SHORT FORM ORDER

INDEX No. 10-31986
CAL. No. 12-01233MV

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 11-29-12
ADJ. DATE
Mot. Seq. # 001 - MD

---X

JOANNE CAULFIELD,

Plaintiff,

- against -

KATHLEEN J. MCCALLUM and JAMES F. MCCALLUM,

Defendants.

---X

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Upon the following papers numbered 1 to 12 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 12; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers__; Replying Affidavits and supporting papers__; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (001) by the defendants, Kathleen J. McCallum and James F. McCallum, pursuant to CPLR 3212 for summary judgment dismissing the complaint, as asserted against them on the issue of liability and on the basis that the plaintiff has not sustained a serious injury as defined by Insurance Law § 5102 (d), is denied in its entirety.

In this negligence action, the plaintiff, Joanne Caulfield, seeks damages for personal injuries arising out of a motor vehicle accident which occurred on June 30, 2009 at approximately 1:25 p.m., on Ruland Road at or near its intersection with Pinelawn Road, in Huntington, New York, when her vehicle, and the vehicle operated by defendant Kathleen J. McCallum, came into contact, allegedly causing the plaintiff to sustain serious injury.

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. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]; ***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 motion (001),defendants have submitted an attorney's affirmation; copies of the summons and complaint, answer, and plaintiff's verified bill of particulars; signed and certified copy of the transcript of the examination before trial of Kathleen Mc Callum, and the unsigned but certified transcript of the examination before trial of Joanne Caulfield which is considered (*see* ***Zalot v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]) as not objected to by the plaintiff; an unauthenticated copy of a photograph; an empty exhibit F; the MRIs of the plaintiff's cervical spine dated August 8, 2004, with record of Poonam S. Dulai M.D. indicating bilateral C5-6 and C6-7 radiculopathy; radiology report of the plaintiff's lumbosacral spine dated June 30, 2009; unsigned MRI report of the plaintiff's lumbar spine dated July 3, 2009; unsigned MRI report of the plaintiff's left hip dated July 23, 2009; the sworn report of Mathew M. Chacko, M.D. dated March 20, 2012 concerning his independent neurological examination of the plaintiff; and the sworn report of Noah Finkel, M.D. dated March 26, 2012 concerning his independent orthopedic examination of the plaintiff.

Turning to the issue of liability, the plaintiff, Joanne Caulfield testified to the extent that she was involved in the automobile accident on June 30, 2009 at approximately 1:20 p.m.. The weather was sunny, and there was no precipitation on the ground. She was alone in her vehicle traveling north on Pinelawn Road. When the accident occurred, she was attempting to make a left turn at Ruland Avenue, also known as Colonial Springs, to then travel south on Pinelawn. She described Ruland as a two way street going east and west. She testified that when she made the left turn from northbound Pinelawn onto westbound Ruland, there were three westbound lanes, one of which was a turn lane. She was in the left travel lane on Ruland and intended to turn left onto southbound Pinelawn Road. There was a traffic signal light at the intersection which was red as she traveled northbound on Pinelawn before she made the left turn onto westbound Ruland. She had to stop for about thirty seconds for that red light before turning left at Ruland. There were a few cars ahead of her, one of which made a left turn when the light to turn onto Ruland turned green. She saw no traffic coming from eastbound Ruland as she stopped at the intersection. The light was still green in her favor as she proceeded with caution into the intersection with her left turn signal on. She inched up a couple of feet, and proceeded into the intersection at about ten to fifteen miles per hour, attempting to turn into the left travel lane on Pinelawn. She had almost completed the turn when her vehicle was struck by the defendants' vehicle, which she did not see prior to the impact. The rear portion of the passenger side of her vehicle was struck by the defendants' vehicle, causing the defendants' front fender to fall off.

Defendant Kathleen McCallum testified to the extent that she was involved in the accident while driving alone in a car registered to her husband. She continued that it was a hot summer day, and she was traveling east on Ruland Road, which she described as having two travel lanes in that direction, with a turn lane, and which decreased to one travel lane after crossing the Pinelawn intersection. Pinelawn, which runs north and south, has a traffic signal light at the intersection of Ruland and Pinelawn. She was in the right

hand lane on Ruland, which opened from one lane to two east bound lanes about a block or a block and a half prior to reaching that intersection. There were no vehicles ahead of her in the right lane. She saw the traffic light at the intersection was green from about a block away as she traveled about thirty miles per hour. A car in front of her had just gone through the intersection. She first saw the plaintiff's vehicle in the left turn lane on Ruland facing west, standing still with its left turn signal on, from about a block or a half block away. There were a few cars proceeding through the intersection going straight across in both lanes. As she approached the intersection, she saw the plaintiff's vehicle attempt to make a left turn in front of her when she was about six to eight feet from the plaintiff's vehicle. She testified that this occurred simultaneously as she (defendant) entered the intersection. The defendant stated that since she had the right of way, she proceeded through the intersection when she saw the plaintiff's vehicle was stopped. She thought that "possibly" some part of her vehicle had entered into the southbound lane of Pinelawn Road, but it was "hard to answer." From the time she entered the intersection, about four seconds lapsed before the front of her vehicle struck the right rear of the plaintiff's vehicle. She was about four feet from the plaintiff's vehicle when she put her foot on her brake as she was traveling about twenty five miles per hour. The defendant testified that the plaintiff's vehicle was on Pinelawn facing south when the impact occurred.

Here there are factual issues which preclude summary judgment as both the plaintiff and the defendant testified that the traffic signal light for travel in their respective direction of travel was green. The defendant further testified that there were cars crossing Pinelawn Road, going straight across in both lanes on Pinelawn prior to the plaintiff making her left turn to travel south on Pinelawn Road, leaving this court to speculate as to whether the defendant had a red or green light, and raising factual and credibility issues which preclude summary judgment. Although drivers who have the right-of-way are entitled to anticipate that other drivers would obey the traffic laws which required the other driver to yield (***Berner v Koegel***, 31 AD3e 591, 819 NYS2d 89 [2d Dept 2006]; ***Russo v Scibetti***, 298 AD2d 514, 748 NYS2d 871 [2d Dept 2002]), such cannot be determined based upon the conflicting testimonies concerning who had the green light for travel and who had the right of way in the intersection, precluding summary judgment.

Accordingly, that part of motion (001) for summary judgment in favor of the defendants on the issue of liability is denied.

Turning to that part of motion (001) wherein the defendants seeks summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law §5102 (d), it is determined that there are factual issues which preclude summary judgment on this issue.

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 medically 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*).

By way of the verified bill of particulars, the plaintiff alleges that as a result of this accident, she sustained injuries consisting of left posterolateral disc herniation extruding into the left anterior recess and origin to the left neural foramen at C7-T1; bulging discs at C4-5 and C5-6; subligamentous bulges in the extension position at C2-3 and C3-4; C5-7 radiculopathy; left predominant L5-S1 disc herniation impressing the left thecal sac and impression and posterior displacement on the exiting left S1 nerve root in the foramen; subligamentous L4-5 disc herniation impressing the thecal sac and having peripheral components into the foramen and L5 nerve roots which are abutted prior to their exit from the thecal sac; right lateral subligamentous disc herniation at L3-4 impressing on the right L3 nerve root in the foramen accompanied by posterior disc bulging; and derangements of the shoulders.

Upon review and consideration of the defendants' evidentiary submissions, it is determined that the defendants have not established prima facie entitlement to summary judgment dismissing the complaint on the basis that Joanne Caulfield did not sustain a serious injury as defined by Insurance Law § 5102 (d).

The letter from Anjani Sinha, M.D. is not affirmed or sworn to and is not in admissible form to be considered on this motion for summary judgment (CPLR 3212). The defendants' experts, Mathew M. Chacko, M.D. and Noah S. Finkel, M.D., have not submitted copies of their respective curriculum vitae to qualify to give expert orthopedic or neurological opinions. They have each itemized the medical records and materials which they reviewed and upon which they base their opinions in part, however, all these medical records have not been provided to this court (*see* ***Friends of Animals v Associated Fur Mfrs.***, *supra*. Expert testimony is limited to facts in evidence (*see also* ***Allen v Uh,*** 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***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]; ***Hornbrook v Peak Resorts,*** Inc. 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]), which facts are not in evidence.

Dr. Chacko stated that following this accident, the plaintiff underwent physical therapy for three months. She did have a prior accident with injuries to her neck, ribs, lower back, chest, right knee, and right hand. She complained of lower back and right hip pain and stiffness in her neck at the time of his examination. While Dr. Chacko examined the plaintiff's cervical and lumbar spine and obtained range of motion findings which he compared to the normal values, he did not opine as to whether any of the claimed cervical or lumbar bulging or herniated discs were caused by or aggravated by the within accident. Although he found no objective signs from a neurological standpoint, there are factual issues concerning whether or not the plaintiff suffers from cervical radiculopathy as the nerve conduction studies by Dr. Poonam S. Dulai, M.D., neurologist, provided the impression of bilateral C5-6 and C6-7 radiculopathy, right more than left. While Dr. Chacko opined that the plaintiff exhibited no objective neurological evidence of any disability from the accident, or findings consistent with cervical or lumbar radiculopathy, he did not address the plaintiff's ongoing complaints of pain, or reconcile the difference in cervical and lumbar range of motion findings, or radiating cervical and lumbar pain reported by Dr. Finkel.

The MRI of the plaintiff's cervical spine dated August 8, 2004, demonstrated that there is a mild disc bulge at the C2-3 level, and degenerative disc associated with plate change with a small to moderate broad based central disc herniation flattening the ventral sac at the C5-6 level, with disc material encroaching on the neural foramina, right greater than left with mass affect on the exiting right C6 root. There is a right lateral disc bulge with flattening of the ventral subarachnoid space eccentric to the left with mass affect on the left neural foramen with disc material touching the exiting root. There is bilateral mild foraminal narrowing with mildly stenosis of the spinal canal, with degenerative spondylitic change and disc bulging at L3-4. There is question of a small central disc herniation at L4-5 with degenerative changes and diffuse disc bulging at L4-5. At L5-S1 there is degenerative spondylitic change with interspace narrowing and reactive subchondral changes, with diffuse disc bulging and small central herniation and annular tear, with moderate left foraminal narrowing and mild right foraminal narrowing.

The x-ray of the plaintiff's lumbosacral spine of June 30, 2009 reveals narrowing of the L5-S1 disc space, with vacuum phenomenon at the interspace. The MRI of the plaintiff's lumbar spine dated July 3, 2009 reveals diffuse disc bulging centrally and slightly into both foramina with a small left-sided annular tear at L2-3, with slightly prominent posterior elements and bilateral mild foraminal narrowing.

Dr. Finkel set forth in his report that the plaintiff was involved in a motor vehicle accident in 2004 and was getting back to her normal weight and activity level when this accident occurred. Upon examination of the plaintiff's cervical spine, marked deficiencies in the plaintiff's left and right rotation, extension and forward flexion was found when Dr. Finkel compared his findings with the normal ranges of motion. A deficit in the forward flexion of the lumbar spine was reported by Dr. Finkel upon examination of the plaintiff's lumbar ranges of motion when compared to the normal ranges of motion. Dr. Finkel further reported that the straight leg raising and neurological testing of both the lower and upper extremities revealed diminished, but symmetrical reflexes, although without pathological reflexes, which diminished findings he does not distinguish or explain.

While Dr. Finkel found deficits in range of motion upon examination of the plaintiff's lumbar spine, he stated that the strains of the cervical and lumbar spine have resolved completely, however, he raised factual

issue to further preclude summary judgment as he did not reconcile his objective findings of limitations of range of motion in the plaintiff's lumbar spine with this opinion. While Dr. Chacko reports no findings consistent with cervical or lumbar radiculopathy, Dr. Finkel found that the plaintiff has pain in her cervical spine radiating to her shoulders, and that she has back pain radiating down her right leg and foot, thus raising further factual issues concerning the plaintiff's claims of radicular injuries.

It is 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' physicians' 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]).

Dr. Finkel reported that the plaintiff continued to note pain in her neck at its base with radiation into both shoulders and some limitation of range of motion. He stated that she has difficulty sleeping secondary to pain in her neck and has difficulty with bowling and biking, activities she previously engaged in prior to this accident. The pain in her back radiates to her right leg and foot, and she notes constant pain in her back with stiffness in the morning, and difficulty sleeping at night. The plaintiff testified that her elderly mother, with whom she lives, is dependent upon her to do the grocery shopping and cleaning, which she had difficulty performing since this accident. Initially, she could not perform those activities and had a friend assist her. When she is not feeling well, she hires a woman who provides cleaning services at home, and to whom she pays $15 per hour. Following the accident, she was unable to run around from conference room to conference room to perform her usual functions at work. She had to turn down an offer for a better job as her neurologist advised her against work involving bending, standing and walking, with which she was having difficulty.

Based upon the foregoing, the defendants have not demonstrated that the plaintiff did not suffer a serious injury as defined by either section of Insurance Law § 5102 (d).

The factual issues raised in defendants' moving papers preclude summary judgment. The defendants have failed to satisfy the burden of establishing, prima facie, that plaintiff did not sustain a "serious injury" within the meaning of 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 parties have 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 branch of motion (001) by the defendants for summary judgment dismissing the complaint on the basis that the plaintiff did not suffer a serious injury as defined by Insurance Law §5102 (d) is denied as to both categories of injury.

Dated: 2/11/13

A.J.S.C.

___ FINAL DISPOSITION__X__ NON-FINAL DISPOSITION