Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY **PART 35**
Justice

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JUN LI,

Plaintiff,

-against-

IAN H. RESLER,

Defendant.

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Index No.: 702238/19
Mot. Date: 8/10/21
Mot. Seq. No. 1

The following papers were read on the motion by defendant for an order, pursuant to CPLR 3212, granting summary judgment in his favor dismissing the complaint of plaintiff Jun Li, on the basis that plaintiff did not sustain a "serious injury" under Insurance Law § 5102(d); and on the cross-motion by plaintiff for an order granting summary judgment in plaintiff's favor against the defendant, pursuant to CPLR 3212, on the issue of liability and granting plaintiff summary judgment, pursuant to Insurance Law §5102 (d), and dismissing the affirmative defense of comparative negligence and granting costs, disbursements, and reasonable attorneys fees.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	EF 14-25
Notice of Cross-Motion-Affidavits-Exhibits.....	EF 26-35
Replying Affidavits.....	EF 36

Upon the foregoing papers, it is ordered that the defendant's motion is denied and the plaintiff's cross-motion is granted in part and denied in part.

In this action seeking damages for personal injuries, allegedly sustained in a motor vehicle accident that occurred on February 2, 2018, the defendant moves for an order granting summary judgment dismissing plaintiff Jun Li's Complaint on the basis that the plaintiff did not sustain a "serious injury" under Insurance Law §5102(d); and plaintiff cross-moves for an order granting summary judgment in his favor against defendant Ian H. Resler, pursuant to CPLR 3212, on the issue of liability and granting the plaintiff summary judgment, pursuant to Insurance Law § 5102(d), and dismissing all affirmative

defenses and granting costs, disbursements, and reasonable attorneys fees.

Turning first to the plaintiff's cross-motion, that branch of plaintiff's cross-motion seeking summary judgment on liability grounds, pursuant to CPLR 3212, is granted.

This is an action for personal injuries arising out of a motor vehicle accident, that occurred on February 2, 2018, on the Grand Central Parkway, at/or near 175th Street, in Queens County, New York.

The evidence proffered in support of the motion, which evidence includes, *inter alia*, the examination before trial transcript testimony of plaintiff Jun Li reveals that: there was a rear-end collision wherein a vehicle operated by plaintiff was travelling at 15-20 mph, when it was struck from behind by a vehicle operated by defendant Ian H. Resler.

It is well established law that a rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of negligence on the part of the driver of the rearmost vehicle, requiring the operator of that vehicle to proffer an adequate, non-negligent explanation for the accident (*Reed v New York City Transit Authority*, 299 AD2 330 [2d Dept 2002]; *See also Velazquez v Denton Limo, Inc*., 7 AD3d 787 [2d Dept 2004], stating that: "[a] rear end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the driver of the moving vehicle, requiring the operator of that vehicle to come forward with a non-negligent explanation for the accident.)" The same logic applies even when the lead car is moving (*Giangrasso v Callahan,* 87 AD3d 521 [2d Dept 2011]).

The party opposing the motion must present sufficient evidence establishing that a genuine issue of fact exists (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Defendant has failed to present a triable issues of fact, as the defendant did not submit any papers in opposition to the plaintiff's application seeking summary judgment on the issue of liability.

Pursuant to Vehicle and Traffic Law §1129(a), the defendant was under a duty to maintain a safe distance between his vehicle and plaintiff's vehicle and his failure to do so in the absence of an adequate, non-negligent explanation is deemed negligence as a matter of law (*Leal v Wolff*, 224 AD2d 392 [2d Dept 1996].

Thus, as there are no triable issues of fact regarding liability, the plaintiff is entitled to summary judgment on the issue of liability.

Furthermore, as the record reveals no evidence that the plaintiff caused or contributed to the accident in any way, the defendant's affirmative defense alleging comparative negligence shall be dismissed.

Turning now to the motion by defendant for an order, pursuant to CPLR 3212, granting summary judgment in his favor dismissing the complaint of plaintiff Jun Li, on the basis that the plaintiff did not sustain a "serious injury," under Insurance Law § 5102(d), same is denied.

