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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IAS PART 24
Justice

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GALO PROANO and ELISABETH FACTOS-PROANO,

Index No: 22122/09

Plaintiffs,

Motion

-against- Dated: March 21, 2013

RAFAEL HURTADO and FRANCISCO PELEAS,

m# 4 & 5

Defendants.

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The following papers numbered 1 to 29 read on this motion by defendants for leave to renew their prior motion for summary judgment on the ground that neither plaintiff sustained a serious injury pursuant to Insurance Law § 5102(d) (Sequence No. 4); and separate motion by plaintiff on the counterclaim Galo Proano for (i) leave to renew his prior motion for summary judgment seeking to dismiss the counterclaim insofar as asserted against him on liability grounds; and (ii) summary judgment dismissing the complaint of plaintiff Elisabeth Factos-Proano on the ground that plaintiff Elisabeth Factos-Proano failed to sustain a serious injury pursuant to Insurance Law § 5102(d) (Sequence No. 5); and cross motion by the plaintiffs for summary judgment dismissing the counterclaim as against plaintiff on the counterclaim Galo Proano.

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Upon the foregoing papers it is ordered that these two motions and this cross motion are decided as follows:

At the outset, the court notes that pursuant to a short form order dated October 19, 2011, defendants' motion for summary judgment was denied without prejudice to renewal when the stay imposed as a result of the filing of a bankruptcy petition by plaintiff Elisabeteh Factos-Proano was vacated. Pursuant to stipulation so-ordered by Court Attorney-Referee Leonard N. Florio, dated November 9, 2012, the matter was restored to active status. Thus, the instant motions for summary judgment can now be entertained.

Plaintiffs allegedly sustained serious injuries while their vehicle, which was operated by plaintiff Galo Proano, was involved in an automobile accident with defendants' vehicle on June 8, 2009 at the intersection of 102nd Street and 41st Avenue in Queens County. Plaintiffs commenced the instant action to recover damages for negligence. Defendants interposed a counterclaim against plaintiff Galo Proano. Defendants now move for summary judgment on the ground that neither plaintiff has sustained a serious injury within the meaning of Insurance Law § 5102(d). Plaintiff on the counterclaim Galo Proano moves for summary judgment dismissing the complaint of plaintiff Elisabeth Factos-Proano on the ground that she has not sustained a serious injury pursuant to Insurance Law § 5102(d) and also seeks to dismiss the counterclaim as against him on liability grounds.

The issue of whether plaintiff has made a prima facie showing of serious injury is a matter of law, to be determined in the first instance by the court. (*Licari v Elliott*, 57 NY2d 230, 237 [1982]; *Charles v U.S. Fleet Leasing*, 140 AD2d 481, 481 [2d Dept 1988].) A defendant can establish that the plaintiff's injuries are not serious within the meaning of Insurance Law § 5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim. (*see Grossman v Wright*, 268 AD2d 79, 84 [2d Dept 2000]; *Turchuk v Town of Wallkill*, 255 AD2d 576, 576 [2d Dept 1998].) With this established, the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact as to whether a serious injury was sustained within the meaning of the Insurance Law. (*see Gaddy v Eyler*, 79 NY2d 955, 957 [1992].) A plaintiff's subjective claim of pain and limitation of motion must be sustained by verified objective medical findings. (*see Carroll v Jennings*, 264 AD2d 494, 495 [2d Dept 1999]; *Kauderer v Penta*, 261 AD2d 365, 366 [2d Dept 1999].)

Defendants made a prima facie showing that the plaintiff Galo Proano did not sustain a serious injury within the meaning

of Insurance Law § 5102(d). (*Toure v Avis Rent-A-Car Sys., Inc.*, 98 NY2d 345, 350 [2002].)

In opposition to the motion, plaintiff Galo Proano fails to raise a triable issue of fact as to the existence of a serious injury. Plaintiff Galo Proano submits the sworn and notarized affirmation of Dr. Deborah A. Turner, who initially examined the said plaintiff on June 10, 2009. Dr. Turner avers that her examination of the plaintiff revealed moderate and mild limitations in the range of motion of the cervical and lumbar spine. However, minor or slight limitations in the plaintiff's range of motion do not constitute a serious injury. (*Licari v Elliott*, 57 NY2d 230, 236 [1982]; *Tuberman v Hall*, 61 AD3d 441, 441 [1st Dept 2009]; *Lincoln v Johnson*, 225 AD2d 593, 594 [2d Dept 1996].)

Dr. Turner also avers that she reviewed the magnetic resonance imagings ("MRIs") of Galo Proano's neck and back, which revealed various herniated discs. However, the mere existence of a herniated disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration. (*Estrada v Tejeda*, 56 AD3d 603, 603-604 [2d Dept 2008]; *Gastaldi v Chen*, 56 AD3d 420, 421 [2d Dept 2008]; *Smeja v Fuentes*, 54 AD3d 326, 328 [2d Dept 2008].)

With respect to plaintiff Elisabeth Factos-Proano, defendants and plaintiff on the counterclaim made a prima facie showing that the said plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d). (*Toure v Avis Rent-A-Car Sys., Inc.*, 98 NY2d at 350.)

In opposition, plaintiff Elisabeth Factos-Proano submits sufficient evidence raising a triable issue of fact as to the existence of a serious injury. Plaintiff Elisabeth Factos-Proano submits the affidavit of Dr. Deborah A. Turner, who performed a qualitative and quantitative examination of the said plaintiff that was contemporaneous with the subject accident. (*Perl v Meher*, 18 NY3d 208, 217 [2011].) Dr. Turner found some severe limitations of the plaintiff's lumbar spine. Dr. Turner notes that plaintiff Elisabeth Factos-Proano treated at her facility two to three times per week until January 29, 2010. She explains that further treatment would be unnecessary since the plaintiff's condition was "chronic in nature." Such averment is sufficient to constitute a reasonable explanation for this plaintiff's gap in treatment. (*see Pommells v Perez*, 4 NY3d 566, 574 [2005]; *Jean-Baptiste v Tobias*, 88 AD3d 962, 962-963 [2d Dept 2011]; *Paz v Wydrzynski*, 41 AD3d 453, 453-454 [2d Dept 2007].)

The court notes that although Dr. Turner did not quantify the limitations in plaintiff Elisabeth Factos-Proano's range of motion at the recent examination she performed, this is not fatal to the plaintiff's claim that she sustained a significant limitation of use of a body function or system. (*see Estrella v Geico Ins. Co.*, 102 AD3d 730, 731-732 [2d Dept 2013].)

The court will now address the remaining branch of the motion by plaintiff on the counterclaim and the plaintiffs' cross for summary judgment pertaining to liability.

It is well settled that a driver who fails to yield the right-of-way after stopping at a stop sign is in violation of Vehicle and Traffic Law § 1142(a) and is negligent as a matter of law. (*Thompson v Schmitt*, 74 AD3d 789, 789 [2d Dept 2010]; *Klein v Crespo*, 50 AD3d 745, 745-746 [2d Dept 2008]; *Gergis v Miccio*, 39 AD3d 468, 468 [2d Dept 2007].) Further, a driver is required to see that which through the proper use of his of her senses he or she should have seen, and a driver who has the right-of-way is entitled to anticipate that the other motorist will obey the traffic law requiring him to stop. (*Sirot v Troiano*, 66 AD3d 763, 764 [2d Dept 2009]; *Hull v Spagnoli*, 44 AD3d 1007, 1007 [2d Dept 2007].)

In the case at bar, the admissible evidence establishes that defendant Francisco Pelaez was traveling on 102nd Street, and there was a stop sign controlling traffic in his direction at the intersection of 102nd Street and 41st Avenue. Plaintiff/plaintiff on the counterclaim Galo Proano was traveling on 41st Avenue, and there were no traffic control devices in his direction near the subject intersection. Plaintiff Galo Proano testified at his deposition that he saw the defendants' vehicle approximately three seconds before the impact. He further testified that following the accident, he told the police that the defendant did not stop at the stop sign. Thus, the evidence demonstrates that defendants' vehicle failed to yield the right-of-way at the stop sign on 102nd Street. Defendants have failed to submit any evidence raising an issue of fact as to whether Galo Proano was negligent.

Accordingly, the branch of this motion by defendants for summary judgment pursuant to Insurance Law § 5102(d) is granted solely to the extent that the complaint of plaintiff Galo Proano is dismissed. (Sequence No. 4).

The branch of this motion by defendants for summary judgment dismissing the complaint of plaintiff Elisabeth Factos-Proano pursuant to Insurance Law § 5102(d) is denied. (Sequence No. 4).

The branch of the motion by plaintiff on the counterclaim Galo Proano for summary judgment dismissing the complaint of plaintiff Elisabeth Factos-Proano pursuant to Insurance Law § 5102(d) is denied. (Sequence No. 5).

The branch of the motion by plaintiff on the counterclaim Galo Proano for summary judgment dismissing the counterclaim as asserted against him is granted, and the counterclaim against plaintiff on the counterclaim Galo Proano is dismissed. (Sequence No. 5).

The cross motion by plaintiffs for summary judgment dismissing the counterclaim as against plaintiff on the counterclaim Galo Proano is granted.

Date: June 13, 2013

AUGUSTUS C. AGATE, J.S.C.