Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Rosalind Seabury,

Plaintiff(s)

-against-

Michael Heiser, Artheree Dominic and Michael Dominic,

Defendant(s)

Motion date:
Submitted: 1/24/07
Motion Sequence No.: 001 MG
002 MD
003 MD
004 MD

Index No.: 13434-05

Attorney for Plaintiff:
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Upon the following papers numbering 1 to 16 read upon these four motions:

Notice of Motion and supporting papers 1 - 4;
Notice of Cross Motion and supporting papers 5 - 7, 8 - 10, 11 - 12;
Affidavit in Opposition and supporting papers 13 - 14;
Reply Affidavits and supporting papers 15 - 16; it is

ORDERED that this motion (001) by defendants, Artheree Dominic and Michael Dominic for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiff's complaint on the ground that, as a matter of law, the accident was caused by co-

defendant Michael Heiser is granted; and it is further

ORDERED that this cross motion (002) by plaintiff, Rosalind Seabury ("plaintiff") for an order pursuant to CPLR 3212 granting summary judgment in favor of plaintiff on the issue of liability against Michael Heiser is granted; and it is further

ORDERED that this cross motion (003) by defendant, Michael Heiser for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiff's complaint on the ground that plaintiff failed to establish that her alleged injuries were caused by the subject accident and further that the alleged injuries do not fall within the definition of "serious injury" as defined by the Insurance Law is denied; and it is further

ORDERED that this cross motion (004) by defendants, Artheree Dominic and Michael Dominic for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiff's complaint on the ground that plaintiff's alleged injuries do not fall within the definition of "serious injury" as defined by the Insurance Law is denied as moot.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff when the Dominic vehicle, in which plaintiff was a passenger, was hit in the rear by the vehicle driven by defendant, Michael Heiser. At the time of the accident, Artheree Dominic, the driver of the vehicle was either stopped or stopping prior to making a turn.

"A rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability with respect to the operator of the moving vehicle, and imposes a duty on the operator of the moving vehicle to come forward with an adequate non-negligent explanation for the accident" (Emil Norsic & Son, Inc. v L. &P Transp., Inc., 30 AD3d 368, 815 NYS2d 736 [2d Dept. 2006]). Artheree Dominic has established prima facie her entitlement to summary judgment by submitting the transcript of her deposition indicating the accident occurred when she was stopped prior to making a left turn off of Motor Parkway.

In opposition to this motion, defendant Heiser fails to raise a triable issue of fact. Counsels's speculation that Artheree Dominic, the driver of the preceding vehicle, may have been able to avoid the accident or take some evasive action ignores the applicable case law that requires her client to come forward with a non-negligent explanation for this rear end accident. Moreover, his position that the Dominic vehicle was moving at the time of the accident is irrelevant, since the same presumption of negligence against the second vehicle arises whether the preceding vehicle is stopped or stopping (see Emil Norsic & Son, Inc. v L. &P Transp., Inc. supra).

Moreover, plaintiff's claim that the Dominic defendants should remain in this case because there is a question of fact as to whether Artheree Dominic used her directional signal is insufficient to raise a triable issue of a fact as to any negligence on Dominic's part. Contrary to plaintiff's counsel's contention, plaintiff did not testify on page 58 of the transcript that the Dominic vehicle did not have its directional signal on. Rather plaintiff answered in the negative

to counsel's question if she heard "the sounds of any directional signal noises." She was not asked whether the directional signal was activated. In any event, since Heiser testified that he did not see the brake lights on the Dominic vehicle until one or two seconds prior to impact, the fact that he testified that he did not see a directional on that vehicle does not raise a triable issue of issue of fact. "When a driver of an automobile approaches another automobile from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle. In addition, Vehicle and Traffic Law §1129(a) requires a driver to maintain a safe distance between vehicles: "The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway". Moreover, "drivers have a 'duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident' " (Filippazzo v. Santiago, 277 AD2d 419, 716 NYS2d 710 [2d Dept. 2000] [citations omitted]). Thus, plaintiff has failed to raise a question of fact that the alleged failure of Artheree Dominic to use her directional signal was the proximate cause of the accident.

Defendant, Michael Heiser moves to dismiss plaintiff's complaint on the ground that plaintiff's injuries were not caused by the subject accident and further that the injuries she did sustain do not fall within the definition of "serious injury" under the Insurance Law. This motion is joined by co-defendants, who cross move for the same relief.

The evidence submitted by defendant Heiser in support of his motion does not establish prima facie that plaintiff did not suffer a serious injury within the meaning of Insurance Law §5102(d) as result of the motor vehicle accident. More specifically, the submissions provided by defendant indicate factual questions as to whether, inter alia, the torn tendon in plaintiff's right shoulder was caused by the accident. While the affirmation of Arthur M. Bernhang, M.D. F.A.C.S. who performed the independent orthopaedic examination states that the arthritic changes in plaintiff's shoulder could not have been caused by the accident, he is silent as to the suspected cause of the tear. Beatrice Engstrand, M.D., F.A.A.N., the examining neurologist performed several tests, noted certain decreases in range of motion, does not comment on the MRI report indicating a tendon tear, and opines that plaintiff has no disability from this accident. In the affirmation of Melissa Sapan Cohn, the defendant's examining radiologist, Dr. Cohn opines that the tendon tear is degenerative. However, also annexed to the defendant's motion is a letter from plaintiff's physician indicating that based on the presence of effusion, the tear was recent and not chronic. Accordingly, the court finds that defendant has failed to meet his prima facie burdens (see Kovalenko v. General Electric Capital Auto Lease, ___ AD2d___, 2007 WL 534383 [2d Dept. 2007]) and the court need not consider the sufficiency of plaintiff's opposition papers.

Dated: March 14, 2007

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