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SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM-PART 1



**Present:** Honorable Mary Ann Brigantti-Hughes

DELORES BROWNE, DOREEN FRIDAY & LAVERNE BROWNE,

Plaintiffs,

-against-

JOSEPH A. COVINGTON,

Defendant,

**DECISION/ORDER**

Index No.: 0302400/2007

The following papers numbered 1 to 9 read on this Motion noticed on September 25, 2009 and on the Motion Calendar of March 10, 2010 of Part 1A15.

| **Papers Submitted** | **Numbered** |
|---|---|
| Notice of Motion, Affirmation & Exhibits | 1,2 |
| Cross-Motion, Affirmation in Opposition | 3,4 |
| Cross-Motion, Affirmation | 6,7 |
| Affirmation in Opposition to Cross-Motion | 8 |
| Reply Affirmation | 9 |

Upon the foregoing papers, the following motions are before the Court: (1) Plaintiff Delores Browne (hereinafter "D. Browne")'s motion for Summary Judgment, dismissing the counterclaim of defendant Joseph A. Covington (hereinafter the "Defendant"); (2) Defendant's Cross-Motion for Summary Judgment, dismissing the complaint of plaintiff Laverne Browne (hereinafter "L. Browne") for failure to satisfy the "serious injury" threshold of New York Insurance Law Sec. 5102; and (3) Plaintiffs D. Browne, L. Browne, and Doreen Friday (collectively the "Plaintiffs")'s cross-motion for Summary Judgment against Defendant on the issue of liability.

The within action arises from a motor vehicle accident occurring on May 11, 2007, in which Plaintiffs alleges that they sustained injuries. D. Browne moves for summary judgment, dismissing the counterclaim filed by Defendant, which alleges that D. Browne's negligence in the operation of her vehicle was the cause of the accident. Contemporaneously, all Plaintiffs cross-move for

summary judgment against Defendant on the issue of liability. For the reasons set for herein, both motions are granted.

The courts function on a motion for summary judgment is issue finding rather than issue determination. *Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. *Stone v. Goodson*, 8 N.Y.2d 8, (1960); *Sillman v. Twentieth Century Fox Film Corp., supra.*

With regard to the motions filed by Plaintiffs in the present action, it is well-settled that a rear-end collision with a stopped vehicle creates the presumption that the operator of the moving vehicle was negligent. *Dominga Agramonte, et al. v. City of New York, et al.*, 288 A.D.2d 75 (1st Dept. 2001). Drivers must maintain safe distances between their cars and cars in front of them (*see Vehicle and Traffic Law Sec. 1129(a)*), a rule which imposes on drivers a duty to be aware of all traffic conditions, including sudden vehicle stoppages. *Johnson v. Phillips*, 261 A.D.2d 269 (1st Dept. 1999), citing *Sass v. Ambu Trans. Inc.*, 238 A.D.2d 570). The Appellate Division has declared that drivers have a "duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident." *Id.*, citing *DeAngelis v. Kirschner*, 171 A.D.2d 593, 595 (1st Dept. 1991).

The presumption of negligence as to the rear driver in rear-end collisions has been applied when the front vehicle stops suddenly in slow-moving traffic, even if the stop is repetitive; in stop-and-go traffic, when the front vehicle stopped while crossing an intersection; and when the front vehicle stopped after changing lanes. *Id.*, citing *Mascitti v. Greene*, 250 A.D.2d 821 (2nd Dept. 1998); *Leal v. Wolff*, 224 A.D.2d 392 (2nd Dept. 1996); *Barbra v. Best Sec. Corp.*, 235 A.D.2d 381 (2nd Dept. 1997); and *Cohen v. Teeranella*, 112 A.D.2d 264 (2nd Dept. 1985). When such a collision occurs, the occupants of the front vehicle are entitled to summary judgment on liability, unless the driver of the rear vehicle can provide a non-negligent explanation, in evidentiary form, for the collision. *Id.* citing *Leal v. Wolff, supra.* An explanation that the plaintiff's vehicle came to an

abrupt or sudden stop in traffic, however, is insufficient to rebut the inference of negligence. *Dickie v. Pei Xiang Shi et al.*, 304 A.D.2d 786 (2nd Dept. 2003).

This matter involves a rear-end collision wherein Defendant's vehicle struck Plaintiffs' vehicle as it was merging onto highway traffic. While Plaintiffs' vehicle was not completely stopped, it was moving slowly in anticipation of the merge. (See D. Browne's Deposition Transcript, at 18:9-10). Plaintiff testified that she observed Defendant's vehicle traveling at 25-30 miles per hour in her rear view mirror moments before the impact. (*Id.* at 20:18-20). Defendant's vehicle struck Plaintiff's right rear bumper and passenger side rear. (*Id.* at 21:15:22). Plaintiffs include a report drafted by a responding police officer. In his report. Officer Kastrinos notes that Plaintiffs' vehicle was struck from behind on the highway on-ramp, and includes a diagram of the vehicles following the impact. The report notes that Defendant stated the front vehicle "stopped suddenly."

In opposition to D. Browne's motion to dismiss the counterclaim and Plaintiffs' motion as to liability, counsel for Defendant argues that they have been unable to locate their client for several months. Consequently, he failed to appear for a deposition and, to date, is missing despite counsel's use of a private investigative service to track him down. Essentially, Defendant argues that there is outstanding discovery in this matter, specifically the deposition of Defendant, which should preclude the entry of summary judgment.

As stated earlier, it is Defendants' duty in a rear-end collision to come forward with an adequate non-negligent explanation for the accident. *Emil Norsic & Son v. LP Transportation, Inc.*, 30 A.D.3d 368 (2nd Dept. 2006). Plaintiff sustained its burden of establishing a prima facie case for negligence by submitting the police report of the responding officer, as well as her own deposition testimony which demonstrates that Plaintiff's vehicle was struck in the rear by Defendant's vehicle. Defendant has come forward with no evidence in rebuttal, and certainly no evidence that D. Browne's actions in any way contributed to this accident.

Defendant's claims of outstanding discovery will not preclude entry of summary judgment where it is Defendant himself who has personal knowledge of the relevant facts surrounding the accident. *Emil Norsic*, *supra*. A purported need to conduct discovery does not does not warrant denial of summary judgment where the opponents of the motion have personal knowledge of the relevant facts, and the lack of disclosure does not excuse the failure of a party with personal

knowledge to submit an affidavit in opposition to the motion. *Ranford v. Sung Han, et al.* 18 *A.D.3d* 638 (2nd Dept. 2005) *citing Niyazou v. Bradford*, 13 A.D.3d 501 (2nd Dept. 2004). Further, Defendant offers only speculation and the mere hope that evidence uncovered during Defendant's deposition would support his claim or adequately rebut the presumption of Defendant's negligence in this matter. Such speculation of evidence is insufficient to warrant denial of the instant motions, especially considering the fact that the record contains no indication whatsoever that the plaintiff driver contributed to this accident. *Kaufman v. Citi Corp. Mortgage Inc.*, 272 A.D.2d 379 (2nd Dept. 2000).

Accordingly, Defendant has not satisfied his burden of rebutting the presumption of negligence in this rear-end collision. The motion of D. Browne on Defendant's counter-claims, and the motions of all Plaintiffs herein are granted.

With regard to Defendant's motion as to plaintiff L. Browne's injuries, the burden is his to establish, by the submission of evidentiary proof in admissible form, that the plaintiff has not suffered a serious injury. *Lowe v. Bennett*, 511 N.Y.S.2d 603 (1st Dept. 1986), *aff'd*, 69 N.Y.2d 701 (1986). When a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff to produce prima facie evidence in admissible form to support the claim of serious injury. *Licari v. Elliot*, 57 N.Y.2d 230 (1982); *Lopez v. Senatore*, 65 N.Y.2d 1017 (1985). When a claim is raised under the "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," 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 is acceptable. *Toure v. Avis Rent-A-Car Systems, Inc.*, 98 N.Y.2d 345 (2002).

In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis and, (2) the evaluation compares the plaintiff's limitations to normal function, purpose and use of the affected body organ, member,

function or system. *Toure, supra.*[1] Plaintiff must demonstrate more than "a mild, minor or slight limitation of use" and is required to provide objective medical evidence of the extent or degree of limitation and its duration. *Booker v. Miller*, 258 A.D.2d 783 (3rd Dept. 1999). Resolution of the issue of whether "serious injury" has been sustained involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part. *Dufel v. Green*, 84 N.Y.2d 795 (1995). The "significant limitation of use of a body function or system" requires proof of the significance of the limitation, as well as its duration. *Id.*

Following the accident, was treated and released from St. Joseph's Hospital. Unsworn medical records from this visit are included in plaintiff's opposition papers. On May 16, 2007, she commenced treatment with Dr. Osafradu Opam of Grand Concourse Chiropractors. An affidavit of Dr. Opam, along with the plaintiff's relevant medical records, are attached to plaintiff's opposition. Only the records from Dr. Opam's office are sworn, and thus in admissible form for the motion herein.

According to Dr. Opam, L. Browne presented with complaints of pain in her neck, mid-back, lower back and right shoulder. On May 18, 2007, Dr. Opam performed objective range of motion testing on the cervical spine, lumbar spine, and both shoulders. Cervical flexion revealed a 33% loss of motion, extension revealed a 50% loss of motion, lateral bending revealed 75% loss of motion, and lateral rotation similarly revealed 25-50% loss of motion on the right and left sides. Upon examination of the right shoulder, Dr. Opam found positive impingement signs and joint tenderness, along with restricted range of motion upon flexion, extension, abduction, internal and external rotation. Examination of the plaintiff's lumbar spine likewise revealed losses of motion of 22% upon flexion, 50% upon extension, 50% upon lateral bending to the left and right. Straight-leg raising was "positive" on both the left and right sides. Additional objective testing of plaintiff's left ankle revealed similar restrictions.

