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Ind No: 18692/2005

SHORT FORM ORDER

Supreme Court - State of New York
IAS PART 12 - SUFFOLK COUNTY

MOTION DATE: 11-08-07
ADJ. DATE: 03-20-08
MOT. SEQ: 003-MD
004-MD
005-MD

PRESENT:

Hon. MARTIN J. KERINS
J.S.C.

PATRICIA WILLIAMS, and JERMAINE WILLIAMS, infant by Parent PATRICIA WILLIAMS,	**STANFORD KAPLAN, ESQ.** Attorney for Plaintiffs 200 Willis Avenue Mineola, NY 11501
Plaintiff(s),	**BRIAN J. MCGOVERN, ESQ.** Attorney for Defendant **Barbara Gambles** 15 Maden Lane New York, NY 10038
- against -	
BARBARA GAMBLES, MEREDITH LEHRMAN, and DAVID LEHRMAN,	**LOCCISANO & LARKIN** Attorneys for Defendant **Meredith and David Lehrman** 150 Motor Parkway, Suite 405 New York, New York 10038
Defendant(s).	

Upon the following papers numbered 1 to 36 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1-8 ; Notice of Cross Motion and supporting papers 9-17; 20-27 ; Answering Affidavits and supporting papers 28-29; 30-36 ; Replying Affidavits and supporting papers _____; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (seq 003) by plaintiffs, Patricia Williams and the child Jermaine Williams, for partial summary judgment on the issue of liability against the defendants, Meredith Lehrman and David Lehrman, is denied; and it is further

ORDERED that the cross-motion (seq 004) by defendant, Barbara Gambles, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the issue that plaintiffs did not sustain a serious injury within the meaning of Insurance Law §5102[d] is denied; and it is further

ORDERED that the cross-motion (seq 005) by defendants, Meredith Lehrman and David Lehrman, for summary judgment dismissing the complaint on the issue that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102[d] is denied; and it is further

ORDERED that counsel for the original movant shall serve a copy of this Order with Notice of Entry upon counsel for the named defendants, pursuant to CPLR 2103(b)(l), (2) or (3), within twenty (20) days of the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court.

This action was commenced by plaintiffs, Patricia Williams and Jermaine Williams, for injuries allegedly sustained by them as the result of a motor vehicle accident which occurred on September 2, 2002, at the intersection of Straight Path Rd. and Long Island Ave., Babylon, NY. Plaintiffs were passengers in a vehicle operated by defendant, Barbara Gambles. Defendant Gambles has not appeared for her deposition.

The 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 from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]).

Plaintiff has not submitted sufficient evidence in admissible form, demonstrating that defendant, Meredith Lehrman, made an abrupt left-hand turn into the path of Gambles vehicle, which was passing through an intersection and that Gambles was free from any negligence (*see* ***Griffin v. Pennoyer,*** 49 AD3d 341). Nor has plaintiff made a prima facie showing of entitlement to judgment as a matter of law by presenting evidence which demonstrated that the sole proximate cause of the accident in question was the failure of the defendants Lehrman to yield the right-of-way as required

by Vehicle & Traffic Law § 1141 (*See,* ***Agati v. Wandel,*** 49 AD3d 572). When viewing the evidence in the light most favorable to the nonmovant, an issue of fact exists as to whether the defendant Gambles vehicle was so close to the intersection or dangerously close when defendant Lehrman made her left turn (***Fleming v. Graham,*** 34 AD3d 525).

In light of the foregoing, the motion by plaintiff, for partial summary judgment on the issue of liability against the defendants, Lehrman, is denied.

In cross-motions (004) Barbara Gambles and (005) Meredith Lehrman and David Lehrman, seek summary judgment dismissing the complaint on the basis that plaintiffs have not sustained a serious physical injury within the meaning of Insurance Law §5102(d).

Pursuant to Insurance Law § 5102(d), " '[s]erious injury' means 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 medical 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."

The term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570[1982]).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102(d), the initial burden is on the defendant to "present evidence in competent form, showing that plaintiff has no cause of action" (***Rodriquez v Goldstein,*** 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (***DeAngelo v Fidel Corp. Services, Inc.***, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268, 587 NYS2d 692 [2nd Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (***Cammarere v Villanova,*** 166 AD2d 760, 562 NYS2d 808, 810 [3rd Dept 1990]).

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). 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 "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). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, 57 NY2d 230).

It is for the court to determine in the first instance whether a prima facie showing of "serious injury" has been made out (*see*, ***Tipping-Cestari v Kilhenny***, 174 AD2d 663). 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). 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). Such proof, in order to be in a competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268). The proof must be viewed in a light most favorable to the non-moving party, here, the plaintiffs (***Cammarere v Villanova,*** 166 AD2d 760). Plaintiff, Patricia Williams, testified at her examination before trial that she was riding in the front passenger seat of the vehicle operated by defendant, Barbara Gambles on September 2, 2002. Her son, Jermaine was seated in the back seat right behind the driver. Their vehicle was hit by another car on the middle of the driver's side. She hit her head on the dashboard. The next day she went to the hospital with complaints to her neck and back. She went to see a chiropractor who treated her with physical therapy. She asserts that she can not play volleyball, walk around the mall and play handball.

In her verified bill of particulars, Patricia Williams, has claimed injuries consisting of, *inter alia*, lumbosacral spine derangement with bulging disc at L2-3, L3-4, L4-5, and L5-S1, lumbar radiculopathy, lumbar strain/sprain, lumbago, headaches, myfascial pain syndrome, cervical radicular syndrome, cervical subluxation complex at C3-C4 and C6-C7, cervical strain/sprain, segmental dysfunction, and permanent loss of range of motion.

Moreover, Jermaine Williams, has claimed injuries consisting of cervicalgia, cervical strain/sprain, cervical radiculopathy, cervical cranial encephalagia, cervical subluxation complex at C3-C4 and C5-C6, cervical bulging disc at C3-C4, C4-C5, C5-C6, and C6-C7, right knee pain, right knee derangement, and persistent left angle sprain.

In support of motion (004) defendant Gambles and (005) defendant Lerhman, along with other documents, have submitted reports of Arthur M. Bernhang, M.D.

Patricia Williams was examined for an independent orthopedic examination on September 30, 2006 by Dr. Arthur M. Bernhang. At that time she was 40 years of age. The history recorded by the doctor reveals that plaintiff has pain in her neck which radiates to her lower back but not to her

shoulders or lower extremities. Dr. Bernhang set forth the average range of motion in evaluating plaintiff's dorsolumbar expansion, lateral flexion, lying supine straight leg raising. The doctor reported a pelvic roll positive at 5 degrees. However, he noted this finding was inconsistent with her having just been seated with her hips and knees flexed at 90 degrees. He noted disc bulging at L2/3. He also noted prominent disc bulging at L3/4 through L5/S1. However, he noted that according to a report in the Journal of the American Academy of Orthopedic Surgeons, disc bulging was found in 56% of asympomatic individuals in plaintiff's age group without traumatic origin.

Based upon the foregoing, defendants have failed to demonstrate that plaintiff did not suffer a serious injury within the definition of Insurance Law §5102[d]. It would be mere speculation if the court determined otherwise. Dr. Bernhang used an average range of motion instead of a normal range of motion. He also quantified deficits in the range of motion of plaintiff's cervical spine.

Jermaine Williams was examined for an independent orthopedic examination on December 29, 2006 by Dr. Arthur M. Bernhang. Again, Dr. Bernhang used an average range of motion rather than a normal range of motion. He also quantified deficits in the range of motion straight-leg raising.

Here, the affirmed reports of the defendants' examining orthopedic surgeon is deficient in that it failed to compare the degrees of range of motion of the plaintiffs compared to the normal range of motion, thereby leaving the court to speculate as to what findings were compared to normal ranges of motion, he failed to compare those findings to the normal range of motion (***Rodriguez v Schickler,*** 229 AD2d 326; *see also* ***Frey v Fedorciuc,*** 36 AD3d 587; ***Powell v Alade,*** 31 AD3d 523). Moreover, Dr. Bernahng does not comment on the causation of the disc bulges relative to the within accident.

Since Defendants, Gambles and Lehrman, failed to establish their entitlement to judgment as a matter of law, it is not necessary to consider whether plaintiff's papers in opposition to defendants' motions were sufficient to raise a triable issue of fact (*see* ***Agathe v Tun Chen Wang,*** 33 AD3d 737; ***Facci v Kaminsky***, 18 AD3d 806).

Accordingly, the motions are denied.

Dated: June 16, 2008
RIVERHEAD, NY

Martin J. Kerins,
J.S.C.

FINAL DISPOSITION_____ NON-FINAL DISPOSITION_____