[* 1]
SCANNED ON 11/5/2007

SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

PRESENT: HON. DEBORAH A. KAPLAN PART 22
Justice

HALANA RICHARDSON

INDEX NO. 103143/05

MOTION DATE 6-27-07

- v -

MOTION SEQ. NO. 001

NICOLAS BERGGRUEN and APARICIO FERNANDES

MOTION CAL. NO. 72

The following papers, numbered 1 to 7, were read on this motion by defendants for summary dismissing the complaint on the ground that the plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102(d); and cross-motion by the plaintiff for summary judgment dismissing the defendants' affirmative defense asserting the same ground and for partial summary judgment on the issue of liability.

Notice of Motion - Affidavits -- Exhibits ...	1
Notice of Cross-Motion -- Affidavits -- Exhibits ...	2
Answering Affidavits -- Exhibits (Memo)	3
Replying Affidavits (Reply Memo)	4,5,6,7

Cross-Motion: ■ Yes ☐ No

Upon the foregoing papers and after oral argument, and for the reasons set forth in the attached Memorandum Decision, it is

ORDERED that the defendants' motion for summary judgment is denied, and it is further,

ORDERED that the plaintiff's cross-motion for summary judgment is denied in its entirety.

This constitutes the Decision and Order of the Court.

FILED
NOV 05 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: October 26, 2007

Deborah K

Deborah Kaplan, J.S.C.

DEBORAH A. KAPLAN
J.S.C.

Check one: ☐ FINAL DISPOSITION ■ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 22

----------x

HALANA RICHARDSON,

Plaintiff, Index No.: 103143/05

- against -

NICOLAS BERGGRUEN and APARICIO FERNANDES,

Defendants.

----------x

DEBORAH KAPLAN, J:

I. Introduction

This is an action to recover damages for personal injuries allegedly sustained in an automobile accident on September 17, 2002. While driving on Northern Boulevard in Queens County in her Land Rover, the plaintiff, Halana Richardson, turned left onto 50th Street, proceeded about thirty feet and was struck in the rear by a Mercedes-Benz operated by defendant Aparacio Fernandes and owned by defendant Nicolas Berggruen. According to the plaintiff, she was stopped at a red traffic light and handing a bottle to her infant daughter in the rear seat. According to the defendants, the plaintiff was not stopped but had changed lanes, cutting off their vehicle, making the collision unavoidable. The plaintiff further claims to have sustained "serious injury" within the meaning of Insurance Law §5102(d).

There are two motions now before the court. The defendants move for summary judgment dismissing the complaint, pursuant to CPLR 3212, on the ground that the plaintiff did not meet the "serious injury" threshold requirement of Insurance Law § 5101(d). The plaintiff cross-moves for summary judgment dismissing the defendants' third affirmative defense, which asserts the same ground as their motion, and for partial summary judgment on the issue of liability. For the reasons set forth below, both motions are denied.

II. Background

Plaintiff's Account of the 2002 Accident

On September 17, 2002, plaintiff was driving westbound on Northern Boulevard and made a left hand turn onto 50th Street. After traveling approximately 30 feet on 50th Street, after making the left turn, plaintiff stopped for a red light. While stopped at the light, in the second lane, plaintiff turned toward the backseat to give her daughter a bottle. Within seconds, plaintiff heard a screeching sound coming from behind her car. Plaintiff was turned toward her daughter, when her vehicle was hit by the defendants' Mercedes-Benz. The impact moved plaintiff's car about one foot forward but did not cause it to strike the car stopped in front of it at the light. Plaintiff testified that she did not see any damage to the back of her vehicle, but that the automobile behind her was smashed in front. According to the plaintiff, Fernandes left the scene about 20 minutes after the accident occurred. Plaintiff took her car to the repair shop. The police were never called to the scene of the accident.

Fernandes' Account of the 2002 Accident

Defendant Apracio Fernandes, a former employee of Berggruen, testified at his deposition that he was on his way to pick up Berggruen's girlfriend to take her to the airport. According to Fernandes, the first time he saw plaintiff's vehicle was upon impact. He testified that plaintiff's car was not stopped at a red light, but was moving at a speed of at least 20 miles per hour when it crossed in front of him. He testified that, in a matter of seconds, plaintiff's car came from the left lane to the center lane, cutting him off. Before plaintiff pulled into his lane, the vehicle ahead of him was less than 15 to 20 feet away. Fernandes could not change into the left lane to avoid the collision because cars were passing in that lane. He could not recall whether cars were parked in the right lane at that time. Fernandes testified that the plaintiff never gave him a chance to exchange information. Rather, she got out of her car, looked at her bumper, looked at Fernandes and left the scene. After plaintiff left, Fernandes called a car dealership and his employer, who in

turn notified the insurance company. The car Fernandes was driving sustained damages to the hood, bending it six to seven inches. Fernandes sustained no personal injuries as a result of the accident.

Plaintiff's Alleged Injuries Attributed to the 2002 Accident

According to the Bill of Particulars, dated May 23, 2005, plaintiff suffered the following injuries as a result of the 2002 accident:

- headaches
- cervical injuries, including disc bulges, acute cervical and lumbar sprain, lower right back pain, decreased range of motion and muscle spasms
- thoracic injuries, including thoracic somatic dysfunction and decreased range of motion
- extremity injuries, including right internal shoulder derangement, left internal hip derangement, decreased range of motion in both shoulders, pain down the right leg, numbness in both arms, and numbness in the right posterior lateral thigh and ankle.

Plaintiff claims that, since the 2002 accident, she has continually suffered from neck and back pain. She affirms that the pain and limitations restrict her from participating in daily activities, such as: household chores; standing and sitting for long periods of time; exercising; driving long distances; playing and sharing in activities with her children (including roller skating and ice skating); horseback riding and going on vacation. In addition, as a result of the accident, plaintiff could not return to work as scheduled on October 21, 2002.

Plaintiff's Prior and Subsequent Accidents

Plaintiff testified that, prior to the 2002 accident, dating back to 1987, she was involved in three motor vehicle accidents, two of the three accidents were rear-end collisions, which

caused injury to her lower back and neck. Plaintiff was involved in another car accident on June 24, 2004, wherein she sustained the same injuries as all of her previous accidents, i.e., whiplash and lower back injuries.

Plaintiff's Medical Treatment as a Result of the 2002 Accident

The day after the 2002 accident, plaintiff sought medical treatment from her primary care physician, Dr. Jocelyne Sanon, complaining of pain in her neck, back, legs, arms and stomach. Dr. Sanon referred her to Dr. Gregg D. Rubinstein, board certified chiropractor, whose course of treatment included massages, heat, electric treatment and hot and cold packs. Dr. Rubinstein referred plaintiff for an MRI of the cervical and lumbar spine at Sutton Place Imaging (see MRI report dated 11/6/02). Dr. Steven Shankman, radiologist with Sutton Place Imaging, concluded the lumbar spine was normal and the cervical spine showed no evidence of disc herniation or spinal stenosis, but that there was a mild disc bulge at C4/5 (id.). Plaintiff was treated by Dr. Rubinstein from September 24, 2002 through June 1, 2004, and then again on January 23, 2007 (see Dr. Rubinstein's report dated 3/7/07).

Plaintiff's Medical Treatment Subsequent to the 2004 Accident

On July 1, 2004, plaintiff sought treatment from Dr. Steve Losik of Advantage Medical. His initial evaluation, while unsworn, stated that "the patient was injured in 9/2002 and was almost recovered when this accident occurred all symptoms were exacerbated injured neck, middle and lower back" (see Initial Evaluation dated 7/15/04). On July 22, 2004, at the request of Dr. Losik, plaintiff had an MRI taken of her cervical spine. Dr. Steven Brownstein, radiologist, concluded that there was no diffuse bulge or focal disc herniation at the C4-C5 disc space level, but that there was diffuse bulging on the C5-C6 and C6-C7 discs. Dr. Brownstein also found a reversal cervical cure consistent with muscle spasm (see Dr. Brownstein's MRI Study: Cervical Spine taken 7/22/04).

On July 27, 2004, Dr. Z. Maksumova took cervical x-rays of plaintiff, which indicated a muscle spasm (see unaffirmed x-ray of cervical spine report by Dr. Z. Maksumova).

According to the October 5, 2005 report and evaluation of Dr. Arthur Hryhorowych, MD, physiatrist, plaintiff had shown right sacral ilitis, chronic L-S radiculopathy and cervical radiculopathy. Plaintiff was placed on a physical therapy program. Plaintiff indicated that she had "trauma to her neck and head more than three years ago . . . denies any recent trauma . . . ." (see Dr. Hryhorowych report dated 10/3/05). There is no mention of the 2004 accident in the two-page report.

Plaintiff's Experts Witnesses

On January 23, 2007, Dr. Rubinstein conducted a follow-up examination of plaintiff. In his sworn report dated March 7, 2007, he concluded that plaintiff's range of motion measurements taken on September 24, 2002 were slightly decreased from his January 23, 2007 findings. He concluded that her injuries "have resulted in significant loss of range of motion to the spine . . . which will permanently affect the spine and nervous system resulting in a significant limitation and disability." He also concluded that if there is a significant degeneration of her condition, she may be a candidate for spinal surgery.

Dr. Jeffrey Chess, a board certified radiologist, affirmed that he reviewed the MRI scans taken on November 6, 2002 and concluded that there was "a left posterior herniation of the C4/5 intervertebral disc" and "a straightening of the cervical lordosis, which may be secondary to the presence of . . . muscle spasm" (see Dr. Chess affirmation). Dr. Chess's underlying February 2, 2007 report is unsworn and his affirmation is not dated.

Dr. Stephen A. Wilson, board certified physiatrist, evaluated plaintiff on February 27, 2007 in connection with her injuries from the 2002 accident. Dr. Wilson found that plaintiff's total spinal loss of range of motion to be approximately 25.6%. While Dr. Wilson was made aware of the 2004 accident, his assessment was attributed solely to the 2002 accident.

Defendants' Expert Witnesses

On June 30, 2006, Robert S. Goldstein, M.D., a general orthopedic physician, examined plaintiff. According to his evaluation and report, Dr. Goldstein found that plaintiff completely recovered from her alleged injuries. Subsequent to his physical examination of plaintiff, Dr. Goldstein reviewed other medical records concerning plaintiff, including x-rays of her hip and spine, both of which were taken on September 20, 2005, and Dr. Hryhorowych's report dated October 3, 2005. Dr. Goldstein maintained his earlier diagnosis, despite conflicting findings between him and Dr. Hryhorowych. The report of Ranga Krishna, M.D., board certified neurologist, dated February 21, 2006, supports Dr. Goldstein's findings, in that it found no neurological injuries.

Filing of the Motion and Cross Motion

By an order dated June 21, 2005, this Court (Tingling, J.) directed that summary judgment motions shall be made no later than 60 days after the filing of a note of issue. Plaintiff filed the note of issue on November 6, 2006. On January 11, 2007, 59 days after the note of issue was filed, defendants served their motion for summary judgment. Plaintiff cross-moved for summary judgment on the issues of serious injury and liability on April 12, 2007, 157 days after the filing of the note of issue. Plaintiff asserted in a reply to defendants' opposition to the cross motion that the reason for the delay was attorney error. Plaintiff's counsel assumed that the parties stipulation to adjourn the motion had the effect of extending his time to file a cross-motion.

III. Defendants' Motion for Summary Judgment on the Issue of "Serious Injury"

In order to grant summary judgment, there must be no material or triable issues of fact presented. It is well established that "'[t]he 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 issues of fact'" (Wolff v New York City Trans. Auth., 21 AD3d 956 [2d

Dept 2005], quoting Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). The party opposing the motion must then come forward with sufficient evidence to create an issue of fact for the consideration of the jury (Pinto v Pinto, 308 AD2d 571 [2d Dept 2003], citing Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Zuckerman v City of New York, 49 NY2d 557 [1980]).

In deciding a summary judgment motion, the court must bear in mind that issue finding rather than issue determination is the key (see Sillman vTwentieth Century Fox Film Corp., 3 NY2d 395 [1957]). Furthermore, since summary judgment is a drastic remedy which deprives a litigant of his or her day in court, the evidence adduced on the motion must be liberally construed in the light most favorable to the opposing party (see Kesselman v Lever House Restaurant, 29 AD3d 302 [1st Dept. 2006]; Goldman v Metropolitan Life Ins. Co., 13 AD3d 289 [1st Dept. 2004]).

On a motion for summary judgment in a personal injury action involving an automobile accident, a defendant must make a prima facie showing of a lack of serious injury (Toure v Avis Rent A Car Systems, Inc., 98 NY2d 345 [2002]). Section 5102 (d) of the Insurance Law defines a 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 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."

Objective, qualified evidence, presented in admissible form, of the extent or degree of limitation of use of the plaintiff's affected body parts is sufficient to establish a prima facie case (Parker v Defontaine-Stratton, 231 AD2d 412 [1st Dept 1996]). The court disagrees with defendants' contention that they established their prima facie entitlement to judgment as a matter of law, based on the reports of their experts, Dr. Robert S. Goldstein, a general orthopedist, and

Dr. Ranga Krishna, a neurologist.

Specifically, while Dr. Goldstein specified the degrees of motion found plaintiff's cervical spine, "he failed to compare those findings to the normal range of motion 'thereby leaving the court to speculate as to the meaning of those figures'" (Bray v Rosas, 29 AD3d 422, 423 [1st Dept 2006], citing Toure, 98 NY2d 345, Manceri v Bowe, 19 Ad3d 462, 463 [2d Dept 2005], Webb v Johnson, 13 AD3d 54 [1st Dept 2004]; see also Kovolenko v General Electric Corp., 37 AD3d 664 [2d Dept 2007]). Therefore, the report fails to objectively demonstrate plaintiff did not sustain a permanent consequential or significant limitation of the use of her spine (see Manceri, 19 AD3d at 463).

Likewise, although Dr. Krishna affirmed that "the [plaintiff] may have sustained a cervical and lumbar strain, all of which was resolved and does not require any further diagnostic testing or treatment. There is no neurological indication of a disability or permanency. . . . There are no neurological deficits that would constitute a disability or permanency" (see Report dated 2/21/06), nowhere in Dr. Krishna's report does she set forth the objective testing performed to support her conclusion. As such, defendants fail to meet their threshold burden (see Kavanagh v Singh, 34 AD3d 744, 745 [2d Dept 2006] [citation omitted]; Offman v Singh, 27 AD3d 284 [1st Dept 2006]). In light of the above, the court need not address the remainder of plaintiff's arguments as to the sufficiency of defendants' submissions.

Since defendants failed to establish their prima facie entitlement to judgment, it is unnecessary to reach the question of whether the plaintiff's papers were sufficient to raise a triable issue of fact (see Somers v Macpherson, 40 AD3d 742 [2d Dept 2007]).

Accordingly, defendants' motion for summary judgment is denied.

IV. Plaintiff's Cross Motion for Summary Judgment on "Serious Injury" Issue

Plaintiff cross-moves for summary judgment on the issue of serious injury, essentially seeking dismissal of the defendants' third affirmative defense, which asserts that she did not meet

the statutory threshold. The plaintiff argues that she has demonstrated, with substantial medical evidence, "serious injury" under the "90/180" category of the statutory definition.

Under the "90/180" category, "a plaintiff must present objective evidence of a medically determined injury of a non-permanent nature" (Toure v Avis Rent A Car Systems, supra at 347, citing Insurance Law § 5102 [d], Licari v Elliot, 57 NY2d 230 [1982]; see also Uddin v Cooper, 32 AD3d 270 [1st Dept 2006]). That is, the plaintiff must: (1) demonstrate that her usual daily activities were restricted during 90 of the 180 days following the 2002 accident; and (2) submit competent credible evidence based on objective medical findings of a medically determined injury or impairment which caused the alleged limitations in plaintiff's daily activities (see Toure v Avis Rent A Car Systems, supra; Gaddy v Eyler, 79 NY2d 955 [1992]).

Upon review of the submissions proffered, plaintiff has failed to establish as a matter of law that she was unable to perform substantially all of her usual and customary duties for 90 of the 180 days following the 2002 accident (see Otero v 971 Only U, Inc., 36 AD3d 430 [1st Dept 2007]). Dr. Rubinstein's report indicates that plaintiff suffered from a loss of range of motion in her spine shortly after the 2002 accident as well as several years after the accident. However, it is not clear whether the medical documentation submitted by plaintiff with respect to the daily activities she could not perform were merely a recitation of plaintiff's own self-serving subjective conclusions about those daily activities or per her physicians' recommendation and/or instruction (see Sainte-Aime v Ho, 274 AD2d 569 [2d Dept 2000]). Further, Dr. Rubinstein's medical records dated March 14 and March 24, 2003, indicate that plaintiff's condition improved by 50% and was progressing as expected; however, it is not clear whether any such limitations during those six months were in fact significant (see Licari, 57 NY2d at 236 [the statute's phrase "substantially all" requires that the plaintiff's performance of her usual activities have been curtailed to a great extent, not merely a slight curtailment]). In addition, plaintiff herself testified that, following the accident and at various times during the 180-day period, she used public transportation, drove her car five days a week, went food shopping, and attended classes for a job

readiness program. Based on these factors, there are triable issues of fact as to whether plaintiff suffered a serious injury under the 90/180 category.

Accordingly, plaintiff's cross motion for summary judgment dismissing the defendants' third affirmative defense is denied.

