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SHORT FORM ORDER

INDEX No. 11-10322
CAL No. 13-00558MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 6-27-13 (#001)
MOTION DATE 7-10-13 (#002)
ADJ. DATE 10-2-13
Mot. Seq. # 001 - MG
002 - MD

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TANYA CORONA,

Plaintiff,

- against -

ELIAS HERNANDEZ and ANA RAMOS,

Defendant.

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Upon the following papers numbered 1 to 29 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9; 10 - 18; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 19 - 20; 21 - 25; Replying Affidavits and supporting papers 26 - 29; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (# 001) by plaintiff and the motion (# 002) by defendants are consolidated for purposes of this determination; and it is further

ORDERED that the motion (# 001) by plaintiff for an order granting her summary judgment on the issue of liability against defendants is granted; and it is further

ORDERED that this motion (# 002) by defendants for summary judgment dismissing the complaint against them on the ground that the plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, Tanya Corona, when her vehicle collided with a vehicle owned by defendant Ana Ramos and operated by defendant Elias Hernandez at the intersection of Veterans Memorial Highway and Motor Parkway in Haupauge, New York, on November 22, 2010 at approximately 10:30 a.m.

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It is undisputed that Veterans Memorial Highway, which is a two-way road with two lanes in each direction, runs north and south, and that Motor Parkway, which is a two-way road with two lanes in each direction, runs east and west.

Plaintiff moves (# 001) for an order granting her summary judgment on the issue of liability against defendants. Plaintiff alleges that she is not liable for the accident, and that the subject accident was solely the result of defendant Elias Hernandez's failure to control his vehicle. In support, plaintiff submits, *inter alia*, the pleadings, her own deposition transcript, and the transcript of the deposition testimony given by defendant Hernandez.

At her examination before trial, plaintiff testified to the effect that, on the day of the accident, she had been traveling on Motor Parkway, and that she came to a complete stop at a red traffic light at the intersection with Veterans Memorial Highway for approximately 45 seconds to one minute. Her vehicle was the first vehicle stopped at the intersection. When the traffic light turned green, she looked both ways to see if there was any vehicle approaching. After ascertaining that it was safe to cross, she proceeded into the intersection. About two seconds thereafter, her vehicle collided with the defendants' vehicle. As a result of the impact, her vehicle spun around twice. Prior to the accident, she did not see the defendants' vehicle.

At his deposition, defendant Hernandez testified to the effect that, on the day of the accident, he had been traveling southbound on Veterans Memorial Highway at approximately 50 miles per hour. When he first observed a green traffic light at the intersection with Motor Parkway, he was approximately 25 feet before the intersection. When he was approximately 10 to 15 feet away from the intersection, the traffic light turned from green to yellow for traffic. Although he applied his brakes very hard, his vehicle skidded and collided with the plaintiff's vehicle at the intersection. Prior to the impact, he observed the light turn to "red," and he did not see the plaintiff's vehicle.

A driver with the right of way has no duty to watch for and avoid a driver who might fail to stop at a stop sign or a traffic light (*see* ***Barbato v Maloney***, 94 AD3d 1028, 943 NYS2d 204 [2d Dept 2012]; ***Dinham v Wagner***, 48 AD3d 349, 851 NYS2d 535 [1st Dept 2008]; ***Jenkins v Alexander***, 9 AD3d 286, 780 NYS2d 133 [1st Dept 2004]). Moreover, an operator who has the right of way is entitled to anticipate that other vehicles will obey the traffic laws that require them to yield (*see* ***Duran v Simon***, 83 AD3d 654, 919 NYS2d 895 [2d Dept 2011]; ***Horton v Warden***, 32 AD3d 570, 819 NYS2d 356 [3d Dept 2006]). Vehicle and Traffic Law § 1140 (a) obligates drivers approaching an intersection to yield the right-of-way to a vehicle that has entered the intersection from another direction (*see* ***Le Claire v Pratt***, 270 AD2d 612, 704 NYS2d 354 [3d Dept 2000]).

Here, plaintiff has established her prima facie entitlement to summary judgment by presenting evidence that she was driving in a reasonable and prudent manner. She testified at her deposition that she entered the subject intersection with a green light in her favor, and that she could not avoid the collision. Moreover, defendant Hernandez admitted that he went through the red light at the subject intersection. Under these circumstances, plaintiff has also established that the sole proximate cause of the subject accident was defendant Hernandez's negligence – his failure to stop at the red traffic light when proceeding into the intersection (*see* ***Shapiro v Munoz***, 28 AD3d 638, 813 NYS2d 755 [2d Dept

2006]; ***Klein v Byalik***, 1 AD3d 399, 766 NYS2d 687 [2d Dept 2003]; ***Puccio v Caputo***, 272 AD2d 387, 707 NYS2d 478 [2d Dept 2000]). Thus, the burden of demonstrating a material issue of fact shifts to non-movant.

In opposition, defendants' contention that there is a triable issue of fact as to the plaintiff's negligence because she failed to see that which by the proper use of her senses she should have seen is mere speculation, insufficient to defeat the motion (*see* ***Hamilton v Kong***, 93 AD3d 821, 940 NYS2d 901 [2d Dept 2012]; ***Klein v Byalik***, *supra*; ***Puccio v Caputo***, *supra*). Defendants failed to raise a triable issue of fact as to whether plaintiff was in any way at fault in the happening of the accident (*see* ***Shapiro v Munoz***, *supra*; ***Puccio v Caputo***, *supra*). A driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively at fault for failing to avoid the collision (*see* ***Figueroa v Diaz***, 107 AD3d 754, 967 NYS2d 109 [2d Dept 2013]; ***Barbato v Maloney***, 94 AD3d 1028, 943 NYS2d 204 [2d Dept 2012).

In view of the foregoing, plaintiff's motion for an order granting her summary judgment on the issue of liability is granted.

Defendants move (# 002) for summary judgment dismissing the complaint against them on the ground that plaintiff has not sustained a serious injury as defined in Insurance Law § 5102 (d).

By her bill of particulars, plaintiff alleges that, as a result of the subject accident, she sustained serious injuries including herniated discs at C4-C5, C5-C6, C6-C7, L4-L5, and L5-S1; bulging discs at C2-C3, C3-C4, T6-T7, and T7-T8; posterior primary rami dysfunction at C6; nerve root abutment and radiculopathy at L5; and right eye visual disturbances secondary to headaches.

Insurance Law § 5102 (d) defines "serious injury" as "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."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance***, 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 a "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 (*see* ***Perl v Meher***, 2011 NY Slip Op 8452, 2011 NY Lexis 3320 [2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Akhtar v Santos*** 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff's own deposition testimony and the affirmed medical report of the defendant's own examining physician (*see* ***Moore v Edison***, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; ***Farozes v Kamran*** 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

On July 30, 2012, approximately one year and eight months after the subject accident, defendants' examining orthopedist, Dr. Craig Ordway, examined plaintiff using certain orthopedic and neurological tests, including straight leg raising test and foraminal closure test. Dr. Ordway found that all the test results were negative or normal. Dr. Ordway performed range of motion testing on plaintiff's cervical spine and mid and lower back using a goniometer, and found that her ranges of motion were all within normal ranges. With regard to the cervical spine, Dr. Ordway indicated that the chin is easily brought to the chest; that upward gaze is carried beyond 70 degrees; that right to left lateral gaze is noted to be 50 degrees, symmetrically, in each direction; and that right to left lateral tilt is carried to 40 degrees, symmetrically, in each direction. Dr. Ordway stated that "this would represent an essentially normal range of motion." With regard to the mid and lower back, Dr. Ordway indicated that forward bending is carried beyond 70 degrees; that right to left lateral bending is symmetrically carried beyond 15 degrees; and that "this would represent an, essentially, normal range of motion."

On August 3, 2012, defendants' examining neurologist, Dr. Beatrice Engstrand, examined plaintiff using certain orthopedic and neurological tests including straight leg raising test, Tinel's sign and Phalen's sign. Dr. Engstrand found that all the test results were negative or normal, and that there were mild spasms in the plaintiff's neck. Dr. Engstrand performed range of motion testing on plaintiff's cervical and lumbar spine using a goniometer, and found that her ranges of motion were all within normal ranges. With regard to the cervical spine, Dr. Engstrand indicated that flexion was 45 degrees (45 degrees normal), extension was 45 degrees (45 degrees normal), right and left rotation were 80 degrees (80 degrees normal), and right and left lateral flexion were 40 degrees (40 degrees normal). With regard to the lumbar spine, Dr. Engstrand indicated that flexion was 90 degrees (90 degrees normal), extension was 30 degrees (30 degrees normal), right and left rotation were 30 degrees (30 degrees normal), and right and left lateral flexion were 30 degrees (30 degrees normal).

Here, defendants failed to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see* ***Reitz v Seagate Trucking, Inc.***, 71 AD3d 975, 898 NYS2d 173 [2d Dept 2010]). Drs. Ordway and Engstrand's reports are insufficient to sustain defendants' prima facie burden. While Dr. Ordway found that plaintiff's cervical extension and rotation were "beyond 70 degrees" and 50 degrees respectively, Dr. Engstrand found that plaintiff's cervical extension and rotation were 45 degrees and 80 degrees respectively. It is also noted that Drs. Ordway and Engstrand's respective range of motion findings for plaintiff's lumbar flexion and lateral bending are

different. The conflicting medical opinions of the experts raise issues of credibility for the jury to determine (*see* ***Manuel v New York City Tr. Auth.***, 82 AD3d 1059, 918 NYS2d 787 [2d Dept 2011]; ***Kalpakis v County of Nassau***, 289 AD2d 453, 735 NYS2d 427 [2d Dept 2001]). Moreover, Dr. Ordway failed to specify the degree of range of motion in plaintiff's cervical flexion and lumbar extension (*see* ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2006]). Dr. Engstrand failed to discuss the degree of range of motion of plaintiff's thoracic spine.

Inasmuch as defendants failed to meet their prima facie burden, it is unnecessary to consider whether the papers submitted by plaintiff in opposition to the moving defendants' motion for summary judgment were sufficient to raise a triable issue of fact (*see* ***McMillian v Naparano***, 61 AD3d 943, 879 NYS2d 152 [2d Dept 2009]; ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]).

Accordingly, the defendants' motion for summary judgment on the issue of serious injury is denied.

Dated: JAN 16 2014

J.S.C.
HON. JEFFREY ARLEN SPINNER

____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION