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SHORT FORM ORDER

INDEX No. 09-4327
CAL. NO. 11-02279MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 5-24-11
ADJ. DATE 2-14-12
Mot. Seq. # 002 - MD

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YANPING XU and WILLIAM VAN ZWIENEN,

Plaintiffs,

- against -

GOLD COAST FREIGHTWAYS, INC., and KLAUS R. NONN,

Defendants.

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Upon the following papers numbered 1 to 31 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (002) 1 - 21; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 22-29; Replying Affidavits and supporting papers 30-31; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (002) by the defendants, Gold Coast Freightways, Inc. and Klaus R. Nonn, for summary judgment dismissing the complaint and all cross claims asserted against them on the basis that they bear no liability for the occurrence of the accident, is denied, and for further order dismissing the complaint and all cross claims asserted against them on the basis that the plaintiff, Yanping Xu, did not sustain a serious injury as defined by Insurance Law § 5102 (d), is also denied.

In this action premised upon the alleged negligence of the defendants, the plaintiff, Yanping Xu, seeks damages for personal injuries allegedly sustained on December 4, 2008, at or near Church Street in Islip, New York, when her vehicle was involved in an accident involving the tractor trailer owned by defendant Gold Coast Freightways, Inc. and operated by defendant Klaus R. Nonn, while the tractor trailer was backing from the roadway into a parking lot. A derivative claim has been asserted on behalf of William Van Zwienen.

The defendants seek summary judgment dismissing the complaint and all cross claims asserted against them on the bases that they bear no liability for the occurrence of the accident, and assert that the plaintiff, Yanping Xu, did not sustain a serious injury as defined by Insurance Law § 5102 (d). It is noted that there are no cross claims asserted against the moving defendants.

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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]).

In support of this application, the defendants have submitted, inter alia, an attorney's affirmation; copies of the summons and complaint and answer and plaintiff's verified bill of particulars; copies of the unsigned and uncertified transcript of the examination before trial of Yanping Xu dated January 7, 2010, the certified but unsigned transcript of Yanping Xu dated February 24, 2010, the unsigned but certified copy of the transcript of the examination before trial of Klaus R. Nonn dated November 5, 2010; copies of the plaintiff's medical records maintained by William M. Frank, M.D, Panetta Physical therapy, P.C., Matthew Kalter, M.D., Southside Hospital, Zilka Radiology, Joseph Terrana, M.D., Stony Brook University Hospital; the report dated October 22, 2010 of Edward Toriello and addendum dated January 25, 2011, concerning his independent orthopedic examination of plaintiff; the report dated October 1, 2010 by Scott S. Coyne, M.D. concerning his radiological review of the plaintiff's left knee, left hip, left shoulder, chest, CT of the abdomen and pelvis; MRI examinations of the cervical and lumbar spine and left knee; and the radiology reports as set forth in the report.

The plaintiff has incorporated by reference those exhibits submitted by the defendants labeled D, E, F, G. Therefore, the transcripts of the plaintiff's examinations before trial are considered herein. It is noted that the report by Scott S. Coyne, M.D., submitted with the moving papers, is partially illegible. Even if Dr. Coyne's report were legible, the report by Dr. Toriello concerning his independent orthopedic examination of the plaintiff, submitted by the defendants, raises factual issues which preclude summary judgment on the issue of serious injury.

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 small right paracentral herniated disc at C4-5; bulging discs at C4-5 and C6-7 which impinge upon the thecal sac; degenerative disc disease from C2 to T1; mild cervical spine scoliosis; moderate sized central herniated disc at L4-5; small bulging disc at L3-4; degenerative disc disease from L3 to S1, most severe at L4-5; anterior disc protrusion into the prevertebral soft tissues of L4-5; anterior osteophytes from L3 to L5; small S1 meningeal cyst; hemangiomas at several levels in the lumbar spine; tear of medial meniscal body of the left knee; bilateral knee pain; bilateral shoulder pain; lumbar spine sprain/strain; lumbar radiculopathy; post traumatic headaches secondary to nerve damage in the cervical spine; cervical sprain; cervical radiculopathy; neck pain with radiation to the upper extremities; tingling and weakness in both arms; post traumatic myofascial pain syndrome; sensory deficit in the upper extremity; significant limitation in cervical and lumbar range of motion; cervical myofascial pain; loss of strength, inability to lift; and anxiety and depression.

Upon review and consideration of the evidentiary submissions, it is determined that the defendants have not established prima facie entitlement to summary judgment dismissing the complaint on the basis that Yanping Xu did not sustain a serious injury as defined by Insurance Law § 5102 (d). The defendant's moving papers raise triable issues of fact which preclude summary judgment.

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

Dr. Toriello has set forth in his report concerning his independent orthopedic examination of the plaintiff that he examined the plaintiff's cervical spine, lumbar spine, shoulders, knees, ankles, feet and toes to determine the range of motion relative to each area examined. However, he has not set forth in his report of October 22, 2010, the method used to determine such range of motion, such as with the use of a goniometer, inclinometer or arthroidal protractor (*see* ***Martin v Pietrzak***, 273 AD2d 361, 709 NYS2d 591 [2d Dept 2000]; ***Vomero v Gronrous***, 19 Misc3d 1109A, 859 NYS2d 907 [Nassau County 2008]), leaving it to this court to speculate as to how he determined such range of motion when examining the plaintiff ***(Rodriguez v Schickler***, 229 AD2d 326, 645 NYS2d 31 [1st Dept 1996], *lv denied* 89 NY2d 810, 656 NYS2d 738 [1997]). In examining the plaintiff's cervical spine range of motion values, Dr. Toriello set forth the normal range of motion and failed to set forth his actual findings except to state that the plaintiff could fully rotate and could flex her neck without discomfort, thus raising factual issues as to his actual determinations. Dr. Toriello has also raised credibility issues which preclude summary judgment. He set forth that examination of the cervical spine revealed range of motion in all directions of ten degrees until she was distracted, and examination of the lumbar spine revealed decreased flexion of thirty degrees until she was distracted, and that by the end of the examination, she was able to pick up a bag from the floor. On a motion for summary judgment, the court is not to determine credibility, but is to determine whether there exists a factual issue, or if arguably there is a genuine issue of fact, CPLR §3212(b), ***S.J. Capelin Associates, Inc. v. Globe Manufacturing Corporation***, 357 N.Y.S.2d 478, 34 N.Y.2d 338. These factual and credibility issues preclude summary judgment.

In his addendum of January 25, 2011, Dr. Toriello set forth that range of motion testing was measured by use of a goniometer and by visual inspection. Again, he raises factual issues concerning his statement that examination of the lumbar spine revealed decreased flexion of thirty degrees until the plaintiff was distracted, and that by the end of the examination, she was able to fully flex at the waist to pick up a bag from the floor. He then set forth the range of motion for the lumbar spine, but did not set forth range of motion determinations relative to the plaintiff's cervical spine. Thus, the addendum by Dr. Toriello does not eliminate the factual and credibility issues raised in his initial report. Additionally, Dr. Toriello does not rule out in either his initial report or the addendum whether or not the alleged cervical and lumbar herniated and bulging discs were causally related to the accident.

The report by Dr. Coyne does not rule out that these bulging or herniated lumbar and cervical discs were not caused by the accident. He stated that the bulging and herniated discs are degenerative and long standing, but does not address what is meant by the same, or the age of these "pre-existing" conditions. Although he indicates that disc protrusions frequently result from degenerative disc process, which is the most probable cause of the disc protrusion at C4-5, he does not rule out that the disc protrusions preceded the accident or were not caused by the accident. This raises further factual issues concerning whether or not the plaintiff sustained a serious injury as defined by Insurance Law §5102 (d).