V. Plaintiff's Cross- Motion for Summary Judgment on Issue of Liability

The branch of plaintiff's cross motion for summary judgment on the issue of liability was made more than 60 days after the note of issue was filed and is therefore untimely (see Micelli v State Farm Mut. Auto Ins. Co., 3 NY3d 725 [2004]; Brill v City of New York, 2 NY3d 648 [2004]; Cabibel v XYZ Assocs., L.P., 36 AD3d 498 [1st Dept 2007]; Levy v Deer Trans. Corp., 27 AD3d 279 [1st Dept 2006]). An untimely motion may be considered by the court, where a timely motion was made on nearly identical grounds (see Bressingham v Jamaica Hosp. Med. Ctr., 17 AD3d 496, 497 [2d Dept 2005]). Here, the serious injury issues raised in the cross motion are already properly before the court, however, as the issue of liability was not raised in defendants' motion for summary judgment and more than 120 days have passed since the note of issue was filed, plaintiff's cross motion for summary judgment on liability is untimely. The court finds that plaintiff's counsel's purported "good cause" for delay, i.e., attorney error, which was first raised in reply to defendants' opposition to plaintiff's cross motion was asserted too late (see Cabibel, 26 AD3d at 498). Nevertheless, even if the court were to consider the merits of the cross motion as to liability, summary judgment would be denied as triable issues of fact exist.

It is settled law that the driver of a motor vehicle is expected to drive at a safe rate of speed, taking into account weather and road conditions, and to maintain a safe distance from the vehicle in front of him (see Vehicle and Traffic Law §§1129[a];1180[a]; Mitchell v Gonzalez, 269 AD2d 250 [1st Dept. 2000]). "[T]his rule imposes on [drivers] a duty to be aware of traffic conditions, including vehicle stoppages." (Johnson v Philips, 261 AD2d 269, 271 [1st Dept. 1999]). Furthermore, a rear-end collision with a stopped or stopping vehicle establishes a prima

facie case of negligence on the part of the driver who strikes the vehicle in front, unless the operator of the rear vehicle can come forth with an adequate, non-negligent explanation for the collision (see Somers v Condlin, 39 AD3d 289 [1st Dept. 2007]; Francisco v Schoepfer, 30 AD3d 275 [1st Dept. 2006]; Garcia v Bakemark Ingredients (East) Inc., 19 AD3d 224 [1st Dept. 2005]; Grimes-Carrion v Carroll, 13 AD3d 125 [1st Dept. 2004]; Johnson v Phillips, supra). Without more, "an assertion that the lead vehicle 'stopped suddenly' is generally insufficient to rebut the presumption of negligence on the part of the offending vehicle." (Francisco v Schoepfer, supra at 276; see Ferguson v Honda Lease Trust, 34 AD3d 356 [1st Dept. 2006]); Woodley v Ramirez, 25 AD3d 451 [1st Dept. 2006]; Mitchell v Gonzalez, supra). However, a non-negligent explanation maybe made out, in some circumstances, by showing that the front vehicle stopped short. For example, a sufficient explanation may be that the front vehicle swerved in front of the rear vehicle or cut the rear vehicle off before stopping short, leaving "too little space to safely react and avert a collision." (Lebron v IESI Corp., 6 AD3d at 215 [1st Dept. 2004]; see Myers v Crestwood Metals Corp., 40 AD3d 75 [1st Dept. 2007]; Sawhey v Bailey, 13 AD3d 203 [1st Dept. 2004]; Evans v Fox Trucking Inc., 309 AD2d 618 [1st Dept. 2003]; Corrado v DeJesus, 264 AD2d 577 [1st Dept. 1999]).

In the instant case, the parties' deposition testimony presents triable issues of fact as to whether the plaintiff was stopped at the red light when struck or whether she swerved in front of Fernandes' vehicle leaving him no opportunity to react and safely avert the collision. While plaintiff testified that she was stopped at a red light, Fernandes' deposition testimony presents a different account. He alleges that at the time of the accident both cars were moving and plaintiff's vehicle abruptly drove into his lane, giving him no time to stop. The conflicting deposition testimony raises an issue of credibility which is a factual determination for the jury (see Figueroa v Cadbury Utility Constr. Corp., 239 AD2d 285 [1st Dept 2005] [reversing lower court's decision granting plaintiff summary judgment in a rear-end collision case holding "defendant's affidavit asserting he was cut off by plaintiff's automobile raises issues sufficient to defeat summary

judgment"]; see also Adams, 816 NYS3d 693).

Accordingly, plaintiff's cross motion seeking partial summary judgment on the issue of liability must be denied.

VI. Conclusion

For the reasons set forth above, it is

ORDERED that the defendants' motion for summary judgment is denied; and it is further,

ORDERED that the plaintiff's cross motion for summary judgment is denied in its entirety.

Dated: October 26, 2007

Deborah Kaplan, J.S.C.

DEBORAH A. KAPLAN
J.S.C.