SHORT FORM ORDER

NEW YORK SUPREME COURT - COUNTY OF QUEENS

Present: HONORABLE SIDNEY F. STRAUSS
Justice

IA PART 11

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BIN LU,

Plaintiff,

-against-

DANIA M. HIDALGO and YONG XIU ZHANG,

Defendants.

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Index No. ; 1329/2011

Motion Dates: February 21, 2013
April 1, 2013

Seq. Nos.: 3 & 2

The following papers numbered 1 to 17 were read on the motion by the defendant Yong Xiu Zhang ("Zhang"), seeking an order, pursuant to CPLR 3212, granting summary judgment to said defendant, dismissing plaintiff's complaint on the grounds that plaintiff's injuries do not satisfy the threshold for serious injury as required by Insurance Law 5102 and 5104. Also read was the motion by the defendant Dania M. Hidalgo ("Hidalgo"), seeking an order, pursuant to CPLR 3212, granting summary judgment to said defendant, dismissing plaintiff's complaint and all cross-claims on the ground of liability. Also read was the cross-motion of the plaintiff, seeking an order pursuant to CPLR 3211 and 3212, granting plaintiff summary judgment on the issue of liability with an apportionment of fault as between the defendants to be determined at trial, an immediate inquest and an assessment of damages.

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On a motion for summary judgment made pursuant to Insurance Law §5102(d), the

defendants must establish entitlement to dismissal as a matter of law by demonstrating that the plaintiff's alleged injuries were either not "serious", through proof that none of the statutory categories are fulfilled, or that the plaintiff's injuries were not causally related to the accident at issue. (see, *Baez v Rahamatali*, 6 NY3D 868 [2006]; *Pommells v Perez*, 4 NY 3D 566 [2005].) The defendant's moving papers establish prima facie that the injuries sustained by the plaintiff were not "serious" within the meaning of the Insurance Law, and at most, were degenerative in nature. (see, *Gaddy v Eyler*, 79 NY2d 955 [2d Dept. 1992]; *Licari v Elliott*, 57 NY2d 230 [2d Dept. 1982].) Defendant Zhang submits the affirmed reports of Dr. Marianna Golden, a neurologist; Dr. Thomas Nipper, an orthopedist; and Dr. Audrey Eisenstadt, a radiologist. At the outset, the report of Dr. Golden, providing only conclusory determinations of normal neurological findings, absent any specificity with regard to the means of objective tests used to reach such conclusions, is without probative value. (see, *Rodgers v Duffy*, 95 AD3d 864 [2d Dept. 2012]; *Perez v Fugon*, 52 AD3d 668 [2d Dept. 2008]; *Lamb v Rajinder*, 51 AD3d 430 [1st Dept. 2008].) However, the reports of Dr. Nipper and Dr. Eisenstadt are sufficient to establish prima facie, defendant's assertion that plaintiff has not sustained serious injuries to her cervical and lumbar spines as defined by statute. Furthermore, Dr. Eisenstadt's conclusions are insufficient because they fail to address plaintiff's claim of injuries to her head as well as left and right shoulders.

In opposition, plaintiff sufficiently rebuts defendant's arguments, submitting the affirmed report of Dr. William Wang, treating physician, and the affirmation of Dr. Mary Hu, a radiologist, who attests to the MRI reports of plaintiff's cervical and lumbar spines taken November 24, 2008 and November 21, 2008, respectively. Defendant argues that plaintiff's medical reports rely upon unsworn records. However, "[a] defendant may submit unsworn medical reports and records of the injured plaintiff's physicians in support of a motion for summary judgment in order to demonstrate the lack of a serious injury."(*Kearse v New York City Transit Authority*,16 AD3d 45 [2d Dept. 2005]; see also, *Pagano v Kingsbury*, 182 AD2d 268 [2d Dept. 1992].) Therefore, since the affirmed medical reports submitted in the moving papers refer to plaintiff's unsworn reports, plaintiff may properly rely upon them as well. The court finds that conflicting medical affirmations and affidavits considered on this motion, demonstrate the existence of triable issues of fact as to whether the alleged injuries sustained by the plaintiff are serious in nature as required by statute. Where the court is presented with contradictory medical opinions as to the nature and extent of a plaintiff's injuries and limitations, the motion must be properly denied. (*Estevez v Mantos*, 264 AD2d 754 [2d Dept. 1999]; *Florez v Diaz*, 243 AD2d 607 [2d Dept. 1997].)