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]). It is noted that the plaintiff testified that following the accident, she was confined to home for about two to three months due to the pain and injuries suffered in the subject accident. Prior to the accident, she could climb nineteen floors by stairs, but can no longer climb stairs, go hiking, do housework, lift heavy things from the washing machine, dig in the garden, sit straight, or sit for a period of time to use the computer.

Based upon the foregoing, it is determined that the 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]).

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

As to the issue of liability, the plaintiff testified to the extent that on December 4, 2008, at about 10:30 a.m., she was involved in an automobile accident at Church Street and Orville Street, Bohemia, while driving her vehicle. She exited the parking lot for the vitamin store on Orville Street, and planned to turn left onto Church Street. She looked to her right, to the south, and did not see any cars traveling towards her. As she began to travel south on Orville street, she saw a container truck stopped on Orville Street facing Church Street, with the rear of the truck facing towards her, over to the center and left side, close to the east side of the roadway. She began to slow her vehicle and stopped behind the truck, which was some distance ahead of her stopped car. Her car came to a stop at the north side of a parking lot. The front of the truck was making a right turn to head west, but the rear of the truck was getting closer to her and came to about one meter from her vehicle. She started to scream, and the right rear of the truck, which was still in front and to the left of her vehicle, struck the driver's door of her vehicle while her vehicle was still stopped. She stated that she could not move her vehicle because she thought she was going to die.

Klaus R. Nonn testified to the extent that on the date of the accident, he had a commercial driver's license issued by the State of New Jersey. At the time of the accident, he was making a delivery of vitamins to Nature's Bounty at 110 Orville Street. He was driving a Kenworth tractor, with a forty-eight foot trailer attached. The trailer was half full of vitamins which weighed about 15,000 pounds. The trailer additionally weighed about 15,000 pounds. When he first observed the plaintiff's vehicle, it was underneath the rear wheels of the trailer up to its front door. He stated that at the time of the impact, three quarters of the trailer was in the driveway as he was backing into the parking lot at about three miles per hour. He had his right turn directional on at the time. His vehicle came to a sudden stop. He thought he hit the fire plug. He continued that there was nothing obstructing his view of the rear of the trailer at the time the impact occurred. While he was entering the driveway at Nature's Bounty, he took a quick glance out the right hand mirror to the rear of the trailer and did not see anything, so he proceeded to back up.

Here there are factual issues which preclude summary judgment from being granted to the defendant. The plaintiff alleges that her vehicle came to a stop behind the trailer. While her vehicle was still stopped at a distance behind the trailer, she saw the rear of the trailer move towards her vehicle. The defendant did not see the plaintiff's vehicle prior to, or while he was backing up from the roadway into the parking lot. Thus, the defendant has not established prima facie entitlement to summary judgment dismissing the complaint on the issue of liability. VTL § 1211 (a) provides that "[T]he driver of a vehicle shall not back the same unless such movement can be made with safety and without interfering with other traffic." In ***De Sessa v City of White Plains***, 30 Misc2d 817, 219 NYS2d 190 [Sup. Ct. Westchester County 1961], the court stated that "[A] driver of a large truck has the duty of operating his vehicle with reasonable care. Specifically, he is bound to use caution in backing his vehicle, particularly because of its size, and because he is not able to see its rear at all times." Here, there are factual issues with regard to whether the defendant driver was negligent in failing to see the plaintiff's vehicle. It is for the jury to determine whether the defendant was driving in a manner which was reasonable under the circumstances by taking a "quick glance" prior to backing up the large tractor trailer (*see* ***Townley v Bagby Transfer Company***, 19 AD2d 757, 241 NYS2d 492 [3d Dept 1963].

Accordingly, that part of motion (002) which seeks summary judgment dismissing the complaint on the basis that the defendants bear no liability for in the occurrence of the accident is denied.

Dated: APR 10 2012

J.S.C.
HON. JEFFREY ARLEN SPINNER

____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION