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

PRESENT: Hon. George J. Silver, Justice PART 22

HOLLIE ELKINS

vs.

BUCUR EXPRESS CAB CORP., and PAPA SECK

INDEX NO. 114978/2007

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to 6 were read on this motion to/for SUMMARY JUDGMENT

| | Papers Numbered |
|---|---|
| Notice of Motion/Order to Show Cause — Affidavits— Exhibits | 1 |
| Answering Affidavits — Exhibits | 2, 3 |
| Replying Affidavits, Cross Motion | 4, 5, 6 |



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, Defendants Bucur Express Cab Corp., and Papa Seck (collectively "Defendants") move pursuant to CPLR §3212 for an order granting summary judgment and dismissing Hollie Elkins's ("Plaintiff") complaint on the grounds that she did not sustain an injury that qualifies as "serious" as defined by New York Insurance Law §5102(d). Plaintiff cross moves pursuant to CPLR §2221 for an order granting leave to renew or reargue their motion for summary judgment, and upon reargument, for an order granting Plaintiff summary judgment on liability.

Defendants' Serious Injury Motion

Plaintiff alleges in her Verified Bill of Particulars that, as a result of the accident, she sustained a serious injury including fracture of L5 pars interarticularis, L4-L5 disc bulge, cervical strain and post traumatic stress disorder. 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 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

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE

Check one: ☐ FINAL DISPOSITION ■ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE ☐ SETTLE/SUBMIT ORDER/JUDG.

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]).

In support of this motion, Defendants submit the affirmed expert reports of Dr. Robert Israel, Dr. David Bronster, Dr. A. Robert Tantleff and Dr. Alain De La Chapelle. Dr. Israel conducted an orthopedic examination of Plaintiff on March 20, 2009. He conducted range of motion testing using a goniometer and found no limitations in range of motion when compared to normal, for Plaintiff's cervical spine, lumbar spine, bilateral shoulders, elbows, wrists, hands, hips and knees. Dr. Israel concluded that Plaintiff had no sustained any permanent injuries as a result of the accident. Dr. Bronster performed a neurological examination of Plaintiff on February 5, 2009. He concluded that there was no objective evidence of any neurological disability. Dr. Tantleff reviewed Plaintiff's lumbar spine MRI taken on January 6, 2007. He concluded that Plaintiff had bilateral spondylolysis of the L5 pars associated with degenerative change consistent with normal pathogenesis between the ages of eight and thirteen. Dr. Tantleff concluded that these findings were unrelated to the accident. Dr. Tantleff also reviewed Plaintiff's cervical spine MRI film taken on January 23, 2007. He concluded that it revealed a normal cervical spine MRI. Dr. De La Chapelle conducted a psychiatric examination of Plaintiff on March 30, 2009. After a mental status examination, Dr. De La Chapelle concluded that Plaintiff had suffered from Posttraumatic Stress Disorder and Depressive Disorder, both resolved. Defendants additionally submit Plaintiff's lumbar spine MRI report taken on January 6, 2007. The report states that there is no vertebral fracture, but that a very small posterior right paracentral disc protrusion causes minimal thecal sac compression. The report does find bilateral spondylosis of the L5 pars with minimal anterolisthesis. Defendant has satisfied his burden of establishing *prima facie* that Plaintiff did not suffer a serious injury (*Yagi v Corbin*, 2007 NY Slip Op 7749 [1st Dept]; *Becerril v Sol Cab Corp*, 50 AD 3d 261, 854 NYS2d 695 [1st Dept 2008]).

In order to rebut defendant's *prima facie* case, plaintiff must submit objective medical evidence establishing that the claimed injuries were caused by the accident, and "provide objective evidence of the extent or degree of the alleged physical limitations resulting from the injuries and their duration" (*Noble v Ackerman*, 252 AD2d 392, 394 [1st Dept 1998]; *Toure v Avis Rent A Car Sys.*, Inc., 98 NY2d 345, 350 [2002]). Plaintiff's subjective complaints "must be sustained by verified objective medical findings" (*Grossman v Wright*, 268 AD2d 79, 84 [2d Dept 2000]). Such medical proof should be contemporaneous with the accident, showing what quantitative restrictions, if any, plaintiff was afflicted with (*see Nemchyonok v Ying*, 2 AD3d 421, 421 [2d Dept 2003]). The medical proof must also be based on a recent examination of plaintiff, unless an explanation otherwise is provided (*see Bent v Jackson*, 15 AD3d 46, 48 [1st Dept 2005]; *Nunez v Zhagui*, 60 AD3d 559, 560 [1st Dept 2009]).

In opposition to Defendants' motion, Plaintiff submits the expert reports of Dr. Michael Paley, Christine Espejo, Dr. Maureen McSweeney, Dr. Reuben Ingber, Dr. David Payne, Dr. Jeffrey Kaplan and Dr. Annette Ferez-Delboy. Dr. Paley's report does not opine as to the causation of the results of Plaintiff's radiographs. Therefore, Dr. Paley's affirmation insufficient to defeat defendants' prima facie showing (*see Valentin*, 59 AD3d 184 [1st Dept 2009]). Christine Espejo is a physical therapist, who began treating Plaintiff on January 26, 2007. Her certified physical therapy records include range of motion testing exhibiting limitations in Plaintiff's range of motion when compared to normal. Dr. McSweeney is a psychologist who began treating Plaintiff on July 31, 2006. She last treated Plaintiff on July 9, 2009 and concluded that Plaintiff still suffered from posttraumatic stress disorder caused by the present accident. Dr.

Ingber began treating Plaintiff on June 11, 2007. He conducted range of motion testing, but failed to compare Plaintiff's range of motion to normal. As such, Dr. Ingber's report is insufficient to establish Plaintiff's burden (*Beazer v Webster*, 2010 NY Slip Op 1584 [1st Dept]). Dr. Payne reviewed Plaintiff's lumbosacral spine MRI taken on January 6, 2007. He concludes that Plaintiff has L5-S1 spondylolisthesis causally related to the present accident. Dr. Kaplan conducted an orthopedic examination of Plaintiff on March 16, 2009. He conducted range of motion testing and found limitations in Plaintiff's range when compared to normal. Dr. Ferez-Delboy began treating Plaintiff in 2006 for her pregnancy and diagnosed her with placenta previa. As a result of this diagnosis, Dr. Ferez-Delboy advised Plaintiff to avoid physical therapy after the present accident until after the birth of her child. Plaintiff additionally attaches medical records from St. Luke's Roosevelt Hospital and Hospital for Special Surgery contemporaneous with the accident.

Under the permanent consequential limitation and significant limitation categories of New York Insurance Law §5102(d), Plaintiff must submit medical proof containing "objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff's present limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Gorden v. Tibulcio*, 2008 NY Slip Op 3382 [1st Dept] *quoting John v Engel*, 2 AD3d 1027, 1029 [3d Dept 2003]). Further, to qualify under the "consequential" or "significant" injury definition, the injury must be more than minor or slight (*Gaddy v Eyler*, 79 NY2d 955 [1992]). The Court of Appeals has held that a minor, slight or mild limitation of use is considered insignificant within the meaning of the Insurance Law (*Licari v. Elliot*, 57 NY2d 230, 455 NYS2d 570 [1982]). However, Plaintiff's submissions raise a triable issue of fact as to whether Plaintiff suffered a serious injury within the permanent consequential limitation and/or significant limitation categories of Insurance Law §5102(d).

A defendant can establish the nonexistence of a serious injury under the 90/180 category of Insurance Law §5102(d) by citing to evidence, such as plaintiff's own testimony, demonstrating that plaintiff was not prevented from performing all of the substantial activities constituting his usual and customary daily activities for the prescribed period *(see Copeland v Kasalica*, 6 AD3d 253, 254 [1st Dept 2004]). Further, Plaintiff's injuries must restrict her from performing "substantially all" of her daily activities to a great extent rather than some slight curtailment (*Szabo v. XYZ, Two Way Radio Taxi Ass'n, Inc.*, 700 NYS2d 179 [1999]; *Thompson v. Abbasi*, 788 NYS2d 48 [1st Dept 2005]; *Hernandez v. Rodriguez*, 63 A.D.3d 520 [1st Dept 2009]). Plaintiff's Bill of Particulars claims that she was confined to bed and home for one week following the accident. Further, Plaintiff does not submit any evidence to show that his confinements were medically determined. Therefore, this evidence is insufficient to establish a substantial curtailment of Plaintiff's normal activities during the three-month period immediately following the accident as required under the 90/180 category (*Grimes-Carrion v Carroll*, 17 AD3d 296, 794 NYS2d 30 [App. Div. 1st Dept 2005]; *Lopez v Abdul-Wahab*, 2009 NY Slip Op 8685 [1st Dept]; *Rodriguez v Herbert*, 34 AD3d 345, 825 NYS2d 37 [1st Dept 2006]).

Plaintiff's Cross Motion for Leave to Renew

Plaintiff cross moves pursuant to CPLR §2221(e) for an order granting leave to renew her motion for summary judgment, and upon renewal, for an order granting Plaintiff summary judgment on liability. Plaintiff contends that on June 30, 2006, she was crossing West 79th Street at Amsterdam Avenue within a designated crosswalk with the pedestrian signal in her favor when she was struck by a vehicle operated by Defendant Papa Seck and owned by Bucur Express Cab Corp. In support of her original motion for summary judgment, Plaintiff submitted her affidavit stating that she lawfully crossed the street in a crosswalk with the pedestrian light in her favor. In opposition, Defendants submitted an affidavit of Defendant Seck stating that his

vehicle had passed the crosswalk when Plaintiff walked into the vehicle. On these original papers, this court (Paul Wooten, J.) held that there is a triable issue of material fact as to how the accident occurred.

In support of this motion for renewal, Plaintiff argues that renewal is warranted because at his deposition, Defendant Seck disavowed the contents of his affidavit and instead admitted that he did not see Plaintiff any time prior to the accident. A motion for leave to renew is not subject to any particular time constraints. The motion must be made to the judge that signed the order, unless, as here, the IAS judge has been reassigned and no longer has the case (Siegel, 2000 Supp Practice Commentary, McKinney's Cons Laws of NY, Book 7B, CPLR §2221:4). A motion to renew simply requires a showing of new facts not offered on the prior motion, that would change the prior determination, or a change in the law that would change the prior determination, and a reasonable justification for the failure to present such facts on the prior motion (CPLR §2221(e)(1); *Ramos v City of New York*, 61 AD3d 51 [1st Dept 2009]). Plaintiff has sufficiently shown entitlement to renewal.

Upon the present submissions, Plaintiff is entitled to summary judgment as a matter of law on the issue of liability. Plaintiff has made a *prima facie* showing that Defendants failed to yield to Plaintiff as she was crossing the street within a designated crosswalk. Even if this Court were to find that Defendants properly rebutted Plaintiff's *prima facie* case by showing that there are triable issues of facts present, Plaintiff would still be entitled to summary judgment because Plaintiff is not required to show lack of comparative fault. A recent decision by the Appellate Division, First Department, has established that a plaintiff is no longer required to show lack of comparative fault to be entitled to summary judgment (*see Tselebis v Ryder Truck Rental, Inc.*, 2010 NY Slip Op 1442 [1st Dept]). In *Tselebis v Ryder*, the Court stated "it is not plaintiff's burden to establish defendant's negligence as the sole proximate cause of [plaintiff's] injuries in order to make a *prima facie* case of negligence." (*Id.* at 200). Instead, the plaintiff only has to make a *prima facie* case by showing that "defendant's negligence was a substantial cause of the events which produced the injury." (*Id.*, quoting *Derdiarian v Felix Construction Corp.*, 51 NY2d 308, 315 [1980]). The Appellate Division, First Department essentially held that prior decisions which suggest that a plaintiff has to be free from comparative negligence to prevail on a motion for summary judgment are incompatible with CPLR §1411 (*Id.*). Therefore, Plaintiff's summary judgment motion on liability is granted (*Id.*).

Accordingly, it is hereby

ORDERED that Defendants' motion for summary judgment is denied as to Plaintiff's claim under the permanent consequential limitation and significant limitation categories of Insurance Law §5102(d); and it is further

ORDERED that Defendants' motion for summary judgment is granted as to Plaintiff's claim under the 90/180 category of Insurance Law §5102(d); and it is further

ORDERED that Plaintiff's cross motion for leave to renew is granted and upon renewal, Plaintiff's motion for summary judgment as to liability is granted; and it is further

ORDERED that Defendants are to serve a copy of this order, with Notice of Entry upon all parties, within 30 days; and it is further



**Dated:** DEC 0 3 2010
**New York, New York**

George J. Silver, J.S.C.

GEORGE J. SILVER