Additionally, defendant's physicians establish that, as of their examinations of plaintiff more than four years after the accident, his limitations in functioning were not attributable to the trauma of the collision. However, having never examined plaintiff during the six months after the collision, such reports do not conclude, nor offer any other objective medical support for the conclusion, that no injury or impairment attributable to the collision, prevented her daily activities during that period. (see, *Ballard v Cunneen*, 76 A.D.3d 1037 [2d Dept. 2010]; *Sayers v Hot*, 23 A.D.3d 453 [2d Dept. 2005].) Accordingly, reference to plaintiff's own deposition and

bill of particulars sufficiently refute the "90/180" category under Insurance Law § 5102(d). (see, *Jack v Acapulco Car Serv., Inc.*. 63 AD3d 1526 [4th Dept 2010]: *Bleszcz v Hiscock*, 69 AD3d 639 [2d Dept 2010]: *Lopez v Abdul-Wahab*, 67 AD3d 598 [2d Dept 2009]; *Kuchero v Tabachnikov*, 54 AD3d 729 [2d Dept 2008].)

Accordingly, the motion by defendant Zhang is denied.

As to the motion of defendant Hidalgo, seeking summary judgment as to liability, the court determines as follows:

Hidalgo asserts that on the day of the accident, September 3, 2008, she was lawfully driving on Corona Avenue, with no traffic control devices, and with the right of way at the intersection of Remson Street in North Valley Stream, when co-defendant Zhang, traveling on the same road but coming from the opposite direction, attempted a left turn directly into the path of Hidalgo, causing a collision. Both the plaintiff, a passenger in Zhang's vehicle, and Zhang herself, admit that neither one observed Hidalgo's vehicle until after the accident occurred. Hidalgo testified that immediately before impact she realized that Zhang was attempting to make a turn, and further, that Zhang was on her cell phone. Hidalgo testified that she applied her brakes and swerved to the right to avoid the collision, but Zhang continued making her left turn into Hidalgo's path, without ever having acknowledged Hidalgo's vehicle.

Counsel for Hidalgo contends that Zhang's actions in attempting to make a left turn from the opposite direction, without yielding to the Hidalgo vehicle, which had the right of way, was the sole proximate cause of the accident. Counsel contends that the actions of Zhang in turning her vehicle directly into the path of Hidalgo's oncoming vehicle constitutes negligence as a matter of law. "Vehicle and Traffic Law § 1141 requires that '[t]he driver of a vehicle intending to turn to the left within an intersection ... yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard.' A driver with the right of way is entitled to anticipate that the other driver will obey traffic laws that require her to yield ."(see, *Kucar v Town of Huntington*, 81 AD3d 784 [2d Dept. 2011], citing, *Kann v Maggies Paratransit Corp.*, 63 AD3d 792 [2d Dept. 2009]; *Berner v Koegel*, 31 AD3d 591 [2d Dept. 2006]; *Gabler v Marly Bldg. Supply Corp.*, 27 AD3d 519 [2d Dept. 2006].) Moreover, counsel contends that Hidalgo had the right to assume that the Zhang vehicle would not disobey the traffic rules. (see, *Ahern v Lanaia*, 85 AD3d 696 [2d Dept. 2011]; *Mohammad v Ning*, 72 AD3d 913 [2d Dept. 2010]; *Polamo v Pozzi*, 57 AD3d 498 [2d Dept. 2008]; *Spivak v Erickson*, 40 AD3d 962 [2d Dept. 2007].)

In opposition to that branch of the motion concerning liability, plaintiff's counsel argues that there are inconsistencies in the pre-trial testimony of the parties which fail to eliminate all questions of fact regarding the happening of the accident and the comparative negligence of the Hidalgo vehicle.

The proponent of a summary judgment motion must tender evidentiary proof in

admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position (see, *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Here, defendant Hidalgo established her prima facie entitlement to judgment as a matter of law through the submission of her deposition testimony and that of the plaintiff passenger. Since the Zhang vehicle made a left turn into the path of the Hidalgo vehicle without yielding the right of way prior to initiating the left turn, the testimony established that Zhang failed to yield to the Hidalgo vehicle as she proceeded lawfully through the intersection and Zhang was therefore negligent as a matter of law. (see, *Heath v Liberato*, 82 AD3d 841 [2d Dept. 2011]; *Kucar v Town of Huntington*, supra; *Loch v Garber*, 69 AD3d 814 [2d Dept. 2010]; *Gabler v Marly Bldg. Supply Corp.,* supra.) Defendant Hidalgo, who had the right-of-way, was entitled to anticipate that the Zhang vehicle would obey the traffic law which required her to yield, and therefore her violation of Vehicle and Traffic Law § 1141 was a proximate cause of the accident. (see, *Torro v Schiller*, 8 AD3d 364 [2d Dept. 2004].) The evidence submitted demonstrates that Zhang was negligent in failing to see that which, under the circumstances, she should have seen, and in attempting to make the left turn when it was hazardous to do so. (see, *Salce v Check*, 23 AD3d 451 [2d Dept. 2005].) Further, the movant established, prima facie, her entitlement to judgment as a matter of law as the evidence submitted in support of her motion demonstrated that the subject motor vehicle accident was not proximately caused by any negligence on the part of the movant. (see, *Alvarez v Prospect Hosp*., 68 NY2d 320 [1986].)

In opposition to Hidalgo's prima facie showing, Zhang failed to raise a material question of fact as to whether Hidalgo was comparatively negligent (see *Zuckerman v City of New York*, supra; see also, *Moreno v Gomez*, 58 AD3d 611 [2d Dept. 2009]; *Moreback v Mesquita*, 17 AD3d 420 [2d Dept. 2005]). Zhang attempts to raise an issue of fact as to whether Zhang had hit a light pole while making a U-turn just prior to the accident, however, Zhang herself testified that she was making a left turn at the moment of impact, and that it was after the collision between the two defendants' vehicles when the Zhang vehicle hit the light pole.

Although there were minor differences in the respective defendants' accounts as to the precise manner in how the accident occurred, both accounts showed that Zhang was negligent and none of the differences in the accounts was sufficient to demonstrate the existence of a triable issue of fact as to whether Hidalgo was comparatively negligent. (see *Kucar v Town of Huntington*, supra; *Kann v Maggies Paratransit Corp*., supra.) Furthermore, the court is not persuaded by Zhang's conclusory and speculative allegations regarding the rate of speed of Hidalgo's vehicle, attempting to raise the issue of comparative negligence.(see, *Kann v Maggies Paratransit Corp*., supra; *McCain v Larosa*, 41 AD3d 792 [2d Dept. 2007]; *Rieman v Smith*, 302 AD2d 510 [2d Dept. 2003].)

Accordingly, defendant Hidalgo's motion, seeking the dismissal of all claims and cross-

claims as against her, is granted. Plaintiff's complaint, as to defendant Hidalgo, is dismissed.

As to plaintiff's cross-motion seeking summary judgment as to liability, same is granted. It is well settled that the right to summary judgment of an innocent passenger or bystander involved in a personal injury action is not in any way restricted by potential issues of comparative negligence as between defendant and any other drivers involved in the accident. (see, *Cummins v Rose*, 185 AD2d 839 [2d Dept 1992]; *Silberman v Surrey Cadillac Limousine Service, Inc.,* 109 AD2d 833 [2d Dept 1985].) As this court has determined, plaintiff's complaint as against defendant Hidalgo, is dismissed. Therefore, plaintiff's motion as to liability is granted solely as it applies to defendant Zhang. The matter shall now proceed to trial on the issue of damages as against the defendant Zhang.

Dated: April 11, 2013

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SIDNEY F. STRAUSS, J.S.C.