SHORT FORM ORDER

INDEX No. 09-11659
CAL. No. 10-01507-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 9-24-10
ADJ. DATE 10-22-10
Mot. Seq. # 001 - MD
002 - XMG

MARIA A. AGUILAR and SEGUNDA AGUILAR,

Plaintiffs,

- against -

AISHA CHAPMAN,

Defendant.

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Upon the following papers numbered 1 to 35 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers 21 - 33; Answering Affidavits and supporting papers 13 - 18; 32 - 33; Replying Affidavits and supporting papers 19-20; 34 - 35; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant Aisha Chapman seeking summary judgment dismissing plaintiff's complaint is denied; and it is

ORDERED that this cross motion by plaintiff Maria Aguilar seeking summary judgment in her favor on the issue of liability and dismissing the counterclaim against her is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff Maria Aguilar as a result a motor vehicle accident that occurred at the intersection Route 27 and Sunrise Highway in the Town of Babylon on November 14, 2008. The accident allegedly occurred when the vehicle operated by defendant Aisha Chapman struck the rear of the vehicle operated by plaintiff while it was stopped at a red traffic light. Plaintiff's daughter, Amanda Rivera, and plaintiff's sister, Segunda Aguilar, were passengers in her vehicle at the time of the accident. Plaintiff, by her bill of particulars, alleges that she

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sustained various personal injuries as a result of the subject accident, including disc herniations to levels C3 through C5 and L1 through L5; disc bulges at levels C5 through C7; cervical radiculopathy; internal derangement of the left knee and left shoulder; tears of the biceps tendons of the left shoulder; acromioclavicular joint hypertrophy of the left shoulder; and medial patella plica of the left knee. Plaintiff alleges that as a result of the injuries she sustained from the accident she was confined to her bed for approximately one week and her home for approximately one month following the subject accident. Plaintiff further alleges that she was incapacitated from her employment as a machine operator at Seal It Print Pack Corporation for approximately one month immediately following the accident, and that she continues to be partially disabled from her employment to date. Plaintiff is currently unemployed, because she was laid off on October 19, 2009. Defendant also interposed a counterclaim for contribution and indemnification against plaintiff, alleging that it was plaintiff's negligence that caused the accident and any injuries that Segunda Aguilar may have sustained.

Defendant now moves for summary judgment on the basis that plaintiff's injuries do not come within the meaning of the "serious injury" threshold requirement of Insurance Law § 5102(d). In support of the motion, defendant submits a copy of the pleadings, a copy of plaintiff's deposition transcript, a copy of the police motor vehicle accident report, and the sworn medical report of Dr. Paul Miller. Dr. Miller, at defendant's request, conducted an independent orthopedic examination of plaintiff on January 25, 2010. Plaintiff opposes the motion on the ground that defendant has failed to demonstrate that the injuries she sustained as a result of the subject accident do not meet the "serious injury" threshold requirement of Insurance Law § 5102(d). Alternatively, plaintiff asserts that the evidence presented in opposition shows that she sustained injuries within the "limitations of use" categories and the "90/180 days" category. In opposition to the motion, plaintiff submits a copy of her deposition transcript, the sworn medical reports of Dr. Michele Rubin and Dr. Joseph Perez, and the affidavit of Dr. Nicolas Martin.

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 NYS2d 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 NYS2d 570 [1982]; ***Porcano v Lehman***, 255 AD2d 430, 680 NYS2d 590 [1988]; ***Nolan v Ford***, 100 AD2d 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 NYS2d 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, 707 NYS2d 233 [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 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 NYS2d 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]).

Here, defendant, through the submission of plaintiff's deposition testimony and the report of her medical expert, has established her prima facie burden 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*; ***Gaddy v Eyler***, *supra*; ***Thomas v Weeks***, 61 AD3d 961, 878 NYS2d 182 [2009]). Dr. Ross, in his medical report, states, in pertinent part, that an examination of plaintiff's cervical spine reveals that she exhibits flexion of 50 degrees (normal is 50 degrees), extension of 60 degrees (normal is 60 degrees), right and left lateral flexion of 45 degrees (normal is 45 degrees), and right and left rotation of 80 degrees (normal is 80 degrees). The report states that an examination of plaintiff's lumbar spine reveals that she exhibits flexion of 80 degrees (normal is 60 degrees, "the claimant exceeds the normal value"), extension of 25 degrees (normal is 25 degrees), and bilateral bending of 25 degrees (normal is 25 degrees). It states that there is no muscle spasm or tenderness upon palpation of the paracervical and paralumbar muscles, and that the straight leg raise test is negative, bilaterally. The report states that an examination of plaintiff's right and left shoulders reveals that she exhibits flexion of 180 degrees (normal is 180 degrees), extension of 50 degrees (normal is 50 degrees), abduction of 180 degrees (normal is 180 degrees), adduction of 50 degrees (normal is 50 degrees), and internal and external rotation of 90 degrees (normal is 90 degrees). It states that an examination of plaintiff's right and left knee reveals that she exhibits flexion of 135 degrees (normal is 110 degrees, "the claimant exceeds the normal value"), and extension of 0 degrees (normal is 0 degrees). Dr. Ross opines that the sprains that plaintiff sustained to her cervical, thoracic, and lumbar spines and to her left shoulder and left knee as a result of the accident have all resolved. The report concludes that there is no evidence of an orthopedic disability.

Therefore, the burden shifted to plaintiff to come forward with competent admissible medical evidence based on objective findings, sufficient to raise a triable issue of fact that she sustained a "serious injury" (*see* ***Gaddy v Eyler***, *supra*; ***Luckey v Bauch***, 17 AD3d 411, 792 NYS2d 624 [2005];***McLoyrd v Pennypacker***, 178 AD2d 277, 577 NYS2d 272 [1991]). A plaintiff must demonstrate a total loss of use of a body organ, member, function or system to recover under the "permanent loss of use" category,(*see* ***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). "Whether a limitation of use or function is 'significant' or 'consequential' * * * relates to medical significance and 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***, *supra at* 798; *see* ***Toure v Avis Rent A Car Sys.***, *supra*). Therefore, in order for a plaintiff to prove the extent or degree of physical limitation under the "permanent consequential limitation of use of a body organ or member" or the "significant limitation of use of a body function or system" category, a plaintiff must present either objective medical evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration (*see* ***Magid v Lincoln Servs. Corp.***, 60 AD3d 1008, 877 NYS2d 127 [2009]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2006]; ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2006]; ***Meyers v Bobower Yeshiva Bnei Zion***, 20 AD3d 456, 797 NYS2d 773 [2005]). A sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part may also suffice (*see* ***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]; ***Dufel v Green***, *supra*). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]).

In opposition, plaintiff has raised a triable issue of fact as to whether she sustained a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (*see* ***Walker v Esses***, 72 AD3d 938, 2010 NY Slip Op 3310 [2010]; ***Yeong Hee Kwak v Villamar***, 71 AD3d 762; 894 NYS2d 916 [2010]; ***Parker v Singh***, 71 AD3d 750, 896 NYS2d 437 [2010]; ***Benitez v Lashanitz***, 70 AD3d 879, 897 NYS2d 441 [2010]; ***Sanevich v Lyubomir***, 66 AD3d 665, 885 NYS2d 635 [2009]). The affidavit of plaintiff's chiropractor, Dr. Nicolas Martin, and the medical report of plaintiff's treating physician, Dr. Joseph Perez, reveal that plaintiff had significant range of motion limitations in her cervical and lumbar regions and in her left shoulder and knee contemporaneous with the accident, and that such limitations still were present when she was re-examined on August 11, 2010 and September 13, 2010, respectively, by each doctor. Plaintiff's experts opine that she sustained a cervical and lumbar derangement, which resulted in significant limitations in her ranges of motion in her cervical and lumbar regions. Additionally, Dr. Perez states that as a result of the subject accident plaintiff sustained a labral tear and impingement of the left shoulder, which resulted in a permanent disability and significant limitation, and interferes with her home activities and work capabilities.

Consequently, the affirmed medical reports of plaintiff's experts conflict with those of defendant's expert, who found that there were no significant limitations in plaintiff's ranges of motion in neither her cervical and lumbar spine, nor her left shoulder and knee. "Where conflicting medical evidence is offered on the issue of whether a plaintiff's injuries are permanent or significant, and varying inferences may be drawn, the question is one for the jury" (***Noble v Ackerman***, 252 AD2d 392, 395, 675 NYS2d 86 [1998]; *see* ***LaMasa v Bachman***, 56 AD3d 340, 869 NYS17 [2008]; ***Reynolds v Burghezi***, 227 AD2d 941, 643 NYS2d 248 [1996]). Although disc bulges and herniations, standing alone are not

evidence of a "serious injury" under Insurance Law § 5102 (d), evidence of range of motion limitations, when coupled with positive MRI findings and objective test results, are sufficient to defeat summary judgment (*see* ***Wadford v Gruz***, 35 AD3d 258, 826 NYS2d 57 [2006]; ***Meely v 4 G's Truck Renting Co., Inc.***, 16 AD3d 26, 789 NYS2d 277 [2005]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2005]). Thus, plaintiff has submitted sufficient evidence to raise a triable issue of fact as to whether her injuries are causally related to the subject accident (*see* ***Barry v Valerio***, 72 AD3d 996, 902 NYS2d 97 [2010]; ***Paula v Natala***, 61 AD3d 944, 879 NYS2d 153 [2009]; ***Azor v Torado***, 59 AD3d 367, 873 NYS2d 655 [2009]).

Lastly, plaintiff cross-moves for summary judgment on the issue of liability in her favor. Plaintiff alleges that defendant's action, namely striking the rear of her vehicle while she was stopped at a red light, was the sole proximate cause of the accident. In support of the cross motion, plaintiff relies on copies of the parties' deposition transcripts and a copy of the police motor vehicle accident report. Defendant opposes the cross motion, claiming there are material issues of fact as to how the accident occurred, whether plaintiff's vehicle came to a sudden and unexpected stop, and whether plaintiff's view was obstructed by other vehicles in the left turning lane.

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 AD3d 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 [2nd Dept 2010]; ***Arias v Rosario***, 52 AD3d 551, 860 NYS2d 168 [2008]). Plaintiff testified at an examination before trial that her vehicle was struck from the rear by defendant's vehicle while it was stopped at a red light, waiting for traffic to clear in order to make a right turn onto Sunrise Highway. Thus, plaintiff has demonstrated that her vehicle was impacted from the rear after it had been brought to a lawful stop in traffic (*see* ***Smith v Seskin***, *supra*; ***Elezovic v Harrison***, 292 AD2d 416, 739 NYS2d 410 [2002]; ***Bournazos v Malfitano***, 275 AD2d 437, 713 NYS2d 75 [2000]). In opposition to plaintiff's prima facie showing, defendant has failed to rebut the inference of negligence by providing a non-negligent explanation for the collision or to show negligence on the part of plaintiff that 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]). Accordingly, plaintiff's cross motion for an order granting summary judgment on the issue of liability and dismissing the counterclaim against her is granted.

Dated: 2-7-2011

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

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