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SHORT FORM ORDER

INDEX No. 08-31042
CAL. No. 10-00707-MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 6-8-10 (#001 & #002)
MOTION DATE 8-13-10 (#003)
ADJ. DATE 9-3-10
Mot. Seq. # 001 - MD
002 - XMD
003 - XMotD

JULIA ANDENMATTEN, Plaintiff, - against - A.J. LAUBIS-CORDOVA, EMMANUEL M. LEWIS and OLAYINKA O. LEWIS, Defendants.	YOUNG & YOUNG, LLP Attorney for Plaintiff 863 Islip Avenue Central Islip, New York 11722 KELLY, RODE & KELLY, LLP Attorney for Defendant A.J. Laubis-Cordova 330 Old Country Road, Suite 305 Mineola, New York 11501 SCHONDEBARE & KORCZ Attorney for Defendant Olayinka O. Lewis 3555 Veterans Memorial Highway, Suite P Ronkonkoma, New York 11779

Upon the following papers numbered 1 to 45 read on this motion and cross motions for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1 - 14 ; Notice of Cross Motion and supporting papers 15 - 23; 24 - 38 ; Answering Affidavits and supporting papers _____; Replying Affidavits and supporting papers 39 - 41; 42 - 45 ; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant A.J. Laubis-Cordova seeking summary judgment dismissing plaintiff's complaint is denied; and it is further

ORDERED that this cross motion by defendants Emmanuel Lewis and Olayinka Lewis seeking summary judgment dismissing plaintiff's complaint is denied, and it is further

ORDERED that this cross motion by plaintiff July Andenmatten seeking partial summary judgment in her favor on the issue of liability and setting this matter down for an immediate assessment of damages is granted.

RST

This is an action to recover damages for injuries allegedly sustained by plaintiff Julia Andenmatten as a result of a four-vehicle rear-end collision that occurred on the eastbound Southern State Parkway, approximately five miles from the Meadowbrook State Parkway exit, in the Town of Hempstead, New York on April 29, 2008. Plaintiff, by her bill of particulars, alleges that she sustained various personal injuries as a result of the subject accident, including cervical thoracic, and lumbar sprains/strains; right wrist sprain; reversal of the normal lordotic curve; straightening of the cervical spine; and limited range of motion. Plaintiff alleges that she was confined to her bed for one month and to her home for two months following the accident. Plaintiff further alleges that she has been incapacitated from her employment as a waitress at Salsa Salsa of Smithtown since the date of the accident.

Defendant Laubis-Cordova now moves for summary judgment on the basis that plaintiff's alleged injuries fail to meet the "serious injury" threshold requirement of Insurance Law § 5102(d). In support of the motion, defendant Laubis-Cordova submits a copy of the pleadings, a copy of plaintiff's deposition transcript, and the sworn medical report of Dr. Isaac Cohen. Dr. Cohen, at defendant's request, conducted an independent orthopedic examination of plaintiff on March 18, 2010. The Lewis defendants cross-move for summary judgment on the basis that plaintiff's injuries to not satisfy the serious injury threshold set forth in Insurance Law § 5102(d). In support of the cross motion, the Lewis defendants submit a copy of the parties' deposition transcript. Plaintiff opposes the motion and the cross motion on the ground that defendants have failed to establish their prima facie burden that the injuries she sustained as a result of the accident do not meet the serious injury threshold requirement of Insurance Law § 5102(d). Alternatively, plaintiff asserts that the evidence submitted in opposition establishes that she sustained injuries within the "limitations of use" categories and the "90/180 days" category of serious injury. In opposition to the motions, plaintiff submits her own affidavit, the medical report of Dr. Frank Segreto, and the affidavit of Bernhard Sengstock, D.C. Plaintiff also summits unsworn copies of her paychecks and CVS pharmacy receipts.

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries (***Dufel v Green***, 84 NY2d 795, 622 NYS 2d 900 [1995]; *see also* ***Toure v Avis Rent A Car Sys.,*** 98 NY2d 345, 746 NYS2d 865 [2002]. Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (*see* ***Licari v Elliott,*** 57 NY2d 230, 455 NYS 2d 570 [1982]; ***Porcano v Lehman,*** 255 AD2d 430, 680 NYS2d 590 [1988]; ***Nolan v Ford,*** 100 AD2d 579, 473 NYS2d 579, 473 NYS2d 516 [1984], *aff'd* 64 NYS2d 681, 485 NYS2d 526 [1984]).

Insurance Law § 5102 (d) defines a "serious injury" 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 seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Sys.***, *supra;* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS 2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, such as, affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [1992]). A defendant may also establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see* ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2001]; ***Grossman v Wright***, 268 AD2d 79, [2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [1997]; ***Torres v Micheletti***, 208 AD2d 519, 616 NYS2d 1006 [1994]). Once defendant has met this burden, plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under the new York's No-Fault Insurance Law (*see* ***Dufel v Green***, *supra;* ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [2003]; ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS 2d 692 [1992]). However, if a defendant does not establish a prima facie case that the plaintiff's injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff's opposition papers (*see* ***Burns v Stranger***, 31 AD3d 360, 819 NYS2d 60 [2006]; ***Rich-Wing v Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2005]; *see generally* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Dr. Cohen in his medical report, states, in pertinent part, that an examination of plaintiff's cervical spine reveals that she exhibits "flexion and extension of 60 degrees (normal up to 46 +-6.5), and rotational motion to the right and left in the 80-degree range (normal up to 78 +-15)." The report states that plaintiff's cervical curvature is normal, and that plaintiff's cervical paravertebral muscles are supple and non-tender upon palpation. Dr. Cohen's report states that an examination of plaintiff's thoracolumbosacral spine reveals that she exhibits "flexion to 70 degrees (normal up to 66+-15), extension to 30 degrees (normal up to 33 +-5.5), and right and left lateral bending to 25 degrees (normal 29 +-6.6). Left and right rotational motion is possible to 30 degrees (normal up to 30)." The report states that plaintiff's thoracolumbosacral curvature is normal, and that her paravertebral muscles are supple and non-tender upon palpation. It states that an examination of plaintiff's right wrist reveals that she exhibits "dorisflexion to 75 degrees (75+-6.6 degrees normal), palmar flexion to 75 degree (up to 75 +-6.6 degrees normal), radial deviation to 20 degrees (up to 21 +-4 degrees normal), and ulnar deviation to 35 degrees (up to 35 +-3.8 degrees normal)." The report states that Tinel's sign and Phalen's tests are negative, and that plaintiff's pronation and supination is to 90 degrees (normal is 90 degrees). Dr. Cohen opines that plaintiff's cervical, lumbosacral, and right wrists sprains have resolved, that plaintiff does not have any evidence of residual disability or permanency related to the subject accident, and that plaintiff is capable of performing her normal daily living activities without restrictions.

Based upon the adduced evidence, defendant Laubis-Cordova has failed to demonstrate that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra;* ***Licari v Elliott***, *supra;* ***Galofaro v Wylie***, __ AD3d __, 2010 NY Slip Op 7891 [2d Dept 2010]; ***Guzman v Joseph***, 50 AD3d 741, 855 NYS2d 638 [2008]; ***Lopez v Geraldino***, 35 AD3d 398, 825 NYS2d 143 [2006]). While Dr. Cohen concluded

that plaintiff has full range of motion in her cervical and lumbosacral regions, and her right wrist, and that the sprains she sustained from the subject accident had resolved, his medical report is deficient in that the normal range of motion measurements that he set forth for plaintiff leaves the court to speculate as to the normal values (*see* ***Borelli v Ogno***, 36 AD3d 638, 826 NYS2d 585 [2007]; ***Hernandez v Stanley***, 34 AD3d 428, 824 NYS2d 149 [2006]; ***Manceri v Bowe***, 19 AD3d 462, 798 NYS2d 441 [2005]). Therefore, the court cannot conclude as a matter law, that plaintiff's limitations were mild, minor, or slight so as to be considered insignificant within the meaning of the No-Fault statute (*see* ***McLaughlin v Rizzo***, 38 AD3d 856, 832 NYS 2d 666 [2007]; ***Powell v Alade***, 31 AD3d 523, 818 NYS2d 600 [2006]; ***Aronov v Leybovich***, 3 AD3d 511, 770 NYS2d 741 [2004]).

Since defendant Laubis-Cordova failed to meet his prima facie burden that plaintiff did not sustain a serious injury within the meaning of the Insurance Law § 5102(d), it is unnecessary for the court to determine whether plaintiff's opposition papers were sufficient to raise a triable issue of fact (*see* ***Umar v Ohrnberger***, 46 AD3d 543, 846 NYS2d 612 [2007]; ***Bluth v World Omni Fin. Corp.***, 38 AD3d 817, 832 NYS2d 640 [2007]; ***Yashayev v Rodriguez***, 28 AD3d 651, 812 NYS2d 367 [2006]). Accordingly, defendant Laubis-Cordova's motion for summary judgment is denied. The Lewis defendants' cross motion for summary judgment dismissing plaintiff's complaint for failure to sustain a serious injury within the meaning of Insurance Law § 5102(d), therefore, also is denied.

As to plaintiff's cross motion for summary judgment on the issue of liability, plaintiff alleges that defendants' conduct, namely striking the rear of her vehicle while she was stopped in traffic, was the sole proximate cause of the subject accident. Plaintiff, in support of the cross motion, relies upon the evidence submitted in opposition to defendants' motion and cross motion for summary judgment. Defendant Laubis-Cordova opposes the cross motion on the ground that it is untimely and plaintiff has not provided an excuse for its late filing. Defendant also asserts that there are material issues of fact as to whether plaintiff's and Emmanuel Lewis's operation of their vehicles contributed to the happening of the subject accident. Defendant, in opposition to the motion, submits a copy of the preliminary conference stipulation and order dated January 1, 2009. The Lewis defendants also oppose plaintiff's motion on the ground that defendant Laubis-Cordova's vehicle struck their vehicle while it was stopped in traffic, causing their vehicle to be pushed into plaintiff's vehicle. The Lewis defendants rely on the evidence submitted on behalf of their cross motion for summary judgment.

As a general rule, a rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle and requires that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision (*see* ***DeLouise v S.K.I. Wholesale Beer Corp.***, 75 AD 3d 489, 904 NYS2d 761 [2010]; ***Smith v Seskin***, 49 AD3d 628, 854 NYS2d 420 [2008]; ***Klopchin v Masri***, 45 AD3d 737, 846 NYS2d 311 [2007]; ***Niyazov v Bradford***, 13 AD3d 501, 786 NYS2d 582 [2004]; "One of several nonnegligent explanations for a rear-end collision is a sudden stop of the lead vehicle" (***Chepel v Meyers***, 306 AD2d 235, 237, 762 NYS2d 95 [2003]; *see* ***Davidoff v Mullokandov***, 74 AD3d 862, 903 NYS2d 107 [2010]; ***Carhuayano v J&R Hacking***, 28 AD3d, 413, 812 NYS2d 162 [2006]). If the operator of the moving vehicle cannot come forward with any evidence to rebut the inference of negligence, the plaintiff is entitled to judgment as a matter of law (*see* ***Leal v Wolff***, 224 AD2d 392, 638 NYS2d 110 [1996]). However, the operator of the lead vehicle also has a duty not to stop suddenly or slow down without proper signaling so as to avoid a collision (*see*

Purcell v Axelsen, 286 AD2d 379, 729 NYS2d 495 [2001]).

In the instant matter, plaintiff has demonstrated her entitlement to judgment as a matter of law that she did not contribute to the happening of the subject accident (*see* ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]; ***Savarese v Cerrachio,*** __AD3d__, 2010 NY Slip Op 9118 [2010]; ***Arias v Rosario***, 52 AD3d 551, 860 NYS2d 168 [2008]). A.J. Laubis-Cordova testified that he was traveling eastbound on the Southern State Parkway when the traffic ahead of him came to a sudden stop. He testified that in an attempt to avoid hitting the vehicle in front of his, he jammed on his brakes, because he did not observe the Lewis vehicle come to stop, but that his vehicle still struck the rear of the Lewis vehicle. He testified that as a result of the impact between his vehicle and the Lewis vehicle, the Lewis vehicle moved forward and impacted the vehicle ahead of it. Additionally, plaintiff and Emmanuel Lewis testified that their vehicles were completely stopped in traffic when their vehicles were struck from the rear. Furthermore, plaintiff and Emmanuel Lewis testified that the Lewis vehicle was struck from the rear by A.J. Laubis-Cordova's vehicle prior to striking plaintiff's vehicle. Thus, plaintiff has demonstrated that her vehicle was impacted from the rear after it had been brought to a lawful stop in traffic (***Smith v Seskin***, *supra;* ***Elezovic v Harrison***, 292 AD2d 416, 739 NYS2d 410 [2002]; ***Bournazos v Malfitano***, 275 AD2d , 713 NYS2d 75 [2000]). In opposition to plaintiff's prima facie showing, defendants have failed to rebut the inference of negligence by providing a non-negligent explanation for the collision, or as to whether any negligence on the part of plaintiff contributed to the collision (*see* ***Ramirez v Konstanzer***, 61 AD3d 837, 878 NYS2d 381 [2009]; ***Jumandeo v Franks***, 56 AD3d 614, 867 NYS2d 541 [2008]; ***Lundy v Llatin***, 51 AD3d 877; 858 NYS2d 341 [2008]; ***Campbell v City of Yonkers***, 37 AD3d 750, 833 NYS2d 101 [2007]; ***Belitsis v Airborne Express Frgt. Corp.***, 306 AD2d 507, 761 NYS2d 320 [2003]). Defendant Laubis-Cordova's claim that plaintiff's cross motion is untimely is rejected, as such motion was made less than 120 days after the filing of the note of issue. Accordingly, plaintiff's cross motion for summary judgment in her favor on the issue of liability is granted.

Plaintiff shall serve a copy of this order with notice of its entry upon the Calendar Clerk of this Court. Upon such service, the Calendar Clerk shall place this matter on the CCP calendar for an inquest to ascertain and assess plaintiff's damages.

Dated: 1-10-2011

Hon. Denise F. Molia
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**