To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

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KONSTANTINOS FOTIOU,

Index No. 60714/2022

Plaintiff,

DECISION & ORDER

– against –

Motion Seq. no. 2

ELIZABETH HILLENBRAND HARTOFILIS,

Defendants.

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The following papers, filed on NYSCEF as documents number 29-41 and 46-48, were read on this motion by plaintiff for (1) summary judgment, pursuant to CPLR 3212, on the issue of liability, (2) partial summary judgment, pursuant to CPLR 3212, on the issue of serious injury threshold, as defined by Insurance law § 5120(d), and (3) for such other and further relief as this Court deems just and proper.

Papers Considered

1. Notice of Motion/Affirmation in Support of Thomas G. Cascione, Esq./ Exhibits A-I/Statement of Material Facts/Memorandum of Law in Support
2. Affirmation in Opposition of Cristina M. Moreira, Esq./Exhibit A
3. Affirmation in Reply of Thomas G. Cascione, Esq.

FACTUAL AND RELEVANT PROCEDURAL BACKGROUND

Plaintiff commenced this action seeking to recover damages for personal injuries allegedly sustained as a result of a motor vehicle accident that occurred on October 20, 2021 on the Saw Mill River Parkway. Plaintiff alleges that his motor vehicle was struck in the rear by defendant's motor vehicle while it was stopped in traffic. Defendant joined issue with the service and filing of an answer.

Plaintiff now moves, pursuant to CPLR 3212, for summary judgment on the issue of liability and for partial summary judgment on the on the issue of serious injury threshold, as defined by Insurance Law § 5102(d).

In support of plaintiff's motion on the issue of liability, plaintiff submits, inter alia, the police accident report, plaintiff's affidavit and the parties' deposition testimony. Plaintiff contends that he is entitled to summary judgment on the issue of liability insofar as the motion record establishes that defendant's motor vehicle struck plaintiff's motor vehicle in the rear while it was stopped on the parkway.

In opposition, defendant argues that plaintiff failed to demonstrate entitlement to summary judgment on the issue of liability since plaintiff improperly relied upon the uncertified police accident report annexed in support of the motion papers. Defendant further argues, in opposition, that since plaintiff failed to submit evidence in admissible form eliminating any material issue of fact from the case as to the issue of liability, there is no need for defendant to submit any proof.

With respect to the issue of serious injury threshold, plaintiff submits his medical records from his treating medical providers, the affirmation of plaintiff's treating chiropractor and the reports of defendant's examining physicians. Plaintiff contends that he is entitled to partial summary judgment on the issue of serious injury threshold since the foregoing records, affirmation and reports establish that he sustained a cervical injury with loss of range of motion, loss of cognition, and a left shoulder labral tear, which required arthroscopic surgery, with ongoing disability. Plaintiff further asserts that insofar as defendant's expert Orthopedist agrees with the finding of plaintiff's physician with respect to the left shoulder labral tear with continuing disability post-surgery, plaintiff is entitled to summary judgment on the issue of serious injury threshold.

Defendant argues, in opposition, that plaintiff failed to establish the absence of an issue of fact as to whether plaintiff sustained a "serious injury" as a result of the accident. Defendant notes that the records of plaintiff's treating medical providers found limitations to plaintiff's neck, back and left shoulder, which they opined are permanent and causally related to the motor vehicle accident. However, defendant argues that the findings in the medical records of plaintiff's treating medical providers are speculative as they failed to address the normal findings as to plaintiff's neck and back by the attending physician at the Emergency Room the day of the accident.

Moreover, defendant asserts that, in the medical records, plaintiff's treating medical providers claim to have reviewed the MRI study of plaintiff's cervical spine, but then fail to address the findings of degeneration of plaintiff's cervical spine contributing to mild left foraminal encroachment at C5-6 and the findings of joint hypertrophy at C4-5. Defendant also argues that the findings of plaintiff's treating chiropractor are speculative with respect to causation since he did not treat plaintiff until three months after the accident.

Additionally, in opposition, defendant notes that records of the Emergency Room do not contain any complaints by plaintiff with respect to his left shoulder. Further, defendant argues that plaintiff erroneously relies on defendant's expert report since the defendant's expert did not address causation.

Defendant, therefore, asserts that the proof submitted by plaintiff in support of that branch of the motion was insufficient to establish that plaintiff's injuries were caused by the subject motor vehicle accident. Accordingly, defendant argues that the branch of plaintiff's motion for partial summary judgment on the issue of serious injury threshold must be denied.

In reply, plaintiff contends that defendant's opposition was untimely and should be disregarded. Plaintiff asserts that, upon defendant's request, plaintiff consented to two adjournments from October 30, 2023 to November 27, 2023 and then to December 18, 2023, but defendant then sought a third adjournment directly from the court without seeking plaintiff's consent and another short adjournment. As a result, the court granted a final adjournment to January 5, 2024, such that plaintiff received the opposition papers on the Friday morning of New Year's weekend before plaintiff's counsel was out of the country for the week.

Plaintiff, in reply, also argues that the "uncertified" police report was for informational purposes only as the Westchester County Police would not provide a certified copy as they did not report to the scene of the accident. Moreover, plaintiff contends that since defendant conceded under oath that she struck the rear of plaintiff's motor vehicle, plaintiff is entitled to summary judgment on the issue of liability.

As to the serious injury threshold, plaintiff argues that although defendant relies upon findings of degeneration in plaintiff's cervical spine, they have no evidence of a pre-existing condition of the left shoulder. Plaintiff asserts that, three weeks after the accident and during plaintiff's first examination, plaintiff's treating medical provider, Dr. Aric Hausknecht, noted the

left shoulder injury, requested an MRI of the shoulder and found a causal connection to the injury and the motor vehicle accident. Plaintiff further asserts that the MRI, performed less than a month after the accident, showed a tendon and labrum tear in the left shoulder. Plaintiff's chiropractor, who started treating plaintiff less than three months after the accident, noted "accident related symptoms" including the left shoulder (Plaintiff's Exhibit G, DeLaCruz Aff ¶ 4). Plaintiff further argues that plaintiff was an active maintenance manager for an elevator company, who worked in the field, such that "he was not walking around with that torn shoulder indefinitely, deferring medical care while waiting for someone to blame it on" (Reply Affm ¶ 8).

In reply, plaintiff also contends that defendant improperly relies on the Emergency Room record as it was uncertified and not generally admissible. In any event, plaintiff contends that Emergency Room records should not be relied on since soft tissue injuries often manifest themselves more severely in the days after the accident. Plaintiff further argues that it is hard enough to get reports from the treating physicians without insisting that they critique the Emergency Room physician.

Finally, plaintiff argues that defendant failed to rebut the plaintiff's Material Statement of Facts which laid out the factual basis for all of plaintiff's contentions regarding liability and injury threshold. Plaintiff concedes that the court is not required to deem plaintiff's contentions in the Material Statement of Facts as being admitted by defendant's omission. However, plaintiff contends that since defendant's submission was labeled as "Counter Statement to Plaintiff's Statement of Material Facts, Affirmation in Opposition, Certificate of Compliance and Exhibit"[1] and no counter statement was submitted, it should have some bearing on the determination of the issues.

DISCUSSION

A party seeking summary judgment bears the initial burden of affirmatively demonstrating its entitlement to summary judgment as a matter of law *(see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). If the moving party makes such a prima facie showing, the burden shifts to the opposing party to

[1] This court was unable to locate a submission by defendant that was so labeled. Defendant labeled the affirmation in opposition as "Affirmation in Opposition."

demonstrate the existence of an issue of fact requiring a trial (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Phillip v D & D Carting Co., Inc.*, 136 AD3d 18 [2nd Dept 2015]; *Dempster v Liotti*, 86 AD3d 169 [2nd Dept 2011]). The party opposing the motion for summary judgment "must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). On a motion for summary judgment, the court must consider all of the facts in a light most favorable to the non-moving party, and afford that party the benefit of ever favorable inference (*see Wilson v Rye Family Realty, LLC*, 218 AD2d 836 [2d Dept 2023]). A motion for summary judgment should not be granted where the facts are in dispute, or where conflicting inferences may be drawn from the facts that are undisputed, or where there are issues of credibility (*see Mapfre Ins Co of NY v Ferrall,* 214 AD2d 635, 638 [2d Dept 2023]; *Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010]).

Summary Judgment on the Issue of Liability

VTL § 1129(a) states that the "driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway. It is well settled that "drivers have a 'duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident' " (*Filippazzo v Santiago*, 277 AD2d 419, 420 [2d Dept 2000][internal quotes and citations omitted]).

Moreover, "when the driver of an automobile approaches another automobile from the rear, he or she 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" (*Chepel v Meyers*, 306 AD2d 235, 23 [2d Dept 2003]; *see Macauley v ELRAC, Inc.*, 6 AD3d 584, 585 [2d Dept 2004]). It is well settled that "[a] rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the rearmost vehicle, requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision" (*Lopez v Suggs*, 186 AD3d 589, 589-590 [2d Dept 2020]). "A

nonnegligent explanation may include evidence of a mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on wet pavement, or any other reasonable cause" (*Ortiz v Hub Truck Rental Corp.*, 82 AD3d 725, 726 [2d Dept 2011]; *see Grant v Carrasco*, 165 AD3d 631, 632 [2d Dept 2018]).

On the present motion, plaintiff demonstrated that defendant's motor vehicle struck the rear of plaintiff's motor vehicle. In support of the motion, plaintiff submitted the affidavit of the plaintiff, wherein the plaintiff avers that he was stopped in traffic on the Saw Mill River Parkway when plaintiff's motor vehicle was hit in the rear by defendant's motor vehicle. Moreover, plaintiff submitted the transcript of the defendant's deposition, wherein defendant testified that her foot "came off the brake" and she "lurched into the back of … [plaintiff's] car" (Plaintiff's Exhibit E, Defendant's Deposition Transcript at 19:9-13). Accordingly, plaintiff has satisfied his prima facie burden for summary judgment on the issue of defendant's liability, and the burden shifted to defendant to demonstrate a non-negligent explanation (*see Macauley v ELRAC, Inc.*, 6 AD3d at 585).

In opposition, defendant only contended that plaintiff did not meet the burden of demonstrating entitlement to summary judgment on the issue of liability insofar as plaintiff relied on the uncertified police accident report, which defendant asserted is not admissible evidence. Defendant, however, did not address plaintiff's affidavit or the deposition testimony which establishes that plaintiff's motor vehicle was struck in the rear by defendant's motor vehicle. Notably, defendant did not contradict the assertion of plaintiff's counsel that defendant failed to execute her deposition transcript within 60 days of service such that the unsigned transcript relied upon by plaintiff is deemed admissible.

Therefore, defendant failed to raise an issue of fact as to whether there was a non-negligent explanation for the accident and failed to meet her burden of raising a triable issue of fact on the issue of liability. In view of the foregoing, plaintiff is entitled to summary judgment on the issue of liability.

Summary Judgment on the Issue of Serious Personal Injury Threshold

In order to establish entitlement to damages for injuries sustained in a motor vehicle accident, plaintiff must submit evidentiary proof that plaintiff sustained a "serious injury" as

defined by Insurance Law § 5102 (d) as a result of a motor vehicle accident. A plaintiff is, therefore, only entitled to summary judgment on the issue of serious injury threshold where plaintiff demonstrates by admissible evidentiary proof a "serious injury" caused by the motor vehicle accident. In relevant part, a "serious injury" has been defined as "permanent loss of use of a body organ," "a significant limitation of use of a body function," 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" (Insurance Law § 5102 [d]).

Here, plaintiff by the submission of the records of plaintiff's treating medical providers demonstrated, inter alia, that plaintiff's left shoulder injury with a post-surgery disability is a serious injury within the meaning of Insurance Law § 5102 (d). As conceded by defendant's expert, plaintiff's left shoulder injury remains unresolved post-surgery. Moreover, plaintiff's treating physician, Dr. Aric Hausknecht, who first examined plaintiff on November 9, 2021 and ordered an MRI of the shoulder, opined that plaintiff's injuries, including the left shoulder injury, were causally related to the subject motor vehicle accident (Plaintiff's Exhibit F, Complete Care records, 11-9-24 Letter Affm of Dr. Aric Hausknecht at 4).

Despite the foregoing, when viewing the plaintiff's submissions on this motion in the light most favorable to defendant, as the opposing party, and giving defendant the benefit of all reasonable inferences, an issue of fact exists as to whether the subject motor vehicle accident caused plaintiff's shoulder injury. Plaintiff's treating physician, Dr. Hausknecht, in his letter affirmation dated November 9, 2021, opined that, with a reasonable degree of medical certainty, plaintiff's injuries, including left shoulder arthopathy, were causally related to the motor vehicle accident. However, he also noted therein that plaintiff was seen at Northern Westchester Hospital Emergency Room on the date of the accident and received treatment for head and neck injuries, but does not mention treatment for the plaintiff's left shoulder. Importantly, Dr. Hausknecht then failed to explain the delay in the onset of the shoulder complaints. Dr. Hausknecht also failed to provide any foundation or objective medical basis supporting his conclusion that the shoulder injury was actually caused by the accident itself (*see Franchini v Palmieri*, 1 NY3d 536 [2003]; *Scott v Aponte*, 49 AD3d 1131, 1134 [3d Dept 2008]).

Accordingly, an issue of fact exists as to the causation of plaintiff's shoulder injury, and plaintiff failed to demonstrate entitlement to summary judgment on the issue of serious injury threshold. That branch of plaintiff's motion seeking summary judgment on the issue of serious injury threshold, therefore, must be denied.

This Court has considered all of the parties' remaining contentions. To the extent not specifically addressed, the contentions are either without merit or do not need to be reached in view of the foregoing determinations.

In view of the foregoing, it is hereby

ORDERED that the branch of plaintiff's motion for summary judgment on the issue of liability against defendant pursuant to CPLR 3212 is granted; and it is further

ORDERED that the branch of plaintiff's motion for summary judgment on the issue of serious injury threshold under Insurance Law § 5102 (d) is denied; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order with notice of entry within ten (10) days of entry; and it is further

ORDERED that the parties are directed to appear for a virtual settlement conference on May 13, 2024 at 11:30 A.M. subject to confirmation by the virtual conference link emailed by this Court.

Dated: White Plains, New York
April 2, 2024

HON. WILLIAM J. GIACOMO, J.S.C.