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Short Form Order

**SUPREME COURT - STATE OF NEW YORK**
**TRIAL TERM, PART 11 NASSAU COUNTY**

**PRESENT:**

***Honorable Karen V. Murphy***
**Justice of the Supreme Court**

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**ANTHONY PONTOSKY and DEBORAH PONTOSKY,**

**Plaintiff(s),**

**Index No. 4177/10**

**Motion Submitted: 3/23/12**
**Motion Sequence: 001, 002**

**-against-**

**JESUS S. VARGAS, ANDY VARGAS, ALBERT G. FREDERICKS and DANA H. LEWIS,**

**Defendant(s).**

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The following papers read on this motion:

Notice of Motion/Order to Show Cause.....XX
Answering Papers.....XX
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Defendants, Jesus S. Vargas and Andy Vargas, move this Court for an Order, pursuant to CPLR § 3212 dismissing the complaint with regard to the Plaintiff, Deborah Pontosky, on the grounds that her injuries do not satisfy the "serious injury" threshold requirement of Insurance Law § 5102(d).

Defendants, Albert G. Fredericks and Dana H. Lewis, move this Court for an Order, pursuant to CPLR § 3212 dismissing the complaint and cross claims against them on the basis that no liability may be assessed against them as a matter of law. Defendants Fredericks and Lewis additionally adopt the motion of Defendants Vargas and Vargas for an Order, pursuant to CPLR § 3212 dismissing the complaint with regard to the Plaintiff, Deborah Pontosky, on the grounds that her injuries do not satisfy the "serious injury" threshold requirement of Insurance Law § 5102(d).

This action arises out of a motor vehicle accident that occurred on November 3, 2009, at approximately 4:45 p.m. at the intersection of Franklin Avenue and 6th Street, County of Nassau, State of New York. Defendant Dana Lewis ("Lewis") was driving Defendant Albert Fredericks' ("Fredericks") vehicle on Franklin Avenue and preparing to drive past 6th Street. Defendant Andy Vargas ("Vargas"), driving Defendant Jesus Vargas' ("Vargas, Sr.") vehicle from the other direction on Franklin Avenue, attempted to turn left onto 6th Street. Plaintiffs Anthony and Deboarah Pontosky ("Anthony" and "Deborah") had just begun to walk across 6th Street. Vargas made his left turn ahead of Lewis when Anthony and Deborah had entered the intersection. Lewis arrived at the intersection before Vargas had completed the left turn and collided with Vargas' vehicle, which in turn came into contact with Plaintiffs.

Plaintiff Deborah Pontosky claimed that, as a result of this accident, she sustained, *inter alia*, injuries to her cervical spine, lumbar spine, wrist and knee: including C2/3 and C3/4 disc bulges; herniations at C4/5 and C5/6; L5/S1 diminished disc space height; L2/3 posterior disc bulge; L3/4 and L4/5 posterior disc herniation; L5/S1 posterior disc herniation; synovial effusion in the knee joint, narrowing of the patellofemoral joint compartment with patellofeniral chondromalacia and posterior patellar bruising; lesion possibly representing cyst or enchonfroma; possible tear of the body and anterior horn of the medial meniscus and posterior horn of the lateral meniscus; and a wrist sprain.

From the scene of the accident Deborah was taken by ambulance to Winthrop University Hospital, where she was treated and released that day. She wore a splint on her arm for less than one week until following up with an orthopedist. She then began treating with a chiropractor who worked with her for approximately four months following the accident. She missed one month of work as a school nurse as a result of this accident. Upon returning to work after one month, she was able to resume the full duties.

Deborah claims to have persisting limitations in her neck and discomfort in her right knee, particularly when bending or walking on stairs. She had to temporarily modify her exercise routine to help treat her injuries. She said her routine was "back to normal" after six months, except that she no longer does Pilates. She additionally claimed that she can no longer run outside, though this was not advised by a doctor.

Deborah, who was 52 years old at the time of the subject accident, claims that her injuries fall within the following four categories of the serious injury statute: to wit, a 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; and a medically determined injury or impairment of a nonpermanent nature, which prevents the Plaintiff from performing substantially all of the material acts, which constitute

the Plaintiff'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.

