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SHORT FORM ORDER

INDEX No. 10-22902
CAL No. 11-02310MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 12-27-11 (#003)
MOTION DATE 1-18-12 (#004)
ADJ. DATE 1-18-12
Mot. Seq. # 003 - MD
004 - XMG

JOSE ESCALANTE and VITALINA ESCALANTE,

Plaintiffs,

- against -

KENNETH W. KEATING,

Defendant.

JACOBY & JACOBY, ESQS.
Attorney for Plaintiffs
1737 North Ocean Avenue
Medford, New York 11763

PICCIANO & SCAHILL, P.C.
Attorney for Defendant
900 Merchants Concourse, Suite 310
Westbury, New York 11590

Upon the following papers numbered 1 to 33 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (003) 1 - 11 ; Notice of Cross Motion and supporting papers (004) 12-19 ; Answering Affidavits and supporting papers 20-27; 28-29 ; Replying Affidavits and supporting papers 30-31; 32-33 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (003) by the defendant, Kenneth W. Keating, for summary judgment dismissing the complaint on the basis that the plaintiffs, Jose Escalante and Vitalina Escalante, did not sustain serious injury as defined by Insurance Law § 5102 (d), is denied; and it is further

ORDERED that motion (004) by the plaintiffs, Jose Escalante and Vitalina Escalante, for summary judgment against the defendant on the basis they bear no liability for the occurrence of the accident, is granted; and the plaintiffs are directed to serve a copy of this order with notice of entry upon the defendants and the Clerk of the Calendar Department, Supreme Court, Riverhead, within thirty days of the date of this order, and the Clerk is directed to schedule this matter for a trial on damages forthwith.

In this action premised upon the alleged negligence of the defendant, Kenneth Keating, the plaintiffs, Jose Escalante and Vitalina Escalante, seek damages for personal injuries which they each claim to have sustained on September 18, 2009, on County Road 99 (Woodside Avenue) at its intersection with Lake View Avenue, Hamlet of Holtsville, Town of Brookhaven, Suffolk County, New York, when their vehicle was allegedly struck in the rear by the vehicle operated by defendant.

In motion (003), Kenneth Keating seeks dismissal of the complaint on the basis that neither plaintiff sustained a serious injury as defined by Insurance Law §5102(d) as a consequence of this accident. In motion (004), the plaintiffs Jose Escalante and Vitalina Escalante seek summary judgment

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on the issue of liability in that they bear no liability for the occurrence of the accident because their vehicle was struck in the rear by the defendant's vehicle.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

Pursuant to Insurance Law § 5102(d), "'[s]erious injury' means 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 medical 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."

The term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102(d), the initial burden is on the defendant to "present evidence in competent form, showing that plaintiff has no cause of action" (***Rodriquez v Goldstein***, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (***DeAngelo v Fidel Corp. Services, Inc.***, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (***Cammarere v Villanova***, 166 AD2d 760, 562 NYS2d 808, 810 [3d Dept 1990]).

In order to recover under the "permanent loss of use" category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 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 (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, *supra*).

In support of motion (003), the defendant has submitted, inter alia, an attorney's affirmation; a copy of the summons and complaint, answer, and plaintiffs' verified bill of particulars; the sworn reports of Dr. Joseph Margulies dated May 31, 2011 concerning his independent orthopedic examinations of the plaintiffs, Jose Escalante and Vitalina Escalante, Dr. Audrey Eisenstadt, M.D. dated October 8, 2010 concerning her independent radiology reviews of the cervical and lumbar spine MRI's dated October 21, 2009 and October 20, 2009, respectively of Jose Escalante, and the cervical spine and lumbar spine MRI's dated October 21, 2009 and October 20, 2009, respectively, of Vitalina Escalante; copies of the transcripts of the examinations before trial of Jose Escalante and Vitalina Escalante, each dated May 6, 2011, and accompanied by proof of service upon them;

Jose Escalante alleges that he sustained the following injuries as a result of the accident: posterior disc bulge at C2-3, C3-4, C5-6; subligamentous disc herniation impressing on the cord at C4-5; C6-7 subligamentous disc herniation impressing on the ventral margin of the cord; bilateral sensorimotor median nerve entrapment which is consistent with carpal tunnel syndrome requiring multiple trigger point injections; posterior disc bulge impressing on the thecal sac at L3-4; posterior disc bulge at L5-S1; broad left disc herniation at L4-5 impressing on the left L5 nerve root; left sided L5 radiculopathy; cervical strain/sprain; thoracic sprain/strain; lumbar sprain/strain; left shoulder sprain/strain; cervical reactive arcural kyphosis; myospasm and myofascitis; myofascial pain syndrome; subluxation complex syndrome of the cervical, thoracic, and lumbar spines; cervicalgia; left cervical radiculitis; cervical myalgia; lumbar myalgia; and lumbar trigger points.

Vitalina Escalante alleges that she sustained the following injuries as a result of the accident: subligamentous disc herniation and radial annular tear abutting the ventral cord at C5-6; central disc herniation and radial annular tear in proximity to the ventral cord at C6-6; left sided radiculopathy at C6-7 requiring multiple cervical paravertebral trigger point injections; bulging disc impressing the thecal sac at T12-L1 and L2-3; cervical sprain/strain; thoracic sprain/strain; lumbar sprain/strain; cephalgia; myospasm and myofascitis; myofascial pain syndrome; subluxation complex syndrome of the cervical, thoracic and lumbar spines; lumbar trigger points; cervical trigger points; right shoulder sprain; cervicalgia; cervical myalgia; lumbago; lumbar myalgia; and lumbar facet arthropathy.

Upon review of the evidentiary submissions, it is determined that the defendant Kenneth Keating has not established prima facie entitlement to summary judgment dismissing the complaint on the basis that Jose Escalante and Vitalina Escalante did not sustain a serious injury. It is further determined that the moving papers raise triable issues of fact which preclude summary judgment.

Although the Jose Escalante has claimed bilateral sensorimotor median nerve entrapment consistent with carpal tunnel syndrome which required multiple trigger point injections; left sided L5 radiculopathy, and left cervical radiculitis in the bill of particulars, and Vitalina Escalante has claimed left sided radiculopathy at C6-7, which required multiple cervical paravertebral trigger point injections, and cervicalgia, as set forth in the bill of particulars, no report from a neurologist who examined the

plaintiffs on behalf of the moving defendant has been submitted to rule out these claimed neurological/ radicular injuries (*see* ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]), thus raising factual issue precluding summary judgment.

The defendants have further failed to support this motion with copies of the medical records and initial test results for the MRI studies of the plaintiffs' cervical spine, lumbar spine, and shoulders, set forth in the reports of Dr. Margulies and Dr. Eistenstadt, which reports the examining expert physicians reviewed and commented upon in their reports, leaving it to this Court to speculate as to the contents of those records and MRI reports reviewed. The general rule in New York is that an expert cannot base an opinion on facts he did not observe and which were not in evidence, and the expert testimony is limited to facts in evidence (*see,* ***Allen v Uh,*** 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Hornbrook v Peak Resorts,*** Inc. 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]; ***Marzuillo v Isom,*** 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; ***O'Shea v Sarro***, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]).

Upon examination of Jose Escalante, Dr. Margulies has set forth deficits in the range of motion findings he obtained for cervical flexion, extension, right and left lateral flexion, and right and left lateral rotation when he compared his findings to the normal range of motion values. He has also set forth deficits in the range of motion findings for lumbar flexion; extension, right and left lateral bending, and right and left rotation. Upon examination of Vitalina Escalante, Dr. Marguiles has set forth deficits in the range of motion findings he obtained for lumbar extension, right and left lateral bending, and right and left rotation when he compared his findings to normal range of motion values. A disc bulge may constitute a serious injury within the meaning of Insurance Law 5102 (***Hussein et al v Harry Littman et al,*** 287 AD2d 543, 731 NYS 2d 477 [2001]). Disc herniation and limited range of motion based on objective findings may constitute evidence of serious injury (***Jankowsky v Smith***, 294 AD2d 540, 742 NYS2d 876 [2d Dept 2002]). In that Dr. Margulies has set forth the aforementioned deficits, and objective evidence in the nature of deficits found upon examination of the plaintiffs as set forth, factual issue has been raised concerning whether or not the plaintiffs' claimed cervical and lumbar discs/ bulges/herniations constitute a serious injury. Additionally, Dr. Marguiles has failed to set forth the objective method employed to obtain such range of motion measurements of the plaintiffs' cervical and lumbar spines, such as the goniometer, inclinometer or arthroidal protractor (*see* ***Martin v Pietrzak***, 273 AD2d 361, 709 NYS2d 591 [2d Dept 2000]; ***Vomero v Gronrous***, 19 Misc3d 1109A, 859 NYS2d 907 [Supreme Court, Nassau County 2008]), leaving it to this court to speculate as to how he determined such ranges of motions when examining the plaintiffs.

Dr. Eistenstadt's opinions are not stated within a reasonable degree of medical certainty, and are conclusory in nature as to the age of the disc desiccations and degenerations found in Jose Escalante's and Vitalina Escalante's cervical and lumbar spine MRI's upon her review, thus leaving it to this court to speculate on the bases for her conclusions.

It is further noted that the defendant's examining physicians did not examine the plaintiffs during the statutory period of 180 days following the accident, thus rendering the defendant's physician's affidavits insufficient to demonstrate entitlement to summary judgment on the issue of whether the plaintiffs were unable to substantially perform all of the material acts which constituted her usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; *see,* ***Uddin v Cooper***, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; ***Toussaint v Claudio,*** 23 AD3d 268,

803 NYS2d 564 [1st Dept 2005]), and the experts offer no opinion with regard to this category of serious injury (*see* ***Delayhaye v Caledonia Limo & Car Service, Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]).

Based upon the foregoing, the defendant has failed to demonstrate entitlement to summary judgment on either category of injury defined in Insurance Law § 5102(d) (*see*, ***Agathe v Tun Chen Wang***, 98 NY2d 345, 746 NYS2d 865 [2006]); *see also* ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]). Inasmuch as the moving party has failed to establish prima facie entitlement to judgment as a matter of law in the first instance on the issue of "serious injury" within the meaning of Insurance Law § 5102 (d), it is unnecessary to consider whether the opposing papers were sufficient to raise a triable issue of fact (*see* ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]); ***Krayn v Torella***, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; ***Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]), as the burden has not shifted to the plaintiff.

Accordingly, motion (003) by the defendant, Kenneth Keating, for summary judgment dismissing the complaint on the basis that the plaintiffs did not suffer serious injury as defined by Insurance Law §5102 (d) is denied.

In motion (004), the plaintiffs seek summary judgment in their favor on the issue of liability on the basis they bear no liability for the occurrence of the accident, and support the application with, inter alia, an attorney's affirmation; copies of the pleadings; and copies of the transcripts of the examinations before trial of Vitalina Escalante and Jose Escalante, each dated May 6, 2011, and a signed copy of the transcript of the examination before trial of Kenneth W. Keating.

Vitalina Escalante testified to the effect that she was driving a motor vehicle on September 18, 2009, and her husband of 49 years was a passenger seated in the front passenger seat. It was a sunny day and the roads were dry. She was traveling westbound on Woodside Avenue when the accident occurred at the intersection with Lakeview Avenue. She described Woodside Avenue as having two travel lanes in each direction, east and west. Her vehicle was in the left westbound travel lane when she saw that the three phase traffic light at the intersection controlling traffic in her direction was yellow. She described her speed as "slow," about fifteen miles per hour. She was approximately twenty feet from the light when it turned yellow, and stated that she began to apply the brakes to stop slowly. When her vehicle came to a stop, she was the first vehicle in the left lane of traffic. Her vehicle was stopped for about a minute, as she was waited for the light to turn green. Suddenly, without warning, she felt a heavy impact to the rear of her vehicle. The impact from the defendant's vehicle pushed her vehicle forward and to the left about twenty to twenty-five feet. She heard no sounding of a horn, screeching of brakes, or skidding of tires prior to the accident.

Jose Escalante testified to the effect that the vehicle in which he was a passenger was stopped at a traffic light at an intersection for about twenty to thirty seconds, when suddenly, he felt a heavy impact to the rear of the vehicle, causing it to push forward and to the right about twenty feet. He heard no sounding of a horn, screeching of brakes, or skidding of tires prior to the accident.

Kenneth Keating testified to the effect that the accident occurred on Woodside Avenue, but he could not remember where he was going, or how the accident occurred. He believed the plaintiffs' vehicle was moving very slowly when his vehicle stuck it in the rear; however, he testified that he did not see the plaintiffs' vehicle prior to the impact, and did not know where he was looking during the ten

seconds preceding the accident. He did not remember if there was a traffic light or if the accident occurred at an intersection. He stated that the left front of his vehicle on the driver's side made contact with the left rear of the plaintiffs' vehicle. He testified that his vehicle was totaled as a result of the accident. He described the damage to the plaintiffs' vehicle as substantial. He did not think he lost consciousness as a result of the accident.

When a driver approaches another vehicle from the rear, he is bound to maintain a reasonably safe rate of speed and to maintain control of his vehicle and use reasonable care to avoid colliding with the other vehicle (***Chepel v Meyers,*** 306 AD2d 235, 762 NYS2d 95 [2003]; ***Power v Hupart,*** 260 AD2d 458, 688 NYS2d 194 [1999]; *see also,* Vehicle and Traffic Law § 1129[a]). The plaintiffs have demonstrated their prima facie entitlement to summary judgment on the issue of liability by showing that this was a rear-end collision, that the plaintiffs' vehicle was stopped at the time of the impact, and that the defendant failed to maintain control of his vehicle or to use reasonable care to avoid colliding with the plaintiffs' vehicle.

In opposition, the defendant has failed to raise a factual issue or to come forward with a non-negligent explanation for the occurrence of the accident and his failure to see the plaintiffs' vehicle prior to striking it in the rear. A driver, as a matter of law, is charged with seeing what there is to be seen on the road, that is, what should have been seen, or what is capable of being seen at the time (***People of the State of New York v Anderson,*** 7 Misc3d 1022A, 801 NYS2d 238 [City Court of New York, Ithaca 2005]). Here, the defendant testified that he never saw the plaintiffs' vehicle prior to striking it in the rear with the front of his vehicle. He did not know where he was looking for ten seconds preceding the accident.

The defendant has not come forward with an explanation with regard to his operation of his vehicle. Although an attorney's affirmation was submitted in opposition to plaintiff's motion, the affidavit of an attorney lacking personal knowledge of the events giving rise to the cause of action or defenses without setting forth evidentiary facts, cannot support or defeat a motion for summary judgment (***Olan v Farrell Lines, Inc.,*** 64 NY2d 1092, 481 NYS2d 370 [1985]). Consequently, the defendant failed to meet the burden of establishing through admissible evidentiary proof, the existence of a triable issue of fact sufficient to defeat the summary judgment motion.

Accordingly, the plaintiffs' motion (004) for summary judgment in their favor on the issue of liability is granted.

Dated: March 13, 2012

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION

HON. JERRY GARGUILO