

**Mozen v Papa**

2010 NY Slip Op 31463(U)

June 8, 2010

Sup Ct, NY County

Docket Number: 107763/2007

Judge: George J. Silver

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

PRESENT: GEORGE J. SILVER

PART 22

Index Number : 107763/2007  
**MOZEN, CHELSEA**  
VS.  
**PAPA, JOHN P.**  
SEQUENCE NUMBER : 002  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

in this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1 \_\_\_\_\_

2, 3 \_\_\_\_\_

4 \_\_\_\_\_

**FILED**

JUN 14 2010

NEW YORK COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

In this action to recover for personal injuries allegedly sustained in a motor vehicle accident, Defendant John P. Papa ("Defendant") moves pursuant to CPLR §3212 for an order granting summary judgment and dismissing the complaint of Plaintiff Chelsea Mozen ("Plaintiff") on the grounds that Plaintiff did not sustain an injury that qualifies as "serious" as defined by New York Insurance Law §5102(d). Plaintiff cross moves for summary judgment pursuant to CPLR §3212 for an order granting summary judgment on the grounds that Defendant is wholly liable for the accident.

Plaintiff contends that on April 14, 2007 at approximately 6:40 p.m., she was stopped behind a minivan in the westbound direction of the Long Island Expressway in "stop and go" traffic. She alleges that Defendant rear-ended her vehicle, causing her vehicle to collide with the minivan in front of her. Plaintiff alleges in her Verified Bill of Particulars that as a result of the accident she sustained a brain concussion with loss of consciousness and central disc protrusions at L5-S1 and C5-C6. She contends to have been confined to her home for three months following the accident. Plaintiff also claims that she was disabled from April 14, 2007 to July 15, 2007 and remains partially disabled.

Under New York Insurance Law §5102(d), a "serious injury" is defined 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

Dated: 1/5

J.S.C.

Check one: FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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.

"[A] defendant can establish that [a] plaintiff's injuries are not serious within the meaning of Insurance Law §5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Grossman v Wright*, 268 AD2d 79, 83-84 [1st Dept 2000]). If this initial burden is met, "the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law" (*id.* at 84). The Plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is serious within the meaning of §5102(d), but also that the injury was causally related to the accident (*Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]).

#### Defendant's Motion

In support of its motion, Defendant submits the expert reports of Dr. Robert Goldstein, Dr. William Head Jr., Dr. Stephen Lastig, Dr. Kenneth Falvo, Dr. Louis Filardi and Dr. Marina Babiy's medical records. Dr. Robert Goldstein conducted an orthopedic examination of Plaintiff on November 25, 2008. He conducted visual range of motion testing of the cervical spine revealing flexion of 45 degrees compared to 45 degrees normal, extension of 45 degrees compared to 45 degrees normal, lateral rotation of 70 degrees to the right and 90 degrees to the left compared to 90 degrees normal and lateral bending of 35 degrees right and left compared to 45 degrees normal. Plaintiff was also able to turn her neck to the right to 90 degrees, but with pain.

Dr. Goldstein also conducted visual range of motion readings on the lumbar spine revealing flexion of 60 degrees compared to 90 degrees normal, extension of 25 degrees compared to 25 degrees normal and left and right lateral bending of 25 degrees compared to 25 degrees normal. He noted that Plaintiff reported that she would not flex further than 60 degrees because she was scared it may cause pain. Further, Dr. Goldstein conducted straight leg raising in both the sitting and supine positions, which was normal at 90 degrees bilaterally. Dr. Goldstein also conducted visual range of motion testing for Plaintiff's shoulders, elbows, wrists, fingers, hips, knees and ankles.

Dr. Goldstein concludes that Plaintiff sustained a cervical and lumbar sprain that is casually related to the accident. He states that decreased range of motion is subjective and that he did not find any objective findings on examination. Dr. Goldstein further concludes that there is no permanency or residual effects of the sprains and no disability.

On December 2, 2008, Dr. William B. Head, Jr. conducted a neurological examination of Plaintiff. Dr. Head took circumferential measurements of the upper and lower extremities which he concluded were within the boundaries of physiological variation and normal. Further, Dr. Head took strength of grip measurements on six successive attempts with the Jamar dynamometer revealing measurements normal for Plaintiff's size and build. He also obtained range of motion measurements visually. Dr. Head determined that cervical range of motion was flexion of 37.5 degrees, compared to 50 degrees normal, cervical extension of 30 degrees

compared to 60 degrees normal, cervical lateral flexion of 45 degrees compared to 45 degrees normal and rotation of 60 degrees compared to 80 degrees normal. Lumbar range of motion measurements included flexion of 12 degrees compared to 60 degrees normal, extension of 12.5 degrees compared to 25 degrees normal, right lateral flexion of 20 degrees compared to 25 degrees normal and left lateral flexion of 15 degrees compared to 25 degrees normal. Dr. Head also states that these diminished range of motion findings are subjective in nature.

