

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
CIVIL TERM - IAS PART 34 - QUEENS COUNTY  
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD  
Justice

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DANIEL MOSKOVITZ,	Index No.:18660/2007
Plaintiff,	Motion Date: 6.11.09
- against -	Motion No.: 11
NICHOLAS ALLMAN, KIMBERLY TAYLOR,	Motion Seq.: 2
NARINE S. SINGH and IRA MOSKOVITZ,	
Defendants.	

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The following papers numbered 1 to 21 were read on this Motion by the Defendant Narine S. Singh [hereafter "Singh"]for Summary Judgment and dismissal of counter claims, Motion by defendant Ira Moskovits to dismiss on ground that plaintiff did not sustain a "serious injury" and Motion by plaintiff for summary judgment, a motion by defendant Allman and Taylor, joined by Singh and Ira Moskovitz, to dismiss the plaintiff's complaint pursuant to Insurance Law 5102.

	<u>Papers Numbered</u>
Notice of Motion -Affirmation- Exhibits [Singh]	1-4
Notice of Cross-Motion - Affirmation - Exhibit [Allman & Taylor]	5-9
Notice of Cross-Motion - Affirmation - Exhibits [Ira Moskovitz]	10-13
Notice of Cross-Motion [Plaintiff]- Affirmation in Opposition to [Ira Moskovitz ]	14-17
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Upon the foregoing papers these motions are resolved as follows:

This action is for alleged personal injuries sustained by the

plaintiff as a result of an automobile accident on May 20, 2007 at 4:40 AM on the southbound side of the Clearview Expressway near its intersection with 35<sup>th</sup> Avenue, in Queens County, New York.

The accident happened as Singh was traveling in the left lane of the Clearview Expressway when his car was struck in the rear by Nicholas Allman's [hereafter "Allman"] automobile which caused his car to spin and strike the metal highway divider.

The plaintiff, Daniel Moskovitz, was a passenger in the car of Ira Moskovitz, Daniel's father, who was traveling in the middle lane of the Clearview Expressway. Singh's motion relies on the testimony of the plaintiff to describe the incident from Ira Moskovitz' perspective as set forth in his deposition. It appears that the plaintiff testified "Q. Can you describe the distance in any way that separated the front of your dad's car from the other car ? A. Not really. Q. Did you say anything to your dad when you saw the other car ? A. I said, "dad," and I pointed at the car. Q. Did your dad say anything back ? A. No. Q. What did your dad do, if anything? A. He tried to swerve out of the way to avoid it." [Daniel Moskovitz 23].

Singh argues that the plaintiff must demonstrate that his negligence was the proximate cause of the accident, and that it must be a the proximate substantial cause of the plaintiff's injury. Singh further posits that "the codefendant's loss of control over his vehicle after he struck" Singh's vehicle was a "superseding event". Because Singh "was not liable for the first accident as he was hit by codefendant ALLMAN and thus was not the cause. Accordingly, as defendant SINGH was not the proximate cause of the first accident, he can not be held for the second, subsequent accident involving the plaintiff."

The plaintiff's affirmation in opposition argues that the evidence was not clear cut. Singh had represented that he intended to pass a tractor-trailer who was in front of him by moving to the left lane. The testimony of Singh on an important point supporting his motion was: "Q. Do you recall how long after merging into the left lane the impact with the Allman vehicle occurred ? A. No." [Singh 37]. This clearly is a critical point whose resolution must be made by the trier of fact. The colloquy at Allman's deposition reveals another fact which must be explored at trial: "Q. What part of your vehicle came into contact with the Singh vehicle ? A. My passenger's side hit the back driver's side of the Singh vehicle. The front passenger's side." [Allman 20-21], and "Q. Where exactly on the Singh vehicle did you come into contact with it ? A. The left passenger's side, left rear." [Allman 29].

With regard to liability for the accident's occurrence Ira Moskovitz argued that he was not liable pursuant to the "emergency doctrine" which holds that one may not be liable if "his actions were reasonable in the context of the emergency situation". Which states that when a driver "is left without time" to consider alternatives, he cannot be negligent.

The Notice of Cross-Motion on behalf of Ira Moskovitz, the defendant-driver, requests that the plaintiff's complaint be dismissed because he did not sustain "serious injury" as defined in Insurance Law 5012(d). However, the Affirmation in Support simply relies on the Allman/Taylor Affirmation dated February 13, 2009.

Allman/Taylor allege that the plaintiff has not sustained a "serious injury" as set out in Insurance Law 5102(d) which provides:

A personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body function or system; significant limitation of use of a body organ or member; 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.

This "No-Fault" law is designed to bar suits for automobile accidents unless the plaintiff has sustained a "serious injury". Counsel posits that "the undisputed facts show that the injuries claimed by plaintiff do not satisfy the 'serious injury' requirement of the No-Fault Law".

The defendant alleges that the plaintiff did not sustain "serious injury" as defined in the first five categories, namely, death, dismemberment, significant disfigurement, fracture, or loss of a fetus, nor did the plaintiff sustain a "permanent" or "significant" injury within the meaning of the sixth, seventh, or eighth categories of "serious injury" pursuant to Insurance Law 5102(d), nor was the plaintiff prevented from performing substantially all of the material acts which constitute his usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the accident.

Defendant relies on the affirmation of Dr. Sanford D. Wert, M.D., an orthopedic surgeon, dated October 15, 2008 in which Dr. Wert stated that the plaintiff complained of pain in the cervical spine that radiates to both shoulders; non-radiating pain in the lumbosacral spine, and intermittent pain in his left knee. Dr. Wert had reviewed the reports from North Shore University Hospital, reports of Dr. Lev Aminov through May 29, 2007; MRI reports dated May 31, 2007, June 7, 2007, and June 20, 2007; EMG/NCV report of Dr. Asimov dated June 25, 2007, medical evaluation report of Dr. Ernesto Selden dated July 19, 2007 and Dr. Bruce Ross dated August 13, 2007, the operative report from Day-Op Center of Long Island, for surgery performed by Dr. Jonathan Glassman, dated November 16, 2007, and follow up notes of Dr. Bruce Lee dated November 26, 2007, December 10, 2007; September 10, 2007, and October 10, 2007.

At the time of this examination by Dr. Wert, the plaintiff was 21 years old.

Dr. Wert opined that based on his examination Daniel Moskovitz on October 15, 2008 was suffering no "disability or permanency". That the "MRI report of the cervical spine documented disc herniations. However, today's examination provided no clinical correlation of these reported findings. The MRI report of the lumbosacral spine documented a disc bulge. It should be mentioned that a disc bulge could certainly be found in the normal population without any episodes of trauma. There is no objective evidence of cervical radiculopathy."

Dr Wert did state "After reviewing the claimant's medical file, taking a complete history and performing a physical examination, it is apparent that the injuries sustained and accident reported are causally related."

The plaintiff submits the affirmation of Dr. Lev Aminov, M.D., whom he saw subsequent to the accident on May 29, 2007 and thereafter until July 20, 2007. It appears that subsequent to his treatment at the Emergency Room he was prescribed Motrin and told to follow up with treatment. The plaintiff saw his primary care physician Dr. Jason Ehrlich, M.D. who ordered back and knee x-rays, and subsequently the plaintiff saw Dr. Aminov.

On May 29, 2007 the plaintiff presented with complaints of "'whiplash' pain in his back, low back, right shoulder, leg and arm pain, as well as in both knees." Dr. Aminov performed physical and neurological examinations which revealed "Laseque's sign positive 55 on the right side, and decreased sensation to the light touch and pin prick over C5, C6, L5 dermatomes on the right side." Dr. Aminov also found "tenderness" over the cervical and lumbar

paraspinal muscles. "Evaluation of the cervical spine revealed decreased range of motion movements of flexion 45° (normal 60°); extension 35° (normal 50°); right and left lateral flexion 30° (normal 40°) right rotation 50° (normal 80°), and left rotation 65° (normal 80°). Evaluation of the lumbar spine revealed decreased range of motion upon movement of flexion 70° (normal 90°); extension 15° (normal 30°); right and left lateral flexion 15° (normal 20°); and right and left rotation 15° (normal 30°). Range of motion tests of both knees revealed upon flexion 135° (normal 150°), and extension 135° (normal 150°).

Dr. Aminov prescribed physical therapy, gradual resumption of activity with a cervical collar and lumbar spine support. Dr. Aminov advised against "sitting for prolonged periods" and prescribed "the drugs Naprosyn and Flexeril".

On May 30, 2007 an MRI of plaintiff's right knee was performed at Diagnostic Radiological Imaging, P.C., by Dr. John T. Rigney, M.D., a Radiologist, who interpreted the MRI films, and an MRI on June 5, 2007 and June 19, 2007 of plaintiff's cervical and lumbar spine and left knee. The MRIs revealed that the plaintiff had a "posterior midline herniations at C3-C4 and C4-C5; posterior bulge at L5-S1 into the epidural fat; and tearing of the left posterior horn of the medial meniscus." It was Dr. Rigney's "Impression" that the plaintiff had sustained "Tearing of the posterior horn of the medial meniscus."

The patient was examined on June 25, 2007 and Dr. Aminov found "tenderness over the paraspinal muscles" and "moderate restricted range of motion in the neck and right shoulder" and "decreased sensation over C5, C6 dermatomes on the right side."

The patient was again examined on July 23, 2007 and the plaintiff still experienced "tenderness over the paraspinal muscles", "moderate restricted range of motion in the lower back and both knees" and "decreased sensation over the right L5 dermatome".

Mr. Daniel Moskovitz underwent 21 physical therapy treatments from May 29, 2007 until July 20, 2007. Because of the plaintiff's continuing complaint about his left knee he was referred to Dr. Ernesto D. Seldman, M.D., a Board Certified Orthopedic Surgeon.

It was Dr. Aminov's professional opinion that the plaintiff, a 27 year old man, "sustained a significant limitation of function and restriction in the use and activity of his left knee, neck and back which were causally related to his automobile accident."

Dr. Seldman in his report to Dr. Aminov stated that: "Clinical Impression: Posttraumatic chondromalacia, right knee, posttraumatic chondromalacia, left knee, and tear of posterior horn of medial meniscus." Dr. Seldman reports that he spoke to the plaintiff about arthroscopic surgery of the left knee.

Dr. Bruce R. Ross, M.D., an Orthopedic Surgeon, in his affirmation spoke of the plaintiff's presentation on August 13, 2007 of pain in his left knee. Dr. Ross found "physical movement of flexion 115° (normal 120°), extension 0° (normal 120°); as well as mild pain over the medial and lateral joint line." On September 10, 2007 the plaintiff saw Dr. Ross again with complaints of occasional pain in his left knee despite physical therapy. An examination of the plaintiff revealed that he had pain over the medial joint which, "revealed decreased range of motion upon movement and extension 0° (normal 120°), and flexion 100° (normal 120°). Upon the patient's return on October 10, 2007 he was referred to Dr. Jonathan Glassman, M.D., an orthopedic surgeon.

The plaintiff had the surgery on November 16, 2007 which found "the presence of a medial femoral compartment synovectomy with resection, because it was seen to be rubbing over the medial femoral condyle and shoulder" , and the "medial meniscal tear" believed to have been found on the MRI.

Upon the plaintiff's return on November 26, 2007 it was found that the "Range of motion evaluation revealed limitation of movement of extension 0° (normal 120°), and flexion 95° (normal 120°)" Mr. Daniel Moskovitz was referred for physical therapy [Exhibit IV] and returned to Dr. Ross' office thereafter on December 10, 2007; February 1, 2008 and June 9, 2008 when upon finding "mild atrophy of the quadriceps" Dr. Ross ordered continued physical therapy. Dr. Ross's prognosis was guarded. It is his belief that the plaintiff "experienced a significant derangement of function of his left knee that required surgical repair and extensive postoperative physical therapy."

On January 19, 2009 the plaintiff returned to Dr. Ross stating that his knee had improved. "Range of motion test performed on that date revealed limitation upon extension 0° (normal 120°) and flexion 120° (normal 120°), with mild patellofemoral crepitus.

The patient returned April 19, 2009 complaining of "occasional retropatellar pain". Dr. Ross again performed the "range of motion evaluation and found decreased limitation upon extension 0° (normal 120°) and flexion 115° (normal 120°) from the prior visit on January 19, 2009. I diagnosed the patient with chondromalacia patellar, a softening of the articular cartilage of the patella."

It was Dr. Ross' opinion with a reasonable degree of medical certitude that the complaints of Daniel Moskovitz with regard to chronic left knee pain and physical limitations are consistent with the "surgical operative findings and repair of a medical femoral compartment synovial plica. It is also my opinion, with a reasonable degree of medical certainty, that this twenty year old patient sustained a permanent consequential limitation; and/or significant limitation of function and restriction in the use and activity of his left knee and extremity, which was casually related to his automobile accident on May 20, 2007."

The patient has shown "chronic relapsing symptoms of variable intensity requiring repeat physical therapy" as well as "Mr. Moskovitz' difficulty to normally use his left knee in his daily and work related activities."

Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (*Licari v Elliott*, 57 NY2d 230). Initially it is defendant's obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345; *Grossman v Wright*, 268 AD2d 79). If the defendant's motion raises the issue as to whether the plaintiff has sustained a "serious injury" the burden shifts to the plaintiff to prima facie demonstrate through the production of evidence sufficient to demonstrate the existence of a "serious injury" in admissible form, or at least that there are questions of fact as to whether plaintiff suffered such injury (*Gaddy v Eyler*, 79 NY2d 955; *Bryan v Brancato*, 213 AD2d 577).

Insurance Law 5102 is the legislative attempt to "weed out frivolous claims and limit recovery to serious injuries" (*Toure v Avis Rent-A-Car Systems, Inc.*, 98 NY2d 345, 350).

Under Insurance Law 5102(d) a permanent consequential limitation of use of a body organ or member qualifies as a "serious injury", however, the medical proof must establish that the plaintiff suffered a permanent limitation that is not minor slight, but rather, is consequential which is defined as an important or significant limitation.

Here the defendants have come forward with sufficient evidence to support their claim that the plaintiff has not sustained a "serious injury" (*Gaddy v Eyler*, 79 NY2d 955).

To establish that the plaintiff has suffered a permanent or

consequential limitation of use of a body organ or member and/or a significant limitation of use of a body function or system, the plaintiff must demonstrate more than "a mild, minor or slight limitation of use" and is required to provide objective medical evidence of the extent or degree of limitation and its duration (*Booker v Miller*, 258 AD2d 783; *Burnett v Miller*, 255 AD2d 541). Resolution of the issue of whether "serious injury" has been sustained involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part (*Dufel v Green*, 84 NY2d 795). Upon examination of the papers and exhibits submitted this Court finds that the plaintiff has raised triable factual issue as to whether the plaintiff has "permanent consequential" and "significant limitation" categories.

The question presented as to the difference between the measurements of the plaintiff and defendant create an issue of fact for the jury (*Martinez v Pioneer Transportation Corp.*, 48 AD3d 306).

A diagnosis of permanency having been sustained by the plaintiff obviates the need for further treatment and, therefore, there is no "gap" in treatment (*Pommells v Perez*, 4 NY3d 566).

With regard to the 90/180 rule, the defendant's medical expert must relate specifically to the 90/180 claim made by the plaintiff before dismissal is appropriate (*See, Scinto v Hoyte*, 57 AD3d 646; *Faun Thau v Butt*, 34 AD3d 447; *Lowell v Peters*, 3 AD3d 778)

Regarding the "permanent loss of use" of a body organ, member or system the plaintiff must demonstrate a total and complete disability which will continue without recovery, or with intermittent disability for the duration of the plaintiff's life (*Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295). The finding of "Permanency" is established by submission of a recent examination (*Melino v Lauster*, 195 AD2d 653 *aff'd* 82 NY2d 828).

Regarding "permanent limitation" of a body organ, member or system the plaintiff must demonstrate that he has sustained such permanent limitation (*Mickelson v Padang*, 237 AD2d 495). The word "permanent" is by itself insufficient, and it can be sustained only with proof that the limitation is not "minor mild, or slight" but rather "consequential" (*Gaddy v Eyler*, 79 NY2d 955).

The "significant limitation of use of a body function or system" requires proof of the significance of the limitation, as well as its duration (*Dufel v Green*, 84 NY2d 795; *Fung v Uddin*, 60 AD3d 992; *Hoxha v McEachern*, 42 AD3d 433; *Barrett v Howland*, 202

AD2d 383).

Summary Judgment is appropriate only where through admissible evidence, which eliminates all material issues of fact, the proponent establishes her cause of action (*Alvarez v Prospect Hospital*, 68 NY2d 320). Upon demonstrating entitlement the burden shifts to the opponent to rebut the proffered evidence (*Bethlehem Steel Corp v Solow*, 51 NY2d 870). Such facts offered in opposition must be in evidentiary form and naked allegations are therefore insufficient (*Zuckerman v City of New York*, 49 NY2d 557). Summary Judgment is not available when the evidence submitted is subject to argument or debate (*Sillman v Twentieth Century-Fox Film Corp*, 3 NY3d 395; *Stone v Goodson*, 8 NY2d 8 rehearing den 8 NY2d 934).

From the exhibits introduced it is apparent that there is a factual dispute as to whether and what portion the liability is rests on the defendants. Whether an emergency situation was present is a question of fact which must be determined by a jury, just as in there is a superseding cause (*Karash v. Adetunji*, 56 AD3d 726; *White v Diaz*, 49 AD3d 134).

Whether the stopped vehicle merely furnished the condition and was not the cause of the this accident must yet be determined (*Dunlop v City of New York*, 186 AD2d 782 lv denied 81 NY2d 703; *Diaz v Green*, 47 AD3d 612).

Accordingly, the motions by the plaintiff and defendants for summary judgement is denied, as is the defendants' motions to dismiss pursuant to Insurance Law 5102.

So Ordered

Dated: Long Island City, N.Y.  
June 15, 2009

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**ROBERT J. MCDONALD**  
**J.S.C.**