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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

JANE F. BOSCO and SAVERIO BOSCO,

Plaintiff(s),

- against -

GISELLE M. COLLADO, COUNTY OF NASSAU and NASSAU COUNTY POLICE DEPARTMENT,

Defendant(s).

TRIAL/IAS PART 5

INDEX NO. 2407009

MOTION SEQUENCE NO. 1 & 2

MOTION SUBMISSION DATE: April 11, 2012

The following papers read on this motion:

Notice of Motion	X
Notice of Cross Motion	X
Affirmation in Opposition	X
Affirmation in Reply	X

Upon the foregoing papers, defendants, Giselle M. Collado, the County of Nassau and the Nassau County Police Department [hereinafter the County], move pursuant to CPLR §3212, for an order granting summary judgment dismissing the within complaint on the following bases: the plaintiffs have failed to demonstrate that the County acted with reckless disregard, and; that plaintiff, Jane Bosco, has failed to establish she has sustained a serious injury as contemplated by Insurance Law §5102[d] (Sequence #001).

The plaintiffs, Jane F. Bosco and Saverio J. Bosco, cross-move pursuant to CPLR §3212 for an order granting summary judgment as the issue of serious injury, as well as for an order pursuant to CPLR §3211, dismissing the defendants' Fifth and Sixth Affirmative Defenses (Sequence #002).

The underlying action was commenced by the plaintiffs on November 23rd, 2009, as a result of a motor vehicle accident, which occurred on November 29th, 2008, at or near the intersection of Page Road and Marlboro Road in Valley Stream, New York (*see* Korn Affirmation in Support at ¶¶4,5; *see also* Exh. A at ¶¶26,27). The subject intersection is controlled by stop sign for those vehicles traveling on Marlboro Road (*id.* at Exh. D at p. 39).

As recited in the relevant deposition transcript, Officer Collado testified on the day of the accident she was operating police vehicle number 523 and was traveling approximately 30 miles per hour southbound

on Marlboro Road responding to an emergency call she received in connection to an unconscious person in need of medical assistance (*id.* at Exh. E at pp. 24, 25, 28,37). Upon receipt of this call, Officer Collado activated the emergency lights, which remained illuminated continuously, as well as the siren, which she operated intermittently "every half second" until the time of the accident (*id.* at pp. 34-36,38). Upon approaching the subject intersection, Officer Collado began to slow the police vehicle down when she observed the automobile operated by the plaintiff traveling eastbound of Page Road (*id.* at 43-45,48). After observing the plaintiff's vehicle, Officer Collado continued to sound the siren and attempted to stop the police cruiser but was unable to do so and collided with the plaintiff (*id.* at pp. 44 -48,72). Officer Collado testified that at the time of impact, the speed of the police cruiser was between "five to ten" miles per hour (*id.* at p.47).

The plaintiff claims that as a consequence of the subject accident, she has sustained serious injuries as defined in Insurance Law §5102[d] (*see* Korn Affirmation in Support at Exh. A at ¶31). Plaintiff, Saverio Bosco, while not alleging a claim of serious injury, has asserted a derivative claim for loss of consortium (*id.* at ¶¶42,43). The applications respectively interposed by the moving parties thereafter ensued and are determined as set forth hereinafter.

The Court initially addresses that branch of the defendants' application which seeks an order dismissing the underlying complaint on the basis that the plaintiff has failed to demonstrate the County acted with reckless disregard to the safety of others (*see* Korn *see* Korn Affirmation in Support at ¶25). In support thereof, counsel argues that at the time of the accident the police cruiser was an authorized vehicle responding to an emergency situation and was operated by Officer Collado in a non-reckless manner thus warranting the relief herein requested (*id.* at ¶¶24,25). Counsel relies, in part, upon the above-cited portions of Officer Collado's deposition testimony, as well as upon that of Police Officer Christopher Boccio, who was with Office Collado at the time of the subject accident and who testified the emergency lights were activated upon receipt of the emergency call and that the siren was sounded intermittently (*id.* ¶15; *see also* Exh. F at p.18).

The plaintiffs oppose this branch of the defendants' application and simultaneously cross move for various forms of relief. In opposing the instant application, plaintiffs'counsel posits that there are material questions of fact as to the relative speeds of the vehicles respectively operated by Ms. Bosco and Officer Collado, as well as with respect to whether Officer Collado adequately sounded the siren upon approaching the subject intersection.

It is well settled that a motion for summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue of fact (*Sillman v Twentieth Century Fox*, 3 NY2d 395 [1957]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). To obtain summary judgment, the moving party must establish its claim or defense by tendering admissible proof which is sufficient to warrant the Court to direct judgment in the movant's favor (*Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065 [1979]). Such evidence may include deposition transcripts as well as other proof annexed to an attorney's affirmation(CPLR §3212 [b]; *Olan v Farrell Lines,* 64 NY2d 1092 [1985]).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial (*Zuckerman v City of New York*, 49 NY3d 557 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985], *supra*). When considering a motion for summary judgment, the function of the court is not to resolve factual issues but rather to determine if any such material issues of fact exist (*Barr v County of Albany*, 50 NY2d 247[1980]).

Of particular relevance herein, Vehicle and Traffic Law §1104 [hereinafter VTL], bestows upon "[t]he driver of an authorized emergency vehicle" a qualified privilege to disregard established traffic rules when responding to an emergency situation (VTL §1104[a],[b]; *Szczerbiak v Pilat*, 90 NY2d 553 [1997]). Such

privilege extends to permitting an emergency vehicle to "[p]roceed past a steady red signal, flashing red signal or stop sign, but only after slowing down as may be necessary for safe operation" (VTL §1104[b][2]). The privilege provided by the statute is expressly limited by VTL§1104[e], which provides "[t]he foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others" (VTL 1104[e]; *Saarinen v Kerr*, 84 NY2d 494 [1994]). The standard of reckless disregard "requires proof that the officer intentionally committed an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow" (*Corallo v Martino*, 58 AD3d 792 [2d Dept 2009] at 793; *Burrell v City of New York,* 49 AD3d 482 [2d Dept 2008]; *Szczerbiak v Pilat*, 90 NY2d 553 [1997], *supra; Saarinen v Kerr*, 84 NY2d 494 [1994], *supra*).

The Court has carefully reviewed the record and finds that the submissions proffered by the defendants fail to eliminate material issues of fact as to the speed at which the police vehicle was being operated as it entered the intersection, as well as with respect to how frequently the siren was sounded prior to impact (*Corallo v Martino*, 58 AD3d 792 [2d dept 2009], *supra*; *Burrell v City of New York,* 49 AD3d 482 [2d Dept 2008], *supra*). In the instant matter, and as noted above, Officer Collado testified she operated the siren intermittently every half second and that she slowed the police vehicle prior to entering the subject intersection. However, said assertions are plainly contradicted by the statements provided to the police by non-party witnesses, Giuseppe Marra and Justin Rienzie, copies of which are included in the defendants' motion papers. A review thereof indicates that Mr. Marra stated he "saw a marked police car number 523 driving southbound on Marlboro road pass [him] with its lights on doing about 40-50 mph." Mr. Marra additionally stated that as "[t]he police car approached the intersection at Page road * * * [he] heard the Police Siren for about a second and then * * * saw a collision." As to Mr. Rienzie, he stated he observed the police vehicle "travelling [sic] south bound [sic] on Marlboro road going fast" and that "as the police car approached the intersection of Page road [he] heard the siren for about 1 second and then [he] saw the police car collide * * *" with the plaintiff's vehicle.

Thus, given the foregoing, this Court finds that the defendants have failed to establish their *prima facie* burden (*Corallo v Martino*, 58 AD3d 792 [2d Dept 2009], *supra*; *Burrell v City of New York,* 49 AD3d 482 [2d Dept 2008], *supra*). Accordingly, this Court need not consider the sufficiency of the plaintiffs' opposition papers (*id.*).

The Court now addresses that branch of the defendants' application which seeks dismissal of the underlying complaint on the basis that Ms. Bosco did not sustain a serious injury (*see* Korn Affirmation in Support at ¶¶28,30,34,35,37,40,41,42,43,45,50-53). In support thereof, the defendants provide the following: the affirmed report of Dr. Jerrold Gorski, M.D.; several affirmed independent radiologic reviews authored by Dr. Jeffrey Warhit, M.D. in connection to various MRIs and X-rays taken of the plaintiff's cervical, lumbar and thoracic spines; an unsworn operative report authored by Dr. Michael Shapiro, M.D., who preformed a pre-accident discectomy at L5-S1, and; an unsworn pre-accident MRI report dated, January 5, 2007, from Dr. Alexandre de Moura, M.D. (*id. at* Exhs. G,H,I,J,K,L,M,N,O).

Dr. Gorski conducted an orthopedic examination on 6/13/11 which included range of motion testing as to the plaintiff's neck, which was obtained by way of visual observation (*id.*). Such testing revealed restrictions as to flexion [45 degrees observed, 60 degrees is normal], extension [5 degrees observed, 15 degrees is normal], and lateral bending and rotation [45 degrees observed, 60 degrees is normal] (*id.*). Dr. Gorski opined that the plaintiff "has a diagnosis of underlying and pre-existing osteoarthritis in the neck and back and it is my opinion this may have been exacerbated in this motor vehicle accident" (*id.*).

Dr. Jeffrey Warhit. M.D., conducted an independent radiologic review of three post- accident MRIs taken with respect to the plaintiff's cervical, lumbar and thoracic spines, as well as with regard to a series of post-accident X-rays taken of the same areas of the spine (*id.* at Exhs. H-M).With respect to the cervical

spine MRI taken on 1/12/09, Dr. Warhit opined that same revealed the following: "[d]egenerative changes throughout the cervical spine especially the C5-C6 and C6-C7 levels." Dr. Warhit further stated that "[i]n view of the associated degenerative changes, the mild disc bulging noted at the C3-C4 and C4-C5 levels and the disc herniation noted at the C5-C6 and C6-C7 levels may well be on a degenerative basis." (*id.* at Exh. H). He ultimately opined that "[t]here was no evidence of a traumatic injury " (*id.*). As to the MRI of the lumbar spine taken on 1/22/09, Dr. Warhit opined that same revealed "[d]egenerative changes at the L4-L5 and L5-S1 levels" and that "[i]n view of the associated degenerative changes as well as the postoperative changes at the L5-S1 level, there is no evidence that these changes were due to the patients reported recent traumatic event" (*id.* at Exh. J). Finally, as to the thoracic spine MRI taken on 2/3/09, Dr. Warhit opined that there was "[n]egative evidence of fracture, disc herniation or disc bulging" and that "there [was] no evidence of a traumatic injury to the thoracic spine" (*id.* at Exh. I).

As to the series of post-accident X-rays, Dr. Warhit opined that the cervical spine X-ray indicated "[d]egenerative changes from the C3 through C7 levels, most prominently at the C5-C6 and C6-C7 levels" and that there was "no evidence of a traumatic injury" (*id.* at Exh. K). With respect to the lumbar spine, Dr. Warhit opined that the X-rays revealed "[d]egenerative changes at the L4-L5 and L5-S1 levels" and that the findings were "negative" for both fracture and traumatic injury (*id.* at Exh. M). As to the X-ray of the thoracic spine, Dr. Warhit stated that same revealed "[m]ild degenerative changes" and was "negative" for both fracture and traumatic injury (*id.* at Exh. L).

In addition the foregoing medical evidence, the defendants also provide the unsworn medical report of Dr. Michael Shapiro, M.D., who performed pre-accident spinal surgery on the plaintiff on April 3, 2007 (*id.* at Exh. N). Said report included a postoperative diagnosis of "L5-S1 left herniated nucleus pulposus, left lower extremity radiculopathy, and back pain" (*id.*). Finally, the defendants provide an unsworn report from Dr. de Moura in reference a pre-accident MRI taken of the plaintiff's lumbar spine on August 7, 2006 (*id.* at Exh. O). Dr. de Moura opined that said MRI revealed the presence of a herniated disc at L5-S1 (*id.* at Exh. O).

This branch of the defendants' application is opposed by the plaintiffs' who also cross-move for an order granting summary judgment as to the issue of serious injury. In both opposing the application and in support of the cross-motion, counsel for the plaintiff submits the following medical evidence: the affidavit of Dr. Grushack, D.C; the affirmed medical reports from Dr. Richard Parker, M.D.; the affirmed medical reports of Dr. Hausknecht, M.D., and; three affirmed reports in connection to the afore-referenced post-accident MRIs (*see* Isaacs Affirmation in Opposition at Exhs.1, 9).

Dr. Grushack initially examined the plaintiff on 12/1/08 at which time range of motion testing revealed restrictions in both the cervical and lumbar spines (*id.* at Exh. 9). With particular respect to the lumbar spine, Dr. Grushack noted that the Kemp's test was positive bilaterally and that the Fabre-Patrick, Bragards and Gaenslens tests were all positive on the left (*id.*). Subsequent to this initial examination, Dr. Grushack rendered a lengthy diagnosis which included the following: cervicobrachial syndrome; posterior disc bulges at C2-C3 through C4-C5; disc herniations at C5-C6 and C6-C7; disc herniations at L4-L5 and L5-S1 (*id.*). Dr. Grushack opined that based upon his examination together with his review of the relevant medical records, the plaintiff's condition was directly related to the motor vehicle accident of 11/29/08 (*id.*). Subsequently, on 5/28/10, the plaintiff was reevaluated by Dr. Grushack at which time range of motion testing again revealed restrictions as to both the cervical and lumbar spines (*id.*). Most recently, on 1/13/12, the plaintiff was reexamined by Dr. Grushack whereupon range of motion testing again indicated restrictions in the cervical and lumbar spines (*id.*). Following this last evaluation, Dr. Grushack reiterated his opinion that the plaintiff's condition was "a direct result of the traumatic injury sustained by Ms. Bosco on 11/29/08" (*id.*).

Dr. Parker, an orthopedist, examined the plaintiff on 3/12/09 at which time he observed restrictions in the plaintiff's cervical and lumbar spines (*id.* at Exh. 1). Based upon this examination, Dr. Parker rendered

the following medical assessment, which he opined was causally related to the subject accident: "Cervical Spine Herniated Nucleus Pulposus [and] Lumbar Spine Radiculopathy" (*id.*).Subsequently on 6/16/09, Dr. Parker authored a report in reference to the MRI taken of the plaintiff's lumbar spine on 1/22/09, wherein he stated that said MRI indicated the presence "of a disc herniation at L5-S1" but that it was difficult to determine "if this [was] the same disc herniation as was addressed at her previous surgery or if this [was] new"(*id.*).

Dr. Hausknecht, M.D., a neurologist, examined the plaintiff on 4/29/09 and 5/9/09, respectively (*id.* at Exh. 1). Upon initial examination, range of motion testing indicated restrictions in the cervical and lumbar spine and Dr. Hausknecht stated that the plaintiff's condition was a direct consequence of the subject accident (*id.*). On May 9, 2009, the plaintiff was again seen by Dr. Hausknecht whereupon restrictions were again noted in the cervical and lumbar spines (*id.*). The Court notes that with respect to this latter examination, while Dr. Hausknecht reports restrictions in these areas of the spine, he does not ascribe a numeric percentage thereto (*id.*).

Finally, the plaintiff submits the affirmed medical reports respectively issued by Dr. Ronald Wagner, M.D. and Dr. Steven Winter, M.D. in connection to the afore-referenced post-accident MRIs conducted as to the cervical, lumbar and thoracic spines (*id.*). As to the cervical spine MRI taken on 1/12/09, Dr. Wagner opined that same revealed: small posterior disc bulges at C2-C3 through C4-C5, and; disc herniations at C5-C6 and C6-C7 (*id.*). As to the lumbar MRI taken on 1/22/09, Dr. Winter stated that the results thereof indicated an array of findings including disc herniations at L4-L5 and L5-S1 (*id.*). As to the thoracic spine MRI taken on 2/3/09, Dr. Winter noted that same revealed, *inter alia*, upper left and lower right convex scoliotic curvature, mild anterior spur formation in the mid-thoracic region, as well as "[s]lightly exaggerated kyphotic angulation without focal malignment" (*id.*).

Where, as here, the defendants have interposed a threshold motion seeking dismissal of a personal injury complaint, the movant bears the specific burden of establishing that the plaintiff did not sustain a "serious injury" as enumerated in Insurance Law §5102[d] (*Gaddy v Eyler*, 79 NY2d 955 [1992]). Upon such a showing, it becomes incumbent upon the plaintiff to come forth with sufficient evidence, in admissible form, to raise an issue of fact as to the existence of a "serious injury" (*id.*). Within the scope of the defendants' burden, the medical experts must specify the objective tests upon which the stated medical opinions are based and, when rendering an opinion with respect to the plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part (*Black v Robinson,* 305 AD2d 438 [2d Dept 2003]*; Minlionica v Shahabi,* 296 AD2d 569 [2d Dept 2002]; *Junco v Ranzi,* 288 AD2d 440 [2d Dept 2001]; *Mondi v Keahan*, 32 AD3d 506 [2d Dept 2006]; *Qu v Doshna*, 12 AD3d 578 [2d Dept 2004]*; Browdame v Candura*, 25 AD3d 747 [2d Dept 2006]).

Having carefully reviewed the numerous medical reports submitted herein, the Court finds that none of the moving parties herein have demonstrated entitlement to summary judgment (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). Initially, and with respect to the moving defendants, the Court finds they have failed to demonstrate that the plaintiff did not sustain a "serious injury" (*Gaddy v Eyler,* 79 NY2d 955 [1992], *supra*). Here, in addition to opining that the subject accident may have exacerbated a pre-existing condition, the defendants' medical expert clearly observed limitations in the plaintiff's neck as to flexion, extension and lateral rotation (*Zamaniyan v Vrabeck*, 41 AD3d 472 [2d Dept 2007]; *Bentivegna v Stein*, 42 AD3d 555 [2d Dept 2007]; *Morales v Theagene*, 46 AD3d 775 [2d Dept 2007]; *Tchjevskaia v Chase*, 15 AD3d 389 [2d Dept 2005]; *McDowall v Abreu*, 11 AD3d 590 [2d Dept 2004]; *Volpetti v Yoon Kap*, 28 AD3d 750 [2d Dept 2006]).

As to the moving plaintiffs, while Dr. Grushack and Dr. Hausknecht each respectively note the plaintiff's pre-existing condition at L5-S1, neither of these experts opine as to what effect, if any, this prior condition had with respect to the plaintiff's current physical status (*Behm v Radoccia*, 6 AD3d 473 [2d Dept 2004]). As to Dr. Parker, he specifically opined that it was unclear as to whether the herniation at L5-S1 was

new or rather the same herniation from which the plaintiff had suffered prior to the subject accident (*id.*).

Based upon the foregoing, that branch of the defendants' application seeking summary judgment dismissing the within complaint on the basis that the plaintiff failed to sustain a serious injury is DENIED and the plaintiffs' cross-motion for an order granting summary judgment in their favor as to the issue of serious injury is DENIED.

This constitutes the Decision and Order of the Court.

All applications not specifically addressed are Denied.

DATED: 5/31/2012

.....Roy S. Mahon.....
J.S.C.

ENTERED
JUN 05 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE