SHORT FORM ORDER

INDEX No. 04-23006
CAL No. 10-01319MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 11-4-10 (#005 & #006)
MOTION DATE 12-20-10 (#007)
ADJ. DATE 4-14-11
Mot. Seq. # 005 - MG
006 - MG
007 - XMD
008 - XMG

HENRY MERCADO BRAVO and ELVIRA FAMILIA, Plaintiffs, - against - ANGEL C. CARRION, CAROLIN M. CARRION, GALAXY CARTING CORPORATION, JAYCON PERFORMANCE AND AUTO, INC., JACOB OTERO AND JOHN DOE, a fictitious name for a person presently unknown, Defendants.	SANFORD L. PIROTIN, PC Attorney for Plaintiffs 323 Madison Street Westbury, New York 11590 MARTYN, TOHER & MARTYN, ESQS. Attorney for Defendants Carrion 330 Old Country Road, Suite 211 Mineola, New York 11501 RUBIN, FIORELLA & FRIEDMAN, LLP Attorney for Defendant Galaxy Carting 292 Madison Avenue New York, New York 10017 MOLOD SPITZ & DeSANTIS, PC Attorney for Defendant Jaycon Performance and Jacob Otero 104 West 40th Street New York, New York 10018

Upon the following papers numbered 1 to 62 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause (005) and supporting papers 1 - 22 ; Notice of Motion/Order to Show Cause (006) and supporting papers 23 - 39 ; Notice of Cross Motion (007) and supporting papers 40 - 42 ; Notice of Cross Motion (008) and supporting papers 42a - 42c ; Answering Affidavits and supporting papers 43 - 46c ; Replying Affidavits and supporting papers 47 - 48 ; Other Plaintiffs' Affidavits in Opposition and supporting papers 49 - 62 ; it is,

ORDERED that the defendants' motions for summary judgment, designated as motion sequence numbers #005, #006, #007, and #008, are consolidated for the purposes of this determination; and it is further

ORDERED that the motions (#005 and #008) by defendant Galaxy Carting Corporation for an Order, pursuant to CPLR 3212, dismissing plaintiffs' complaints and all cross-claims against it are granted; and it is further

ORDERED that the motion (#006) by defendants Jaycon Performance and Auto, Inc., and Jacob Otero for an Order, pursuant to CPLR 3212, dismissing plaintiffs' complaint and any of defendants' cross-claims is granted; and it is further

ORDERED that the cross-motion (#007) of defendants Angel C. Carrion and Carolin M. Carrion for an Order, pursuant to CPLR 3212, dismissing plaintiff Elvira Familia's complaint is denied.

The instant action seeks to recover damages for personal injuries allegedly sustained by plaintiffs as a result of a motor vehicle accident that occurred on Suffolk Avenue approximately 420 feet west of Route 111 in the Town of Islip on August 15, 2004 at approximately 2:00 a.m. Plaintiff Henry Mercado Bravo ("Bravo") was the front seat passenger and plaintiff Elvira Familia ("Familia") was a rear seat passenger in a 1995 Mitsubishi automobile driven by defendant Angel C. Carrion and owned by defendant Carolin M. Carrion. The Carrion vehicle collided with a parked 1990 Western Star truck owned by defendant Galaxy Carting Corporation ("Galaxy") and in the custody of defendant Jaycon Performance and Auto, Inc. ("Jaycon") and/or its president defendant Jacob Otero ("Otero"). The plaintiffs allege that defendants Carrion were negligent in the maintenance, ownership and control of the Mitsubishi automobile at the time of the accident, and that the defendant Angel C. Carrion was negligent in operating the vehicle at a dangerously fast rate of speed, in failing to keep the vehicle in its proper lane of traffic, in operating the vehicle while under the influence of and while his ability to drive was impaired by the consumption of alcohol, and in causing the vehicle to collide with the Western Star truck. In addition, plaintiffs allege that defendant Galaxy illegally parked the Western Star truck at or about the location where the collision occurred and that defendants Jaycon and Otero illegally, negligently, carelessly and recklessly parked the Western Star truck at or about the location where the collision occurred.

