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SHORT FORM ORDER

INDEX No. 07-13033
CAL. No. 09-02616-MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 4-7-10 (#007 & #009)
MOTION DATE 4-12-10 (#008)
ADJ. DATE 6-14-10
Mot. Seq. # 007 - MG
008 - XMG; CASEDISP
009 - MD

DEBORAH KIM, Plaintiff, - against - JEANMARIE PANZECA and EDWARD J. STOREY, Defendants.	SACKSTEIN, SACKSTEIN & LEE, LLP Attorney for Plaintiff 1140 Franklin Avenue, Suite 210 Garden City, New York 11530 RICHARD T. LAU & ASSOCIATES Attorney for Defendant Jeanmarie Panzeca P.O. Box 9040 Jericho, New York 11753-9040 PICCIANO & SCAHILL, P.C. Attorney for Defendant Edward J. Storey 900 Merchants Concourse, Suite 310 Westbury, New York 11590

Upon the following papers numbered 1 to 4 read on these motions and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 4, 5 - 8, 9 - 12 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 13 - 15, 16 - 18 ; Replying Affidavits and supporting papers 19 - 20, 21 - 22, 23 - 24 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (007) by defendant Edward Storey for summary judgment dismissing the action on the ground that he did not proximately cause plaintiff's injuries is granted; and it is further

ORDERED that the cross motion (008) by defendant Jeanmarie Panzeca for summary judgment dismissing the action as asserted against her on the ground that plaintiff did not sustain a serious injury pursuant to New York Insurance Law § 5102(d) is granted; and it is further

ORDERED that the motion (009) by defendant Edward Storey for summary judgment dismissing the action as asserted against him on the ground that plaintiff did not sustain a serious injury pursuant to New York Insurance Law § 5102(d) is denied as academic.

In this negligence action, plaintiff Deborah Kim seeks damages for allegedly sustaining personal injuries in a three-vehicle accident on May 7, 2004 on Meadow Road, near the entrance of Smithtown High School Freshman Campus in the Town of Smithtown, New York. Plaintiff alleges that the vehicle operated by defendant Jeanmarie Panzeca crossed a double yellow line causing a head-on collision. Plaintiff further alleges that shortly thereafter, a vehicle operated by defendant Edward Story collided with the rear of her vehicle. By way of the bill of particulars, plaintiff alleges that she sustained the following injuries: temporomandibular joint (TMJ) dysfunction; cervical sprain/strain; cervical derangement; paraspinal muscular spasms; lumbar radiculopathy; lumbosacral sprain/strain; lumbar derangement; right shoulder tendinitis; and right shoulder sprain/strain. Plaintiff further alleges that she was disabled for one week.

Plaintiff also alleges that she sustained injuries in the following serious injury categories: permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system; and/or a medically determined injury or impairment of a non-permanent nature which prevented plaintiff from performing substantially all of the material acts which constitute her usual and customary daily activities for a period of not less than 90 days during the first 180 days immediately following the accident.

Defendant Storey now moves for summary judgment dismissing the action as asserted against him on the ground that he did not proximately cause plaintiff's injuries and in a separate motion, that plaintiff did not sustain a serious injury. Defendant Panzeca cross-moves for summary judgment dismissing the action as asserted against her on the ground that plaintiff did not sustain a serious injury in accordance with New York Insurance Law § 5102(d).

A rear-end collision into a stopped automobile creates a *prima facie* case of liability with respect to the operator of the moving vehicle, imposing a duty of explanation on its operator (***Niyazov v Bradford***, 13 AD3d 501, 786 NYS2d 582 [2d Dept 2004]; ***Russ v Investech Secs.***, 6 AD3d 602, 775 NYS2d 867 [2d Dept 2004]). Drivers must maintain safe distances between their cars and cars in front of them (Vehicle and Traffic Law § 1129 [a]) and this rule imposes on them a duty to be aware of traffic conditions, including vehicle stoppages (***Jacobellis v New York State Thruway Auth.***, 51 AD3d 976, 858 NYS2d 786 [2d Dept 2008]; ***Sass v Ambu Trans, Inc.***, 238 AD2d 570, 657 NYS2d 69 [2d Dept 1997]). If the operator cannot come forward with any evidence to rebut the inference of negligence, the claimant may properly be awarded judgment as a matter of law (***Starace v Inner Circle Qonexions***, 198 AD2d 493, 604 NYS2d 179 [2d Dept 1993]; ***Young v New York***, 113 AD2d 833, 493 NYS2d 585 [2d Dept 1985]).

In support of the motion, defendant Storey contends that he was confronted with an emergency situation. The emergency doctrine applies only to circumstances where an actor is confronted by a sudden and unforeseen occurrence not of the actor's own making (*see* ***Muye v Liben***, 282 AD2d 661, 723 NYS2d 510 [2d Dept 2001]). He submits, among other things, the pleadings, the bill of particulars, and the deposition testimonies of the plaintiff, defendant Storey, and defendant Panzeca. Plaintiff testified that she was proceeding north bound on Meadow Road at approximately 20 to 25 miles per hour. She observed a vehicle operated by defendant Panzeca approximately five car lengths ahead in the south bound lane traveling at approximately 35 miles per hour coming toward her. Plaintiff stated that

she slammed on the brakes and steered her vehicle to the right to avoid the defendant. Plaintiff also honked her horn. Defendant's vehicle crossed over the double yellow line and collided head-on into plaintiff's vehicle. The impact was to the front end and pushed her vehicle backward in the direction of the vehicle behind her. Plaintiff stated that her vehicle was then struck from behind by defendant Storey's vehicle.

Defendant Storey's testimony supports plaintiff's account of the collision between plaintiff and defendant Panzeca. He also stated that he saw defendant Panzeca's vehicle come around a bend in the road and saw it swerve into the north bound lane, striking plaintiff's vehicle. He estimated that defendant Panzeca was driving approximately 45 miles per hour and that plaintiff was driving at approximately 30 to 35 miles per hour. Defendant Storey stated that he stepped on his brakes very hard and his front end made light contact with plaintiff's rear bumper. He observed defendant Panzeca's vehicle entirely in the north bound lane after impact. Her vehicle had severe front end damage with fluids draining from the engine. When he looked at the rear bumper of plaintiff's vehicle and the front bumper of his own vehicle, he stated that there was minimal damage, if any.

Defendant Panzeca testified that she was thirteen weeks pregnant at the time of the accident. She was proceeding south bound on Meadow Road and was not familiar with the road. Defendant stated that she was driving at approximately 25 to 30 miles per hour and that the north bound traffic was going at a slow rate of speed. She did not recall where her vehicle was located at the time of the impact.

The Court finds that defendant Storey was faced with an emergency situation not of his making when he was confronted with the head on collision between the plaintiff and defendant Panzeca which pushed plaintiff's vehicle backward into his path and he acted reasonably under the circumstances (*see* ***Alexiou v Ales***, 283 AD2d 380, 724 NYS2d 75 [2d Dept 2001]; ***Pettica v Williams***, 223 AD2d 987, 636 NYS2d 502 [2d Dept 1996]; ***Wenz v Shafer***, 293 AD2d 742, 742 NYS2d 318 [2d Dept 2002]). Thus, defendant has rebutted the inference of negligence. Accordingly, the motion by defendant Storey is granted dismissing the action as asserted against him. Therefore, defendant's second motion for summary judgment on the issue of whether plaintiff sustained a serious injury is denied as academic.

The Court now turns to the issue of whether plaintiff sustained a serious injury. Under the Insurance Law, "'[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 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" (Insurance Law § 5102 [d]).

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 Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957],

reh denied 3 NY2d 941 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

A defendant can establish that the 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, 707 NYS2d 233 [2d Dept 2000]). Once defendant has met the burden, the burden shifts to the plaintiff to demonstrate with competent proof that he sustained a serious injury within the meaning of the No-Fault Insurance Law (***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Staff v Yshua***, 59 AD3d 614, 874 NYS2d 180 [2d Dept 2009]). 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 [2d Dept 1992]).

In support of the cross motion, defendant Panzeca submits, among other things, the pleadings, the bill of particulars, plaintiff's deposition testimony and sworn reports by Arthur M. Kupperman, M.D., and Jay Nathan, M.D. Plaintiff testified that after the accident, she was taken by ambulance to St. Catherine of Siena Hospital, and was treated and released. She participated in physical therapy and massage therapy for approximately four months. A few days after the accident, her jaw locked. Plaintiff was treated by a dentist who later prescribed a mouth guard. She continued obtaining massage therapy once per month and pays out of pocket for the treatment. Plaintiff stated that she was involved in a subsequent accident in June, 2004, however, her injuries from that accident did not increase her symptoms from the instant accident. Plaintiff stated that she missed three weeks of work as a waitress after the accident. In addition, she has limited range of motion in her right shoulder and cannot play musical instruments, or conduct an orchestra. Moreover, she is unable to work out at the gym as she did before the accident. Such testimony establishes that plaintiff did not sustain medically determined injury of a non-permanent nature for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment (*see* ***Jocelyn v Singh Airport Serv.***, 35 AD3d 668, 826 NYS2d 434 [2d Dept 2006]).

Dr. Kupperman avers that he is an oral and maxillofacial surgeon and examined plaintiff on December 16, 2008. He observed that the teeth were present and in good repair. There was full range of opening without deviation noted on opening or closing. There was full range of lateral and protrusive movements. He concluded that the oral examination was normal. He opines that there is no causal relationship to the subject accident and that plaintiff is not disabled. In an addendum dated January 4, 2009, Dr. Kupperman states that he reviewed plaintiff's dental films and that his opinion, that plaintiff's TMJ problem is unrelated to the subject accident, remains unchanged.

Dr. Nathan avers that he performed an independent orthopedic medical examination of the plaintiff on January 12, 2009. He used a goniometer to measure the range of motion in the cervical spine, lumbar spine, upper extremity, and lower extremity and noted, after comparing to normal ranges, that plaintiff had no limitations in movement. He also performed several objective tests which were negative. He opines that plaintiff sustained a right shoulder sprain. He concludes that there is no permanent impairment and no disability.

The court finds that defendant Panzeca has demonstrated her prima facie entitlement to judgment as a matter of law by establishing that plaintiff has not sustained serious injuries (*see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 352, 746 NYS2d 865 [2002]). The burden of proof shifts to plaintiff to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*see* ***Gaddy v Eyler***, *supra*).

In opposition, plaintiff submits, among other things, uncertified records from St. Catherine of Siena Hospital, sworn reports by Christopher Durant, M.D., Alan J. Zimmerman, M.D., and Albert Winyard, M.D., several unsworn medical reports, uncertified and unsworn reports by a physical therapist, an unsworn MRI report of the plaintiff's right shoulder, and an affirmation by Evan P. Mondshine, D.D.S. The Court finds that plaintiff may rely upon the uncertified medical records, and unsworn reports where defendant's examining experts referred to them (***Silkowski v Alvarez***, 19 AD3d 476, 798 NYS2d 468 [2d Dept 2005]; ***Ayzen v Melendez***, 299 AD2d 381, 749 NYS2d 445 [2d Dept 2002]; ***Perry v Pagano***, 267 AD2d 290, 699 NYS2d 882 [2d Dept 1999]). However, although plaintiff has shown that her injuries were causally related to the accident by contemporaneous examinations by the above experts, she failed to submit a recent examination which establishes the duration of the injuries and how substantial the injuries are (***Constantinou v Surinder***, 8 AD3d 323, 777 NYS2d 708 [2d Dept 2004]; ***Kauderer v Penta***, 261 AD2d 365, 689 NYS2d 190 [2d Dept 1999]).

In addition, plaintiff has failed to submit competent medical evidence which raises an issue of fact that she was unable to perform substantially all daily activities for not less than 90 days of the first 180 days subsequent to the subject accident (***Albano v Onolfo***, 36 AD3d 728, 830 NYS2d 205 [2d Dept 2007]; ***Bell v Rameau***, 29 AD3d 839, 814 NYS2d 534 [2d Dept 2006]; ***Doran v Sequino***, 17 AD3d 626, 795 NYS2d 245 [2d Dept 2005]). Thus, plaintiff has failed to raise a triable issue of fact. Accordingly, the cross motion by defendant Panzeca for summary judgment is granted.

In sum, defendant Storey's motion on the issue of liability and defendant Panzeca's cross motion for summary judgment on the serious injury issue are granted. Defendant Storey's second motion for summary judgment is denied as academic.

Dated: 7/26/10

THOMAS F. WHELAN, J.S.C.