| **Phillip v Singh** |
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| 2022 NY Slip Op 30735(U) |
| March 2, 2022 |
| Supreme Court, Kings County |
| Docket Number: Index No. 518010/2020 |
| Judge: Lillian Wan |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17
-----------------------------------------------------------------X
KELON PHILLIP,

Plaintiff,

- against –

RAVINDER SINGH and ISHAN HAMZA,

Defendants.
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Index No.: 518010/2020
Motion Seq.: 02 & 03

**DECISION AND ORDER**

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of these motions for summary judgment by the plaintiff and defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 02) 32-40, 52-54 and (Motion 03) 41-50, 58-69 were read on these motions for summary judgment.

The plaintiff moves for partial summary judgment (Motion 02), pursuant to CPLR § 3212, on the issue of liability, and for dismissal of the defendants' affirmative defenses alleging comparative negligence, contributory negligence and culpable conduct of the plaintiff. The defendants move for summary judgment (Motion 03) on the ground that the plaintiff did not sustain a serious injury pursuant to Insurance Law § 5102(d). Upon careful consideration of the parties' submissions, the plaintiff's motion is granted and the defendants' motion is denied for the reasons set forth below.

This action arises from a motor vehicle accident that occurred on August 22, 2020 in the County of Kings, City and State of New York. At the time of the collision, the plaintiff was travelling straight on Hegeman Avenue passing through the intersection with Thatford Avenue in the designated moving lane for travel. The plaintiff's path of travel at the intersection was not controlled by a stop sign or any other traffic control device. The vehicle owned by defendant Ishan Hamza, and operated by defendant Ravinder Singh (Singh), was travelling straight on Thatford Avenue attempting to enter the intersection with Hegeman Avenue and execute a left turn onto Hegeman Avenue. Defendant Singh's path of travel at the intersection was controlled by a stop sign. As Singh moved his vehicle forward past the stop sign and entered the intersection while attempting to make the left turn, his vehicle struck the plaintiff's vehicle.

In support of the motion (02), the plaintiff submits the pleadings, the plaintiff's deposition testimony, the plaintiff's sworn affidavit, a certified copy of the police report, and a copy of the order of the Hon. Lawrence Knipel, dated June 21, 2021, with Notice of Entry, conditionally precluding the defendant from offering evidence, without further order of the Court in the event that the defendant's deposition failed to take place by the date specified in the order.

VTL § 1141 provides:

> Right of Way
> §1141. Vehicle turning left.
>
> The 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.

Further, VTL § 1142(a) states:

> …every driver of a vehicle approaching a stop sign shall stop as required by section eleven hundred seventy-two and after having stopped shall yield the right of way to any vehicle which has entered the intersection from another highway or which is approaching so closely on said highway as to constitute an immediate hazard during the time when such driver is moving across or within the intersection.

According to VTL § 1172(a):

> …every driver of a vehicle approaching a stop sign shall stop at a clearly marked stop line, but if none, then shall stop before entering the crosswalk on the near side of the intersection, or in the event there is no crosswalk, at the point nearest the intersecting roadway where the driver has a view of the approaching traffic on the intersecting roadway before entering the intersection and the right to proceed shall be subject to the provisions of section eleven hundred forty-two.

A violation of the Vehicle and Traffic Law constitutes negligence as a matter of law. *Joaquin v Franco*, 116 AD3d 1009 (2d Dept 2014); *see also Vainer v DiSalvo*, 79 AD3d 1023 (2d Dept 2010); *Maliza v Puerto-Rican Transp. Corp*., 50 AD3d 650 (2d Dept 2008). "A driver who fails to yield the right of way after stopping at a stop sign controlling traffic is in violation of Vehicle and Traffic Law § 1142 (a) and is negligent as a matter of law." *See Laino v Lucchese*, 35 AD3d 672, 672 (2d Dept 2006). Moreover, "[a] driver is required to see what is there to be seen, and a driver who has the right of way is entitled to anticipate that the other motorist will obey the traffic law requiring him or her to yield." *Id*. at 672-673; *see also Francavilla v Doyno*, 96 AD3d 714 (2d Dept 2012). Further, "[a]lthough a driver with the right-of-way also has a duty to use reasonable care to avoid a collision…it has been recognized that a driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision" (citations omitted). *See Yelder v Walters*, 64 AD3d 762, 764 (2d Dept 2009).

Summary judgment is a drastic remedy and may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp*., 68 NY2d 320 (1986); *see also Phillips v Joseph Kantor & Co.*, 31 NY2d 307 (1972). The moving party is required to make a prima facie

showing of entitlement to judgment as a matter of law, and evidence must be tendered in admissible form to demonstrate the absence of any material issues of fact. *Alvarez*, 68 NY2d at 324; *see also Zuckerman v City of New York*, 49 NY2d 557 (1980). If the prima facie burden has been met, the burden then shifts to the opposing party to present sufficient evidence to establish the existence of material issues of fact requiring a trial. CPLR § 3212 (b); *see also Alvarez*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562.

The plaintiff has established his prima facie entitlement to judgment as a matter of law by submitting evidence demonstrating that defendant Singh failed to stop at the stop sign and entered the intersection in violation of VTL §§ 1141, 1142(a) and 1172(a), and that this was the sole proximate cause of the accident. *Joaquin*, 116 AD3d at 1009-1010; *see also Jiang-Hong Chen v Heart Tr., Inc*., 143 AD3d 945 (2d Dept 2016). The plaintiff testified that he was travelling along Hegeman Avenue at approximately 15 miles per hour, and observed the defendants' vehicle attempt to make a left turn from Thatford Avenue, which was controlled by a stop sign, only one to two seconds before the collision. According to the certified police report, the defendant driver, Singh, admitted that a stop sign controlled his lane of travel. In opposition, the defendants have failed to raise a triable issue of fact. The defendants' submissions are insufficient and speculative, as they do not present any factual basis for the assertion set forth only in an attorney's affirmation, that "there is a strong basis for a jury to find [p]laintiff to be solely at fault in the subject incident." *See Browne v Castillo*, 288 AD2d 415 (2d Dept 2001).

Turning to the defendants' motion for summary judgment (Motion 03) seeking dismissal of the plaintiff's complaint based on Insurance Law § 5102(d), the defendants submit the pleadings, the plaintiff's deposition testimony, the note of issue filed on August 23, 2021, and the affirmed report of their medical expert, Dr. Jeffrey Guttman.

The plaintiff's bill of particulars alleges that the plaintiff sustained a serious injury as defined by section 5102(d) of the Insurance Law that includes:

> …a permanent loss of use of a body member, function, organ or system; a permanent consequential limitation of a body organ or member; a significant limitation of a body function or system; and/or plaintiff sustained a non-permanent medically determined injury which prevented plaintiff from performing substantially all of the material acts which constituted her [sic] usual and customary duties for at least ninety days of the first one hundred and eighty days after the accident…

Further, according to the bill of particulars, the plaintiff sustained injuries to, inter alia, the lumbar spine and left shoulder, including L4-L5 and L5-S1 central and bilateral paracentral disc herniation with associated spinal stenosis or neural foraminal narrowing, and lumbosacral internal derangement, disc disorder, sprain, strain, radiculopathy, myofascitis and/or neuritis; and left shoulder partial tear of the glenoid labrum, partial tear of the rotator cuff, synovitis, and subacromial impingement. On November 11, 2020, the plaintiff underwent arthroscopic surgery related to the left shoulder injuries, which was performed by Dr. Harvey Manes.

The report of Dr. Guttman, a board-certified orthopedic surgeon, examined the plaintiff on June 13, 2021, and reviewed the plaintiff's verified bill of particulars. Dr. Guttman performed range of motion and other objective testing of the plaintiff's lumbar spine and left shoulder and found those areas to have no limitations in range of motion. Based on the examination, Dr. Guttman's impression was resolved lumbar and left shoulder sprain. Dr. Guttman did not render an opinion as to causation, and concluded that the plaintiff did not sustain any significant or permanent injury as a result of the accident. His report does not address the plaintiff's claim based on the 90/180 day category of Insurance Law § 5102(d).

As the proponent of the summary judgment motion, the defendants have the initial burden of establishing that the plaintiff did not sustain a serious injury under the categories of injury claimed in his bill of particulars. *See Toure v Avis Rent A Car Sys.,* 98 NY2d 345 (2002). A defendant can satisfy the initial burden by relying on statements of defendant's examining physician, or plaintiff's sworn testimony, or by the affirmed reports of plaintiff's own examining physicians. *See Pagano v Kingsbury*, 182 AD2d 268 (2d Dept 1992).

In the instant matter, the defendants' motions must be denied since they failed to meet their prima facie burden of showing that the plaintiff did not sustain a serious injury under the 90/180–day category of Insurance Law § 5102(d). *See Toure v Avis Rent A Car Sys*., 98 NY2d 345. The defendants' submissions failed to adequately address the plaintiff's claim, clearly set forth in the bills of particulars, that he was incapacitated from his employment for approximately 90 days, and 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 daily activities for not less than 90 days during the 180 days immediately following the subject accident. *See Che Hong Kim v Kossoff*, 90 AD3d 969 (2d Dept 2011); *see also Raphael v City of New York*, 199 AD3d 1037 (2d Dept 2021). Further, the defendants failed to submit sufficient evidence establishing that the plaintiff's injuries were not causally related to the accident, as Dr. Guttman did not render an opinion on the issue of causation. *See Mariaca-Olmos v Mizrhy*, 226 AD2d 437 (2d Dept 1996). Likewise, although the report indicates that Dr. Guttman examined the plaintiff's left shoulder, it does not address the plaintiff's main claim in his bill of particulars relating to the arthroscopic repair of the labrum and rotator cuff tears of the plaintiff's left shoulder, as alleged in the plaintiff's bill of particulars. *See Loadholt v New York City Transit Authority*, 12 AD3d 352 (2d Dept 2004).

Since the defendants failed to meet their prima facie burden of showing that the plaintiff did not suffer a serious injury, it is unnecessary to consider the plaintiff's opposing papers in this regard. *See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Marmer v IF USA Express, Inc.*, 73 AD3d 868 (2d Dept 2010).

The remaining contentions are without merit.

Accordingly, it is hereby

**ORDERED**, that the plaintiff's motion (Motion 02) is **GRANTED** in its entirety; and it is further

**ORDERED**, that the defendants' motion (Motion 03) is **DENIED**.

This constitutes the decision and order of the Court.

Dated: March 2, 2022

Lillian Wan
HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.