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SHORT FORM ORDER

COPY

INDEX No. 08-23223
CAL No. 10-00951MV

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 6-25-10 (#002)
MOTION DATE 9-28-10 (#003)
ADJ. DATE 12-3-10
Mot. Seq. # 002 - MG
003 - MD

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DORA VILMA LEON,

Plaintiff,

- against -

COUNTY OF SUFFOLK and JOSEPH G. CONDOLFF,

Defendants.

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Upon the following papers numbered 1 to 34 read on these motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; 23 - 30 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 13 - 22; 31 - 32 ; Replying Affidavits and supporting papers 33 - 34 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff Dora Leon seeking partial summary judgment on the issue of liability against defendants and the motion by defendants County of Suffolk and Joseph Condolff seeking summary judgment dismissing plaintiff's complaint hereby are consolidated for the purposes of this determination; and it is

ORDERED that the motion by plaintiff Dora Leon 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; and it is further

ORDERED that the motion by defendants County of Suffolk and Joseph Condolff seeking summary judgment dismissing plaintiff's complaint on the ground that plaintiff did not sustain a serious injury under Insurance Law § 5102(d) is denied.

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This is an action to recover damages for injuries allegedly sustained by plaintiff Dora Leon as a result of a motor vehicle accident that occurred at the intersection of Route 110 and East 13th Street in the Town of Huntington, New York on November 11, 2007. The accident allegedly occurred when the vehicle operated by plaintiff was struck in the rear by the vehicle operated by defendant Joseph Condolff and owned by defendant County of Suffolk. At the time of the accident, defendant Joseph Condolff was operating a police vehicle during the course of his employment as a Suffolk County police officer. By her bill of particulars, plaintiff alleges that she sustained various personal injuries as a result of the subject accident, including a partial tear of the suprasinatus tendon in the right shoulder; a rotator cuff impingement in the right shoulder; right shoulder sprain; cervical and lumbar sprains; disc bulges at levels C2 through C7 and levels L2 through S1; and cervical and lumbar radiculopathy. Plaintiff alleges that following the accident she was incapacitated from her employment as an assembler for approximately one month. Plaintiff further alleges that she was confined to her bed and home for approximately one month following the subject accident.

Defendants now move for summary judgment on the basis that plaintiff did not sustain a "serious injury" within the meaning Insurance Law § 5102(d). In support of the motion, defendants submit a copy of the pleadings, plaintiff's deposition transcript, copies of plaintiff's medical records, and the sworn medical reports of Dr. Arthur Bernhang and Dr. Howard Reiser. At defendants' request, Dr. Bernhang conducted an independent orthopedic examination of plaintiff and Dr. Reiser conducted an independent neurological examination of plaintiff on March 15, 2010. Plaintiff opposes the 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). In the alternative, plaintiff asserts that she sustained injuries within the "limitation of use" and the "90/180 days" categories of serious injury as a result of the accident. In opposition to the motion, plaintiff submits a copy of the police motor vehicle accident report, her 50-H hearing transcript, Police Officer Condolff's deposition transcript, and her medical records. Plaintiff also submits the unsworn medical report of Dr. Ronald Wagner and the sworn medical report of Dr. Michele Lester.

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, 798, 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."

In order to recover under the "limitation of use" 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 in order to prove the extent or degree of physical limitation he or she sustained (*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.***, *supra*; ***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]).

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]).

Based upon the adduced evidence, defendants have failed to establish, prima facie, their burden that plaintiff did not sustain a serious injury as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Senior v Mikhailov***, 71 AD3d 864, 895 NYS2d 864 [2010]). In support of their motion, defendants submitted evidence demonstrating that plaintiff sustained significant range of motion limitations in the lumbar and cervical regions of her spine and in her right shoulder (*see* ***Borras v Lewis***, __ AD3d __, 913 NYS2d 577 [2010]; ***Betivegna v Stein***, 42 AD3d 555, 841 NYS2d 316 [2007]). Defendants' examining orthopedist, Dr. Berhang, in his medical report, found that plaintiff had significant range of motion limitations in her cervical and lumbar regions and in her right shoulder more than three years after the accident (*see* ***Landman v Sarcona***, 63 AD3d 690, 880 NYS2d 168 [2009]; ***Bagot v Singh***, 59 AD3d 368, 871 NYS2d 917 [2009]). Dr. Berhang also states in his medical report that plaintiff sustained a right shoulder rotator cuff tear/tendinitis as a result of the accident. Notably, defendants' examining neurologist, Dr. Reiser, despite concluding that plaintiff does not have

any neurological deficits, failed to address plaintiff's right shoulder in his examination (*see* ***Joseph v Hampton***, 48 AD3d 638, 852 NYS2d 335 [2008]). Additionally, Dr. Reiser states in his medical report that there is "mild nerve roots involvement" in her cervical and lumbosacral regions, despite opining that plaintiff's lower back pain is subjective and without radicular findings. Furthermore, the medical records that defendants submitted with their motion papers indicate that plaintiff had significant range of motion limitations in her spine, and her right shoulder contemporaneous with the subject accident. Finally, plaintiff testified that she continues to receive physical therapy for the injuries she sustained as a result of the subject accident. Therefore, defendants' proof fails to objectively demonstrate that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (*see* ***Madatova v Madatova***, 27 AD3d 531, 811 NYS2d 760 [2006]; ***Dioguardi v Weiner***, 288 AD2d 253, 733 NYS2d 116 [2001]; ***Morales v New York City Transit Auth.***, 287 AD2d 604, 731 NYS2d 754 [2001]). Since defendants failed to meet their prima facie burden, the sufficiency of plaintiff's papers in opposition need not be considered (*see* ***Krayn v Torella***, 40 AD3d 588, 833 NYS2d 406 [2007]; ***Facci v Kaminsky***, 18 AD3d 806, 795 NYS2d 457 [2005]; ***Rich-Wing v Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2005]). Accordingly, defendants' motion for summary judgment is denied.

Plaintiff also moves for summary judgment on the issue of liability on the basis that Officer Condolff's negligent operation of his police vehicle is the proximate cause of the accident. Specifically, plaintiff asserts that Officer Condolff struck the rear of her vehicle while she was stopped at a red light on Route 110. In support of the motion, plaintiff submits a copy of the pleadings, the police motor vehicle accident report, and the parties' deposition transcripts. Defendants oppose the instant motion on the ground that there are material issues of fact as to whether plaintiff's actions may have contributed to the accident's occurrence. In opposition to the motion, defendants submit a copy plaintiff's 50-H hearing transcript.

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 established her entitlement to judgment as a matter law by demonstrating that her vehicle was at a complete stop in traffic when it was struck in the rear by defendants' vehicle, and therefore, her actions were not the proximate cause of the subject accident (*see* ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]; ***Savarese v Cerrachio***, 79 AD3d 725, 911 NYS2d 921 [2010]; ***Arias v Rosario***, 52 AD3d 551, 860 NYS2d 168 [2008]). Defendants, in opposition

to plaintiff's prima facie showing, have failed to raise a triable issue of fact (*see generally* ***Zuckerman v City of New York***, *supra*). Officer Condolff testified at an examination before trial that he was not in "emergency mode," but was on routine patrol, heading towards a reckless endangerment crime scene that had already been set up when the accident occurred. Officer Condolff testified that a local notification had been dispatched stating that shots had been fired at the reckless endangerment crime scene and he was looking for the vehicle that may have been involved when he struck the rear of plaintiff's stopped vehicle. Thus, defendants have 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 motion for summary judgment on the issue of liability is granted. Plaintiff is directed to serve a copy of this order with notice of entry upon the Calendar Clerk of this Court. Upon such service, the Calendar Clerk is directed to place this matter on the Calendar Control Part Calendar for the next available date.

Dated: 3-15-2011

Hon. Denise F. Molia

J.S.C.

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