SHORT FORM ORDER

INDEX No. 12-33999
CAL. No. 13-01771MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 12-19-13 (#001)
MOTION DATE 2-27-14 (#002)
ADJ. DATE 1-16-14 (#001)
ADJ. DATE 2-27-14 (#002)
Mot. Seq. # 001 - MG
002 - MD

JULIE A. MATHEW and BILU J. MATHEW, Plaintiffs, - against - JOANN CARRUTH, Defendant.	EDWARD HORN, ESQ. Attorney for Plaintiffs 82 Pine Street, Suite 206 Freeport, New York 11520 McCABE COLLINS, McGEOUGH, et al. Attorney for Defendant 346 Westbury Avenue, P.O. Box 9000 Carle Place, New York 11514

Upon the following papers numbered 1 to 37 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (001) 24-37; Notice of Cross Motion and supporting papers (002) 1-9; Answering Affidavits and supporting papers 10-21; Replying Affidavits and supporting papers 22-23; Other _; it is,

ORDERED that motion (001) by plaintiff, Julie A. Mathew, pursuant to CPLR 3212 for summary judgment on the issue of liability on the basis that she bears no liability for the occurrence of the accident is granted; and it is further

ORDERED that motion (002) by defendant, Joann Carruth, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that plaintiff, Julie A. Mathew, did not sustain a serious injury as defined by Insurance Law §§ 5102 (d) and 5104 is denied; and it is further

ORDERED that within thirty days of this order being entered with the Clerk of Suffolk County, the plaintiff is directed to serve a copy of this order with notice of entry upon the defendant and the Clerk of the Calendar Department, Supreme Court Riverhead, and said Clerk of the Calendar Department is directed to schedule this matter for a trial on damages forthwith.

In this negligence action, Julie A. Mathew seeks damages for serious personal injuries she alleges were sustained on October 4, 2012, at the intersection of Main Street and Maple Avenue, in Smithtown, New York, when her vehicle was struck in the rear by the vehicle operated by defendant, Joann Carruth.

The plaintiff seeks summary judgment on the issue of liability. The defendant 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). Plaintiff objects by letter to the opposition to motion (001) served by defendant's counsel as untimely, however, the papers are considered as no prejudice has been demonstrated.

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 (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***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), the plaintiff has submitted, *inter alia*, copies of the summons and complaint, answer, plaintiff's verified bill of particulars; and the transcripts of the examinations before trial of the plaintiff Julie Mathew dated June 12, 2013, and the defendant Joann Carruth dated July 12, 2013, and copies of the witness statement of Pipul Shah dated November 20, 2012 which is not notarized or sworn to, and of Juana Cortesde Torres dated November 20, 2012 which is notarized and sworn to; and an uncertified copy of the Police MV-104 Accident Report which this Court notes constitutes hearsay and is inadmissible (*see* ***Lacagnino v Gonzalez***, 306 AD2d 250, 760 NYS2d 533 [2d Dept 2003]; ***Hegy v Coller***, 262 AD2d 606, 692 NYS2d 463 [2d Dept 1999]).

In support of motion (002), defendant has submitted, *inter alia*, an attorney's affirmation; copies of the summons and complaint, answer, plaintiff's verified bill of particulars; an unsigned but certified transcript of the examination before trial of plaintiff dated June 12, 2013, with proof of service pursuant to CPLR 3116; reports dated August 5, 2013 by Richard Lechtenberg, M.D. concerning his independent neurologic examination of the plaintiff, and Gary Kelman, M.D. dated August 8, 2013 concerning his independent orthopedic examination of the plaintiff.

The plaintiff, Julie A. Mathew, set forth in her supporting affidavit that the accident occurred on October 4, 2012 on Jericho Turnpike, also known as Main Street, at the intersection with Maple Avenue, in Smithtown, New York. She was driving eastbound in the left lane of Jericho Turnpike. As she approached the intersection with Maple Avenue, she heard the sirens of an emergency vehicle. There were no vehicles in front of her in the left lane. She slowed her car down to a complete stop before entering the intersection, and the vehicles traveling in the right lane alongside of her also came to a stop.

She remained stopped for approximately three to five seconds when she felt a strong impact to the rear of her vehicle as the ambulance was passing in front of her through the intersection on Maple Avenue.

At her deposition, the plaintiff testified to the extent that the accident occurred at about 9:10 a.m. on a sunny day as she was traveling eastbound on Main Street. She was the owner and operator of her vehicle, a 2012 Audi. There was a standard red, yellow, green traffic light controlling the intersection of Jericho Turnpike and Maple Avenue. When she first saw the traffic light from one block away, it was green, and it did not change color as she approached it. However, she came to a stop at the intersection, as an ambulance was crossing through the intersection, traveling north on Maple Avenue. When she first heard the sirens, she slowed down before the crosswalk. When she came to a complete stop, the front end of her vehicle was into the intersection. Her vehicle had been at a complete stop about five seconds when the impact to the rear and left driver's side of her car occurred from the vehicle behind her.

Joann Carruth testified to extent that she was due at work at 10:00 a.m., but got called into work early to cover for someone who was supposed to be at work at 9:00 a.m. She was driving her car in an easterly direction on Jericho Turnpike, traveling about 30 miles per hour. She observed the traffic light at the intersection was green. Just prior to the accident, she was in the right lane, however, there were cars ahead of her in her lane of travel, so she began accelerating and moved into the left travel lane to pass the vehicle, and saw the plaintiff's vehicle stopped at the green light about three or four car lengths ahead of her in the left travel lane. She did not hear any sirens, and stated that she did not know why the other car was stopped for the green light. She continued that, "but I can tell you that emergency vehicles were coming out of the side street." She continued that the minute she saw the plaintiff's car, she applied her brakes strong and started to turn to the left, hoping to avoid her. The right front of her vehicle hit the plaintiff's driver's rear, with a "soft" impact.

Juana Cortes de Torres averred that the ambulance was traveling north on Maple Avenue with its lights on and siren screeching and entered into the intersection, when the Audi traveling east on Main Street slowed down and stopped to yield the right of way to the ambulance. An SUV traveling east on Main Street collided with the rear-end of the Audi, which was clearly stopping for an ambulance and was not at fault in the accident.

Vehicle and Traffic Law § 1128 (a) provides in pertinent part that a vehicle shall not be moved from a lane until the driver has first ascertained that such movement can be made with safety. As noted in ***Fogfel v Rizzo***, 91 AD3d 706, 937 NYS2d (2d Dept 2012), a driver is negligent if he or she makes an unsafe lane change or fails to see that which, through the proper use of one's senses, should have been seen. In the instant action, it is determined that the defendant was negligent as a matter of law in violating Vehicle and Traffic Law § 1128 (a) in that, while traveling in the right travel lane in an easterly direction on Main Street, she made an unsafe lane change into the left travel lane to pass the vehicle ahead of her, and further failed to see that the plaintiff's vehicle, three or four car lengths ahead in the left lane, was stopping, and did stop, for an emergency vehicle traveling in a northerly direction on Maple Street, across the intersection. The defendant then struck the plaintiff's stopped vehicle in the rear in the left travel lane ahead of her.

A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle; thus, a rear-end collision establishes a *prima facie* case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision (***Fajardo v City of New York***, 95 AD3d 820, 943 NYS2d 587 [2d Dept 2012]). It is determined that the plaintiff established a *prima facie* case of negligence on the part of the defendant. Here, the defendant has not come forward with a non-negligent explanation for striking the plaintiff's vehicle in the rear while it was stopped to yield the right of way to an ambulance passing through the intersection. Thus, it is determined that the defendant was negligent as a matter of law in striking the plaintiff's vehicle in the rear.

Accordingly, motion (001) is granted in favor of the plaintiff, Julie A. Mathew, on the issue of liability on the basis that she bears no liability for the occurrence of the accident.

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 plaintiff's verified bill of particulars, the plaintiff alleges that as a result of this accident, the following injuries were sustained: asymptomatic conditions made symptomatic and disabling; reversal of cervical lordosis centered at C4; bulging discs at C4-5 and C5-6; central to left paracentral broad-based disc herniation at C6-7 abutting the anterior margin of the cervical cord on the left side and extending into the medial left neural foramen at C6-7; cervical syrinx at C5-7; disc desiccation with left foramina disc herniation at L3-4 encroaching the left foramen at L3-4; bilateral facet arthroplasty at L4-5 with posterior synovial cysts left greater than right with cysts measuring 5 mm in size; disc desiccation at L5-S1; impact injury with swelling, loss of motion, flexion and strength to the right ankle; impact injury with swelling, loss of motion, flexion and strength to the right shoulder; severe constant headaches; dizziness; nausea; thoracic strain; cervicalgia with myofascial; C6-7 disc herniation secondary to whiplash injury; soreness and spasms to suboccipital region.

Based upon a review of the evidentiary submissions, it is determined that the defendant has not established *prima facie* entitlement to summary judgment dismissing the complaint on the issue that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d) under both categories of injury.

The defendant submitted the reports of Dr. Lectenberg, a neurologist, and Dr. Kelman, an orthopedist, who each conducted independent examinations of the plaintiff. While both physicians made reference to the medical records, reports, and diagnostic studies they each reviewed, none of those materials, including cervical and lumbar MRIs and EMG/NCV studies, have been submitted in support of the motion. The general rule in New York is that an expert cannot base an opinion on facts he did not observe and which were not in evidence, and that the expert testimony is limited to facts in evidence (*see* ***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]).

Dr. Kelman has not provided a copy of his curriculum vitae to qualify as an expert in this matter. Dr. Kelman described the plaintiff as a 37-year-old female dentist who stated that she has slowed down the amount of treatment she performs at work due to her injuries. Although Dr. Kelman provided range of motion values obtained during his examination of the plaintiff, he has not reported the objective method employed to ascertain such range of motion measurements, such as the goniometer, inclinometer, or arthroidal protractor, (*see* ***Martin et al v Pietrzak***, 273 AD2d 361 [2d Dept 2000]; ***Vomero et al v Gronrous***, 19 Misc 3d 1109A, 859 NYS2d 907 [Sup Ct, Nassau County 2008], leaving it to this court to speculate as to how such reported range of motion values were obtained, precluding summary judgment. Dr. Kelman does not address the issue of the multiple herniated cervical and

lumbar discs claimed in the plaintiff's bill of particulars, and does not opine as to whether or not these injuries are causally related to the subject accident.

Dr. Lechtenberg stated that his impression was that the plaintiff had no objective, clinical, neurological deficits upon his examination. He has not addressed findings of the EMG/NCV testing and has not ruled out neurological/radicular injury related to this accident. It is noted that Dr. Kelman set forth in his report that the NCV/EMG studies of December 17, 2012 reveal evidence of bilateral C6-7 radiculopathy, mild bilateral median neuropathy at the wrist, and mild left neuropathy at the elbow as in cubital tunnel syndrome. Dr. Lechtenberg, as the examining neurologist, does not comment on these findings. Nor does he address the multiple herniated and bulging cervical and lumbar discs, and does not opine as to whether or not they are causally related to the accident. While the plaintiff pleaded headaches, dizziness, and nausea causally related to the subject accident, Dr. Lechtenberg does not address these conditions, and Dr. Kelman deferred all comments with regard to these complaints. These factual issues preclude summary judgment.

The defendant's experts offered no opinion as to whether the plaintiff was incapacitated from substantially performing the activities of daily living for a period of ninety days in the 180 days following the accident, and they did not examine the plaintiff during that statutory period (*see* ***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]; ***Delayhaye v Caledonia Limo & Car Service, Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]), precluding summary judgment to this category of injury as well.

The plaintiff testified that she is married and has two children, ages seven and four. She is employed with Mathew Dental Group in Smithtown, and is the owner of the business and provides dental care and treatment at least 40 hours a week, five days a week. Prior to the accident, she worked in her office four days per week and worked in the office of Abreu and Ortiz in Freeport three days per week, but left that practice two months after the accident as it was too much for her. After the accident, she went to the office to do managerial work. When she saw patients, it was not the with the same intensity, efficiency, and effectiveness that she did prior to the accident. She did not have a full schedule as she previously did, and had to take breaks between patients. She was not seeing as many patients as she had been. There were days she could not go into work, but she could not remember how many. Physically, she has difficulty bending over patients during treatment, and finds it is very straining to maneuver instruments during surgical extraction.

The plaintiff continued to describe her medical care and treatment for excruciating pain in her neck, headaches, right shoulder, right ankle, and back. She had x-rays and MRIs, as well as EMG and NCV studies performed. She sought care from her family doctor and from a neurologist who recommended that she see a neurosurgeon. When she saw the neurosurgeon, he referred her to a physiatrist who administered trigger point injections to her neck, which helped on one side, but exacerbated the other. She received physical therapy three times a week, and still attends on a continuing basis as needed. She also received acupuncture for four months for the pain in her neck, shoulders, arms, and back. She still experiences that pain on a daily basis, along with numbness in her hands and arms. She takes pain medication every day. She experiences restrictions in daily chores such

as lifting laundry baskets, ironing, cooking, stirring, reading in bed, holding a book, watching television while seated on the sofa, bathing her children, making the beds, holding her children, picking them up, intimacy with her husband, and doing long periods of finite work on patients. She had to make sure her hand pieces at work are lighter, and has difficulty sitting in the chair for long periods with her neck bent forward, lifting her arms at an angle to reach a tooth in back of a patient's mouth, and holding heavy hand pieces of equipment.

Based upon the foregoing, the defendant has failed to establish that the plaintiff did not sustain a serious injury under either category set forth in Insurance Law § 5102 (d).

The factual issues raised in defendant's moving papers preclude summary judgment. The defendant 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 party failed to establish *prima facie* entitlement to judgment as a matter of law in the first instance on the issue of "serious injury" 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]), as the burden has not shifted to the plaintiff.

Accordingly, motion (002), by the defendant for summary judgment dismissing the complaint is denied.

Dated: April 2, 2014

Hon. Joseph Farneti
Acting Justice Supreme Court

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**