SHORT FORM ORDER

INDEX No. 03-27609
CAL. No. 06-02759-MV

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 4/5/07
ADJ. DATE 6/15/07
Mot. Seq. # 001 - MD
002 - XMD

LUZ R. FUENTES, Plaintiff, - against - YNELSIA RICHARDSON, DAISYLOU MARTINEZ and LIDIA M. SANCHEZ, Defendants.	SIBEN & SIBEN, LLP Attorneys for Plaintiff 90 East Main Street, P.O. Box 5149 Bay Shore, New York 11706-9975 RUSSO & APOZNANSKI Attorneys for Defts. Richardson & Martinez 875 Merrick Avenue Westbury, New York 11590 LOCCISANO & LARKIN Attorneys for Deft. Sanchez 150 Motor Parkway, Suite 405 Hauppauge, New York 11788-5108

Upon the following papers numbered 1 to 30 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; Notice of Cross Motion and supporting papers 15 - 19; Answering Affidavits and supporting papers 20 - 26; Replying Affidavits and supporting papers 27 - 30; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Lidia Sanchez for summary judgment dismissing the complaint against her on the ground that plaintiff has failed to prove that defendant Sanchez was negligent and plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied; and it is further

ORDERED that the cross motion by defendants Ynelsia Richardson and Daisylou Martinez for summary judgment against them dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Luz Fuentes as a result of a motor vehicle accident on Carleton Avenue in Central Islip, New York, on May 6, 2003. At the time of the accident, plaintiff was a passenger in a vehicle owned by defendant Ynelsia Richardson and operated by defendant Daisylou Martinez when it collided with a vehicle owned and

operated by defendant Lidia Sanchez. Plaintiff was involved in an unrelated motor vehicle accidents in 2000 and 2002.

Defendant Sanchez moves for summary judgment in her favor dismissing the complaint against her on the ground that plaintiff has failed to prove that she was negligent and that plaintiff has not sustained a serious injury as defined in Insurance Law § 5102 (d). In support, defendant Sanchez submits, *inter alia*, the pleadings; a bill of particulars; the deposition testimony given by defendants Sanchez and Martinez; three affirmed MRI reports dated November 1, 2004 of Dr. Sondra Pfeffer concerning plaintiff's cervical and lumbar spine and left knee, taken on May 13, 2003, May 14, 2003 and June 2, 2003 respectively; and the affirmed report dated November 17, 2004 of no-fault carrier's orthopedist, Dr. Armand Prisco.

By her bill of particulars, plaintiff alleges that she sustained serious injuries as a result of the subject accident, including herniated discs at C4-C5, C5-C6 and L5-S1; bulging discs at T9-T10, T10 and T11; cervical, lumbosacral and thoracic spine sprain; and partial thickness tear of the posterior horn of the lateral meniscus left knee. In addition, plaintiff claims that she was confined to bed for four days and to home for approximately four weeks.

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***, 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 Sys.***, 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 [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 [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 [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 [1990]).

Here, defendant Sanchez failed to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see*, ***Nembhard v Delatorre***, 16 AD3d 390, 791 NYS2d 144 [2005]). Based on his review of the MRI films of plaintiff's cervical and lumbar spine, taken on May 13, 2003 and May 14, 2003 respectively, Dr. Pfeffer opined in her report that plaintiff had, *inter alia*, "pre-existing degenerative disc disease" at C3-C4, C4-C5, C5-C6, C6-C7 and L5-S1 and herniated discs at C4-C5, C5-C6 and L5-S1. The MRI report of plaintiff's left knee, taken on June 2, 2003, revealed that plaintiff had "pre-existing medial meniscal posterior horn intrasubstance degeneration *** There is also a tear within the posterior horn of the lateral meniscus." A diagnosis of a meniscus tear creates an issue of fact as to whether the injured plaintiff suffered a serious injury (*see*, ***Papadonikolakis v First Fid. Leasing Group***, 283 AD2d 470, 724 NYS2d 635 [2001]; ***Goldberg v Marengo***, 2006 NY Slip Op 52375U, 2006 NY Misc Lexis 3734 [2006]; ***Michel v Graham***, 2003 NY Slip Op 51170U, 2003 NY Misc Lexis 1036 [2003]). For a herniated disc to constitute a serious injury, there must be objective evidence of the extent or degree of the alleged limitation resulting from the injury and its duration (*see*, ***Guzman v Paul Michael Mgt.***, 266 AD2d 508, 698 NYS2d 719 [1999]). On November 17, 2004, approximately one year and six months after the subject accident, Dr. Prisco examined plaintiff, using certain orthopedic and neurological tests. Dr. Prisco found that there was no "spasm in any portion of the spine" and Straight Leg Raising tests were negative. Although Dr. Prisco found that plaintiff had full range of motion in her entire spine including the cervical spine, she failed to set forth the objective tests that were performed to support her conclusion that plaintiff did not suffer from any limitation of the range of motion in her cervical spine (*see*, ***Vazquez v Basso***, *supra*; ***Kennedy v Brown***, *supra*). In addition, Dr. Prisco opined that "with regard to the left knee she is able to full flex and extend the joint. McMurray signs for meniscal tears were negative."

Defendant Sanchez failed to objectively demonstrate that plaintiff's injuries were not serious within the meaning of Insurance Law § 5102 (d) (*see, **Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2006]; ***Zavala v DeSantis***, 1 AD3d 354, 766 NYS2d 598 [2003]). Thus, defendant Sanchez failed to establish, prima facie, her entitlement to judgment as a matter of law. Accordingly, this branch of the motion by defendant Sanchez for summary judgment dismissing the complaint against her is denied. Under the circumstances, it is unnecessary to consider the sufficiency of plaintiff's opposition papers (*see*, ***Barrett v Jeannot***, 18 AD3d 679, 795 NYS2d 727 [2005]).

Defendant Sanchez also seeks summary judgment in her favor on the ground that plaintiff has failed to prove that she was negligent.

At her examination before trial, defendant Sanchez testified to the effect that she had been traveling southbound on Carleton Avenue when she came to a complete stop on Carleton Avenue for "thirty seconds to a minute" in order to make a left turn into Elmore Street, activating her left turn signal. While she was stopped for thirty seconds to a minute before the accident occurred, there were three or four vehicles "passing her in a southbound direction." She neither saw the Martinez vehicle nor heard "any screeching of brakes, screeching of tires, or a horn before the accident." The accident occurred when she was "completely stopped," and she felt an impact in the back right-hand side of her vehicle.

At her deposition, defendant Martinez testified to the effect that she had been traveling at the speed of 35 or 40 miles per hour in the southbound lane of Carleton Avenue. When she first saw the Sanchez vehicle, it was 30 or 35 feet ahead of her and saw that the vehicle "came to stop with a left signal." Defendant Martinez testified that "[defendant Sanchez] slowed down gradually." When defendant Martinez went to go around defendant Sanchez, she did not make a left turn but suddenly "moved forward." The driver side front bumper of the Martinez vehicle came into contact with the passenger side rear bumper of the Sanchez vehicle.

It is well settled that a prima facie case of liability is created when the operator of the moving vehicle rear-ends a stopped vehicle and that a duty of explanation is imposed on the operator of the moving vehicle to excuse the collision by providing a non negligent explanation, such as a mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on a wet pavement or some other reasonable cause (*see,* ***Rainford v Han***, 18 AD3d 638, 795 NYS2d 645 [2005]; ***Thoman v Rivera,*** 16 AD3d 667, 792 NYS2d 558 [2005]; ***Power v Hupart,*** 260 AD2d 458, 688 NYS2d 194 [1999]). If the operator of the moving vehicle cannot come forward with any evidence to rebut the inference of negligence, the driver of the lead vehicle may properly be awarded judgment as a matter of law (***Russ v Investech Sec.***, 6 AD3d 602, 775 NYS2d 867 [2004]; ***Reid v Courtesy Bus Co.***, 234 AD2d 531, 651 NYS2d 612 [1996]). It is also well settled that a driver of a motor vehicle who is approaching another motor vehicle from the rear is bound to maintain a safe rate of speed and has a duty to keep control over his vehicle, as well as to exercise reasonable care to avoid colliding with the other vehicle (***Chapel v Meyer,*** 306 AD2d 235, 762 NYS2d 95 [2003]; ***Power v Hupart,*** *supra*; *see also*, Vehicle and Traffic Law §1129 [a]).

Here, the deposition testimony of defendants Sanchez and Martinez conflicted with each other as to the happening of the accident. Moreover, there is an issue of fact as to whether the Sanchez vehicle came to a stop or moving at the time of the impact. Under this circumstances, there is a question of fact as to whether the action of defendant Sanchez contributed to any injuries sustained by plaintiff (*see*, ***Viggiano v Camara***, 250 AD2d 836, 673 NYS2d 714 [1998]). Thus, defendant Sanchez has failed to sustain the initial burden of establishing a prima facie entitlement to judgment as a matter of law. Accordingly, this branch of the motion by defendant Sanchez for summary judgment on the issue of liability is denied.

The cross motion by defendants Richardson and Martinez for summary judgment dismissing the complaint against them on the basis that plaintiff has not sustained a serious injury as defined in Insurance Law § 5102 (d) is also denied. The aforementioned defendants have submitted none of the proof required by CPLR 3212 (b) in support of their cross motion, and instead, attempt to incorporate by reference the proof submitted by defendant Sanchez in support of her motion. Not only is this method of seeking summary judgment procedurally incorrect, inasmuch as the court has already determined that defendant Sanchez failed to establish that plaintiff did not sustain a serious injury, the cross motion must be denied, as without substantive merit.

Dated: JUL 24 2007

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION