

Tze-Chi Huang v Pena
2007 NY Slip Op 31919(U)
June 25, 2007
Supreme Court, Suffolk County
Docket Number: 0015638/2005
Judge: Robert W. Doyle
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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 3-29-07
ADJ. DATE 5-29-07
Mot. Seq. # 001 - MotD
002 - XMG

-----X
TZE-CHI HUANG, :
 :
 :
 Plaintiff, :
 :
 - against - :
 :
 NICOLE PENA, :
 :
 Defendant. :
-----X

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Upon the following papers numbered 1 to 41 read on this motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19; Notice of Cross Motion and supporting papers 21 - 29; Answering Affidavits and supporting papers 30 - 41; Replying Affidavits and supporting papers ___; Other ___; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion by defendant for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is granted solely to the extent indicated below, otherwise denied; and it is further

ORDERED that this cross motion by plaintiff for partial summary judgment on liability grounds is granted, without opposition.

This is an action to recover damages for serious injuries allegedly sustained by plaintiff as a result of a motor vehicle accident which occurred on Route 112, approximately 100 feet north of Stony Hill Road, Port Jefferson, Town of Brookhaven, New York on June 7, 2004. The accident allegedly happened when the vehicle owned and operated by defendant Nicole Pena rear-ended the vehicle operated by plaintiff Tze-Chi Huang, and owned by her husband, Chih-Shan Chen, a non-party to this action. Defendant now moves for an order pursuant to CPLR 3212 granting him summary judgment dismissing the complaint on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). Plaintiff opposes this motion and cross moves for partial summary judgment

on liability grounds. Plaintiff's cross motion is unopposed.

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."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*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 a "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed or there must be 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 (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]).

It is for the court to determine in the first instance whether a prima facie showing of "serious injury" has been made out (*Tipping-Cestari v Kilhenny*, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). The initial burden is on the defendant "to present evidence, in competent form, showing that the plaintiff has no cause of action" (*Rodriguez v Goldstein*, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once defendant has met the burden, plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (*Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]). Such proof, in order to be in a competent or admissible form, shall consist of affidavits or affirmations (*Pagano v Kingsbury*, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the nonmoving party, here, the plaintiff (*Cammarere v Villanova*, 166 AD2d 760, 562 NYS2d 808 [3d Dept 1990]).

In support of this motion, defendant submits, inter alia, the pleadings; plaintiff's bill of particulars; the University Hospital at Stony Brook MRI report of plaintiff's left shoulder dated June 23, 2004; the unsworn report of plaintiff's radiologist, Benson Ong Hai, M.D.; the affirmed report of defendant's examining orthopedist, Frank D. Oliveto, M.D.; and the plaintiff's deposition testimony. Plaintiff claims in her bill of particulars that she sustained, among other things, a left shoulder impingement which resulted in a loss of range of motion and weakness with permanent damage to the surrounding soft tissue, ligaments and tendons. Plaintiff also claims that she sustained a cervical spine injury, which resulted in a loss of range of motion, as well as a psychological injury, to wit: depression. Additionally, plaintiff claims that she sustained a serious injury in the categories of a permanent loss of use, a permanent consequential limitation, a significant limitation and a non-permanent injury.

Plaintiff's University Hospital and Medical Center at Stony Brook records dated June 23, 2004 show that an MRI of her left shoulder was taken on that date by the attending physician, Elaine Gould, M.D. In that report, Dr. Gould's findings include mild AC prominence; no spontaneous osteonecrosis; no denervation edema; and a lateral downward sloping of the acromion with slight encroachment on the supraspinatus region. While she observed fluid surrounding the bicipital tendon and a small amount of subacromial/subdeltoid bursal fluid, she also noted that there was no significant joint effusion. Dr. Gould opined that these studies showed mild supraspinatus tendinosis, mild AC arthrosis and fluid surrounding the bicipital tendon.

In his report dated June 28, 2004, Dr. Hai states that he performed a follow-up orthopedic examination of the plaintiff on that date, and his findings include a decreased range of the cervical spine motion and tenderness over the bicipital tendon. He also observed that left shoulder flexion and abduction were 0-120 degrees. Dr. Hai opined that plaintiff had cervical disc disease.

In his report dated July 12, 2006, Dr. Oliveto states that he performed an independent orthopedic examination of plaintiff on that date, and his findings include symmetrical reflexes; a normal motor exam; no neurological deficits of the upper extremities; and no grasp weakness of either upper extremity. He also observed that plaintiff had a full/normal range of motion of the cervical spine and of the left shoulder. Additionally, he noted that there was no deformity or atrophy of the left shoulder. Dr. Oliveto opined that plaintiff had sustained a cervical strain syndrome and a contusion/impingement syndrome of the left shoulder as a result of the accident which were each healed. He also opined that plaintiff's mild osteoarthritis of the left acromioclavicular joint was unrelated to the accident. Furthermore, Dr. Oliveto concluded that plaintiff was able to resume the normal activities with no restrictions and that she was not disabled.

Plaintiff testified to the effect that, following the accident, she drove her vehicle to pick up her children from school. She returned home and then attended her children's musical concert later that evening. Although she wanted to stay in bed for a period of time after the accident, she was unable to because she was responsible for the care of her two young children. In December 2004, she traveled to Universal Studios and Disney World in Orlando Florida. Since the accident, she has also traveled to and from Hawaii on two occasions and Alaska on one occasion. Furthermore, she is unable to do many household activities due to her injuries and that she cannot sleep on her left shoulder for more than five minutes. Lastly, plaintiff testified that she is unable to play her violin and piano.

By her submissions, defendant made a prima facie showing that plaintiff did not sustain a serious injury (see, *Wright v Peralta*, 26 AD3d 489, 809 NYS2d 465 [2d Dept 2006]; *Farozes v Kamran*, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]; *Teodoro v Conway Transp. Serv.*, 19 AD3d 479, 798 NYS2d 466 [2d Dept 2005]; *Gousgoulas v Melendez*, 10 AD3d 674, 782 NYS2d 103 [2d Dept 2004]). Defendant's examining orthopedist found that plaintiff had a full range of motion of the cervical spine and of the left shoulder. Furthermore, defendant's examining orthopedist opined, from his review of plaintiff's medical documentation, that the mild osteoarthritis of the plaintiff's left acromioclavicular joint was pre-existing, degenerative and unrelated to trauma (see, *Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380 [2005]). Defendant's remaining evidence, including plaintiff's deposition testimony, also supports a finding that she did not sustain a serious injury. As defendants have met their burden as to all

categories of serious injury alleged by plaintiff, the Court turns to plaintiff's proffer (*see, Franchini v Palmieri*, 1 NY3d 536, 775 NYS2d 232 [2003]; *Dongelewic v Marcus*, 6 AD3d 943, 774 NYS2d 841 [3d Dept 2004]).

In opposition, plaintiff submits, inter alia, the personal affirmation of her orthopedist, Philip L. Schrank, M.D.; her personal affidavit; and the personal affirmation of counsel. In his affirmation, Dr. Schrank avers that he initially saw plaintiff on September 22, 2004 in connection with her complaints of neck and left shoulder pain, and his findings include a limited range of left shoulder motion, and positive Neer/Hawkin's signs, the latter of which he opined suggested subacromial impingement. Dr. Schrank also opined that she had sustained a possible grade I or II AC separation with no glenohumeral arthritis. He next saw plaintiff on November 3, 2004, at which time he noted some AC tenderness and some orthopedic signs upon testing. On December 12, 2004, he noted similar findings and maintained his diagnosis of grade I to II AC separation of the left shoulder. During his exam on January 19, 2005, Dr. Schrank again noted that plaintiff had positive Neer/Hawkin's signs and a limited range of motion. At that time, he also reviewed the films of plaintiff's second left shoulder MRI which he opined showed a partial thickness tear of the supraspinatus tendon and an increased signal about the AC joint, but no glenohumeral arthritis. Dr. Schrank administered a cortisone injection into plaintiff's left shoulder and recommended that she continue physical therapy. During her February 17, 2005 visit, he noted that plaintiff had a positive cross-arm adduction test and a positive Speed test. He also started her on lidoderm patches. On March 30, 2005, he administered another cortisone injection into plaintiff's shoulder, which was her third in total, inclusive of a prior injection by Dr. Penna at University Hospital. He subsequently examined plaintiff on May 5, 2005, and the findings of that exam include a positive left shoulder cross-arm adduction test with associated AC joint tenderness. Noting that multiple forms of non-operative treatment had failed, he recommended arthroscopy and surgery to plaintiff. On May 13, 2005, Dr. Schrank operated on plaintiff, performing a left shoulder subacromial decompression and distal clavicle excision under general anesthesia, and his findings include a subacromial impingement syndrome with some evidence of acromial clavicular joint arthritis. During her May 25, 2005 post-operative visit, he observed a substantial restriction of motion of plaintiff's left shoulder and advised her to continue physical therapy. Some improvement was noted during her June 27, 2005 visit, however, on August 10, 2005, he advised plaintiff to discontinue physical therapy after she informed him that it was aggravating her left shoulder. Dr. Schrank examined plaintiff most recently on May 3, 2007, and his findings include marked AC tenderness; supraspinatus tenderness; gross spasm and tenderness upon palpation of the left trapezius; external rotation of the left shoulder to only 50 degrees, compared with 80 degrees on the right; forward elevation of the left shoulder to 160 degrees, compared to 185 degrees on the right; and internal rotation to L1 on the left, compared to T6 on the right. According to Dr. Schrank, his testing results show that plaintiff retains significant limitations in the use and range of motion of the left shoulder. He opined, based upon the findings of his examinations and plaintiff's medical history, that her left shoulder impingement syndrome and her current residual limitations were caused by the accident. He also concluded that plaintiff has a long-term disability with respect to lifting and reaching overhead as a direct result of her left shoulder injury.

