SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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CRISTIAN ROMERO,

Plaintiff(s),

MICHELE M. WOODARD, J.S.C.
TRIAL/IAS Part 18
Index No. 5620/05
Motion Seq. No : 01 & 02

-against-

DECISION & ORDER

LETICIA MORALES, MAREK BELEZYNSKI AND HANN AUTO TRUST

Defendants.

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Papers Read on this Motion:

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Plaintiff's Affirmation in Opposition	xx

The plaintiff commenced this action for injuries allegedly sustained in an automobile collision that occurred on April 14, 2004, at about 6:30 PM at Central Avenue near Merrick Road in Baldwin, N.Y. It had been raining earlier in the day (see Exhibit F, pg. 9 annexed to Ms. Morales' motion). Plaintiff was a front-seat passenger in the vehicle driven by Ms. Morales. The Morales vehicle collided with the vehicle owned by Hann (the "Hann vehicle") and operated at the time by Belezynski. Allegedly, the Hann vehicle was exiting a retail store parking lot.

First, the court must determine if the motion and cross-motion are timely pursuant to CPLR §3212(a).

Pursuant to the Certification Order dated November 27, 2006 (see Exhibit B annexed to Belezynski's and Hann's affirmation in opposition dated May 18, 2007), all summary judgment motions had to be filed within 60 days of the filing of the note of issue. Based on the records of

E-Law (see Exhibit C annexed to Belezynski's and Hann's affirmation in opposition), the Note of Issue herein was filed on January 16, 2007. Thus, any summary judgment motion had to be filed by March 18, 2007. If Ms. Morales' motion is examined, it can be seen that it is dated March 12, 2007 and the Nassau County Clerk's office endorsement cover page is dated, i.e., filed, March 13, 2007. Therefore, the motion by Ms. Morales is timely and the cross-motion by Belezynski and Hann are deemed timely also *see Bressingham v Jamaica Hospital Medical Center*, 17 AD3d 496 (2d Dept. 2005).

In her motion, Ms. Morales alleges the plaintiff did not sustain a serious injury as defined in Insurance Law § 5102(d). She also alleges she should be granted summary relief on the issue of liability. Ms. Morales contends the record clearly reflects the collision was caused by the Hann vehicle operated by Mr. Belezynski. Belezynski and Hann, in their cross-motion, join in the branch of Ms. Morales' motion that seeks summary judgment on the grounds that plaintiff did not sustain a "serious injury."

Ms. Morales offers the unsworn reports of Dr. Elvin Ruiz (see Exhibit I annexed to Ms. Morales' motion) and, as unsworn, the reports cannot be considered *see Mezentseff v Ming Yat Lau*, 284 AD2d 379 (2d Dept. 2001). Ms. Morales also offers the report of Dr. J. Farkas (see Exhibit J annexed to Ms. Morales' motion). The report is dated October 11, 2006 (it reflects an examination the same day). Dr. Farkas is an orthopedic surgeon. Dr. Farkas opined that plaintiff had resolved cervical and lumbar sprains as well as resolving sprain to plaintiff's right knee. Dr. Farkas found plaintiff, at the time of the examination, had no orthopedic disability, and plaintiff could perform his usual duties and daily activities.

Ms. Morales has also offered the confirmed report of Dr. Maria Audrie DeJesus, a

neurologist (the report is annexed as Exhibit K to Ms. Morales' motion). The report is dated October 19, 2006, the same days as the examination. Dr. DeJesus found plaintiff's range of motion to be normal. Dr. DeJesus found no indication of a neurological disability.

It is defendants' affirmative task, as the movants of a summary judgment motion, to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact *see Ayotte v Gervasio*, 81 NY2d 1062 (1993). In a judgment motion attempting to show no serious injury had been sustained by a plaintiff, a defendant should demonstrate quantitative measurements and objective medical evidence *see Vishnevsky v Glassberg*, 29 AD3d 680 (2d Dept. 2006).

A defendant moving for summary judgment on the grounds that the plaintiff did not sustain a "serious injury" under Insurance Law § 5102(d) must meet the initial burden of establishing *prima facie* entitlement to judgment *Matthew v Cupie Transportation Corp.*, 302 AD2d 566(2d Dept. 2003). In an automobile negligence case, it is only after a defendant has made a *prima facie* showing of entitlement to summary judgment that it becomes incumbent on the plaintiff to present competent medical evidence to support plaintiff's claim of serious injury *see Franchini v Palmieri*, 307 AD2d 1056 (3d Dept. 2003).

Where a defendant's orthopedic surgeon (such as Dr. Farkas) merely notes plaintiff had a full range of his spine without setting forth the objective test or tests performed supporting his conclusion, such is not sufficient to establish, *prima facie*, that plaintiff did not sustain a serious injury *see Geba v Obermeyer*, 38 AD3d 597 (2d Dept. 2007); *Whittaker v Webster Trucking Corp.*, 33 AD3d 613 (2d Dept. 2006).

The report of a defendant's physician may not rely on the unsworn medical reports,

records, etc., of other physicians, hospital *see Earl v Chapple*, 37 AD3d 520 (2d Dept. 2007); *Jackson v Colvert*, 24 AD3d 420 (2d Dept 2005). An examination of both Dr. Farkas' and Dr. DeJesus' report shows their reliance on unsworn reports of others.

A defendant's examining neurologist (such as Dr. DeJesus) must set forth the objective testing performed to arrive at his or her conclusion that the plaintiff did not suffer from any limitations of movement in neck and back area *see Agathe v Tun Chen Wang*, 33 AD3d 737 (2d Dept. 2006).

Thus, the affirmed medical report of the defendant's physician is not sufficient where the physician has not set forth the objective medical testing performed to support his conclusion *see Benitez v Mileski*, 31 AD3d 473 (2d Dept. 2006); *Vasquez v Basso*, 27 AD3d 728 (2d Dept. 2006). The objective tests utilized by a defendant's physician (or physicians) must be specified *see Cohen v A One Products, Inc.*, 34 AD3d 517 (2d Dept. 2006). Here, defendants' physicians, Dr. Farkas and Dr. DeJesus, have failed to so set forth the testing performed on plaintiff. With the other deficiencies set forth *supra*, their respective reports may not be considered to demonstrate, *prima facie*, that plaintiff has not sustained a serious injury.

Since the defendants failed to establish their *prima facie* entitlement to judgment as a matter of law, the court need not consider whether the papers submitted by the plaintiff in opposition were sufficient to raise a triable issue of fact *see McDonald v Pookie Hacking Corp.*, 37 AD3d 430 (2d Dept 1971); *Ramsey v Kaszuba*, 36 AD3d 681 (2d Dept 2007).

Next, the court will consider that branch of Ms. Morales' motion wherein she seeks summary judgment on the issue of liability as to the plaintiff's complaint and the cross claims of the co-defendants, Belezynski and Hann.

VTL §1143 states a vehicle about to enter or cross a roadway, such as the Hann vehicle, from any place other than another roadway must yield the right of way to all vehicles such as the Morales vehicle approaching on the roadway sought to be entered or crossed.

Since Ms. Morales' vehicle had the right of way, it was entitled to anticipate that the Hann vehicle would obey the traffic laws which required the Hann vehicle to yield to Ms. Morales' vehicle see *Jacino v Sugerman*, 10 AD3d 593 (2d Dept. 2004); *Lucksinger v M.T. Unloading Services*, 280 AD2d 741 (3d Dept 2001); *Cenovski v Lee*, 266 AD2d 424 (2d Dept. 1999).

The deposition of Mr. Belezynski is informative (the deposition of Mr. Belezynski is at Exhibit E annexed to Ms. Morales' motion; the following page numbers refer to that exhibit). When Mr. Belezynski saw Ms. Morales' vehicle approaching 10' away, Mr. Belezynski moved his car forward, i.e., further into Central Avenue (pgs. 21, 48) as the Morales vehicle was almost upon his vehicle. Belezynski's view was partially blocked by a parked car (p. 13).

A motorist who turns directly in the path of a second vehicle as the second vehicle legally proceeded with the right of way and who admitted that he never saw the second vehicle prior to making his turn, was negligent as a matter of law in failing to see that vehicle which he should have seen through the proper use of his senses see *Almonte v Tobias*, 36 AD3d 636 (2d Dept. 2007), thus precluding imposition of liability on the operator of the second vehicle; since the second vehicle had the right of way, the operator of that vehicle was entitled to anticipate that the first motorist would obey the traffic laws which required the first motorist to yield to the second operator's vehicle *see Gabler v Marly Building Supply Corp.*, 27 AD3d 519 (2d Dept 2006).

A motorist who exited a driveway and entered traffic, without yielding as required by law, was negligent in colliding with another vehicle which had the right of way on the roadway, *see*

Ferrara v Castro, 283 AD2d 392 (2d Dept 2006). As such, the party has made a *prima facie* showing of entitlement to judgment as a matter of law *see Stiles v County of Dutchess*, 278 AD2d 304 (2d Dept 2000).

Belezynski and Hann argue there is an issue as to the effect of Ms. Morales' possible violation of the posted speed limit at the time of the collision. The only evidence in the record that Ms. Morales was speeding was the estimate of Belezynski. Belezynski estimated Ms. Morales' speed at "about 40" MPH (see Exhibit F, pg. 22 annexed to Ms. Morales' motion). The posted speed limit is not known but, assuming *arguendo*, Ms. Morales was traveling at a speed 5 to 10 MPH ("about 40") over the speed limit, there is no evidence that Ms. Morales' vehicle speed was the proximate cause of the collision *see Galvin v Zacholl*, 302 AD2d 965 (4th Dept. 2003), *lv den.* 100 NY2d 512 (2003).

In the absence of evidence specifically demonstrating how a further reduction in speed or other evasive action would have permitted Ms. Morales to avoid the Hann vehicle, the Belezynski/Hann conclusion as to Ms. Morales' actions are speculative, *see* W*ilke v Price*, 221 AD2d 846 (3d Dept 2001). Here, Ms. Morales' conduct was, at worst, indicative of an error in judgment in responding to the emergency created by the Hann vehicle, and this is not sufficient to constitute negligence *see Lamey v County of Cortland*, 285 AD2d 885 (3d Dept 2001).

Under the emergency doctrine, when a person is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, the person is not negligent if the actions taken are reasonable and prudent in the emergency context providing the person has not created the emergency, *see* C*aristo v Sanzone*, 96 NY2d 172 (2001).

Negligence will not be found when a driver in his or her proper lane of travel is confronted

with a second automobile or vehicle crossing into his or her lane of travel, and the driver reacts as a reasonable person would in a similar situation *Lamey v County of Cordland, supra*. That is the situation here.

Here, the record clearly shows that Belezynski was negligent in admittedly crossing into the path of Ms. Morales' vehicle when it was hazardous to do so, *see Torro v Schiller*, 8 AD3d 364 (2d Dept 2004).

From the deposition testimony, it is apparent that the collision occurred within a matter of seconds and there was not enough time for plaintiff to take evasive action, i.e., reduce speed or maneuver her vehicle to avoid the Hann vehicle, *see Fuller v Blackbird*, 211 AD2d 886 (3d Dept 2005).

Thus, the speculation of Belezynski and Hann regarding the speed at which Ms. Morales was traveling was insufficient to raise an issue of fact, *see Vogel v Gilbo*, 276 AD2d 977 (3d Dept. 2000).

Accordingly, that branch of Ms. Morales' motion and the Belezynski/Hann cross-motion seeking summary judgment on the issue of serious injury is denied for the reasons set forth above.

That branch of Ms. Morales' motion seeking judgment on the issue of liability is ***GRANTED***.

ORDERED, the case is hereby **Certified** as ready for trial and the plaintiff must file a Note of Issue in the matter by September 25, 2007.

This constitutes the Decision and Order of the Court.

DATED: September 4, 2007
Mineola, NY

ENTER:

HON. MICHELE M. WOOD, J.S.C.