.

In his supplemental bill of particulars, the plaintiff asserts that the prior disc herniations at C4-5 and C5-6 were aggravated and exacerbated by the subject accident, that the prior C4-5 central herniation was made worse in as much it is now abutting the cord and extending into the anterior recess and neural foramen; the prior C5-6 central disc herniation was made worse inasmuch as it is now impressing on the spinal cord; the previously claimed C3-4 and C6-7 herniations are not prior injuries and were sustained in the subject accident.

Based upon a review of the evidentiary submissions, it is determined that the defendants have not established prima facie entitlement to summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law §5102 (d) under both categories of injury.

Dr. Katz, defendants' expert, set forth the materials and records which he reviewed, including plaintiff's hospital records, MRI reports of plaintiff's right elbow, lumbar spine, and cervical spine, and the NCV and EMG studies of the lower and upper extremities, and the records of plaintiff's treating physicians, however, a copy of those records and reports have not been provided with the moving papers. 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 the 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

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Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2005]). Thus, the court is left to speculate as to the contents of the reports and results of the MRI of plaintiff's cervical spine and nerve conduction studies, precluding summary judgment.

Dr. Katz does not address the findings on plaintiff's cervical and lumbar MRI studies and does not opine that these claimed injuries are not causally related to the subject accident.

Although Dr. Katz diagnosed the plaintiff with having cervical and lumbar radiculopathy, no report from a neurologist who examined the plaintiff on behalf of the defendants has been provided to rule out such neurological/radicular injuries are not a result of this accident, precluding summary judgment (*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]), and Dr. Katz does not comment as to etiology of the radiculopathies.


The defendants' expert has offered no opinion as to whether the plaintiff was incapacitated from substantially performing his activities of daily living for a period of ninety days in the 180 days following the accident, and the expert 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]), precluding summary judgment.

Based upon the foregoing, the defendants have failed to establish that the plaintiff did not sustain a serious injury under either category set forth in Insurance Law § 5102 (d).

The factual issues raised in defendants' moving papers preclude summary judgment. The defendants 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), the burden has not shifted to the plaintiff to raise a sufficient trial 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, cross motion (007) by defendant Sperling for summary judgment dismissing the complaint is denied, and motion (005) by defendant Ahmed has been rendered academic by dismissal of the complaint as asserted against him and is denied as moot.

Dated: April 23, 2014

  
 J.S.C.

\_\_\_\_\_ FINAL DISPOSITION \_\_\_X\_\_\_ NON-FINAL DISPOSITION