SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 9 SUFFOLK COUNTY

INDEX NO.: 46925-09

PRESENT:
HON. DANIEL MARTIN

Motion Date: 1/14/11; 3/1/11
Submitted: 3/22/11
Motion Sequence Nos.: 01 - **MD**
02 - **MD**

ELZBIETA RACZUK,

Plaintiff,

-against-

PEDRO A. ROSARIO,

Defendants.

PLAINTIFF'S ATTY:
The Noll Law Firm, PC.
170 Old Country Road
Mineola, New York 11501

DEFENDANT'S ATTY:
Law Offices of Frank J. Laurino
999 Stewart Avenue
Bethpage, NY 11714

The following named papers have been read on this motion:	
Order to Show Cause/Notice of Motion	**X**
Cross-Motion	**X**
Answering Affidavits	**X**
Replying Affidavits	**X**

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, Elzbieta Raczuk, on November 15, 2008 at approximately 5:00 p.m. While the plaintiff pedestrian was crossing Route 27A in Copiague, New York, she was struck by a vehicle owned and operated by defendant Pedro Rosario.

It is undisputed that the accident occurred at the T-intersection of Route 27A and Great Neck Road. Route 27A, a two-way street with two lanes in each direction, runs east and west, and Great Neck Road, a two-way street with two lanes in each direction, runs north and south, and terminates at a T-intersection with Route 27A. On the day of the accident, the intersection was controlled by traffic signals. Plaintiff was crossing Route 27A in a northerly direction, and the defendant's vehicle, which was traveling southbound on Great Neck Road, was in the process of making a left turn into the eastbound lane of Route 27A at the intersection when the accident occurred.

Plaintiff now moves for partial summary judgment in her favor on the issue of liability on

the ground that defendant failed to yield the right-of-way upon entering an intersection in violation of Vehicle and Traffic Law § 1111 and § 1146, and thus, defendant was negligent as a matter of law. In support, plaintiff submits, *inter alia*, the pleadings and the deposition testimony given by plaintiff and defendant.

At her examination before trial, plaintiff testified to the effect that, on the day of the accident, she had walked on a sidewalk on Route 27A, and had arrived at the subject intersection. After the crosswalk sign turn to "green," she started crossing the roadway within the crosswalk, and continued looking at the green sign until she was hit on her left side by the defendant's vehicle. Plaintiff stated that, when she saw the vehicle for the first time, which was a car length away from her, it was turning from Great Neck Road towards her.

At his deposition, defendant testified to the effect that, on the day of the accident, he had been traveling southbound on Great Neck Road. One or two blocks away from the intersection with Route 27A, when he first saw the traffic light which was green, he was driving at the speed of 15 miles per hour. It took him about a minute to reach the intersection. During the minute, he continued looking at the green light, and it never changed. He proceeded into the intersection with his left turn signal activated and hit the plaintiff. Prior to the accident, when he approached Route 27A, he did not see any pedestrians walking on the sidewalk.

While a driver is required to see what, by the proper use of his or her senses, he or she might have seen (*see*, ***Levy v Town Bus Corp***, 293 AD2d 452, 739 NYS2d 459 [2d Dept 2002]; ***Gonzalez v County of Suffolk***, 277 AD2d 350, 716 NYS2d 404 [2d Dept 2000]; *see also*, PJI 2:77.1 [2006]), wayfarers are not at liberty to close their eyes in crossing a city street. Their duty is to use their eyes, and thus protect themselves from danger (*see generally*, ***Barker v Savage***, 45 NY 191 [1871]; ***Thoma v Ronai***, 189 AD2d 635, 592 NYS2d 333 [1st Dept 1993]). The issue of comparative negligence is for a jury to decide (*see*, ***John v Leyba***, 38 AD3d 496, 831 NYS2d 488 [2d Dept 2007]; ***Gaeta v Carter***, 6 AD3d 576, 775 NYS2d 86 [2d Dept 2004]).

Here, plaintiff failed to establish her entitlement to judgment as a matter of law. The deposition testimony of plaintiff and defendant conflicted with each other as to the happening of the accident (*see*, ***Viggiano v Camara***, 250 AD2d 836, 673 NYS2d 714 [2d Dept 1998]). The conflicting testimony of plaintiff and defendant as to which party was properly proceeding in the roadway raised a triable issue of fact on the question of liability (*see*, ***Alexandre v Dweck***, 44 AD3d 597, 848 NYS2d 181 [2d Dept 2007]). Under the circumstances, there are questions of fact as to whether the plaintiff pedestrian was comparatively negligent, and whether the defendant motorist exercised due care to avoid the collision (*see*, ***D.F. v Wedge Mascot Corp.***, 43 AD3d 1372, 843 NYS2d 886 [1st Dept 2007]; ***Dragunova v Dondero***, 305 AD2d 449, 758 NYS2d 819 [2d Dept 2003]; ***Garner v Fox***, 265 AD2d 525, 696 NYS2d 868 [2d Dept 1999]). Thus, plaintiff's motion for summary judgment in her favor on the issue of liability is denied.

Defendant cross-moves for summary judgment in his favor dismissing the complaint on the ground that plaintiff has not sustained a serious injury as defined in Insurance Law § 5102 (d).

By her bill of particulars, plaintiff alleges that she sustained serious injuries as a result of the subject accident, including tear of the fibular collateral ligament of the right knee; abrasions, bruising and scars of the right and left knee; compression fracture of the T1, T2 and T3 vertebrae; a herniated disc at C4-C5; a bulging disc at C3-C4; and cervical radiculopathy.

