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SHORT FORM ORDER

INDEX No. 09-44825
CAL. No. 11-00154MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 4-6-11
ADJ. DATE 6-8-11
Mot. Seq. # 001 - MotD

JUDY A. SVENDSEN-BEEBE, Plaintiff, -against- STEVEN J. ROTTACH, ELRAC, LLC and ENTERPRISE HOLDINGS, INC., d/b/a ENTERPRISE RENT-A-CAR, Defendants.	AMIDEO NICHOLAS GUZZONE, et al. Attorney for Plaintiff 2450 Middle Country Road Centereach, New York 11720 BRAND GLICK & BRAND, P.C. Attorney for Defendants 600 Old Country Road, Suite 440 Garden City, New York 11530

Upon the following papers numbered 1 to 30 read on this motion for dismissal and summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 18 - 27; Replying Affidavits and supporting papers 28 - 30; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendants for dismissal pursuant to CPLR 3211 (a)(7) and for summary judgment dismissing the complaint is determined herein.

This is an action to recover damages for injuries allegedly sustained by the plaintiff on July 4, 2009 when her vehicle was struck by a vehicle owned and leased by the defendant ELRAC, Inc. d/b/a Enterprise (ELRAC), incorrectly sued herein as ELRAC, LLC and Enterprise Holdings, Inc. d/b/a Enterprise Rent-A-Car, and operated by the defendant Steven J. Rottach (Rottach). The accident occurred on South Edgemere at or near its intersection with South Elmwood in the Town of East Hampton, Suffolk County, New York. By her bill of particulars, the plaintiff alleges that as a result of said accident she sustained serious injuries including central posterior protruded disc herniation at C2-3, C3-4, C4-5; left paramedian posterior protruded disc herniation at C5-6 and C6-7; acute cervical sprain and strain with radiculitis; bilateral C5-6 cervical radiculopathy; aggravation of pre-existing injury to the lumbar spine; disc bulge at L3-4; disc bulge at L4-5 contacting left L4 nerve roots within the neural foramen; supraspinatus tendinosis in right shoulder; brachial neuritis; and tinitus in right and left ears. In addition, the plaintiff alleges that she was confined to bed from July 4, 2009 until August 4, 2009, except to attend medical appointments, and was confined to home from July 4, 2009 until September 29, 2009 and

intermittently thereafter except to attend medical appointments. The plaintiff also claims that following said accident she was incapacitated from her employment as a director of resident relations at The Bristol, an assisted living facility, in Massapequa, New York from July 4, 2009 until September 29, 2009, from December 5, 2009 until December 9, 2009, and from December 30, 2009 until January 6, 2010.

The defendant ELRAC now moves for dismissal of the claims against it for failure to state a cause of action as well as for summary judgment based on 49 USC § 30106 (the Graves Amendment). ELRAC submits a faxed copy of an affidavit dated February 11, 2011 of its employee, Daniel Madden, that lacks an original signature. The Court considers said affidavit despite its defect (*see* CPLR 2101 [e], [f]; ***Billingy v Blagrove***, 84 AD3d 848, 922 NYS2d 565 [2d Dept 2011]). Mr. Madden indicates in his affidavit that he is a regional risk supervisor for ELRAC, and that the day before the subject accident, ELRAC rented its vehicle, a Chevy vehicle with a New York license plate EST6633, to Rottach who signed a rental agreement. He also indicates that a search of records related to said vehicle revealed no pre-accident complaints or evidence of any performance or maintenance problems, and that Rottach was not employed by ELRAC on the date of the accident.

On August 10, 2005, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), a comprehensive transportation bill that included the Graves Amendment, was signed into law (***Graham v Dunkley***, 50 AD3d 55, 57-58, 852 NYS2d 169 [2d Dept 2008], *appeal dismissed* 10 NY3d 835, 859 NYS2d 607 [2008]). The Act is now codified at 49 USC § 30106 (*see* ***Graham v Dunkley***, 50 AD3d at 58). The section is entitled "Rented or leased motor vehicle safety and responsibility" and provides:

> (a) In general. An owner of a motor vehicle that rents or leases the vehicle to a person (or an affiliate of the owner) shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner), for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if
>
> > (1) the owner (or an affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and
> >
> > (2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner). (*see* 49 USC § 30106 [a]).

"The section applies to all actions commenced on or after August 10, 2005 (*see* 49 USC § 30106 [c]), and has been enforced as preempting the vicarious liability imposed on commercial lessors by Vehicle and Traffic Law § 388" (***Graham v Dunkley***, 50 AD3d at 58).

Here, ELRAC established that it is an "owner (or an affiliate of the owner) ... engaged in the trade or business of renting or leasing motor vehicles" (*see* 49 USC § 30106; ***Gluck v Nebgen***, 72 AD3d 1023, 898 NYS2d 881 [2d Dept 2010]; ***Graham v Dunkley***, 50 AD3d at 57-58). In addition, Mr. Madden demonstrated through his affidavit that the plaintiff's allegations of failing to maintain the vehicle in a

proper state of repair and respondeat superior are unfounded such that there is no negligence or wrongdoing on the part of ELRAC (*see id.*). Moreover, the plaintiff's vicarious liability claims pursuant to Vehicle and Traffic Law § 388 as against ELRAC are barred by 49 USC § 30106 (*see* ***Hall v ELRAC, Inc.***, 52 AD3d 262, 859 NYS2d 641 [1st Dept 2008]). The plaintiff failed to raise any opposition warranting the denial of ELRAC's request. Therefore, ELRAC is entitled to dismissal of the complaint as against it (*see* 49 USC § 30106; ***Gluck v Nebgen***, 72 AD3d at 1023-1024; ***Hall v ELRAC, Inc.***, 52 AD3d at 262-263; ***Graham v Dunkley***, 50 AD3d at 57-58).

The defendant Rottach seeks summary judgment in his favor dismissing the complaint as against him on the ground that the plaintiff failed to sustain a serious injury as defined in Insurance Law § 5102 (d) as a result of the subject accident.

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Akhtar v Santos***, 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff's own deposition testimony and the affirmed medical report of the defendant's own examining physician (*see* ***Moore v Edison***, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; ***Farozes v Kamran***, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; ***Boone v New York City Trans. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Insurance Law § 5102 (d) defines "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."

"It is well established that in threshold serious injury cases, restrictions in range of motion typically are numerically quantified, compared to the norms, and based upon identified objective tests" (***Perl v Meher***, 74 AD3d 930, 931, 902 NYS2d 632 [2d Dept 2010][internal citations omitted]). "These requirements are applied to defendants seeking summary judgment, as well as to plaintiffs opposing summary judgment" (*id.*). The defendants must submit admissible medical evidence demonstrating that the plaintiff's range of motion was not significantly limited in comparison to the normal range of motion one would expect of a healthy person of the same age, weight, and height (*see* ***Frey v Fedorciuc***, 36 AD3d 587, 588, 828 NYS2d 454 [2d Dept 2007]; ***Powell v Alade***, 31 AD3d 523, 818 NYS2d 600 [2d Dept 2006]).

For a plaintiff to recover under the "permanent loss of use" category, he or she must demonstrate a

total loss of use of a body organ, member, function or system (*see* ***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, the plaintiff must provide either objective evidence of the limitation or loss of range of motion and its duration based on findings from an examination contemporaneous to the accident and a recent examination or the plaintiff must provide a sufficient description of the "qualitative nature" of his or her limitations, with an objective basis, correlating the plaintiff's limitations to the normal function, purpose and use of the body part (*see* ***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 722 [2d Dept 2006]; *see also* ***Perl v Meher***, 74 AD3d at 931).

The defendant Rottach relies on the affirmed medical reports of the defendants' examining orthopedic surgeon, Edward A. Toriello, M.D., and examining neurologist, Mark J. Zuckerman, M.D. The report dated November 9, 2010 of Dr. Toriello indicates that he examined the plaintiff on said date and performed range of motion testing of her cervical spine, right and left shoulders, right and left elbows, right and left wrist and hand, lumbosacral spine, and right and left ankle and foot using a goniometer. Dr. Toriello's findings with respect to the cervical spine revealed decreased bilateral rotation of 30 degrees (normal 80 degrees), flexion of 10 degrees (normal 50 degrees), and extension of 10 degrees (normal 60 degrees), with no evidence of paracervical muscle spasm or atrophy. His findings regarding range of motion of the plaintiff's lumbosacral spine revealed decreased flexion of 30 degrees (normal 60 degrees) limited by pain, and normal extension, bilateral lateral bending and bilateral rotation but with complaints of pain at the extremes of motion. Dr. Toriello stated that the plaintiff has evidence of symptom magnification based on her complaints of pain in her lumbar spine when he lightly touched the skin overlying her paralumbar muscles, her complaints of pain in her lumbar spine when he rotated her body at the hips while maintaining her lumbar spine completely stable, and her complaints of pain radiating from her head to her lower back when he tapped the top of her head. Dr. Toriello noted that there was no paralumbar muscle spasm or loss of normal lumbar lordosis and that straight leg raising was bilaterally full and pain free. In conclusion, Dr. Toriello opined that the plaintiff showed evidence of a resolved cervical hyperextension injury, resolved left foot contusion, resolved right shoulder strain, and resolved low back strain. He also opined that she had evidence of symptom magnification and noted that the range of motion examination is a subjective test under the voluntary control of the individual being tested. Dr. Toriello concluded that the injuries appeared to be causally related to the subject accident, that the plaintiff had no pre-existing conditions affecting her recovery, and that she was presently able to perform the duties of her occupation.

Dr. Zuckerman indicated in his report that he examined the plaintiff on November 8, 2010 and found a normal neurological examination. However, he reported that the plaintiff's spinal range of motion testing with a goniometer revealed lumbar flexion to 20 degrees (60 to 90 degrees normal), cervical flexion to 20 degrees (50 to 60 degrees normal), cervical extension to 20 degrees (40 to 60 degrees normal), and cervical lateral flexion to the left was 20 degrees (45 degrees normal) and cervical lateral flexion to the right was 25 degrees (45 degrees normal). Dr. Zuckerman also reported that the plaintiff needed effort to rotate to the left and rotated to the right 20 out of the maximum 80 degrees. He concluded his report by diagnosing cervical sprain injury superimposed upon cervical degenerative disc

disease, ossified ligaments and congenitally narrowed spinal canal, and subjective headaches, "cervically mediated from spondylosis and sprain/strain." Dr. Zuckerman opined that there was no evidence of cervical radiculopathy, lumbosacral radiculopathy, or central or peripheral nervous system dysfunction and that the plaintiff's reduced range of motion was secondary to spondylitic disease and diminished effort. He further opined that there was no causally related neurologic injury or impairment but that the cervical sprain appeared to be causally related to the subject accident, superimposed upon pre-existing degenerative changes, and that her lumbar condition appeared to be an entirely pre-existing condition.

Here, the defendant Rottach failed to meet his prima facie burden of establishing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see* ***Reitz v Seagate Trucking, Inc.***, 71 AD3d 975, 898 NYS2d 173 [2d Dept 2010]). Dr. Toriello reported the existence of significant limitations in the plaintiff's cervical and lumbosacral spine range of motion more than a year after the subject accident (*see* ***Alam v Karim***, 61 AD3d 904, 879 NYS2d 151 [2d Dept 2009]). Although he stated that the plaintiff had evidence of symptom magnification and that range of motion testing is subjective, he failed to substantiate those conclusions with objective medical evidence (*see* ***Tavaras v Herkimer Taxi Corp.***, 78 AD3d 1162, 911 NYS2d 672 [2d Dept 2010]). In addition, it appears that Dr. Zuckerman also found significant limitations in range of motion of the plaintiff's cervical and lumbar spine, the extent of which is difficult to determine. Dr. Zuckerman reported ranges of motion for the plaintiff's lumbar flexion, cervical flexion, and cervical extension that were expressed in certain or definitive numerical degrees but he failed to provide the corresponding certain or definitive normal values and instead gave ranges or spectrums of degrees spanning 10 to 30 degrees for his normal standards of comparison (*compare* ***Spencer v Golden Eagle, Inc.***, 82 AD3d 589, 920 NYS2d 24 [1st Dept 2011]; *see* ***Lee v M & M Auto Coach, Ltd.***, 2011 NY Slip Op 30667U, 2011 NY Misc Lexis 1131 [Sup Ct, Nassau County 2011]). When a normal reading for range of motion testing is provided in terms of a spectrum or range of numbers rather than one definitive number, the actual extent of the limitation is unknown, and the Court is left to speculate (*see* ***Sainnoval v Sallick***, 78 AD3d 922, 923, 911 NYS2d 429 [2d Dept 2010]; *see also* ***Lee v M & M Auto Coach, Ltd.***, 2011 NY Slip Op 30667U, 2011 NY Misc Lexis 1131 [Sup Ct, Nassau County 2011]). Moreover, Dr. Zuckerman noted that the plaintiff had a pre-existing lumbar condition but failed to address her allegation in her bill of particulars that the subject accident caused an aggravation of pre-existing injury to her lumbar spine (*see* ***Pero v Transervice Logistics, Inc.***, 83 AD3d 681, 920 NYS2d 364 [2d Dept 2011]). Furthermore, both physicians failed to address the plaintiff's claim, as set forth in her bill of particulars, that she sustained a medically-determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary activities for not less than 90 of the 180 days immediately following the accident (*see* ***Aslam v Hossain***, 83 AD3d 749, 920 NYS2d 674 [2d Dept 2011]). Neither physician related his findings to this category of serious injury for the period of time immediately following the subject accident (*see* ***Delayhaye v Caledonia Limo & Car Service, Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]).

Inasmuch as the defendant Rottach failed to meet his prima facie burden, it is unnecessary to determine whether the plaintiff's papers submitted in opposition to his motion for summary judgment were sufficient to raise a triable issue of fact (*see* ***Bengaly v Singh***, 68 AD3d 1030, 1031, 890 NYS2d 352 [2d Dept 2009]).

Accordingly, the motion is granted solely as to the defendant ELRAC, Inc. d/b/a Enterprise and the action is severed and continued as against the defendant Steven J. Rottach.

Dated: 3 Oct. 2011

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**