SUPREME COURT- STATE OF NEW YORK
DUTCHESS COUNTY

Present:
Hon. HAL B. GREENWALD
Justice.

SUPREME COURT: DUTCHESS COUNTY

FRANK NICODEMUS,

Plaintiff(s),

-against-

ANDRE J. MONTEIRO, ROBERT F. MONTEIRO and CHRISTOPHER SEMKE

Defendant(s).

DECISION AND ORDER
Index No. 2016-53066
Motion Seq.. No. 1, 2 3

The following NYSCEF documents were reviewed and considered by the Court in rendering the within Decision and Order.

NYSCEF Nos. 37-55, 58-68

UNDERLYING FACTS

This matter is based upon a two (2) car accident that occurred at the intersection of Meyers Corners Road and All Angels Road, in Wappingers Falls, NY on August 29, 2014. The Plaintiff FRANK NICODEMUS (NICODEMUS), was the front seat passenger in a vehicle driven by his co-worker Defendant CHRISTOPHER SEMKE (SEMKE) that collided with a vehicle driven by Defendant ANDREW J. MONTEIRO (MONTEIRO) owned by co-Defendant ROBERT F. MONTEIRO.

Defendant SEMKE seeks an Order dismissing the action as against him as he alleges he bears no liability for the subject accident; and

Co-Defendants MONTEIRO and SEMKE seek an Order granting Summary Judgment as they allege Plaintiff NICODEMUS has not suffered a "serious injury" under Insurance law 5102; and.

Plaintiff NICODEMUS opposes the above motions and seeks\an Order granting him liability as he alleges the Defendants were negligent and he caused the subject accident that causally caused him to sustain "serious injury".

SUMMARY JUDGMENT

As set forth in *Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395 [1957], summary judgment is a drastic remedy which should not be granted where there is any doubt as

to the existence of triable issues of fact. (see Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223 (1978) *Di Menna & Sons v. City of New York*, 301 N. Y. 118 [1950]; *Greenberg v. Bar Steel Constr. Corp.*, 22 N,Y.2d 210 [1971]; *Barrett v. Jacobs*, 255 N. Y. 520 [1931]; Specifically, automobile accident cases do not generally lend themselves to disposition under summary judgment rules as the question of negligence is essentially one of fact. *Andre v. Pomeroy*, 35 N.Y.2d 361 [(1974] see *(Schneider v. Miecznikowski*, 16 A D 2d 177 [1962]; Barker v. Savage, 45 N. Y. 191; *Salomone v. Yellow Taxi Corp.*, 242 N. Y. 251.) .

When a court decides a motion for summary judgment: "...issue-finding not issue-determination is the key to the procedure. If and when the court reaches the conclusion that a genuine and substantial issue of fact is presented, such determination requires the denial of the application for summary judgment." *Esteve v. Abad*, 271 A.D. 725.[1947].

For a summary judgment motion to be denied, the one opposing the motion must demonstrate the existence of facts that have a probative value that indicates there is an unresolved material issue .See e.g. *Piedmont Hotel Co. v. A.E. Nettleton Co.*, 263 N.Y. 25, 188 N.E. 145 (1933); In determining a motion for summary judgement, the court must look at the proof being offered in the light most favorable to the nonmoving party and then deny the motion when there is :....even arguably any doubt as to the existence of a triable issue'. *Baker v. Briarcliff School Dist.*, 205 A.D.2d 652 [1994].

SEMKE MOTION

Defendant SEMKE alleges he bears no liability in this matter and seeks summary judgment dismissing the action as against him. The relevant statute, Vehicle & Traffic law 1141 states on relevant part: "...the driver of a vehicle intending to turn left within an intersection...shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard"

Herein the movant, SEMKE has no claim for any injury but was the operator of the vehicle that was traveling straight through the intersection. SEMKE asserts that MONTEIRO violated V&T 1141 by not yielding the right of way to SEMKE who was within the intersection. The deposition testimony of both SEMKE and MONTEIRO confirms the above violation. As set forth by MONTEIRO in his deposition at page 31, line 9-16:

Q; And as you approached this intersection –withdrawn. Did you have to stop for that red light before you made your turn?

A. Yes. To make the left, yes, you have to yield and make sure it is clear. If it is a green light, a red light you don't.

Additionally, MONTEIRO stated at page 32, lines 14-25, to page 33, lines 2-16

Q. What color was the light when you entered the left turn lane?

A. It was green.

Q. Okay. And then what happened?

A. I made sure I had time to go and I made the left.

Q. And when you saw you had time to go, what do you mean by that?

A. You know, when there is a green light you have to make sure there is no oncoming traffic to make that turn.

Q. Was there any oncoming traffic --

A. Yes

Q. --- that you saw?

A. Yes.

Q. Before you entered the intersection to make the turn or after?

A After when I was slowing down to look.

SEMKE offered similar statements in his deposition at page 12, lines 7-25, page 13, lines 2-7

Q, Okay. And at the time that you first saw the Monteiro vehicle was it moving?

A. No.

Q. Where was it?

A. It was in the incoming lane facing me in the left turn lane.

Q. Not your left turn lane, but –

A. His left turn lane.

Q. So the left turn lane of opposing traffic?

A. Yes

Q. Standing still?

A. Yes.

Q. Was there a traffic light at that intersection?

A. Yes there was.

Q. And when you were this distance away from the Monteiro car did you also see the color of the light?

A. Yes.

Q. What color was it?

A. Green.

Q. And did the color of the light ever change from the time you first saw the light until the collision occurred?

A. No.

Accordingly, there is no issue of fact that the light was green for both vehicles at the time the MONTEIRO vehicle attempted its left turn.

At page 14, lines 13-25, page 15, lines 2-10 SEMKE proposed what happened next:

Q. And how much time passed between your first sighting of that car, the Monteiro car, and the impact time?

A. Two seconds. It just seemed very short.

Q. And did you have that car under your constant observation for that whole two second period?

A. Yes.

Q. And describe in which direction it moved, how it moved?

A. It started to move and turned—his left turned left in front of me, and – um--…

(short pause)

Q. You can continue.

A. That is when I couldn't do anything. It was a short -- I was already committed to the intersection. I was in it.

Thus, SEMKE states he was "…in it [the intersection]…", when MONTEIRO entered attempted a left turn in front of SEMKE and di not give the right of way to SEMKE. See *Brodney v. Picinic*, 172 A.D.3d 673 [2019] citing *Ming-Fai Jon v. Wager* 165 A.D.3d 1253.This violation is deemed to be negligence per se.} citing *Katikireddy v Espinal* 137 A.D.3d 866.

The left turn attempted by MONTEIRO was unsafe when it could not be made with reasonable safety. *Jung v. Glover* 169 A.D.3d 782 citing *Yu Mei Liu v Weihong Liu* 163 A.D.3d 972.[2018]. MONTEIRO did not raise any triable issue of fact that would preclude the Court from granting summary judgment to Defendant SEMKE as against Co-Defendant MONTEIRO on the issue of MONTEIRO's liability for this accident. As a result of the above Defendant SEMKE's motion for Summary Judgment pursuant to CPLR 3212 dismissing the claim against him is granted

SERIOUS INJURY

In Motion #2 Defendant MONTEIRO sought Summary Judgment pursuant to CPLR 3212 dismissing Plaintiff's complaint. Defendant SEMKE by a Cross Motion joined in the above and is seeking summary judgment pursuant to CPLR 3212 to dismiss the complaint as well.

The controlling statute, N.Y. Ins. Law § 5102 (McKinney) states:
(d) "Serious 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.

Defendant MONTEIRO co-defendant SEMKE separately moved for summary judgment seeking an order dismissing Plaintiff NICODEMUS' complaint. A review of movants' papers alone, demonstrate that the defendants have established that summary judgment should be granted, that NICODEMUS did not suffer. a 'serious injury" as set forth in the relevant statute. Movant relies upon the pleadings, Bill of Particulars, excerpts of NICODEMUS' deposition testimony, hospital and physical therapy records and the IME conducted by Dr Ronald L. Mann, MD. (*see* Toure v. Avis Rent A Car Sys., 98 N.Y.2d 345 [2002]; Gaddy v. Eyler, 79 N.Y.2d 955 [1992]).

Utilizing the very same information as the movant, but in opposition and including a medical opinion, NICODEMUS raised a triable issue of fact as to whether he sustained serious injury as a result of the accident. Further did his injuries lead to a permanent consequential and/or significant limitation of use of his left shoulder. An issue was raised by MONTEIRO regarding the use of the unsworn/ unconfirmed MRI report to substantiate NICODEMUS' claim. Even if the Court were to allow into evidence the unsworn/unconfirmed MRI, the Court is aware that an MRI report showing a tear as sustained by NICODEMUS is not evidence of a serious injury without objective evidence confirming the extent of the physical limitations NICODEMUS suffers from. (*see* Nannarone v. Ott, 837 N.Y.S.2d 311 [2007]; Yakubov v. CG Trans Corp., 817 N.Y.S.2d 353 [2006]; Kearse v. New York City Tr. Auth., 789 N.Y.S.2d 281[2005]). However, in the instant proceeding the IME report objectively confirmed the range of motion issues NICODEMUS was having with respect to his left shoulder. The IME report of Dr. Mann (Exhibit G to MONTEIRO Motion) state at page 3 of 8:

RANGE OF MOTION MEASUREMENTS

The range of motion of the examined body parts were performed by the claimant. This is a subjective maneuver on the part of the claimant. All measurements of the ranges of motion were performed by the examiner [Dr. Mann] using a hand-held goniometer. The measurement itself is, therefore, an objective measurement of the claimant's subjective efforts. (emphasis added)

At page 4 of 8 the left shoulder was evaluated by the examiner [Dr. Mann]:

Left Shoulder: There is no swelling or crepitus appreciated.

Range of motion reveals forward flexion at 90 degrees (180 degrees normal), abduction at 90 degrees (180 degrees normal), internal rotation at 80 degrees (80 degrees normal), and external rotation 30 degrees (90 degrees normal).

Impingement – positive

Hawkins-Kennedy Impingement maneuver – positive

Apprehension – positive

The documents reviewed by Dr. Mann do not include the questionable MRI, as movant's counsel indicated that they had not seen the MRI until Nicodemus' opposition papers, although point 10 (page 6 of 8) regarding the x-ray report of the left shoulder alerts the reader as to the usefulness of an MRI by stating: *If clinical concern for rotator cuff injury, magnetic resonance imaging may be helpful in further evaluation." I*n the instant matter, the 'examiner "[Dr. Mann] not only performed the objective range of motion tests on Plaintiff, but Dr. Mann also included the "normal" range in his IME report. (*see Toure* supra), thus the court did not have to determine the meaning of the range of motion result... (*see Nociforo v. Penna,* 840 N.Y.S.2d 396 [2007]; *Frey v. Fedorciuc,* 828 N.Y.S.2d 454 [2007] *Powell v. Alade,* 818 N.Y.S.2d 600 [2006]; *Manceri v. Bowe,* 798 N.Y.S.2d 441 [2005]). Here, however, there is no need for the Court herein to speculate, as the normal ranges and the actual ranges ere included in Dr. Mann's report.

Nicodemus testified at his deposition that he "used to" perform certain physical labor on the cars he restored. (NICODEMUS EBT page 43, line15 to page 44, line 16. Further, Plaintiff confirms that since the accident he has not "...dismantled any of the vehicles..." EBT page 45, lines 17-19. Co-defendant SEMKE testified at his deposition at page 22, line 15 to page 23, line 15 about NICODEMUS' limitations at work due to the injury he sustained from accident as follows:

Q. And when you resumed working, is he now working with you still?

A. Yes.

Q. The two of you still work together?

A. Yes.

Q. Restoring Cadillacs?

A. yes

Q. And does he [NICODEMUS] perform any differently at work today than he did before this accident?

A. Yes.

Q. Of your observation?

A. yes.

Q. How so?

A. He can't physically help me with anything. Lifting anything is extremely limited.

Q. For example, what did he lift before this accident with you to help you that he no longer does?

A. We used to work side-by-side with me sometimes.

Q. And now?

A. It is not feasible any more

Additionally, as questioned by Deborah Bookwalter, Esq. SEMKE said on page 31, lines 4-19:

Q. What kind of duties does Frank [NICODEMUS] do at the shop where you guys work now?

A. Now?

Q. Yes, now.

A. Billing, public relations, parts locating. That is about it.

Q. So he doesn't work on the cars at all anymore?

A. Pretty much.

Q. And before the accident what were his duties at the shop?

A. It could be anything from helping me take a hood off; a fender off, a door off. Help me –um—the reverse procedure, put the hood or parts back on, We were reliant on each other.

There are issues of fact, including but not limited to the accident itself, what injuries were sustained by NICODEMUS, is his injury causally related to the accident, what work activities did NICODEMUS perform prior to the accident, what work activities does NICODEMUS perform as as a result of the injury to his left shoulder, is the injury to his left shoulder be of such a nature as cause NICODEMUS to sustain a, "…permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member.". These are some of the issues of fact that must be determined by a jury.

Accordingly, the Motions and Cross Motion with supporting affidavits, affirmations, exhibits, the Opposition and supporting documents, the Reply and supporting documents all raise material issues of fact as to whether Plaintiff sustained "serious injury" as defined in Insurance Law 5102(d), that was causally related to the underlying automobile accident.

As a consequence of all the foregoing it is:

ORDERED that Defendant SEMKE's Motion to dismiss the complaint as against him by reason that SEMKE bears no liability for the accident herein is granted and this matter is discontinued as against Defendant SEMKE; and it is further

ORDERED that Defendants MONTEIRO and SEMKE's separate Motions for summary judgment against Plaintiff NICODEMUS on the grounds that NICODEMUS did not suffer any "serious injury" under the relevant statute, Insurance Law 5102(d) is denied; and it is further

ORDERED that counsel for the remaining parties shall appear before the Court for a pre-trial conference on September 19, 2019 at 9:30am.

Any relief not specifically granted herein is denied.

The foregoing constitutes the decision and order of this court.

Dated: September 11, 2019
Poughkeepsie, New York

E N T E R

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Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of entry, the appeal must be taken within thirty days thereof.