Insurance Law § 5102 (d) defines "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 "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed, or there must be 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 (***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see*, ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Akhtar v Santos***, 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff's own deposition testimony and the affirmed medical report of the defendant's own examining physician (*see*, ***Moore v Edison***, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; ***Farozes v Kamran***, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see*, ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Here, defendant failed to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see*, ***Nembhard v Delatorre***, 16 AD3d 390, 791 NYS2d 144 [2d Dept 2005]). On January 6, 2010, approximately one year and two months after the subject accident, defendant's examining radiologist, Dr. Sheldon Feit, reviewed two MRI examinations of the plaintiff's right knee and cervical spine, performed on April 2, 2009 and January 17, 2009 respectively. Dr. Feit found that no meniscal tears were seen; that there was a small joint effusion; and that there were no discernable abnormalities in the cervical spine.

On October 8, 2010, approximately two years after the subject accident, defendant's examining orthopedist, Dr. Robert Israel, examined plaintiff using certain orthopedic and neurological tests, including cervical compression test, Spurling test, straight leg raising test, and McMurray test. Dr. Israel found that all the test results were negative or normal, and that there was no tenderness, spasm or effusion in the plaintiff's cervical, thoracic and lumbar spine and knees. Dr. Israel performed range of motion testing on the plaintiff's cervical and lumbar spine and knees using a goniometer, and found that plaintiff had normal range of motion. Nevertheless, Dr. Israel failed to specify the degree of range of motion in right and left rotation of the plaintiff's lumbar spine (*see*, ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]).

On May 19, 2009, approximately six months after the subject accident, an independent neurologist, Dr. Maria DeJesus, examined plaintiff using certain orthopedic and neurological tests, including Phalen's test, Tinel's test, Patrick's test, and Kernig's test. Dr. DeJesus found that all the neurological and orthopedic test results were negative or normal. Dr. DeJesus performed range of motion testing on plaintiff's cervical and thoracolumbar spine, and found that her ranges of motion were all within normal ranges. Nevertheless, Dr. DeJesus failed to specify the degree of range of motion in rotation of the lumbar spine (*see*, *id.*). Dr. DeJesus also failed to set forth any objective tests with regard to the plaintiff's cervical spine. Moreover, Dr. DeJesus failed to address the plaintiff's claim, clearly set forth in the bill of particulars, that she sustained knee injuries (*see*, ***Volpetti v Kap***, 28 AD3d 750, 814 NYS2d 236 [2d Dept 2006]; ***Sayers v Hot***, 23 AD3d 453, 805 NYS2d 571 [2d Dept 2005]).

On May 19, 2009, an independent orthopedist, Dr. Raghava Polavarapu, examined plaintiff using certain orthopedic and neurological tests, including a cervical compression test, McMurray test, and Lachman test. He found that all the test results were negative or normal. Dr. Polavarapu reported his findings with respect to the various ranges of motion of plaintiff's cervical spine and knees and found range of motion restrictions: 40 degrees flexion and extension (45 degrees normal), 50 degrees right and left rotation (70 degrees normal), and 40 degrees right lateral flexion (45 degrees normal) in the cervical spine and 120 degrees flexion (130 degrees normal) in both knees.

On January 20, 2009, approximately two months after the subject accident, an independent chiropractor, Dr. Robert Snitkoff, examined plaintiff using certain orthopedic and neurological tests, including cervical distraction test, Soto Hall Test, foraminal compression test, Jackson's compression test, straight leg raising test, Minor's sign, Ely's sign, Fabere-Patrick sign, and Kemp's test. Dr. Snitkoff found that all the test results were negative or normal, and that there was no spasm in the cervical and lumbar spine, although there was a complaint of minimal tenderness. Dr. Snitkoff performed range of motion testing on plaintiff's cervical and lumbar spine, and found that her ranges of motion were all within normal ranges. Nevertheless, Dr. Snitkoff failed to address the plaintiff's claim, clearly set forth in the bill of particulars, that she sustained knee injuries (*see*, ***Volpetti v Kap***, *supra*; ***Sayers v Hot***, *supra*).

On March 10, 2009, an independent physician, Dr. Eric Roth, examined plaintiff using certain orthopedic and neurological tests, including cervical distraction test, Lachman test, and McMurray test. Dr. Roth found that all the test results were negative or normal, and that there was no tenderness or spasm in the plaintiff's cervical and thoracic spine and knees. Dr. Roth performed range of motion testing on plaintiff's cervical spine and knees, and found that her ranges of motion were all within normal ranges. Nevertheless, Dr. Roth failed to specify the degree of range of

motion in plaintiff's thoracolumbar spine in support of his conclusion that plaintiff did not sustain a serious injury (*see*, ***Browdame v Candura***, *supra*).

Inasmuch as defendant failed to meet his prima facie burden, it is unnecessary to consider whether the papers submitted by plaintiff in opposition to defendant's motion for summary judgment were sufficient to raise a triable issue of fact (*see*, ***McMillian v Naparano***, 61 AD3d 943, 879 NYS2d 152 [2d Dept 2009]; ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]).

In view of the foregoing, the motion by plaintiff for partial summary judgment on the issue of liability is denied, and the cross motion by defendant for summary judgment on the issue of serious injury is denied.

So Ordered.

Dated: June 15, 2011
Riverhead, NY

HON. DANIEL MARTIN, A.J.S.C.