Additionally, Dr. Head performed straight leg raising, which was negative. Overall, Dr. Head concludes that Plaintiff's neurological examination disclosed no objective evidence of any neurological condition. He further finds that there is no objective evidence of any disability arising out of Plaintiff's accident.

Dr. Head provided a supplemental neurological report based on reviewing a cervical MRI dated May 10, 2007 and a lumbar MRI dated May 11, 2007. He diagnoses Plaintiff with a small, midline disc bulge associated with osteophytes at C4-C5, C5-C6 and C6-C7, but no disc herniation. Dr. Head concludes that these findings are degenerative in nature. He also finds midline disc protrusion and disc degeneration at L5-S1, with well preserved neuroforamina and without evidence of spinal stenosis or nerve root impingement. He again concludes that Plaintiff's examination is objectively normal.

Dr. Stephen Lastig conducted a radiological review of Plaintiff's MRI films on April 9, 2009. Dr. Lastig reviewed films of Plaintiff's cervical and lumbar spine taken on May 10, 2007 and May 11, 2007 respectively. Dr. Lastig concludes that based on the cervical spine MRI, Plaintiff experiences mild disc desiccation consistent with a degree of degenerative disc disease. He also states that the small shallow right paracentral disc herniation at the C5-C6 level cannot be determined as to etiology based on this single study. Dr. Lastig finds no cord impingement or nerve root encroachment. Based on a review of Plaintiff's lumbar spine study, Dr. Lastig concludes that there is degenerative disc disease at the T12-L1, L1-L2 and L5-S1 levels and a small shallow disc protrusion which mildly impresses upon the ventral thecal sac at the L1-L2 and L5-S1 levels. He further concludes that there is no evidence of spinal stenosis.

Dr. Goldstein and Dr. Head report vastly different range of motion limitations for both Plaintiff's cervical and lumbar spine. Further, their opinions greatly differ on the normal range of motion. Clearly, the conflicting affidavits submitted present a factual dispute regarding the extent of Plaintiff's injury. Further, Dr. Lastig presents a different interpretation of Plaintiff's MRI scans than the original radiologist determined. These discrepancies are material factual questions that cannot be resolved in the context of a summary judgment motion (*see Cassagnol v Williamsburg Plaza Taxi*, 234 AD2d 208 [1st Dept 1996]; *Williams v Lucianatelli*, 259 AD2d 1003 [4th Dept 1999]; *Bitici v New York City Transit Auth.*, 245 AD2d 157 [1st Dept 1997]).

Defendant also provides the report of Dr. Kenneth Falvo, an orthopedic surgeon, who examined Plaintiff on June 21, 2007. He measured range of motion of the lumbar spine as 90 degrees flexion, 30 degrees extension, 39 degrees right and left lateral bend and 30 degrees right and left rotation. Dr. Falvo concluded that Plaintiff has suffered from a cervical and low back sprain which have resolved. In order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury. An expert's qualitative assessment of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the

plaintiff's limitations to the normal function (*See Toure v. Avis Rent A Car Sys., Inc.*, 98 N.Y.2d 345, 350-51, 746 N.Y.S.2d [2002]). Dr. Falvo fails to compare Plaintiff's loss of range of motion to what he considers a normal range of motion. This deficiency renders his report insufficient to raise an issue of triable fact.

Dr. Louis Filardi, a chiropractor, examined Plaintiff on June 21, 2007. He determined that range of motion of the cervical spine was 45 degrees for flexion, extension, lateral bend to the right and left and 80 degrees rotation to the right and left. Dr. Filardi also performed straight leg testing, Patrick's test, Ely's test and Hoover's test, which were all negative. He concludes that Plaintiff had suffered a cervical, thoracic and lumbosacral sprain/strain. "CPLR § 2106 does not provide that a chiropractor may affirm the truth of his statement with the same force as an affidavit. Plaintiff's failure to submit the chiropractor's report in admissible form requires its exclusion from consideration" (*Shinn v Catanzaro*, 1 AD3d 195 [1st Dept 2003]; *Sanchez v Romano*, 292 AD2d 202, 203 [1st Dept 2002]). Therefore, Dr. Filardi's report will not be considered.

Defendant also submits the unaffirmed medical records of Dr. Marina Babiy. It is well settled that a moving Defendant may rely upon the unsworn reports of the Plaintiff's own physicians in support of a motion for summary judgment (*see Hochlerin v Tolins*, 186 AD2d 538 [2d Dept 1992]; *Pagano v Kingsbury*, 182 AD2d 268[2d Dept 1992]). Dr. Babiy's records indicate that Plaintiff complains of pain in the neck and upper back. Dr. Babiy describes Plaintiff's range of motion as "decreased and painful in all planes" and diagnoses Plaintiff with whiplash, cervical and thoracic myofascitis and muscle spasm. These records fail to demonstrate that the Plaintiff has not suffered a serious injury (*see Orsenigo v Burnstein*, 202 AD2d 561 [1994]).

Defendants have failed to present evidence sufficient to meet their initial burden of establishing a prima facie case for summary judgment. As such, it is unnecessary to consider Plaintiff's opposition to the motion (*see Offman v Singh*, 27 AD3d 284 [1st Dept 2006]). Accordingly, Defendant's summary judgment motion is denied.

#### Plaintiff's Cross Motion

Plaintiff cross moves pursuant to CPLR §3212 for an order for summary judgment on the grounds that Defendant is solely liable for the accident. As a matter of substantive law, a rear-end collision with a stopped vehicle establishes a *prima facie* case of negligence against the driver and owner of the moving vehicle (*See Golubchik v Das Trading Corp.*, 62 AD3d 480, 480 [1st Dept 2009]; *Mankiewicz v Excellent*, 25 AD3d 591, 592 [1st Dept 2006]). When such a rear-end collision occurs, the driver of the following vehicle must provide a non-negligent explanation for the collision to survive summary judgment (*See Johnson v Phillips*, 261 AD2d 269, 271 [1st Dept 1999]; *Barba v Best Sec. Corp.*, 235 AD2d 381, 381 [2d Dept 1997]).

In support of her motion, Plaintiff submits her affidavit stating that she was fully stopped due to heavy traffic on the Long Island Expressway when Defendant hit her vehicle from behind. Plaintiff also cites to various points in Defendant's deposition testimony where he corroborates the factual circumstances surrounding the accident.

In opposition, Defendant argues that Plaintiff did not make a prima facie showing of entitlement to summary judgment because she fails to include Defendant's deposition transcript.

Defendant does not dispute the validity of any of the deposition statements Plaintiff submits, nor does Defendant submit his deposition transcript in opposition. Furthermore, Defendant completely ignores Plaintiff's properly submitted affidavit. This affidavit provides sufficient evidence in support of Plaintiff's motion for summary judgment.

Defendant also contends that Plaintiff's cross motion is untimely. Defendant relies on a February 27, 2009 Court Order ("Order") to argue that all dispositive motions were to be filed within sixty days of Defendant's receipt of Plaintiff's employment and medical records. However, examination of the Order reveals that the sixty day time frame to submit dispositive motions pertains solely to Defendant. The Order is silent as to the time Plaintiff has to file dispositive motions.

Plaintiff has made a *prima facie* showing of their entitlement to judgment as a matter of law by submitting undisputed evidence that their vehicle was stopped when it was struck in the rear by Defendant's vehicle (*see Somers v Conclin*, 39 AD3d 289 [1st Dept 2007]; *Francisco v Schoepfer*, 30 AD3d 275 [1st Dept 2006]; *Garcia v Bakemark Ingredients (E.) Inc.*, 19 AD3d 224 [1st Dept 2005]).

Accordingly, because there are no triable issues of fact to resolve regarding the Plaintiff's liability, summary judgment is granted (*See CPLR §3212; Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Accordingly, it is hereby

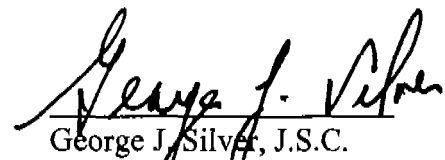
ORDERED that Defendant's motion for summary judgment is denied; and it is further

ORDERED that Plaintiff's cross motion for summary judgment is granted; and it is further

ORDERED that Defendant is to serve a copy of this order, with Notice of Entry on counsel for Plaintiff, within 30 days.

This constitutes the decision and order of the court.

Dated: June 8, 2010  
New York County

  
George J. Silver, J.S.C.

**FILED** GEORGE J. SILVER

JUN 14 2010

NEW YORK  
COUNTY CLERK'S OFFICE