Defendant Galaxy now moves for an Order pursuant to CPLR 3212 dismissing the complaint and all cross-claims asserted against it on the ground that the negligence of the defendants Carrion was the sole cause of the collision. In support of its motion, defendant Galaxy submits, *inter alia*, the pleadings, the bill of particulars, transcript of plaintiff Familia's December 28, 2006 examination before trial, transcripts of plaintiff Bravo's September 13, 2005 and December 28, 2006 examinations before trial, transcripts of examinations before trial of defendants Galaxy, Carrion and Otero and non-party witness police officer John Brunkard, the police accident report, and a Jaycon job order dated August 4, 2004.

Defendants Jaycon and Otero move for an Order pursuant to CPLR 3212 dismissing the complaint and all cross-claims asserted against them on the ground that they are not responsible for the plaintiffs' injuries because the actions of defendants Carrion were the sole proximate cause of the accident. Defendants Carrion oppose defendant Galaxy's motion for dismissal and that portion of the motion of defendants Jaycon and Otero which requests a dismissal of the complaint against them, alleging that there are questions of fact with regard to the legality of the parking of the Western Star truck and its involvement with the accident.

Plaintiffs' opposition to the motions include affidavits of plaintiff Familia and non-party Abraham Mercado, an affirmation of non-treating physician, Huseyin Tuncel, M.D., and a certified copy of a Town of Islip work order dated May 2, 1996. Neither copies of pleadings nor copies of bill(s) of particular were attached to plaintiffs' opposing papers.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see,* ***Rotuba Extruders, Inc. v Ceppos***, 46 NY2d 223, 413 NYS2d 141[1978]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well-settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797,799 [2d Dept 1988]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see* ***Alvarez v Prospect Hosp.***, *supra*).

It is clear that a rear-end collision with a stopped vehicle creates a *prima facie* case of negligence against the driver of the moving vehicle and imposes upon that driver a duty to provide a non-negligent explanation for the collision (*see* ***Blasso v Parente***, 79 AD3d 923, 913 NYS2d 306 [2d Dept 2010]; ***DeLouise v S.K.I. Wholesale Beer Corp.***, 75 AD3d 489, 904 NYS2d 761 [2d Dept 2010]; ***Mandel v Benn***, 67 AD3d 746, 889 NYS2d 81 [2d Dept 2009]). If the operator of the moving vehicle fails to come forward with evidence to rebut the inference of negligence, the court may award summary judgment as a matter of law (*see* ***Mandel v Benn***, *supra*; ***Russ v Investech Securities, Inc.***, 6 AD3d 602, 775 NYS2d 867 [2d Dept 2004]; ***Jaffe v Miller***, 295 AD2d 743 NYS2d 294 [2d Dept 2002]).

Plaintiff Familia testified at her examinations before trial that she was a rear seat passenger in an automobile driven by defendant Angel Carrion on August 15, 2004 at approximately 2:00 a.m. when it was involved in an accident. The weather was foggy and drizzling at the time. She stated that she was asleep or had her eyes closed immediately prior to and at the time of the collision, which occurred on the westbound side of Suffolk Avenue approximately 420 feet west of Islip Avenue. Plaintiff Bravo testified at his examinations before trial that he was traveling in the front passenger seat while defendant Carrion operated his daughter's 1995 Mitsubishi automobile at speeds of 60 to 70 miles per hour on Suffolk Avenue where the speed limit was 30-35-40 miles per hour. He indicated that defendant Carrion swerved to the right in order to pass a yellow vehicle (which had its left turn signal operating) and the Carrion vehicle suddenly impacted the truck which was parked on the side of the road with its rear wheels outside the parking lane. Plaintiff Bravo testified that he was unconscious for fifteen minutes after the accident and "came to" while on a stretcher or gurney.