In her affidavit, plaintiff avers that, as a result of the impact from defendant's vehicle, she injured her left shoulder. Although she did not receive emergency room treatment, the next day she saw her family internist, Lisa Strano-Paul, M.D., with respect to the injury to her left shoulder. After treatment,

Dr. Strano-Paul referred her to an orthopedist whom she then saw at the end of June 2004. She also underwent several regiments of physical therapy until August 2005, at which time Dr. Schrank advised her to stop as it was aggravating her shoulder condition. She decided to forgo a fourth cortisone shot because the first three had only provided minimal short-term relief. Plaintiff avers that she had full, pain free use of her left shoulder prior to the accident, but that she presently has difficulty reaching overhead and is unable to lift even moderately heavy objects. Plaintiff further avers that, while she continues to do some housework and gardening, she has to severely curtail the frequency and duration of all her activities.

Plaintiff's counsel asserts that plaintiff relies solely on her left shoulder injuries for the purpose of opposing defendant's motion. More specifically, counsel asserts that plaintiff sustained a serious injury in the categories of a permanent consequential limitation and a significant limitation as concerning her left shoulder. Counsel further represents that plaintiff has withdrawn her claims that she sustained a serious injury in the categories of a permanent loss of use and a non-permanent injury.

Plaintiff's claim that she sustained a "serious injury" in the categories of a permanent loss of use and a non-permanent injury are dismissed without opposition (*see, Leahey v Fitzgerald*, 1 AD3d 924, 768 NYS2d 55 [4th Dept 2003]). By her other submissions, however, plaintiff has raised a triable issue of fact that she sustained a "serious injury" in the categories of a permanent consequential limitation and a significant limitation of her left shoulder (*see, Parkill v Cleary*, 305 AD2d 1088, 759 NYS2d 262 [4th Dept 2003]; *c.f. Daisernia v Thomas*, 12 AD3d 998, 785 NYS2d 162 [3d Dept 2004]). The affirmation and report of Dr. Schrank, specified, among other things, upon a recent clinical range of motion examination, the degree to which plaintiff's movements were restricted in her left shoulder and these limitations are supported by additional medical proof in the record. Dr. Schrank also noted the permanency of said restrictions based upon test results over a nine-month period after the accident, and from a recent examination on May 3, 2007. Dr. Schrank concluded that plaintiff's left shoulder injury and resulting surgery is consistent with the trauma which she sustained in the accident, and that this injury has resulted in permanent restrictions/limitations of movement (*see, Shpakovskaya v Etienne*, 23 AD3d 368, 804 NYS2d 767 [2d Dept 2005]). Additionally, while the defendant's own expert opined that plaintiff's injuries had resolved, he also concluded that plaintiff's left shoulder impingement syndrome was causally related to the accident (*see, Black v Robinson*, 305 AD2d 438, 759 NYS2d 741 [2d Dept 2003]). Furthermore, Dr. Schrank sufficiently explained the extensive nature of plaintiff's treatment, including surgery and the gap in treatment, pointing out that she was still symptomatic at the time of her last treatments, but that physical therapy was aggravating her condition. He also explained that plaintiff had already received three cortisone injections to her left shoulder area with neither a significant nor a long-term benefit (*see, Pommels v Perez, supra*). Accordingly, defendant's motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" is granted, solely to the extent that her claims that she sustained a "serious injury" in the categories of a permanent loss of use and a non-permanent injury are dismissed.

Turning to the issue of liability, a rear-end collision with a stopped or stopping automobile establishes a prima facie case of negligence on the part of the operator of the moving vehicle and imposes a duty on him or her to explain how the accident occurred (*see, Cace v DiStefano*, 276 AD2d 457, 713 NYS2d 758 [2d Dept 2000]; *Tricoli v Malik*, 268 AD2d 469, 701 NYS2d 644 [2d Dept 2000]).

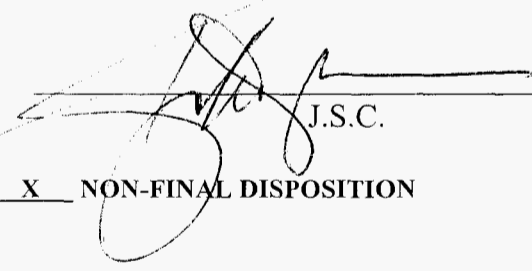
The operator of the moving vehicle is required to rebut the inference of negligence created by an unexplained rear-end collision because he or she is in the best position to explain the cause of such collision (see, *Leal v Wolff*, 224 AD2d 392, 638 NYS2d 110 [2d Dept 1996]). If the operator of the moving vehicle is unable to come forward with any evidence to rebut the inference of negligence, then the plaintiff may properly be awarded judgment as a matter of law (see, *Mendiolaza v Novinski*, 268 AD2d 462, 703 NYS2d 49 [2d Dept 2000]). Conclusory assertions of a sudden and unexpected stop are insufficient to rebut the inference of negligence (see, *Levine v Taylor*, 268 AD2d 566, 702 NYS2d 107 [2d Dept 2000]).

In support of her cross motion, plaintiff submits, inter alia, the pleadings; defendant's deposition testimony; and the plaintiff's personal affidavit. Defendant testified to the effect that she was involved in an automobile accident while traveling on Route 112 in Port Jefferson. It happened at about 2:30 p.m. The weather was "nice" and the roadway was dry. While driving, she looked down for a few seconds. When she looked up, she saw that plaintiff's brake lights were activated. Immediately prior to the impact, her foot was on the gas pedal. At this point, she became nervous and did not attempt to stop or steer to avoid the collision. Defendant further testified that the front of her car hit the back of plaintiff's vehicle and that the impact was "medium."

By her submissions, plaintiff established her prima facie entitlement to judgment as a matter of law on the issue of liability (see, *Hakakian v McCabe*, 38 AD3d 493, 833 NYS2d 106 [2d Dept 2007]; *Rainford v Sung S. Han*, 18 AD3d 638, 795 NYS2d 645 [2d Dept 2007]). In this case, it is undisputed that plaintiff's vehicle was stopped at the time defendant's vehicle hit the back of it. Since defendant was under a duty to maintain a safe distance between her car and plaintiff's vehicle (see, Vehicle and Traffic Law 1129 [a]), her failure to do so, in the absence of a non-negligent explanation, constituted negligence as a matter of law (see, *Mendiolaza v Novinski*, supra). As the cross motion is unopposed, defendant failed to raise a triable issue of fact by coming forward with a non-negligent explanation of the subject accident (see, *Eybers v Silverman*, 37 AD3d 403, 830 NYS2d 240 [2d Dept 2007]). Plaintiff, is therefore, granted partial summary judgment on liability grounds, and the case is to proceed to a determination of damages.

Plaintiff is directed to serve a copy of this order with notice of its entry upon the Calendar Clerk of this Court. Upon such service, the Calendar Clerk is directed to place this matter on the Calendar Control Part Calendar for the next available trial date.

Dated: JUN 25 2007



J.S.C.

____ FINAL DISPOSITION NON-FINAL DISPOSITION