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[1] The Toure decision appears to indicate that claims of neck or back injury resulting from bulging or herniated discs may be considered either under the category of a "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system," as well as the 90/180 day category (Toure v. Avis Rent A Car Systems, Inc., 98 N.Y.2d 345 (2002)).

Ultimately, Dr. Opam diagnosed the plaintiff with, among other things, vertebral derangement due to acceleration/deceleration injury, internal derangement of the right shoulder, and acute traumatic sprain/strain to the cervical, dorsal, and lumbar spine. The plaintiff was considered "fully incapacitated." Dr. Opam referred the plaintiff for MRI exams.

On May 29, 2007, Dr. Opam directed the plaintiff to undergo an MRI examination of the right shoulder, cervical spine and left ankle. The MRI of the right shoulder revealed a tear of the supraspinatus tendon. The MRI of the cervical spine revealed a disc bulge at C5 C6 and muscle spasm.

On June 11 and June 25, 2007, the plaintiff was referred to orthopedic consults conducted by Dr. Remer. Dr. Remer classifies the plaintiff as "diabled." The reports, although attached to Dr. Opam's affidavit, are unsworn.

Dr. Opam again examined the plaintiff on June 27, 2007. Again, upon administration of objective range-of-motion testing, she was found to have significant restrictions. L. Browne was therafter referred to East Tremont Medical Center for steroid injection to the right shoulder, which was performed on July 19, 2007. A follow-up with Dr. Opam on August 10, 2007 revealed that the plaintiff still had restricted movement of the cervical spine. She was referred to physical therapy, records of which are attached to Dr. Opam's affidavit.

On January 15, 2010, Dr. Opam examined the plaintiff, and concluded that her injuries were the result of her May 11, 2007 auto accident. He further opined that the injuries substantially prevented plaintiff from performing customary daily activities for 90 days during the immediate 180 days following the accident.

In opposition, Defendant includes the reports of two (2) independent medical examinations of the plaintiff. The first was performed on July 24, 2007 by Dr. Julio Westerbrand, an orthopedist. In an affirmed report, and upon administration of objective testing, Dr. Westerbrand found full range of motion "with pain" in the plaintiff's cervical spine, shoulders, wrists, and ankles. Plaintiff underwent another independent medical examination conducted by Dr. Robert Israel on June 24, 2009, over two years from the date of the accident.

Dr. Israel concluded that the plaintiff had a "resolved sprain of the cervical and lumbar spine, right shoulder, and left ankle" in his affirmed report. Defendant also includes an affirmed report

from Dr. Jessica F. Berkowitz, who examined the plaintiff's May 29, 2007 MRI of the right shoulder. In her report. Dr. Berkowitz opines that "there is no evidence of acute traumatic injury to the shoulder such as fracture, bone marrow endema" or muscular tear, and whatever tear was evident was a product of natural degeneration and not a result of the incident herein. These findings, as well as those of Drs. Westerbrand and Israel, are disputed by Dr. Opam.

Defendant's motion for summary judgment is denied. Plaintiff L.Browne has submitted evidence in admissible form which raises the question of whether she has sustained a serious injury. Plaintiff produced objective, contemporaneous and qualitative medical evidence regarding her injuries. *See Blackman v. Dinstuhi*, 810 N.Y.2d 79 (1st Dept. 2006); *Jimenez v. Rojas*, 26 A.D.3d 256 (1st Dept. 2006). The objective range-of-motion testing in the record indicates that plaintiff suffered from mild to significant restrictions in her spine and shoulder. Diagnostic testing of the right shoulder revealed some evidence of tearing. Though the source of this injury is disputed, such objective testing is sufficient to create an issue of fact as to the existence of a serious injury. *Toure*, supra; *Brown v. Achy*, 776 N.Y.S.2d 56 (1st Dept. 2004).

Plaintiff's treating physician set forth the nature of her limited ranges of motion by assigning percentages to the limitations and identifying the objective tests performed in deriving those measurements. *Rivera v. Benaroti*, 815 N.Y.S.2d 44 (1st Dept. 2006). Accordingly, the admissible records submitted in opposition create an issue as to whether L.Browne suffered an injury which prevented her 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 accident. Further, the conflicting affidavits and affirmed reports submitted establish the issues exist as to whether the plaintiff's injuries were causally related to the accident as well as the nature and extent of said injuries. *See, Ins. Law Sec. 5102(d), Toure, supra.*.

For the reasons set forth herein, the defendant Joseph A. Covington's motion for summary judgment is denied.

This constitutes the decision and order of this Court.

Dated: July 2, 2010

**Hon. Mary Ann Brigantti-Hughes**