

SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. JOSEPH P. DORSA IAS PART 12  
Justice

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DIOMARIS DISLA,

Plaintiff,

Index No.: 21777/05

- against -

Motion Date: 8/29/07

HUGO MURILLO and CHARLES HOWARD, JR.

Motion No.: 11

Defendant.

Motion Seq. No. 2

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The following papers numbered 1 to 19 on this motion:

	<u>Papers Numbered</u>
Defendant Howard's Notice of Motion-Affirmation-Affidavits-Service-Exhibits	1-4
Defendant Murillo's Notice of Cross-Motion-Affirmation-Affidavits-Service-Exhibits	5-8
Plaintiff's Affirmation in Opposition-Affidavit(s)-Exhibit(s)	9-11
Defendant Murillo's Affirmation in Partial Opposition-Exhibits	12-13
Defendant Howard's Reply Affirmation	14-17
Defendant Murillo's Reply Affirmation	18-19
Reply Affirmation-Exhibit(s)	

By notice of motion, defendant, Charles Howard, Jr., seeks an order of the Court, pursuant to CPLR § 3212, granting him summary judgment and dismissing the complaint as to him on the grounds that plaintiff failed to sustain a serious injury within the meaning of N.Y. Ins. Law § 5102(d) and § 5104(a).

Defendant Howard also seeks dismissal on the grounds that "there are no triable issues of fact against this moving defendant." (Presumably defendant means to claim that he was not negligent).

Defendant, Hugo Murillo, files an affirmation in partial opposition.

Plaintiff files an affirmation in opposition.

By notice of cross-motion, defendant Murillo seeks an order of the Court, granting him summary judgment and dismissing the complaint pursuant to CPLR § 3212, on the grounds that plaintiff failed to sustain a serious injury.

Defendant Howard files a reply to the opposition by plaintiff and the partial opposition by co-defendant, Murillo. Defendant Murillo files a reply to the opposition by plaintiff.

The underlying cause of action is a claim by plaintiff for personal injuries alleged to have been sustained in a motor vehicle accident on October 15, 2002, at Cypress Avenue and the Jackie Robinson Parkway in Kings County, New York.

At that time and place, plaintiff was a passenger in a cab owned and operated by defendant, Hugo Murillo, that was rear-ended by the vehicle operated by defendant, Charles Howard, Jr.

In support of his motion for summary judgment and dismissal, defendant submits the affirmed report of Dr. Michael J. Katz, based upon an examination conducted on January 29, 2007; the affirmed report of Dr. Edward M. Weiland, based upon an examination conducted on June 13, 2006; the affirmed report of Dr. Steven J. Mendelsohn's review of MRI films of plaintiff's lumbar spine taken on November 15, 2002 and reviewed on June 19, 2006; and, Dr. Mendelsohn's review of the MRI film of plaintiff's right shoulder taken on October 24, 2002 and reviewed on June 19, 2006.

In opposition to the motion for summary judgment, plaintiff submits the unaffirmed (emphasis added) medical records of plaintiff's treating doctors, including Dr. Vladimir Kirkorov, and Dr. Raya Kushmir, for treatment plaintiff received beginning November 25, 2002 and apparently continuing through 2003.

Plaintiff also submits the unaffirmed (emphasis added) report of Dr. Stephen Zinn, the radiologist who performed plaintiff's MRIs on her cervical and lumbar spine and right shoulder, as noted above.

Finally, plaintiff provides the affidavit of Dr. Irving Liebman, who performed an examination of plaintiff on June 15, 2007.

In the affirmed report provided by Dr. Michael Katz in support of defendant's motion, it is revealed that Dr. Katz did not review any of plaintiff's medical records in drawing his conclusions.

Dr. Edward M. Weiland, however, did review the reports provided by plaintiff from Drs. Kirkorov and Kushnir, but not Dr. Liebman's report.

Both Drs. Katz and Weiland conclude that any injury plaintiff may have sustained to her cervical spine, lumbar spine, and right shoulder was resolved by the time of their examination, based primarily on range of motion tests which they conducted. The Court notes, however, that defendant's experts did not agree with each other on what a "normal" range of motion would be for this plaintiff.

"To establish their entitlement to summary judgment on the issue of serious injury the defendants were required to submit admissible medical evidence demonstrating that plaintiff's range of motion in [her] cervical spine, lumbar spine, and [right] shoulder were 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, Powell v. Alade, 31 AD3d 523 (2006)." Frey v. Fedorciuc, 36 AD3d 587, 588, 828 NYS2d 454 (2<sup>nd</sup> Dep't 2007)).

This defendants' experts did not do, as the could not agree with each other on what "normal" for this plaintiff would be.

Thus, "...leaving the court to speculate..." as to who was correct, if either, and whether plaintiff did or did not suffer from a limitation in her range of motion due to the accident. Id. at 588. (See also, Bluth v. World Omni Fin. Corp., 38 AD3d 817, 832 NYS2d 640 (2d Dep't 2007)).

"The defendant failed to establish his prima facie entitlement to judgment as a matter of law by showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject motor vehicle accident. (See Toure v. Avis Rent a Car Sys., 98 NY2d 345 (2002); Gaddy v. Eyler, 79 NY2d 955 (1992)." D'Onofrio v. Arsenault, 35 AD3d 646, 828 NYS2d 117 (2d Dep't 2006)).

"Since the defendant failed to meet his initial burden of establishing a prima facie case, it is unnecessary to consider whether the plaintiff's papers submitted in opposition to the defendant's motion were sufficient to raise a triable issue of

fact." (See, Grady v. Jacobs, *supra*; Coscia v. 938 Trading Corp., 283 AD2d 538 (2001).") Id. at 647.

Accordingly, upon all of the foregoing, both defendant Howard's motion for summary judgment and co-defendant Murillo's cross-motion for summary judgment based on a claim that plaintiff failed to sustain a serious injury are denied.

Defendant Howard maintains that he had the right of way and that defendant Murillo made a left turn from an adjacent roadway, striking his vehicle. In response, defendant Murillo maintains that he was in the intersection preparing to make a left turn when defendant Howard's vehicle failed to stop, and collided with his vehicle.

Based on plaintiff's testimony and defendant Howard's own testimony, there are triable issues of fact as to whose actions were negligent, and therefore the proximate cause of the injuries sustained by plaintiff.

While defendant Howard maintains that "he turns (sic) in front of me," he also testified that he "was like a block and a half from him," "where I could see him and he makes a turn." (Defendant's Exh. J, EBT of defendant Charles Howard, Jr., p. 12 lines, 20, 11, 12, and 10, respectively).

Contrary to defendant Howard's contention in paragraph 42, Vehicle and Traffic Law § 1142 does not state:

"Where motorists approached intersection from opposite directions, motorist who intended to proceed through intersection had right of way over motorist who attempted to make left turn."

Vehicle and Traffic Law § 1140(a) provides, however:

"(a) The driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection from a different highway."

"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 issue of fact from the case, and such showing must be made by producing evidentiary proof in admissible form" (Santanastasio v. Doe, 301 AD2d 511 [2<sup>nd</sup> Dep't. 2003]).

Defendant Howard fails to meet his prima facie burden on the

issue of liability and the Court, therefore, need not determine the sufficiency of plaintiff's and co-defendant's motion papers in response. D'Onofrio, supra.

Accordingly, the second branch of defendant Howard's motion is likewise denied.

Dated: Jamaica, New York  
October 12, 2007

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**JOSEPH P. DORSA**  
**J.S.C.**