As a general proposition, the proponent of a summary judgment motion of this type must make a *prima facie* showing of entitlement to summary judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. (*See Licari v Elliot*, 57 NY 2d 230 [1982]; *Alvarez v Prospect Hospital*, 68 NY2d 320 1986]; *Zuckerman v City of New York*, 49 NY 2d 557 [1980]). The defendant's motion papers must demonstrate, through admissible medical evidence, which may include medical reports and records and affidavits and/or affirmed reports of medical examinations, including range-of-motion testing, that address all of the plaintiff's claims, that the plaintiff did not sustain functional limitations which would constitute either a permanent consequential limitation of use of a body organ, member, a significant limitation of use of body function or system, or a medically determined injury or impairment of a non-permanent nature that prevented the plaintiff from performing substantially all of the material, acts which constituted his or her usual customary daily activities for not less than 90 days during the 180 days immediately following the subject accident. (*See Toure v Avis Rent A Car Sys*., 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955 [1992]; *Choi v Guerrero*, 82 AD3d 1080 [2d Dept. 2011]; *Jilani v Palmer*, 83 AD3d 786 [2d Dept. 2011]). The failure to make a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see e.g. Reed v Righton Limo, Inc*., 82 AD3d 1070 [2d Dept. 2011]; *Joris v UMF Car & Limo Service*, 82 AD3d 1050 [2d Dept. 2011]; *Keenum v Atkins*, 82 AD3d 843 [2d Dept. 2011]; *Pero v Transervice Logistics*, 83 AD3d 681 [2d Dept. 2011]).

Here, the defendant's moving papers present proof in admissible form via, *inter alia*, the affirmed report of the defendant's independent examining physician, orthopedic surgeon, Dr. Stuart Springer, M.D. Based upon the foregoing, the defendant provided

proof demonstrating, *prima facie*, the absence of any condition that might have arguably met the serious injury threshold of Insurance Law § 5102(d). Thus, the burden shifts to the plaintiff to demonstrate the existence of a triable issue of fact (*See Gaddy v Eyler, supra*).

A medical affirmation or affidavit which is based upon a physician's personal examinations and observation of plaintiff is an acceptable method to provide a doctor's opinion regrading the existence and extent of a plaintiff's serious injury (*O'Sullivan v Atrium Bus Co.*, 246 AD2d 418 [1st Dept 1980]). The causal connection must ordinarily be established by competent medical proof (*see Kociocek v Chen*, 283 AD2d 554 [2d Dept 2001]; *Pommels v Perez*, 4 NY3d 566 [2005]). Plaintiff submitted medical proof that was contemporaneous with the accident showing *inter alia,* range of motion limitations of plaintiff's right knee (*Pajda v Pedone*, 303 AD2d 729 [2d Dept 2003]). Plaintiff has established a causal connection between the accident and the plaintiff's right knee injuries. Furthermore, the plaintiff has provided a recent medical examination detailing the status of his injuries at the current point in time (*Kauderer v Penta*, 261 AD2d 365 (2d Dept 1999). The sworn narrative report of plaintiff's orthopedic surgeon, Dr. Jerry A. Lubliner, provides that a recent examination of the plaintiff was conducted, on May 25, 2021, and sets forth the objective examination, tests, and review of medical records which were performed to support his conclusion that the plaintiff suffers from significant injuries, to wit, *inter alia*, range of motion limitations of the right knee. Dr. Lubliner opines that the injuries to plaintiff's right knee are permanent in nature and are causally related to the accident of February 2, 2018. Additionally, Dr. Lubliner concludes that he recommends the plaintiff for an operative arthroscopy of the right knee. Clearly, the plaintiff's experts' conclusions are not based *solely* on the plaintiff's subjective complaints of pain, and, therefore, are sufficient to defeat the motion (*DiLeo v Blumber, supra*, 250 AD2d 364 [1st Dept 1998]).

Additionally, the plaintiff testified that he could not fully return to work due to injuries from the date of his accident, until approximately half a year after the accident.

Since there are triable issues of fact regarding whether the plaintiff sustained a serious injury to his right knee, plaintiff is entitled to seek recovery for *all* injuries allegedly incurred as a result of the accident (*Marte v New York City Transit Authority*,

59 AD3d 398 [2d Dept 2009]).

Therefore, plaintiff's submissions are sufficient to raise a triable issue of fact on "serious injury" grounds (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

As such, the defendant's motion is denied and the branch of the plaintiff's cross-motion seeking summary judgment, pursuant to Insurance Law 5102(d), is denied.

Accordingly, it is

ORDERED that the motion by defendant seeking summary judgment, on "serious injury" grounds, is denied; and it is further

ORDERED that the branch of the cross-motion by plaintiff seeking summary judgment, pursuant to Insurance Law § 5102(d) is denied; and it is further

ORDERED that the branch of the cross-motion by plaintiff seeking summary judgment on liability grounds, pursuant to CPLR 3212, is granted; and it is further

ORDERED that the branch of the cross-motion by plaintiff dismissing the affirmative defense of comparative negligence is granted ; and it is further

ORDERED that any and all applications not specifically addressed herein are denied.

The forgoing constitutes the decision and order of this Court.

Dated: October 19, 2021

FILED
10/21/2021
COUNTY CLERK
QUEENS COUNTY

TIMOTHY J. DUFFICY, J.S.C.