

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. JOSEPH COVELLO

Justice

VINCENT SALERNO,

Plaintiff,

-against-

RAYMOND VALENTINE,

Defendant.

**TRIAL/IAS, PART 28
NASSAU COUNTY**

Index #: 007886/01

Motion Seq. #: 01 & 02

Motion Date: 01/08/03

The following paper read on this motion:

Notice of Motion	1
Notice of Cross Motion.....	2
Reply Affirmation and Opposition to Cross Motion.....	3

Upon the foregoing papers the motion by defendant, Raymond Valentine, for summary judgment dismissing plaintiff, Vincent Salerno's complaint pursuant to CPLR §3212 on the ground that plaintiff, Vincent Salerno, did not sustain serious injury within the ambit of Insurance Law §5102(d) is denied.

The cross motion by plaintiff for summary judgment against defendant on the issue of liability pursuant to CPLR §3212(e) is granted.

This action was commenced by plaintiff for injuries he alleges to have sustained in a head-on collision on January 21, 2001, as he traveled northbound on Ocean Parkway, at or near its intersection with Avenue M, in Brooklyn, New York. The accident occurred when defendant's vehicle, which was traveling southbound on Ocean Parkway crossed over into the northbound lanes of traffic and slammed head-on into plaintiff's vehicle. Defendant alleges that

his vehicle slid on snow after he swerved to avoid hitting an unknown vehicle that entered his lane of travel.

According to the plaintiff's bill of particulars, he sustained the following injuries, **inter alia**,

blunt trauma to the spine;
posterior bulge of the C5-C6 disc impinging on the ventral contour
of the dural sac and subarachnoid space; and
limitation and restriction of range of motion of the lumbo-sacral
spine and lower extremities.

In support of his threshold motion for summary dismissal of the complaint, defendant has submitted the affirmed reports of Paul Lerner, M.D., a Neurologist, who performed an independent neurological examination of plaintiff and Barry D. Jupiter, M.D., an Orthopedic Surgeon, who examined plaintiff on March 25, 2002. Dr. Lerner notes, **inter alia**, a full active range of motion at the neck, full range of motion of the right knee and negative straight leg raising. He found "no objective evidence of any neurologic impairment or disability and no indication for any treatment from a neurologic perspective". Dr. Jupiter notes "good" motion in the cervical and thoraco-lumbosacral spines and "normal" unrestricted range of motion of the shoulders. He concluded that there was no objective findings for disability or impairment.

The proffered evidence is not sufficient, however, to establish a **prima facie** case that plaintiff did not, in fact, suffer a serious injury thereby entitling defendant to summary judgment. Defendant's physicians note, but do not address, the MRI evidence of plaintiff's disc bulges and fail to demonstrate that plaintiff's injuries were not causally related to the subject accident, or that they were not serious within the meaning of Insurance Law §5102(d). (**Franca v Parisi**, 298 AD2d 554; **Asta v Eivers**, 280 AD2d 565.) A bulging disc may constitute serious injury within the meaning of Insurance Law §5102(d) (**Longford v Jewett Transp. Service**, 271 AD2d

412). Since defendant failed to demonstrate that the disc bulge was not causally related to the accident, he failed to make out a **prima facie** case of entitlement to summary judgment as a matter of law. (**Derival v New York City Transit Authority**, 289 AD2d 281.)

Further, Dr. Jupiter fails to offer any explanation with respect to his findings of “good” motion in plaintiff’s cervical and thoraco-lumbosacral spines and “normal” range of motion of her shoulders. Dr. Lerner’s affirmation is silent as to any conclusions regarding plaintiff’s cervical and thoraco-lumbosacral spines, noting only an unexplained active full range of motion at the neck. Under these circumstances, defendant has failed to demonstrate that plaintiff did not suffer serious injury within the meaning of the statute. (**Jimenez v Darden**, 290 AD2d 419.)

Where, as here, defendant has not met his burden of establishing a **prima facie** case that plaintiff has not suffered a serious injury, the court need not consider whether plaintiff’s papers in opposition to the motion are sufficient to raise a triable issue of fact. (**Trantel v Rothenberg**, 286 AD2d 325; **Papadonikolakis v First Fid. Leasing Group**, 283 AD2d 470.) In any event, even if defendants’ submissions were adequate, plaintiff has submitted sufficient evidence to raise a triable issue of fact. Plaintiff has met the burden of producing evidence of physical limitations. The submissions of plaintiff’s doctors in opposition to defendant’s motion regarding plaintiff’s condition, based on medical observation (examination) and objective test results, are sufficient to create a question of fact on the serious injury issue. (**Toure v Avis Rent A Car**, 98 NY2d 345.)

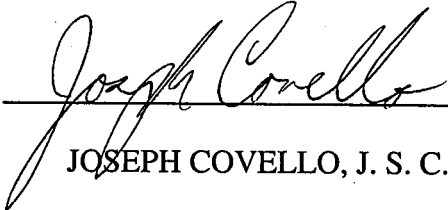
With respect to the issue of liability, it is undisputed that defendant’s vehicle crossed over into an opposing lane of traffic crashing head-on into plaintiff’s vehicle. Crossing a double yellow line into the opposing lane of traffic, in violation of Vehicle & Traffic Law §1126(a), constitutes negligence as a matter of law unless justified by an emergency situation not of the

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driver's making. (**Browne v Castillo**, 288 AD2d 415.) The emergency doctrine is clearly not applicable here, nor can defendant claim that the accident was the unavoidable result of circumstances which could not have been foreseen, or prevented by the exercise of reasonable caution. Unfortunately, the unpleasant reality is that vehicles "cut-off" or swerve in front of vehicles driving in adjacent lanes of traffic routinely ... clearly a foreseeable situation especially when there is snow on the roadway or it is snowing defendant alleges.

This constitutes the decision and order of the court.

Dated: March 28, 2003



JOSEPH COVELLO, J. S. C.

ENTERED

APR 04 2003

NASSAU COUNTY
COUNTY CLERK'S OFFICE