Although defendant Angel Carrion testified at his examination before trial that he did not think that he traveled faster than 40 miles per hour at the time of the accident, he indicated that he had drunk

four shots of Brugal (rum from Santo Domingo) and two or three drinks of Remy Martin (a cognac) in the hours prior to the accident and that it was raining with a lot of fog. He stated that the front right side of the Mitsubishi vehicle he was operating came into contact with the left rear of the parked trailer of the Western Star truck owned by defendant Galaxy. He did not recall seeing any cars ahead of him in the same lane or to the left of him immediately prior to the accident, and did not see the trailer/truck at any point before the impact with it. Defendant Carrion stated that he may have observed the trailer/truck after the collision but that he had no "consciousness" of it because his "mind wasn't right." Despite this testimony, he stated that the trailer was more towards the street than the sidewalk and that he thought "the left part" of the trailer was in his lane of travel "because that's the part I hit." He did not recall if part of the left side or the whole left side of the trailer was in the road. Defendant Angel Carrion was arrested at the scene of the accident and eventually plead guilty to driving while intoxicated.

Defendant Otero testified at his examination before trial that in August 2004 he was the owner and only employee of defendant Jaycon, which was in the auto and truck repair business, and that a Western Star truck owned by defendant Galaxy was in the custody and care of Jaycon on August 14, 15 and 16. He stated that on August 14, 2004 he parked the truck on Suffolk Avenue across the street from his shop (*i.e.* in the westerly direction) entirely in the parking lane, leaving a foot or two of space between the truck and the white shoulder line on the road. Defendant Otero maintained that he often parked trucks in that location, had never received a ticket for doing so, and did not observe any "no parking" signs in the area where he parked the truck. He did not become aware that defendant Galaxy's truck had been involved in an accident until Monday, August 16, 2004 when he was unable to move the truck and found a note left on it by the Suffolk County Police Department. Police Officer John Brunkard testified at an examination before trial that he observed the truck entirely within the shoulder of the roadway when he arrived at the scene of the accident and that the vehicle driven by defendant Angel Carrion was partly on the shoulder and partly in the roadway. He testified that, to the best of his recollection, the truck was permitted to be parked where it was located and that he did not issue a summons for an illegally parked vehicle. David Warren, the president of defendant Galaxy, testified that Galaxy owned a 1990 Western Star truck, that it had been brought to defendant Jaycon for repairs during the first week of August 2004, that it was left with defendant Jaycon for a few weeks, and that during that time period no one from Galaxy had access to the truck. He stated that the truck was not picked up until a date on or after August 17, 2004. Moreover, Mr. Warren indicated that defendant Galaxy was not aware of the accident until a year or two after it occurred.

Based upon the testimony of plaintiff Bravo, plaintiffs allege that the truck parked by defendant Jaycon was within the travel portion of the roadway. Abraham Mercado, the father of plaintiff Bravo, states in an affidavit submitted in opposition to the motions, that shortly after dawn on August 15, 2004 he went to the place where the accident occurred. He averred that he saw a sign stating that there was no parking permitted on Suffolk Avenue in the area where the truck had been parked. Plaintiffs annex a certified copy of a Town of Islip work order dated May 2, 1996 which indicates that "No Parking Anytime" signs were installed on the north side, westerly direction of Suffolk Avenue 400' and 450' west of Joshuas Path (Route 111).

Here, it is clear that defendant Angel Carrion, the driver of the vehicle which collided with the rear end of a parked vehicle, has not come forward with any evidence which would rebut the

presumption that he was negligent in the operation of the Mitsubishi. He was operating the motor vehicle while his ability to do so was impaired by the use of alcohol, he was operating at a high rate of speed under the wet and foggy conditions prevailing at the time of the collision, and he failed to observe the parked vehicle until he collided with it. Plaintiffs' allegations that the truck/trailer was parked illegally is of no import, since they have not shown that it was the proximate cause of the accident (*see* ***Peralta v Manzo***, 74 AD3d 1307, 905 NYS2d 245 [2d Dept 2010]; ***Dormena v Wallace***, 282 AD2d 425, 723 NYS2d 72 [2d Dept 2001]; ***Marsella v Sound Distributing Corp.***, 248 AD2d 683, 670 NYS2d 559 [2d Dept 1998]; ***Feehan v Hon-Suh Park***, 248 AD2d 430, 668 NYS2d 946 [2d Dept 1998]). Accordingly, the motions of defendants Galaxy, Jaycon and Otero which seek an order granting summary judgment dismissing the complaint and any or all cross-claims alleged against them are granted.

Defendants Angel Carrion and Carolin Carrion seek an Order dismissing the complaint of plaintiff Familia against them on the grounds that her injuries do not meet the serious injury threshold requirement under Insurance Law § 5102. They rely upon the submissions of defendants Jaycon and Otero to support their motions. Defendants Jaycon and Otero submit, *inter alia*, the pleadings, transcripts of plaintiff Familia's December 28, 2006 and February 20, 2009 examinations before trial, transcripts of plaintiff Bravo's September 13, 2005 and February 20, 2009 examinations before trial, transcripts of examinations before trial of defendants Carrion and Otero and non-party witness police officer John Brunkard, unsworn reports of Allen Rothpearl, M.D., unsigned affirmed reports of A. Robert Tantleff, M.D., and sworn reports of K.E. Seslowe, M.D. and Leon Sultan, M.D.

A "serious injury" is defined 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 constitutes 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" (Insurance Law § 5102 [d]). The Court of Appeals has held that the issue of whether a claimed injury falls within the statutory definition of a "serious injury" is a question of law for the courts in the first instance, which may properly be decided on a motion for summary judgment (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Charley v Goss***, 54 AD3d 569, 863 NYS2d 205 [1st Dept 2008]).

In a motor vehicle case, a defendant moving for summary judgment on the issue of whether the plaintiff sustained a serious injury has the initial burden of presenting competent evidence establishing that the injuries do not meet the threshold (*see* ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). Failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*).

The complaints (an action by plaintiffs against defendants Carrion and Galaxy was consolidated by stipulation under the above-referenced index number with an action by plaintiffs against defendants

Jaycon and Otero) allege that plaintiff Familia sustained a serious injury as defined in the Insurance Law § 5102. Specifically, the bill of particulars alleges that plaintiff Familia sustained the following injuries: torn medical [*sic*] meniscus; bulging disc at L5-S1, straightening of the lumbar lordosis, lumbar radiculopathy, and acute sprain; bulging cervical disc at C4-C5 with encroachment by the annulus fibrosus and approximating the ventral thecal sac, cervical radiculopathy, marked straightening and reversal of the cervical lordosis, cervicalgia, acute sprain; chest wall contusion; and, cerebral concussion with post-concussion syndrome. The bill of particulars alleges that plaintiff Familia sustained a serious injury within the meaning of the Insurance Law in that she sustained personal injuries which resulted in the permanent loss of use of a body function, organ, member and/or system and/or injuries resulting in a permanent consequential limitation of use of a body function, organ, member and/or system and/or injuries of a non-permanent nature which prevented her from performing substantially all of the natural [*sic*] activities for not less than ninety (90) days during the one hundred eighty (180) days immediately following the accident.

The report of K.E. Seslowe, M.D., an orthopedist, dated July 23, 2010, avers that as a result of the accident, plaintiff Familia sustained soft tissue injuries, including strains of the neck, back and right knee which have resolved. When he examined plaintiff and quantified range of motion in the cervical spine and compared his findings with normal range of motion, he found that the findings were within normal limits. However, upon examination of the lumbar spine he found plaintiff Familia's forward flexion was 70 degrees with 90 degrees being normal and that in the supine position she had negative straight leg raising on the left to 90 degrees and on the right at 70 degrees with 90 degrees being normal. Dr. Seslowe states that he read the MRI report of the right knee done on October 18, 2004 which showed a Grade II signal in the body of the meniscus corresponding to some mucoid change, no other meniscal change. He read the MRI review of Dr. Tantleff done on July 22, 2005 and opined that Dr. Tantleff's reference to the left knee was "miss-marked," should have been the "right knee," and that it showed a minimal amount of synovial effusion with no evidence of meniscal tear or degeneration and no evidence of spinal stenosis, disc herniation, protrusion or bulge in the spine. Dr. Seslowe did not reconcile the differences in the two reports with regard to the right knee. The report of Leon Sultan, M.D., an orthopaedist, dated March 27, 2007, states that plaintiff underwent MRI testing of the right knee on October 15, 2004 which reported Grade II signal seen in the body of the medial meniscus corresponding with mucoid change, in addition to joint effusion and a 3 cm popliteal cyst; MRI testing of the cervical spine on October 19, 2004 which reported reversal of the curvature with disc bulging at C4-5; and, MRI testing of the lumbar spine on October 20, 2004 which reported straightening with disc bulging at L5-S1. After examining plaintiff and quantifying range of motion in the cervical and lumbar spine and comparing his findings with normal range of motion, he found that plaintiff had no disability and that she had no causally related orthopedic or neurological impairment as a result of the August 15, 2004 accident.