Based on the Plaintiff's testimony and medical evidence, there is no indication that Plaintiff sustained a permanent loss of an organ, member, function or system (***Oberly v. Bangs Ambulance, Inc***. 96 N.Y.2d 295, 751 N.E.2d 457, 727 N.Y.S.2d 378 (2001); ***Lynch v. Iqbal***, 56 A.D.3d 621, 868 N.Y.S.2d 676 (2d Dept., 2008); ***Bojorquez v. Sanchez***, 65 A.D.3d 1179, 885 N.Y.S.2d 362 [2d Dept., 2009]). Such a permanent loss was not specifically discussed by the Plaintiff nor addressed by Plaintiff's opposition papers.

Plaintiff's claims that her injuries satisfy the 90/180 category of Insurance Law §5102(d) are unsupported and contradicted by her own testimony wherein she states that she only missed one month of work and was able to resume her full work activities upon her return to work. Additionally, Plaintiff does not provide any evidence that she was "medically" impaired from doing any daily activities as a result of this accident for 90 days within the first 180 days following the subject accident. Her return to work and to the gym within ninety days demonstrate that she was not prevented from performing substantially all of the material acts, which constitute her usual and customary daily activities. Thus, this Court determines that the Plaintiff has effectively abandoned her 90/180 claim for purposes of Defendants' initial burden of proof on a threshold motion ***(Joseph v. Forman***, 16 Misc.3d 743, 838 N.Y.S.2d 902 [Sup. Ct. Nassau 2007]).

Accordingly, this court will restrict its analysis to the remaining two categories as it pertains to the Plaintiff; to wit, "permanent consequential limitation of use of a body organ or member;" and "significant limitation of use of a body function or system."

A party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (***Winegrad v. New York Univ. Med. Center***, 64 NY2d 851 [1985]; ***Zuckerman v. City of New York***, 49 NY2d 557 [1980]). Here, the defendants must demonstrate that the plaintiff did not sustain a serious injury within the meaning of Insurance Law Section 5102(d) as a result of this accident ***(Felix v. New York City Transit Auth.,*** 32 A.D.3d 527, 819 N.Y.S.2d 835 [2d Dept. 2006]).

Under the no-fault statute, to meet the threshold for significant limitation of use of a body function or system or permanent consequential limitation of use of a body organ or member, the law requires that the limitation be more than minor, mild, or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition (***Gaddy v. Eyler***, 79 N.Y.2d 955, 591 N.E.2d 1176, 582 N.Y.S.2d 990 (1992); ***Scheer v. Koubeck***, 70 N.Y.2d 678, 512 N.E.2d

309, 518 N.Y.S.2d 788 (1987); ***Licari v. Elliott***, 57 N.Y.2d 230, 441 N.E.2d 1088, 455 N.Y.S.2d 570 [1982]). A minor, mild or slight limitation is deemed "insignificant" within the meaning of the statute (***Licari v. Elliott, supra***; ***Grossman v. Wright***, 268 A.D.2d 79, 83, 707 N.Y.S.2d 233 [2d Dept., 2000]).

When, as in the instant case, a claim is raised under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, then, in order to prove the extent or degree of the physical limitation, an expert's designation of a numeric percentage of Plaintiff's loss of range of motion is acceptable (***Toure v. Avis Rent A Car Systems***, 98 N.Y.2d 345, 353, 774 N.E.2d 1197, 746 N.Y.S.2d 865 [2002]). Additionally, an expert's qualitative assessment of a Plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis and (2) the evaluation compares the Plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (***Id***). Recently, the Court of Appeals held that a quantitative assessment of a Plaintiff's injuries does not have to be made during an initial examination and may instead be conducted much later, in connection with litigation (***Perl v. Meher***, 18 N.Y.3d 208, 960 N.E.2d 424, 936 N.Y.S.2d 655 [2011]).

In support of their motion, Defendants rely on Plaintiff's testimony from her examination before trial and the affirmation of Dr. Salvatore Corso, a physician who performed an independent orthopedic examination of the Plaintiff on July 5, 2011. Dr. Corso examined the Plaintiff, performed quantified range of motion testing on her cervical spine, thoracolumbar spine, right elbow and right knee with a goniometer, compared his findings to normal range of motion values and concluded that the ranges of motion measured were normal. Based on his clinical findings and review of medical records, Dr. Corso concluded that the Plaintiff had no orthopedic disability at the time of the examination.

Having made a prima facie showing that the injured Plaintiff did not sustain a "serious injury" within the meaning of the statute, the burden shifts to the Plaintiffs to come forward with evidence to overcome the Defendants' submissions by demonstrating a triable issue of fact that a "serious injury" was sustained (***Pommells v. Perez***, 4 N.Y.3d 566, 830 N.E.2d 278, 797 N.Y.S.2d 380 [2005]; *see also* ***Grossman v. Wright, supra***).

Plaintiffs have failed to present any evidence that Deborah Pontosky sustained a serious injury. In opposition, counsel for Plaintiffs failed to submit any medical proof whatsoever to rebut Defendants' *prima facie* showing. Plaintiffs' opposition is wholly insufficient to present a triable issue of fact herein.

Accordingly, Defendants' motion seeking summary judgment dismissal of Plaintiffs' complaint as it pertains to Deborah Pontosky's injuries is herewith granted (***Licari v. Elliott, supra***).

In light of the fact that the other injured Plaintiff, Anthony Pontosky, still has a claim in this action, this Court moves now to the Defendants, Fredericks and Lewis' motion for summary judgment on the issue of liability.

Defendants Fredericks and Lewis contend that Defendant Vargas' failure to yield the right of way in violation of Vehicle and Traffic Law (VTL) § 1141 was the sole proximate cause of the accident that injured the Plaintiffs. Fredericks and Lewis argue that when one of the two drivers violates the VTL, it is per se negligence and the other driver is entitled to judgment on liability.

Defendants Vargas Sr. and Vargas oppose and claim that Lewis failed to use reasonable care to avoid the accident and is therefore at least partially liable. Additionally, they argue that Vargas' negligence is an issue of fact that cannot be decided as a matter of law. Plaintiffs have adopted the Vargas' argument in opposition to this motion, adding that they believe issues of fact exist as to whether Lewis was driving at an excessive rate of speed or otherwise negligent in failing to avoid the accident.

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (***Andre v. Pomeroy,*** 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact. (***Cauthers v. Brite Ideas, LLC,*** 41 A.D.3d 755, 837 N.Y.S.2d 594 [2d Dept., 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the Plaintiff. (***Makaj v. Metropolitan Transportation Authority***, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

A Plaintiff or Co-Defendant is entitled to judgment as a matter of law on the issue of liability if he or she demonstrates that the sole proximate cause of an accident was the Defendant's violation of VTL § 1141 in turning left directly into the path of an oncoming vehicle, which was lawfully present in the intersection (*see* ***Ahern v. Lanaia***, 85 A.D.3d 696, 924 N.Y.S.2d 802 (2d Dept., 2011); ***Gause v. Martinez***, 91 A.D.3d 595, 936 N.Y.S.2d 272 [2d Dept., 2012]). The operator of a vehicle with the right-of-way is entitled to assume that the opposing driver will obey the traffic laws requiring him or her to yield (***Mohammad v. Ning***, 72 A.D.3d 913, 899 N.Y.S.2d 356 (2d Dept., 2010); ***Gause v. Martinez, supra***). However, "[a] driver who has the right-of-way has a duty to exercise reasonable care to

avoid a collision with another vehicle already in the intersection" (***Todd v. Godek***, 71 A.D.3d 872, 895 N.Y.S.2d 861 [2d Dept., 2010]; ***Gause, supra***).

There can be more than one proximate cause of an accident, and therefore "the proponent of a summary judgment motion has the burden of establishing freedom from comparative negligence as a matter of law" (***Pollack v. Margolin***, 84 A.D.3d 1341, 924 N.Y.S.2d 282 (2d Dept., 2011); ***Gardella v. Esposito Foods, Inc.***, 80 A.D.3d 660, 914 N.Y.S.2d 678 (2d Dept., 2011]). The issue of comparative fault is generally a question for the trier of fact (***Allen v. Echols***, 88 A.D.3d 926, 931 N.Y.S.2d 402 [2d Dept., 2011]).

Here, Co-Defendants Lewis and Fredericks, in support of their motion for summary judgment on the issue of liability, submitted the deposition transcripts of both Lewis and Vargas, which contained conflicting testimony as to the facts surrounding the accident, including, but not limited to, the issue concerning which vehicle lawfully entered the intersection first. The evidence did not establish, *prima facie*, that the Co-Defendant Vargas violated VTL § 1141, or that if he did, such violation was the sole proximate cause of the accident (*see* ***Gause, supra***; *see also* ***Todd, supra***).

Accordingly, the Defendants' motion for summary judgment on the issue of liability is denied without regard to opposing proof (***Alvarez v. Prospect Hosp., supra***).

The foregoing constitutes the Order of this Court.

Dated: May 18, 2012
Mineola, N.Y.

Karen V. Murphy
J. S. C.

ENTERED

MAY 23 2012

NASSAU COUNTY
COUNTY CLERK'S OFFICE