SHORT FORM ORDER

INDEX No. 17-608510
CAL. No. 19-00045MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY

PRESENT:

Hon. LINDA J. KEVINS
Justice of the Supreme Court

MOTION DATE 3-29-19 (003 & 004)
ADJ. DATE 5-14-19
Mot. Seq. # 003 - MD
004 - MD

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DAVID MUGAVERO and ELLEN MUGAVERO,

Plaintiffs,

- against -

RICHARD CAFIERO,

Defendant.

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Upon the following papers read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers by defendant, dated February 4, 2019 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers by plaintiff, dated March 22, 2019 and May 13, 2019 ; Replying Affidavits and supporting papers by defendant, dated March 27, 2019 and May 14, 2019 ; Other ; it is,

ORDERED that the motions by defendant Richard Cafiero seeking summary judgment are consolidated for the purposes of this determination; and it is

ORDERED that the motion by defendant Richard Cafiero seeking summary judgment dismissing the complaint on the ground that his conduct was not a proximate cause of the subject accident's occurrence is denied; and it is further

ORDERED that the motion by defendant Richard Cafiero seeking summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident is denied.

Plaintiff David Mugavero commenced this action to recover damages for injuries he allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Phelps Lane and Pacific Street in the Town of Babylon on August 15, 2016. Plaintiff, by his complaint, alleges that the accident occurred when the vehicle owned and operated by defendant Richard Cafiero struck the rear of his vehicle after he reversed out of his own driveway and began to drive forward. Plaintiff's wife, Ellen Mugavero, also

instituted a derivative cause of action for loss of services. By his bill of particulars, plaintiff alleges that he sustained various personal injuries as a result of the subject collision, including a tear of the suprasinatus of the right shoulder, tendinosis of the right elbow, and multilevel disc bulges and herniations of the spine.

Defendant now moves for summary judgment on the basis that the injuries alleged to have been sustained by plaintiff as a result of the accident do not come within the meaning of the serious injury threshold requirement of Insurance Law § 5102 (d). In support of the motion, defendant submits copies of the pleadings, plaintiff's deposition transcript, and the sworn medical report of Dr. Bradley White. At defendant's request, Dr. White conducted an independent orthopedic examination of plaintiff on February 26, 2018. Plaintiff opposes the motion on the grounds that defendant failed to satisfy his prima facie burden, and that the evidence submitted in opposition demonstrates that he sustained injuries within the "limitations of use" and the "90/180" categories of the Insurance Law as a result of the subject accident. In opposition to the motion, plaintiff submits uncertified copies of his medical records regarding the subject accident, and an affidavit by his treating chiropractor, Dr. Christopher Haas.

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (***Dufel v Green***, 84 NY2d 795, 798, 622 NYS2d 900 [1995]; *see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Porcano v Lehman***, 255 AD2d 430, 680 NYS2d 590 [2d Dept 1988]; ***Nolan v Ford***, 100 AD2d 579, 473 NYS2d 516 [2d Dept 1984], *aff'd* 64 NY2d 681, 485 NYS2d 526 [1984]).

Insurance Law § 5102 (d) defines a "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."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, [such as], affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant may also establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see* ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; ***Torres v Micheletti***, 208 AD2d 519,616 NYS2d 1006 [2d Dept 1994]). Once a defendant has met this burden, the plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory

standard for "serious injury" under New York's No-Fault Insurance Law (*see* ***Dufel v Green***, *supra*; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [4th Dept 2003]; ***Pagano v Kingsbury***, *supra*).

Based upon the adduced evidence, defendant failed to establish his prima facie entitlement to judgment as a matter of law to demonstrate that the injuries sustained by plaintiff as a result of the subject accident do not come within the meaning of the serious injury threshold requirement of Section 5102 (d) of the Insurance Law (*see* ***Pommells v Perez***, *supra*; ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Buchanan v Keller***, 169 AD3d 989, 95 NYS3d252 [2d Dept 2019]; ***Rivas v Hill***, 162 AD3d 809, 79 NYS3d 225 [2d Dept 2018]). Defendant's examining orthopedist, Dr. White, who examined plaintiff on February 26, 2018, almost two years after the subject accident, despite concluding that the sprains to plaintiff's spine, right shoulder, and right elbow have resolved, found significant range of motion limitations in plaintiff's cervical region and right shoulder, and that plaintiff did not have any evidence of a contributing pre-existing condition (*see* ***Katanov v County of Nassau***, 91 AD3d 723, 936 NYS2d 285 [2d Dept 2012]; ***Quiceno v Mendoza***, 72 AD3d 669, 897 NYS2d 643 [2d Dept 2010]; ***Morales v Theagene***, 46 AD3d 775, 848 NYS2d 325 [2d Dept 2007]).

Further, while, a defendant is permitted to use a plaintiff's deposition testimony to establish that he or she did not sustain a nonpermanent injury during the 90 days out of the 180 days immediately following the accident (*see e.g.* ***Yanping Xu v Gold Coast Freightways, Inc.***, 107 AD3d 885, 968 NYS2d 111 [2d Dept 2013]; ***Takaroff v AM USA. Inc.,*** 63 AD3d 1142, 882 NYS2d 265 [2d Dept 2009]; ***Shaw v Jalloh***, 57 AD3d 647, 869 NYS2d 189 [2d Dept 2008]; ***Sanchez v Williamsburg Volunteer of Hatzolah***, 48 AD3d 664, 852 NYS2d 287 [2d Dept 2008]), defendant's reliance on plaintiff's testimony in the instant matter is insufficient to meet his burden on the motion (*see* ***Aujour v Singh***, 90 AD3d 686, 934 NYS2d 240 [2d Dept 2011]; ***Bangar v Man Sing Wong***, 89 AD3d 1048, 933 NYS2d 536 [2d Dept 2011]; ***Tinsley v Bah***, 50 AD3d 1019, 857 NYS2d 180 [2d Dept 2008]; *cf.* ***Master v Boiakhtchion***, 122 AD3d 589,996 NYS2d 116 [2d Dept 2014]; ***Geliga v Karibian***, 56 AD3d 518, 867 NYS2d 519 [2008]). Plaintiff testified at an examination before trial that following the accident, he was informed by the doctors at Good Samaritan Hospital and his primary care physician that he had two herniated discs in his lower back and neck, and a torn rotator cuff in his right shoulder, that he was advised by his doctors to remain home and "take it easy," and that he missed approximately two months from his employment as an union ironworker. Plaintiff testified that he continues to receive physical therapy, acupuncture, and chiropractic treatment twice a week, and that his treatments continue to be covered by his No-Fault benefits. Plaintiff further testified that he has never injured his neck, back or shoulder in any prior accident, although he did injure his finger and right knee in a previous accident while working for the Metropolitan Transit Authority.

Having determined that defendant failed to establish his initial burden, it is unnecessary for the court to consider whether plaintiff's opposition papers were sufficient to raise a triable issue of fact (*see* ***Cervantes v McDermott***, 159 AD3d 669, 71 NYS3d 612 [2d Dept 2018]; ***Kharzis v PV Holding Corp.***, 78 AD3d 1122, 912 NYS2d 114 [2d Dept 2010]; ***McMillian v Naparano***, 61 AD3d 943, 879 NYS2d 152 [2d Dept 2009]). Accordingly, defendant's motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident is denied.

Defendant also moves for summary judgment on the basis that he did not breach any duty owed to plaintiff, and that plaintiff was the sole proximate cause of the subject accident, since he failed to yield the right of way in violation of Vehicle and Traffic Law §§ 1211 (a), 1142 and 1173 while reversing out of his driveway onto the roadway. In support of the motion, defendant submits copies of the pleadings, the parties' deposition transcripts, and photographs of the site of the accident. Plaintiff opposes the motion on the grounds that defendant failed to meet his prima facie burden, and that there are material triable issues of fact as to how the subject accident occurred. In opposition to the motion plaintiff relies on the same evidence submitted by defendant in support of such motion.

It is well settled that a driver approaching a vehicle from the rear is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (*see* Vehicle and Traffic Law § 1129[a]; *see also* ***Nsiah-Ababio v Hunter***, 73 AD3d 672, 913 NYS2d 659 [2d Dept 2010]). A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence against the operator of the moving vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision (*see* ***Cortes v Whelan***, 83 AD3d 763, 922 NYS2d 410 [2d Dept 2011]; ***Ramirez v Konstanzer***, 61 AD3d 837, 837 NYS2d 381 [2d Dept 2009]; ***Hakakian v McCabe***, 38 AD3d 493, 833 NYS2d 106 [2d Dept 2007]). A non-negligent explanation for the collision, such as mechanical failure or the sudden and abrupt stop of the vehicle ahead is sufficient to overcome the inference of negligence and preclude an award of summary judgment (***Danner v Campbell***, 302 AD2d 859, 859, 754 NYS2d 484 [4th Dept 2003]; *see* ***Davidoff v Mullokandov***, 74 AD3d 862, 903 NYS2d 107 [2d Dept 2010]; ***Carhuayano v J&R Hacking***, 28 AD3d 413, 812 NYS2d 162 [2d Dept 2006]); ***Rodriguez-Johnson v Hunt***, 279 AD2d 781, 718 NYS2d 501 [3d Dept 2001]). However, the lead vehicle also has a duty not to stop suddenly or slow down without proper signaling so as to avoid a collision (***Chepel v Meyers***, 306 AD2d 235, 237, 762 NYS2d 95 [2d Dept 2003]; *see* ***Carhuayano v J&R Hacking***, 28 AD3d 413, 813 NYS2d 162 [2d Dept 2006]; ***Gaeta v Carter***, 6 AD3d 576, 775 NYS2d 86 [2d Dept 2004]; ***Purcell v Axelsen***, 286 AD2d 379, 729 NYS2d 495 [2d Dept 2001]; ***Colonna v Suarez***, 278 AD2d 355, 718 NYS2d 618 [2d Dept 2000]; *see also* Vehicle and Traffic Law § 1163).

In addition, Vehicle and Traffic Law §§ 1211 (a) and 1173 impose a duty upon an operator of a motor vehicle emerging from a driveway to not make such movement unless it can be done without interfering with other traffic, and to stop such vehicle immediately prior to entering the roadway (*see* ***Nunez v Olympic Fence & Railing Co., Inc.***, 138 AD3d 807, 29 NYS3d 546 [2d Dept 2016]; ***Weathers v Grix***, 273 AD2d 463 [2d Dept 2000]; ***Lugo v Brentwood Union Free Sch. Dist.***, 212 AD2d 582, 622 NYS2d 553 [2d Dept 1995]).

Plaintiff testified at an examination before trial that prior to the accident he was exiting his driveway in reverse, that he looked to his left and right before reversing out of his driveway and did not see any vehicles traveling either eastbound or westbound on Phelps Lane, that he continued looking eastbound towards the oncoming traffic while backing up and did not observe any vehicles, and that he is able to see approximately 60 to 70 yards down Phelps Lane, all the way to its intersection with Pacific Street where a stop sign is located. Plaintiff testified that the accident occurred after he had fully reversed out of the driveway and had driven approximately one foot forward in an easterly direction. Plaintiff testified that he did not observe defendant's vehicle prior to the impact to the rear of his vehicle, and that it was only once his vehicle had been impacted that he realized he had been in an accident. Plaintiff further testified that the

impact caused his vehicle to spin 180 degrees, leaving his vehicle in a westbound direction in the eastbound lane and a portion of his vehicle on his front lawn.

Defendant testified at an examination before trial that prior to the accident he was traveling, approximately 30 miles per hour, eastbound on Phelps Lane, that he is very familiar with the area where the accident occurred, and that he stopped at the stop sign on Phelps Lane, approximately 150 feet from where the accident occurred. Defendant testified that as he was traveling on Phelps Lane he did not observe any vehicles reversing out of their driveway, that immediately before the accident occurred he was accelerating, and that he did not see plaintiff's vehicle before the accident occurred. He testified that he first observed plaintiff's vehicle as it was "coming off the driveway and reversing to turn onto the eastbound lane of Phelps Lane," and that "plaintiff's vehicle was mostly on Phelps Lane with the tip of the vehicle still in the driveway." Defendant testified that he attempted to press his brakes to avoid the accident, but impacted the rear of plaintiff's vehicle nevertheless, that he did not see any lights on the rear of plaintiff's vehicle prior to colliding with the rear of the vehicle, and that as result of the impact, his vehicle continued traveling straight in the eastbound lane of Phelps Lane until it became disabled when the air bags deployed. Defendant further testified that plaintiff's vehicle stopped on the driveway due to the impact, that plaintiff's daughter's boyfriend was operating the vehicle, not plaintiff, although he did not see who exited the vehicle immediately after the accident, and that he informed the police officer on the scene that "he was traveling down the street looking forward and he made impact with the car backing out of the driveway."

In light of the conflicting deposition testimony, which supports different conclusions regarding fault, defendant failed to eliminate all triable issues of fact as to that matter (*see* ***Cho v Demelo***, 175 AD3d 1235, 108 NYS3d 159 [2d Dept 2019]; ***Cruz v Valentine Packaging Corp.***, 167 AD3d 707, 89 NYS3d 316 [2d Dept 2018]; ***Rine v Quadt***, 151 AD3d 1829, 57 NY2d 318 [4th Dept 2017]; *cf.* ***Lopez v Morel-Ulla***, 144 AD3d 504, 41 NYS3d 39 [1st Dept 2016]). The inconsistences in the parties' deposition testimonies raise not only questions of fact regarding comparative negligence, but also questions of credibility, which must be resolved by the trier of fact (*see* ***Martinez v Martinez***, 93 AD3d 767, 941 NYS2d 189 [2d Dept 2012]; ***Camarillo v Sandoval***, 90 AD3d 593, 933 NYS2d 906 [2d Dept 2011]). Additionally, the transcript of defendant's deposition testimony presented a triable issue of fact as to whether he failed to see what was there to be seen through the proper use of his senses (*see* ***Elkholy v Dawkins***, 175 AD3d 1487, 109 NYS3d 392 [2d Dept 2019]; ***Rojas v Solis***, 154 AD3d 985, 62 NYS3d 511 [2d Dept 2017]; ***Palmeri v Erricola***, 122 AD3d 697, 996 NYS2d 193 [2d Dept 2014]). Therefore, defendant failed to establish his prima facie entitlement to judgment as a matter of law (*see* ***Stafford v Allied Bldg. Prods. Corp.***, 164 AD3d 1398, 82 NYS3d 539 [2d Dept 2018]; ***Cervantes v McDermott***, 159 AD3d 669, 71 NYS3d 612 [2d Dept 2018]).

Accordingly, defendant's motion for summary judgment dismissing the complaint on the issue of negligence is denied.

Dated: 2/28/2020

HON. LINDA KEVINS J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION