Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:
WILLIAM B. REBOLINI
Justice

Carlos R. Johnson, Jasmine L. Rodriguez and Samantha C. Alicea,

Plaintiffs,

-against-

Richard O'Connor and Emerald Isle Paving and Landscaping,

Defendants.

Clerk of the Court

Index No.: 50092/2009

Motion Sequence No.: 001; MG
Motion Date: 6/3/11
Submitted: 7/8/11

Motion Sequence No.: 002; MG
Motion Date: 6/3/11
Submitted: 7/8/11

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Upon the following papers numbered 1 to 40 read on this motion and cross motion for summary judgment: Notice of Motion and supporting papers, 1 - 12; Notice of Cross Motion and supporting papers, 17 - 33; Answering Affidavits and supporting papers, 13 - 14; 33 - 36; Replying Affidavits and supporting papers, 15 - 16; 37 - 38.

Plaintiffs Carlos Johnson, Jasmine Rodriguez and Samantha Alicea commenced this action against defendants Richard O'Connor and Emerald Isle Paving and Landscaping, Inc. for injuries they allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of

Route 111 and Moffitt Boulevard in the Town of Islip on July 10, 2009. The accident allegedly occurred when the vehicle operated by defendant Richard O'Connor and owned by defendant Emerald Isle Paving and Landscaping, Inc. struck the left side of the vehicle operated by Johnson as it was traversing the aforementioned intersection. At the time of the accident, Rodriguez and Alicea were passengers in the Johnson vehicle. By her bill of particulars, Rodriguez alleges that she sustained various personal injuries as a result of the subject accident, including cervical radiculopathy, loss or normal cervical lordosis, and cervical sprain/strain.

Johnson now moves for summary judgment in his favor on the issue of liability, arguing that he was not a proximate cause of the subject accident. Johnson contends that O'Connor's negligent operation of the Emerald Isle Paving and Landscaping, Inc. vehicle, his inattention to the road conditions, and his violation of Vehicle and Traffic Law §§ 1111(d) and 1225-c are the reasons for the subject accident's occurrence. In support of the motion, Johnson submits copies of the pleadings and the parties' deposition transcripts. Defendants oppose the motion on the ground that Johnson failed to make a *prima facie* case that he was not a proximate cause of the subject accident, because he submitted an unsigned deposition transcript with his motion for summary judgment, and he failed to state that he slowed down prior to entering the intersection as required by Vehicle and Traffic Law § 1180(e). Defendants also contend that the light was yellow when O'Connor entered the intersection and, therefore, there are questions of fact as to who is responsible for the subject accident's occurrence.

A court's task on a motion for summary judgment is issue finding rather than issue determination (see, Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395 [1957]), and it must view the evidence in the light most favorable to the party opposing the motion (see, Boyce v. Vazquez, 249 AD2d 724 [3d Dept., 1998]). Therefore, in determining a motion for summary judgment, the facts alleged by the nonmoving party and all inferences that may be drawn are to be accepted as true (see, Roth v. Barreto, 289 AD2d 557 [(2nd Dept., 2001]). In the first instance, the moving party bears the burden and must tender evidence sufficient to eliminate all material issues of fact (see, Winegrad v. New York Umiv. Med. Ctr., 64 NY2d 851 [1985]). Once such showing has been made, the burden shifts to the nonmoving party to demonstrate the existence of material issues of fact (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]). Mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]; Perez v. Grace Episcopal Church, 6 AD3d 596 [2nd Dept., 2004]).

Initially, the Court notes that, contrary to the contentions of defendants, the unsigned deposition transcript of Johnson, which was submitted in support of his motion for summary judgment, is admissible under CPLR 3116(a), since the transcript was submitted by the party deponent himself and, therefore, was adopted as accurate by Johnson, as the deponent (see, Ashif v. Won Ok Lee, 57 AD3d 700 [(2nd Dept., 2008]; Thomas v. Hampton Express, 208 AD2d 824 [2nd Dept., 1994]; cf. Santos v. Intown Assoc., 17 AD3d 564 [2nd Dept., 2005]).

Based upon the adduced evidence, Johnson has established his *prima facie* entitlement to judgment as a matter of law on the issue of liability by demonstrating that the negligence of O'Connor, who proceeded through an intersection without stopping at the red light, was the sole proximate cause of the subject accident (see, Vehicle and Traffic Law § 1111[d]; Deleg v. Vinci, 82 AD3d 1146 [2nd Dept., 2011]; Jacobwitz v. City of New York, 59 AD3d 495 [2nd Dept., 2009]; Ramos v. Triboro Coach Corp., 31 AD3d 625 [2nd Dept., 2006]). Johnson testified at his deposition that when he exited the parking lot of a Pathmark grocery store and made a right turn onto Route 111, the traffic light at the intersection was green and it did not change colors prior to the collision. Johnson testified that after he entered the intersection and immediately before the impact, he observed defendants' vehicle from his left side, traveling on Moffitt Boulevard. Johnson further testified that he tried to avoid the collision by turning his vehicle to the right and applying his brakes, but that defendants' vehicle struck his vehicle on the driver's side, from the front fender to the driver's door, and that the impact caused his vehicle to flip over onto its roof. Additionally, Rodriguez and Alicea testified that the traffic light at the intersection was green and that they did not see defendants' vehicle prior to the impact. Furthermore, O'Connor testified that he received and pleaded guilty to a ticket for running a red light. He also testified that he received a ticket for driving while impaired, and that he was speaking to his sister on his cell phone at the moment of impact. Therefore, the burden shifted to defendants to raise a triable issue of fact as to whether Johnson was negligent, and whether such negligence was a proximate cause of the accident (see, Packer v. Mirasola, 256 AD2d 394 [2nd Dept., 1998]; see generally, Pucco v. Caputo, 272 AD2d 387 [2nd Dept., 2000]; Hanak v. Jani, 265 AD2d 453 [2nd Dept., 1999]).

In opposition to the movant's *prima facie* showing, defendants have failed to raise a triable issue of fact as to whether Johnson was at fault in the happening of the accident, or if he could have done anything to avoid the accident's occurrence (see, Monteleone v. Jung Pyo Hong, 79 AD3d 988 [2nd Dept., 2010]; Pitt v. Alpert, 51 AD3d 650 [2nd Dept., 2008]; Lestingi v. Holland, 297 AD2d 627 [2nd Dept., 2002]). O'Connor's testimony that he first observed the traffic light at the intersection when he was approximately 20 feet away and that the traffic light was yellow, but turned red as he was crossing the intersection, presents only a feigned issue of fact, which is insufficient to defeat a motion for summary judgment (see, Capraro v. Staten Is. Univ. Hosp., 245 AD2d 256 [2nd Dept., 1997]). In fact, O'Connor testified that prior to the accident, he caught a glimpse of the Johnson vehicle while it was in the middle of the intersection, traveling down Route 111. In addition, contrary to defendants' contention that a triable issue of fact was raised as to whether Johnson violated Vehicle and Traffic Law § 1180(e), because he did not testify that he slowed down as he approached the intersection, a driver is not mandated to reduce his or her speed at every intersection by Section 1180(e) of the Vehicle and Traffic Law, but only when warranted by the traffic conditions presented (see, Chietan v. Persuad, 57 AD3d 471 [2nd Dept., 2008]; Mosch v. Hansen, 295 AD2d 717 [3d Dept., 2002]; Bagnato v. Romano, 179 AD2d 713 [2nd Dept., 1992], lv denied 81 NY2d 701 [1992]). Accordingly, Johnson's motion for summary judgment dismissing defendants' counterclaim is granted.

Defendants cross-move for summary judgment on the basis that the injuries Rodriguez alleges she sustained as a result of the subject accident do not meet the "serious injury" threshold

requirement of Insurance Law § 5102(d). In support of the motion, defendants submit copies of the pleadings, Rodriguez's deposition transcript, plaintiff's medical records from Southside Hospital, and the sworn medical reports of Dr. Michael Katz and Dr. Michelle Rubin. Dr. Katz conducted an independent orthopedic examination of Rodriguez at defendants' request on January 4, 2011. Dr. Rubin performed an independent radiological review of the magnetic resonance imaging ("MRI") films of Rodriguez's cervical and lumbosacral spines at defendants' request on September 21, 2009. Defendants also submit the uncertified New York Motor Vehicle No-Fault Insurance Law verification of treatment by attending physician or other provider of health services forms that were completed by Rodriguez's chiropractor, Dr. Nicholas Martin.

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (Dufel v. Green, 84 NY2d 795, 798 [1995]; see also Toure v. Avis Rent A Car Sys., 98 NY2d 345 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (see, Licari v. Elliott, 57 NY2d 230 [1982]; Porcano v. Lehman, 255 AD2d 430 [2nd Dept., 1988]; Nolan v. Ford, 100 AD2d 579 [1984], aff'd 64 NYS2d 681 [2nd Dept., 1984]).

Insurance Law § 5102(d) defines a "serious injury" as "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 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."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a *prima facie* case that the plaintiff did not sustain a "serious injury" (see, Toure v. Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v. Eyler, 79 NY2d 955 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, such as, affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (see, Pagano v. Kingsbury, 182 AD2d 268, 270 [2nd Dept., 1992]). A defendant may also establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (see, Fragale v. Geiger, 288 AD2d 431 [2nd Dept., 2001]; Grossman v. Wright, 268 AD2d 79 [2nd Dept., 2000]; Vignola v. Varrichio, 243 AD2d 464 [2nd Dept., 1997]; Torres v. Micheletti, 208 AD2d 519 [2nd Dept., 1994]). Once a defendant has met this burden, the plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (see, Dufel v. Green, 84 NY2d 795 [1995]; Tornabene v. Pawlewski, 305 AD2d 1025 [4th Dept., 2003]; Pagano v. Kingsbury, supra). However, if a defendant does not establish a *prima facie* case that the plaintiff's injuries do not meet the serious injury threshold, the court need not consider

the sufficiency of the plaintiff's opposition papers (see, Burns v. Stranger, 31 AD3d 360 [2nd Dept., 2006]; Rich-Wing v. Baboolal, 18 AD3d 726 [2nd Dept., 2005]; see generally Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]).

Defendants have met their *prima facie* burden establishing their entitlement to judgment as a matter of law that Rodriguez's injuries do not meet the serious injury threshold requirement of Insurance Law § 5102(d), by submitting Rodriguez's deposition transcript and the affirmed medical reports of their experts (see, Toure v. Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v. Eyler, 79 NY2d 955 [1992]; Castillo v. Collado, 83 AD3d 581 [1st Dept., 2011]; McLoud v. Reyes, 82 AD3d 848 [2nd Dept., 2011]). In his medical report, Dr. Katz states that an examination of Rodriguez reveals that she has full ranges of motion in her cervical and lumbar regions, her shoulders, and her left hip and pelvis. Dr. Katz states that there was no paravertebral muscle spasm or tenderness in Ms. Rodriguez's spine or shoulders, and that the straight leg raising test was negative. Dr. Katz concludes that the cervical radiculopathy that Rodriguez allegedly sustained as a result of the subject accident has resolved, that she is not disabled, and that she is capable of performing her normal daily living activities without restrictions. Additionally, Dr. Rubin's reports state that the MRI examination of Rodriguez's lumbar spine was normal, and that the MRI examination of her cervical spine did not reveal any evidence of disc bulges or herniations.

Therefore, defendants have shifted the burden to Rodriguez to come forward with admissible evidence to show that she sustained an injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see, Toure v. Avis Rent A Car Systems, Inc., 98 NY2d 345 [2002]; see generally, Zuckerman v. City of New York, 49 NY2d 557 [1980]). To recover under the "limitations of use" categories, a plaintiff must present objective medical evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration (see, Magid v. Lincoln Servs. Corp., 60 AD3d 1008 [2nd Dept., 2009]; Laruffa v. Yui Ming Lau, 32 AD3d 996 [2nd Dept., 2006]; Cerisier v. Thibiu, 29 AD3d 507 [2nd Dept., 2006]; Meyers v. Bobower Yeshiva Bnei Zion, 20 AD3d 456 [2nd Dept., 2005]). 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 may also suffice (see, Toure v. Avis Rent A Car Systems, Inc., 98 NY2d 345 [2002]; Dufel v. Green, 84 NY2d 795 [1995]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (see, Licari v. Elliott, 57 NY2d 230 [1982]). Further, evidence of pain and discomfort alone, unsupported by credible medical evidence that diagnoses and identifies the injuries, is insufficient to sustain a finding of serious injury (see, Scheer v. Koubek, 70 NY2d 678 [1987]). Unsworn medical reports of a plaintiff's examining physician or chiropractor are insufficient to defeat a motion for summary judgment (see, Grasso v. Anegarmi, 79 NY2d 813 [1991]). However, a plaintiff may rely upon unsworn MRI reports if they have been referred to by a defendant's examining expert (see, Caulkins v. Vicinanzo, 71 AD3d 1224 [3rd Dept., 2010]; Ayzen v. Melendez, 299 AD2d 381 [2nd Dept., 2002]).

In opposition, Rodriguez asserts that she has sustained injuries within the "limitations of use" categories and the "90/180" category of the Insurance Law as a result of the subject accident, and that defendants failed to meet their *prima facie* burden that she did not sustain an injury within the

meaning of the Insurance Law. In opposition to the motion, Rodriguez submits the affirmed electromyography ("EMG") report of Dr. David Steiner, a neurologist, and an affidavit of Dr. Nicholas Martin, her treating chiropractor.

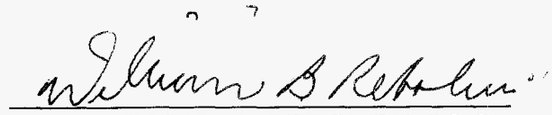
In opposition to defendants' *prima facie* showing, Rodriguez has come forward with sufficient evidence to raise a triable issue of fact as to whether she sustained a serious injury to her cervical spine under the limitations of use categories of Insurance Law § 5102(d) as a result of the subject accident (see, Evans v. Pitt, 77 AD3d 611 [2nd Dept., 2010], lv denied 16 NY3d 736 [2011]; Lee v. McQueens, 60 AD3d 914 [2nd Dept., 2009]; Williams v. Clark, 54 AD3d 942 [2nd Dept., 2008]). Rodriguez primarily relies on the affidavit of Dr. Martin, her treating chiropractor. In his affidavit, Dr. Martin opines, based upon contemporary and recent examinations of Rodriguez, that the range of motion limitations in her cervical spine are significant and permanent and that such limitations are casually related to the subject accident (see, Tai Ho Kang v. Young Sun Cho, 74 AD3d 1328 [2nd Dept., 2010]; Pearce v. Oliverta-Puerto, 73 AD3d 879 [2nd Dept., 2010]; Whitehead v. Olsen, 70 AD3d 678 [2nd Dept., 2010]). In addition, Dr. Martin states that when Rodriguez was dismissed from treatment in November 2009, she had reached an intermediate stage of treatment and any additional treatment would have been palliative in nature. Accordingly, defendants' motion dismissing Rodriguez's cause of action on the ground that she failed to sustain an injury within the "limitations of use" categories of Insurance Law § 5102 (d) is denied.

Based on the foregoing, it is

ORDERED that this motion by plaintiff Carlos Johnson seeking summary judgment dismissing defendants' counterclaim is granted; and it is further

ORDERED that this cross motion by defendants Richard O'Connor and Emerald Isle Paving and Landscaping, Inc. seeking summary judgment dismissing plaintiff Jasmine Rodriguez's cause of action on the ground that she did not sustain an injury within the meaning of Insurance Law § 5102(d) is denied.

Dated: SEP 26 2011



HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**