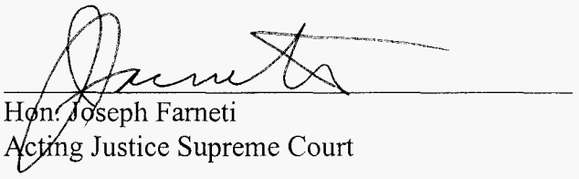
Dr. Seslowe's findings of limitations of motion of the lumbar spine created a material issue of fact as to whether plaintiff had sustained a significant limitation of use of a body function or system (*see* ***Hall v Barth***, 36 AD3d 1050, 825 NYS2d 922 [3d Dept 2007]). Defendants' examining orthopedist, Dr. Sultan failed to set forth the objective tests that he used to determine range of motion (*see* ***Tolstocheev v Bajrovic***, 28 AD3d 473, 811 NYS2d 785 [2d Dept 2006]). Additionally, defendants' papers failed to address plaintiff's allegation, clearly set forth in her bill of particulars, that she sustained a

medically-determined injury or impairment of a nonpermanent nature which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident (*see* ***Daddio v Shapiro***, 44 AD3d 699, 844 NYS2d 76 [2d Dept 2007]). Plaintiff testified at her depositions that she has pain and swelling in and about her right knee and pain in her neck (which goes down into her shoulders) and lower back for more than one year following the accident, that she saw a chiropractor for approximately three months after the accident, that she can no longer attend a gym because of pain in her knee as a result of the accident, and that due to pain in her knee and back as a result of the accident she was unable to continue to work as a "helper"at her "regular" job at the podiatrist's office but was able to babysit several months after the accident. Defendants' examining orthopedist, Dr. Sultan, examined plaintiff Familia approximately two and one-half years after the subject accident and defendants' examining orthopaedist, Dr. Seslowe examined plaintiff Familia approximately six years after the subject accident and neither doctor related his medical findings to this category of serious injury for the period of time immediately following the subject accident (*see* ***Yung v Eager***, 51 AD3d 638, 857 NYS2d 676 [2d Dept 2008]; ***Tinsley v Bah***, 50 AD3d 1019, 857 NYS2d 180 [2d Dept 2008]).

Inasmuch as defendants Angel C. Carrion and Carolin M. Carrion failed to satisfy their *prima facie* burden, it is unnecessary to consider whether plaintiffs' opposition papers were sufficient to raise a triable issue of fact (*see* ***Joseph v Hampton***, 48 AD3d 638, 852 NYS2d 335 [2d Dept 2008]; ***Coscia v 938 Trading Corp.***, 283 AD2d 538, 725 NYS2d 349 [2d Dept 2001]). (The Court notes that plaintiffs' moving papers allege that plaintiff Familia sustained a scar on her right knee, however no scar is mentioned in the bill of particulars, consequently this injury is not considered in the determination of the within motion).

Accordingly, the motions of defendant Galaxy and of defendants Jaycon and Otero which request an Order granting summary judgment dismissing plaintiffs' complaint and all cross-claims interposed against them are granted; that portion of the motion of defendants Jaycon and Jacob Otero and the motion of defendant Galaxy which request an Order granting summary judgment dismissing plaintiff Familia's complaint against them on the grounds that she has failed to satisfy the "serious injury" threshold requirement of Insurance Law § 5102 (d) are denied as moot; and, the motion of the defendants Carrion which requests an Order granting summary judgment dismissing plaintiff Familia's complaint against them on the grounds that she has failed to satisfy the "serious injury" threshold requirement of Insurance Law § 5102 (d) is denied.

Dated: June 15, 2011



Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION