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SHORT FORM ORDER COPY

INDEX No. 09-40634
CAL. No. 11-00608MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 8-8-11 (#002)
MOTION DATE 8-25-11 (#003)
MOTION DATE 10-27-11 (#004)
ADJ. DATE 11-17-11
Mot. Seq. # 002 - MD
003 - MD
004 - MD

---X

MARIA ROSARIO GARCIA,

Plaintiff,

- against -

JASMIN CRUZ, OSCAR CRUZ, JONATHAN MIRANDA and DANIEL A. MIRANDA,

Defendants.

---X

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Upon the following papers numbered 1 to 39 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 18; Notice of Cross Motion and supporting papers (002) 19-22 40-42; Answering Affidavits and supporting papers 23-28; 29-34 ; Replying Affidavits and supporting papers 35-37; 38-39 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (002) by the defendants, Jonathan Miranda and Daniel A. Miranda, for summary judgment dismissing the complaint and all cross claims asserted against them on the basis that the plaintiff, Maria Rosario Garcia, did not sustain a serious injury as defined by Insurance Law § 5102 (d), is denied; and it is further

ORDERED that motion (003) by the defendants, Jasmin Cruz and Oscar Cruz, for summary judgment dismissing the complaint on the basis they bear no liability for the occurrence of the accident, is denied.

ORDERED that motion (004) by the third-party defendant, Maria Rosario Garcia, for summary judgment dismissing the third-party complaint brought by Jonathan Miranda and Daniel Miranda, on the bases she bears no liability for the occurrence of the accident, and that Jasmin Cruz did not sustain a serious injury as defined by Insurance Law § 5102(d), is denied.

In this action premised upon the alleged negligence of the defendants, the plaintiff, Maria Rosario Garcia, seeks damages for personal injuries which she claims she sustained on May 7, 2009 on Suffolk Avenue, approximately 200 feet east of its intersection with Allyn Drive, Suffolk County, New York, when her vehicle was involved in an accident involving the defendants' vehicles.

In their answer, the Miranda defendants have asserted cross claims against the Cruz defendants for judgment over and apportionment of liability. The Cruz defendants have asserted in their answer a cross claim against the Miranda defendants for contribution/indemnification. An action pending under Index No. 10-8763 was commenced on behalf of the infant plaintiff, Jasmin Cruz by Oscar Cruz, as parent of the infant, and individually, against the Miranda defendants. Jonathan Miranda and Daniel Miranda have commenced a third-party action against Maria Rosario Garcia under Index No.10-8763. The within action was consolidated for joint trial with the action pending under Index No.10-8763 by order dated July 6, 2010 (Gazzillo, J.).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case ***(Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

Pursuant to Insurance Law § 5102(d), "'[s]erious injury' means 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 medical 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."

The term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment

(***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102(d), the initial burden is on the defendant to "present evidence in competent form, showing that plaintiff has no cause of action" (***Rodriquez v Goldstein***, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (***DeAngelo v Fidel Corp. Services, Inc.***, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (***Cammarere v Villanova***, 166 AD2d 760, 562 NYS2d 808, 810 [3d Dept 1990]).

In order to recover under the "permanent loss of use" category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 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 "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 Systems, Inc.***, 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*** , *supra*).

As a result of the within accident, the plaintiff alleges she sustained injuries consisting of a herniated disc at C6-7; tear of the supraspinatus tendon of the left shoulder; acromioclavicular joint hypertrophy of the left shoulder; supraspinatus impingement syndrome of the left shoulder; cervical radiculopathy; lumbar radiculopathy; loss of normal cervical lordosis; and lumbar scoliosis.

In support of motion (002), the Miranda defendants have submitted, inter alia, an attorney's affirmation; copies of the pleadings and answers for both actions; plaintiff's verified bill of particulars; an uncertified copy of the Good Samaritan Hospital emergency department record; the report dated January 8, 2011of Frank M. Hudak, M.D. concerning his independent orthopedic examination of plaintiff on January 6, 2011; the report of Audrey Eisenstadt, M.D. dated May 14, 2010 concerning her radiological review of the plaintiff's cervical and left shoulder MRI films; the report dated November 23, 2010 of Dr. Michael J. Katz concerning his independent orthopedic examination of the plaintiff; the reports of Audrey Eisenstadt, M.D. dated May 14, 2010 and June 25, 2010 concerning her radiological review of the plaintiff's cervical spine, lumbar spine, and left shoulder MRI films; and copies of the unsigned and uncertified transcripts of the examinations before trial of Maria Rosario Garcia and Jasmin Cruz both dated September 22, 2 010.

Upon review of the evidentiary submissions, it is determined that the Miranda defendants have not established prima facie entitlement to summary judgment dismissing the complaint on the basis that Maria Rosario Garcia did not sustain a serious injury. It is further determined that the moving papers raise triable issues of fact which preclude summary judgment.

The unsigned and uncertified copies of the transcripts of Maria Rosario Garcia and Jasmin Cruz are not in admissible form to be considered on a motion for summary judgment, and are not accompanied by proof of service of the same pursuant to CPLR 3116, and therefore, are not considered on this motion (*see*, ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; ***McDonald v Maus***, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; ***Pina v Flik Intl. Corp.***, 25 AD3d 772, 808 NYS2d 752 [2d Dept 2006]).

Although the plaintiff has claimed cervical and lumbar radiculopathy in her bill of particulars as injuries, no report from a neurologist who examined the plaintiff on behalf of the moving defendants has been submitted to rule out these claimed neurological injuries (*see,* ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]), thus raising factual issue precluding summary judgment.

The Miranda defendants have failed to support this motion with the medical records and initial test results for the MRI studies of the plaintiff's cervical spine, lumbar spine, and left shoulder, as well as the medical records and reports set forth in the reports of Dr. Hudak and Dr. Katz, which reports the examining expert physicians reviewed and commented upon in their reports, leaving it to this Court to speculate as to the contents of those records and MRI reports reviewed. The general rule in New York is that an expert cannot base an opinion on facts he did not observe and which were not in evidence, and the expert testimony is limited to facts in evidence (*see,* ***Allen v Uh,*** 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Hornbrook v Peak Resorts,*** Inc. 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]; ***Marzuillo v Isom,*** 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; ***O'Shea v Sarro***, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]).

Dr. Katz, Dr. Hudak, and Dr. Eisenstadt have not submitted copies of their curriculum vitae to qualify as experts, other than each stating that he/she is licensed to practice medicine in New York. Dr. Hudak and Dr. Katz, in examining the plaintiff's cervical ranges of motion, have cited to different normal range of motion values, thus raising factual issue concerning which values are the normal values to be considered by this Court. Dr. Hudak has set forth normal ranges of motion which are stated to be of a certain value, but are also qualified as "or greater" leaving this court to speculate as to when the normal range of motion values would be greater. When a normal reading for range of motion testing is provided in terms of a spectrum or range of numbers rather than one definitive number, the actual extent of the limitation is unknown (*see* ***Sainnoval v Sallick***, 78 AD3d 922, 923, 911 NYS2d 429 [2d Dept 2010]; ***Lee v M & M Auto Coach, Ltd.***, *supra*; ***Hypolite v International Logistics Management, Inc.***, 43 AD3d 461, 842 NYS2d 453 [2d Dept 2007]; ***Somers v Macpherson,*** 40 AD3d 742, 836 NYS2d 620 [2d Dept 2007]; ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]; ***Rodriguez v Schickler***, 229 AD2d 326, 645 NYS2d 31 [1st Dept 1996], *lv denied* 89 NY2d 810, 656 NYS2d 738 [1997]), thus raising factual issues.

It is further noted that the defendants' examining physicians did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering the defendants' physician's affidavits insufficient to demonstrate entitlement to summary judgment on the issue of whether the plaintiff was unable to substantially perform all of the material acts which constituted her usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; *see*, ***Uddin v Cooper***, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; ***Toussaint v Claudio,*** 23 AD3d 268, 803 NYS2d

564 [1st Dept 2005]), and the experts offer no opinion with regard to this category of serious injury (*see* ***Delayhaye v Caledonia Limo & Car Service, Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]).

Based upon the foregoing, the Miranda defendants have failed to demonstrate entitlement to summary judgment on either category of injury defined in Insurance Law § 5102(d) (*see*, ***Agathe v Tun Chen Wang***, 98 NY2d 345, 746 NYS2d 865 [2006]); *see also*, ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]). Inasmuch as the moving party has failed to establish prima facie entitlement to judgment as a matter of law in the first instance on the issue of "serious injury" within the meaning of Insurance Law § 5102 (d), it is unnecessary to consider whether the opposing papers were sufficient to raise a triable issue of fact (*see*, ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]); ***Krayn v Torella***, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; ***Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]), as the burden has not shifted to the plaintiff.

Accordingly, motion (002) by the Miranda defendants for summary judgment dismissing the complaint and cross claims asserted against them on the basis that the plaintiff did not suffer a serious injury as defined by Insurance Law §5102 (d) is denied.

In support of motion (003), Jasmin Cruz and Oscar Cruz have submitted, inter alia, an attorney's affirmation; they refer to the copies of the pleadings submitted by the Miranda defendants in motion (002); and have submitted an unsigned but certified copy of the examination before trial of Jonathan Miranda dated September 28, 2010. It is determined that the unsigned but certified copy of the transcript of the examination before trial of Jonathan Miranda, which is not opposed by the plaintiff or the deponent, is considered in this motion for summary judgment (*see,* ***Zalot v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]). It is additionally noted that the Cruz defendants have not submitted an affidavit or a copy of Jasmin Cruz's deposition testimony in support of their motion as required by CPLR 3212, rendering such application insufficient as a matter of law. It is determined that even if this motion were properly supported, that upon review of the testimony by Jonathan Miranda submitted by the Cruz defendants, the Cruz defendants have not established prima facie entitlement to summary judgment as a matter of law as there are factual issues which preclude summary judgment.

Jonathan Miranda testified to the extent that he was involved in a motor vehicle accident on May 7, 2009 at about 6:30 p.m. on Suffolk Avenue. When asked if he was operating a car at the time of the accident, he responded, "Yeah, I guess I was driving." Lillian Morrero was a passenger in the vehicle at the time. He continued that the vehicle, a Honda, was owned by his father, Daniel Miranda, who would let him use the car from time to time. He described the day of the accident as being rainy. He stated that he was driving "at a pretty good speed, but it was not fast because it was raining." He later added that he was traveling no faster than thirty miles per hour, or under. He believed he was traveling east on Suffolk Avenue for about a minute prior to the accident. He described Suffolk Avenue as having two travel lanes, one in each direction. He first saw the black Toyota traveling directly in front of his vehicle at a speed of about twenty five miles per hour. He followed it about a minute or two before the accident occurred. The black Toyota in front of his vehicle hit its brakes "a couple of seconds, like maybe 15 seconds" before the accident. He later stated it was about ten seconds before the impact. He was traveling about twenty miles per hour and was about a car length and a half, which he described as about 18 feet, behind the black Toyota when it applied its brakes. He thought that something might be happening with the cars in front of his, but he heard no impacts or sounds and did not see anything happen. His vehicle slid about ten feet as he applied his brakes, and the front of his vehicle went underneath the back of the black Toyota. The Toyota was not stopped when he struck it in the rear. He

further testified that the Toyota in front of him stopped to avoid whatever was in front of it. He did not know if the Toyota in front of him hit the vehicle in front of it before or after he struck the rear of the Toyota. He did not know if the Toyota came to a stop after his vehicle struck it. He did not know if there was another impact after he struck the black Toyota.

Based upon the foregoing, it is determined that the Cruz defendants have not demonstrated prima facie entitlement to summary judgment dismissing the complaint and cross claims asserted against them. The admissible evidentiary proof, namely the testimony of Jonathan Miranda, does not establish how many cars were involved in the accident, where the Cruz or the Garcia vehicles were located in the line of vehicles involved in the accident, and in what sequence the various contacts between the vehicles occurred. Such factual issues preclude summary judgment on the issue of liability.

Accordingly, motion (003) is denied.

Turning to motion (004), Maria Rosario Garcia, a third-party defendant under Index Number 10-8763, moves in that action for summary judgment dismissing the third party complaint. It is noted that this action has not been consolidated with the main action. Rather it was joined for trial with the main action by order, dated July 6, 2010 (Gazzillo, J.). Therefore, this motion cannot be considered with the main action, but must be made separately under Index Number10-8763 relative to the third party action.

Accordingly, motion (004) is denied.

Dated: 1/23/12

A.J.S.C.

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