Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:
WILLIAM B. REBOLINI
Justice

Joseph Testa and Julie Testa,

Plaintiff,

-against-

Elaina M. Lorefice, Erik A. Karlund, Arben B. Cekovic and Nafije Cekovic

Defendants.

Index No.: 620412/2016**E**

Motion Sequence No.: 002; MD
Motion Date: 10/11/18
Submitted: 1/23/19

Motion Sequence No.: 003; MG
Motion Date: 12/2618
Submitted: 1/23/19

Motion Sequence No.: 004; XMD
Motion Date: 1/2/19
Submitted: 1/23/19

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Clerk of the Court

Upon the following papers read on these **e-filed** motions and cross-motion for summary judgment: Notice of Motion and supporting papers dated September 4, 2018 and November 30, 2018; Notice of Cross-Motion and supporting papers dated December 11, 2018; Answering Affidavits and supporting papers dated January 9, 2019 and January 16, 2019; Replying Affidavits and supporting papers dated January 21, 2019 and January 23, 2019; it is

[* 1] ***ORDERED*** that these motions and the cross-motion are hereby consolidated for purposes

ORDERED that the motion by defendants Elaina Lorefice and Erik Karlund for an order granting summary judgment dismissing the complaint on the ground that plaintiff Joseph Testa did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied; and it is further

ORDERED that the cross-motion by defendants Arben Cekovic and Nafije Cekovic for an order granting summary judgment dismissing the complaint on the ground that plaintiff Joseph Testa did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied.; and it is further

ORDERED that the motion by plaintiffs for summary judgment in their favor on the issue of liability against defendants is granted.

This is an action to recover damages for injuries sustained by plaintiff Joseph Testa ("plaintiff") when his vehicle collided with a vehicle owned by defendant Nafije Cekovic and operated by defendant Arben Cekovic. It is alleged that immediately prior to colliding with plaintiff's vehicle, the Cekovic vehicle collided with a vehicle owned by defendant Erik Karlund and operated by defendant Elaina Lorefice. The accident allegedly occurred on January 7, 2016, at approximately 12:05 p.m., at the intersection of Jericho Turnpike and Eldorado Drive, in the Town of Huntington, New York. By his bill of particulars, plaintiff alleges that, as a result of the subject accident, he sustained serious injuries and conditions, including bulging and herniated discs in the spine, sprains and strains in the spine, and radiculopathy in the cervical and lumbar regions. Plaintiff claims that he sustained a serious injury within the 90/180-day category of Insurance Law § 5102 (d). Plaintiff's wife, Julie Testa, seeks damages for loss of services.

Defendants Lorefice and Karlund move for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law §5102 (d) and defendants Arben Cekovic and Nafije Cekovic also move for summary judgment on the same grounds.

Insurance Law § 5102 (d) defines "serious injury" as "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."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance***, 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 (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Cebron v Tuncoglu***, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Akhtar v Santos***, 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff's deposition testimony and the affirmed medical report of the defendant's own examining physician (*see* ***Moore v Edison***, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; ***Farozes v Kamran***, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Here, defendants Lorefice and Karlund failed to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Spann v City of New York***, 145 Ad3d 932, 43 NYS3d 143 [2d Dept 2016]). In his bill of particulars, plaintiff alleges that he had sustained a medically determined injury or impairment of a nonpermanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary activities for not less than 90 days during the 180 days immediately following the subject accident. However, defendants Lorefice and Karlund failed to show, prima facie, that plaintiff did not sustain such an injury. At his deposition, plaintiff indicated that following the accident, he missed 82 days of work (*see* ***Aujour v Singh***, 90 AD3d 686, 934 NYS2d 240 [2d Dept 2011]; ***Takaroff v A.M. USA, Inc.***, 63 AD3d 1142, 882 NYS2d 265 [2d Dept 2009]; ***Shaw v Jalloh***, 57 AD3d 647, 869 NYS2d 189 [2d Dept 2008]). On January 17, 2018, approximately two years after the subject accident, defendants' examining orthopedist, Dr. Gary Kelman, examined plaintiff. He did not relate any of his findings to the period of time immediately following the accident. Dr. Kelman's report is insufficient to sustain defendants' burden of proof to establish prima facie that plaintiff has not sustained a serious injury by reason of having been incapacitated from performing substantially all of his customary and daily activities for 90 of the first 180 days following the accident (*see* ***Cabey v Leon***, 84 AD3d 1295, 923 NYS2d 713 [2d Dept 2011]; ***Mugno v Juran***, 81 AD3d 908, 917 NYS2d 892 [2d Dept 2011]; ***Ali v Rivera***, 52 AD3d 445, 859 NYS2d 713 [2d Dept 2008]). Defendants failed to negate the existence of a factual issue as to whether plaintiff's injury prevented him from performing substantially all of his usual and customary daily activities for at least 90 of the first 180 days following the accident.

Inasmuch as defendants Lorefice and Karlund failed to meet their prima facie burden, it is unnecessary to consider whether the papers submitted by plaintiffs in opposition to the motion were sufficient to raise a triable issue of fact (*see* ***McMillian v Naparano***, 61 AD3d 943, 879 NYS2d 152

[2d Dept 2009]; ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]). Accordingly, the motion by defendants Lorefice and Karlund for summary judgment dismissing the complaint is denied.

The cross-motion by defendants Arben Cekovic and Nafije Cekovic for summary judgment dismissing the complaint on the basis that plaintiff has not sustained a serious injury as defined in Insurance Law § 5102 (d) is also denied. The Cekovic defendants attempt to incorporate by reference the proof submitted by defendants Lorefice and Karlund in support of their motion. Inasmuch as the court has already determined that defendants Lorefice and Karlund failed to establish that plaintiff did not sustain a serious injury, the cross-motion must be denied, as without substantive merit.

Plaintiffs move for summary judgment in their favor on the issue of liability on the ground that plaintiff was not negligent, and that the subject accident was solely caused by the operation of defendants' vehicles, which collided with each other before the Cekovic vehicle collided with plaintiff's vehicle. In support, plaintiffs submit, *inter alia*, the pleadings and the transcripts of the parties' deposition testimony. Plaintiff suggests herein that he is an innocent driver and entitled to summary judgment (*see* ***Jung v. Glover,*** 169 AD3d 782, 93 NYS3d 390 [2d Dept. 2019]; ***Medina v. Rodriguez,*** 92 AD3d 850 [2d Dept. 2012]).

At his deposition, plaintiff testified that prior to the accident, he had been traveling southbound on Eldorado Drive. Plaintiff testified that he was stopped at a red light at the intersection with Jericho Turnpike for approximately 15 seconds. While stopped, plaintiff observed the Cekovic vehicle, which had been traveling westbound on Jericho Turnpike, skid through the intersection and collide with the Lorefice vehicle, which had been traveling westbound on Jericho Turnpike and was making a left turn onto Eldorado Drive. Plaintiff testified that as a result of the collision with the Lorefice vehicle, the Cekovic vehicle moved and came into contact with his vehicle.

At her deposition, Lorefice testified that prior to the accident, she had been traveling eastbound on Jericho Turnpike. When she arrived at the intersection of Eldorado Drive, she was stopped in the left turning lane to make a left turn onto Eldorado Drive. Lorefice testified that when the traffic light for eastbound traffic on Jericho Turnpike was green, her vehicle was halfway in the intersection, and she saw three vehicles which were traveling in the left westbound lane of Jericho Turnpike slowing down. Lorefice testified that as the first vehicle out of three vehicles came to stop at the intersection, she attempted to make a left turn and collied with the Cekovic vehicle, which had been traveling westbound on Jericho Turnpike. Lorefice testified that prior to the accident, she observed that the Cekovic vehicle switched from the left lane to the right lane and remained in such lane until the impact.

At his deposition, Arben Cekovic testified that prior to the accident, he had been traveling in the right westbound lane of Jericho Turnpike at 35 miles per hour. Cekovic testified that he first observed the green light 100 feet away from the intersection of Eldorado Drive, and that the light

remained green until the accident. Cekovic testified that when he first saw the Lorefice vehicle, it was stopped in the left turning lane of eastbound Jericho Turnpike. Cekovic testified that when the Lorefice vehicle attempted to make a left turn in front of him, he applied his brakes, but was unable to avoid the collision with the Lorefice vehicle. Cekovic testified that as a result of the impact with the Lorefice vehicle, his vehicle moved to the right and struck plaintiff's vehicle, which was stopped.

"A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breach a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries" (***Tsyganash v. Auto Mall Fleet Mgmt., Inc.,*** 163 AD3d 1033, 83 NYS3d 74 [2d Dept. 2018]). A violation of a standard of care imposed by the Vehicle and Traffic Law constitutes negligence per se (***Lebron v. Mensah,*** 161 AD3d 972, 76 NYS3d 219 [2d Dept. 2018]; ***Barbaruolo v. Difede,*** 73 AD3d 957, 900 NYS2d 671 [2d Dept. 2010]***; Ciatto v. Lieberman,*** 266 AD2d 494, 698 NYS2d 54 [2d Dept. 1999]; *see also* ***Barbieri v. Vokoun***, 72 AD3d 853, 856, 900 NYS2d 315 [2d Dept. 2010]; ***Smith v. State of New York,*** 121 AD3d 1358, 1358-59, 955 NYS2d 329 [3d Dept. 2014]. Vehicle and Traffic Law § 1141 requires that "[t]he driver of a vehicle intending to turn to the left within an intersection or into an alley, private road, or driveway 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." A driver with the right of way is entitled to anticipate that other motorists will obey traffic laws that require them to yield the right of way (*see* ***Lebron v. Mensah,*** 161 AD3d 972, 76 NYS3d 219 [2d Dept. 2018]; ***Bullock v. Calabretta***, 119 AD3d 884 [2d Dept 2014]; ***Kucar v. Town of Huntington***, 81 AD3d 784, 917 NYS2d 646 [2d Dept 2011]; ***Todd v Godek***, 71 AD3d 872 [2d Dept 2010] ***Kann v. Maggies Paratransit Corp.***, 63 AD3d 792, 882 NYS2d 129 [2d Dept 2009]; ***Berner v. Koegel***, 31 AD3d 591, 819 NYS2d 89 [2d Dept 2006]; ***Gabler v. Marly Bldg. Supply Corp.***, 27 AD3d 519, 813 NYS2d 120 [2d Dept 2006]). Further, a driver is negligent when an accident occurs because the driver failed to see that which through proper use of the driver's senses he or she should have seen (*see* ***Laino v Lucchese***, 35 AD3d 672, 827 NYS2D 249 [2d Dept 2006]; ***Berner v. Koegel***, 31 AD3d 591, 819 NYS2d 89 [2d Dept 2006]; ***Bongiovi v. Hoffman***, 18 AD3d 686, 795 NYS2d 354 [2d Dept 2005]). However, "a driver who has the right-of-way has a duty to exercise reasonable care to avoid a collision with another vehicle" (***Gause v. Martinez,*** 91 AD3d 595, 936 NYS2d 272 [2d Dept. 2012] *quoting* ***Todd v. Godek,*** 71 AD3d 872, 895 NYS2d 861 [2d Dept. 2010]; ***Bonilla v. Calabria***, 80 AD3d 720 [2d Dept 2011]; ***Gardner v. Smith***, 63 AD3d 783 [2d Dept 2009]; ***Cox v Nunez***, 23 AD3d 427 [2d Dept 2005]). There can be more than one proximate cause of an accident and the issue of comparative negligence is generally a question of fact for the jury to decide (*see* ***Bullock v. Calabretta***, 119 AD3d 884, 989 NYS2d 862 [2d Dept. 2014]; ***Bonilla v. Calabria***, 80 AD3d 720 [2d Dept 2011]; ***Todd v. Godek,*** 71 AD3d 872, 895 NYS2d 861 [2d Dept. 2010]). The fact that a party violated the Vehicle and Traffic Law would not preclude a finding that comparative negligence by another party contributed to the accident (*see* ***Gardner v. Smith***, 63 AD3d 783 [2d Dept 2009; ***Cox v. Nunez***, 23 AD3d 427 [2d Dept 2005]). However, a plaintiff need not prove that he or she was free from comparative fault in order to establish his or her prima facie entitlement to summary judgment (*see* ***Rodriguez v. City of New York***, 31 NY3d 312, 76 NYS3d 898 [2018]; ***Edgerton v. City of New York***, 160 AD3d 809, 74 NYS3d 617 [2d Dept 2018]).

Although the issue of proximate cause is generally one for the jury, liability may not be imposed upon a party who merely furnished the condition or occasion for the occurrence of the event but was not one of its causes (*see* ***Sheehan v City of New York***, 40 NY2d 496, 387 NYS2d 92 [1976]; ***Estate of Goldstein v Kingston***, 153 AD3d 1235, 61 NYS3d 123 [2d Dept 2017]; ***Price v Tasber***, 145 AD3d 810, 811, 43 NYS3d 120 [2d Dept 2016]). Here, plaintiffs established their prima facie entitlement to summary judgment, as they demonstrated that plaintiff's conduct in stopping his vehicle while waiting for a light merely furnished the condition or occasion for the accident, and was not a proximate cause of plaintiff's injuries (*see* ***Price v Tasber***, *supra*; ***Wechter v Kelner***, 40 AD3d 747, 835 NYS2d 653 [2d Dept 2007]).

In opposition, defendants Lorefice and Karlund have failed to raise a triable issue of fact. It is undisputed by defendants that plaintiff was an innocent driver, being that he was lawfully stopped at a red light when his vehicle was struck by the Cekovic vehicle. The court notes that no opposition papers were filed by the Cekovic defendants.

While plaintiff does not bear the burden of establishing the absence of his own comparative fault (***Rodriguez v. City of New York***, 31 NY3d 312, 76 NYS3d 898 [2018]) here, the court finds as a matter of law that plaintiff did not engage in any conduct that contributed to the happening of the accident and dismisses defendants' affirmative defenses of comparative negligence as against plaintiffs in addition to granting plaintiffs summary judgment on liability (*see* ***Jung v. Glover,*** 169 AD3d 782, 93 NYS3d 390 [2d Dept. 2019]; ***Medina v. Rodriguez,*** 92 AD3d 850 [2d Dept. 2012]; *cf.* ***Hedian v. MTLR Corp.,*** 169 AD3d 620, 92 NYS3d 880 [1st Dept. 2019]; ***Oluwatayo v. Dulinayan,*** 142 AD3d 113, 35 NYS3d 84 [1st Dept. 2016]).

Accordingly, plaintiff's motion for summary judgment on liability is granted.

Dated: 10/10/2019

William B. Rebolini

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

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