Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:
WILLIAM B. REBOLINI
Justice

Claudette Chang-Uron,

Plaintiff,

-against-

Janice Albury-Wright,

Defendant.

Index No.: 11548/2012

Motion Sequence No.: 001; MG
Motion Date: 12/20/13
Submitted: 3/12/14

Motion Sequence No.: 002; MD
Motion Date: 12/20/13
Submitted: 3/12/14

Attorney for Plaintiff:

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Attorney for Defendant:

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Clerk of the Court

Upon the following papers numbered 1 to 32 read upon these motions for summary judgment: Notice of Motion and supporting papers (001), 1 - 8; Notice of Cross Motion and supporting papers (002), 9 - 17; Answering Affidavits and supporting papers, 18 - 19; 20 - 28; Replying Affidavits and supporting papers, 29 - 30; 31 - 32; it is

ORDERED that motion (001) by plaintiff, Claudette Chang-Uron, pursuant to CPLR 3212 for partial summary judgment on the issue of liability in her favor and against the defendant, Janice Albury-Wright, is granted; and it is

ORDERED that motion (002) by defendant, Janice Albury-Wright, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff has not sustained a "serious injury" as defined by Insurance Law §5102 (d) is denied; and it is further

ORDERED that the plaintiff is directed to serve a copy of this order upon the defendant and the Calendar Clerk of the Supreme Court, Riverhead within thirty (30) days of the this order, and the Calendar Clerk is directed to calendar this action for a trial on damages forthwith.

In this negligence action, Claudette Chang-Uron alleges that she sustained serious personal injuries on April 3, 2011, at 10 Long Island Avenue, Wyandanch, New York, when her vehicle and the vehicle operated by defendant Janice Albury-Wright came into contact.

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 submitted, *inter alia*, an attorney's affirmation; copies of the summons and complaint; defendant's answer; and the transcripts of the examinations before trial of plaintiff and defendant. It is noted that the plaintiff has not submitted a copy of her verified bill of particulars, but in searching the record, the same is found to have been submitted with motion (002).

Claudette Chang-Uron testified to the extent that it was a sunny day and the roads were dry on the date of the accident. Visibility was good and traffic conditions were medium. As she drove on Little East Neck Road, the light turned from yellow to red for travel in her direction. She brought her vehicle to a gradual stop behind five to ten cars at the traffic light. After she stopped, she felt a heavy jolt to the rear of her car. Janice Albury-Wright testified to the extent that on March 14, 2011, she was involved in an automobile accident as she traveled home after working from 5:00 a.m. to 3:00 p.m. She was traveling on Little East Neck Road for about five minutes. The accident occurred just before the intersection with Long Island Avenue. She was several car lengths back

from the traffic light and did not see the traffic light prior to the accident. Traffic had come to a stop, but she did not know if it was because of the railroad crossing or the stop light. She brought her vehicle to a stop about one-half car length behind the plaintiff's car. She then pulled a CD out of her radio and dropped her CD case as she was about to put the CD into it. Defendant bent down to pick up the case, and her vehicle moved forward, striking the plaintiff's vehicle, which had been stopped for "a couple of minutes." She described the impact as light to medium. Her front bumper came into contact with the hitch located on the rear of the plaintiff's vehicle.

When a driver approaches another vehicle from the rear, she is bound to maintain a reasonably safe rate of speed and to maintain control of her vehicle and use reasonable care to avoid colliding with the other vehicle (***Chepel v Meyers***, 306 AD2d 235, 762 NYS2d 95 [2003]; ***Power v Hupart***, 260 AD2d 458, 688 NYS2d 194 [1999]; *see also* Vehicle and Traffic Law § 1129 [a]). A rear-end collision with a stopped or stopping vehicle establishes a *prima facie* case of negligence against the operator of the rear vehicle, thereby requiring that the defendant rebut the inference of negligence by providing a non-negligent explanation (***Grimm v Bailey***, 2013 NY Slip Op 2220 [Sup Ct, New York, Appl Div. 2d Dept]). Under the circumstances of this case, defendant failed to rebut the inference that she did not maintain a safe distance between her vehicle and the plaintiff's vehicle. Accordingly, motion (001) is granted in favor of the plaintiff on the issue of liability.

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]). 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*).

In support of motion (002), the defendant has submitted, *inter alia*, an attorney's affirmation;

copies of the summons and complaint, defendant's answer, and plaintiff's verified bill of particulars; transcript of the examination before trial of plaintiff; uncertified copy of plaintiff's emergency room record at Good Samaritan Hospital dated June 24, 2009; an interpretation of an EMG and nerve conduction study dated July 7, 2009; and the reports of Joseph Y. Marguilies, M.D., dated July 15, 2013, concerning his orthopedic examination of the plaintiff, and Evan Mair, M.D., dated November 2, 2013 concerning his independent radiological reviews of the plaintiff's cervical MRIs dated May 3, 2004 and May 12, 2011.

By way of her verified bill of particulars, the plaintiff alleges that as a result of the subject accident, she sustained the following injuries: C2-3, C4-5, C5-6, and C6-7 posterior disc herniations; left foramina encroachment of C6-7 with crowding of the exiting left C7 nerve root; C6 right radiculopathy for which she received cervical epidural injection on June 13, 2012; L4 bilateral radiculopathy; exacerbation of L4-5 and L5-S1 disc bulges for which the plaintiff received L4-5 lumbar epidural injections and right and left L4-S1, L5-S1 lumbar facet joint injections on March 14, 2012 and May 9, 2012; cervicalgia; lumbago; upper extremity radiculitis; right lower extremity radiculitis; headaches; cervical segmental joint dysfunction with cervical radicular signs; cervical herniated disc syndrome; thoracic segmental dysfunction; lumbar segmental joint dysfunction with lumbar radicular signs; lumbar herniated disc syndrome; severe anxiety and depression; and aggravation and exacerbation of prior asymptomatic conditions.

Upon review of the defendant's evidentiary submissions, it is determined as a matter of law that the defendant has not established *prima facie* entitlement to summary judgment pursuant to either category of injury defined by Insurance Law § 5102 (d). While the plaintiff has alleged that she sustained cervical and lumbar radiculopathy, as well as right lower extremity radiculitis, headaches, cervalgia and concussion, no report from a neurologist who examined the plaintiff on behalf of the moving defendant has been submitted to rule out these claimed neurological/radicular injuries were not causally related to the subject accident (*see* ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]); thus, factual issues are raised in the moving papers, precluding summary judgment. The defendant has further failed to support this motion with copies of the medical records and initial test results for the EMG and MRI studies of the plaintiff's lumbar spine and cervical spine as reviewed by Dr. Mair, leaving the court to speculate as to the contents of those original records and reports of the MRI studies generated by the plaintiff's treating physicians. 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 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]).

While Dr. Mair noted progression of degenerative disc dessication and a new disc bulge at C3-4 when comparing the cervical MRI's performed in 2004 and 2011, his opinion that these findings are not causally related to the subject accident is conclusory and unsupported with the basis

for such opinion. It is further noted that the defendant's examining physicians did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering the defendant's physician's affidavits/reports 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]). Additionally, movant's expert offers 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]), precluding summary judgment.

The plaintiff testified to the extent that within the week following the accident, she sought treatment from her primary care physician, Dr. Mandarano, because her neck and back were hurting and she could not turn her head. She was given muscle relaxants and pain medication and referred to an orthopedist, Dr. Tabershaw at Suffolk Orthopedic Associates, due to the continuing pain in her neck and back. He eventually recommended epidural injections for her back. She obtained a second opinion with Dr. Brandenstein, who also recommended the injections. She received treatment from a chiropractor three days a week for months, then two days a week for a couple months, for a total of eight months. She also tried physical therapy, three days a week for about four months. She tried exercises as recommended. She returned to Suffolk Orthopedic Associates, and had a series of three epidural injections by the pain management physician. MRIs of her neck and back were done. She was employed at the time of the accident and had to take leave time for her injections and doctors appointments. Since this accident, she cannot stand to make a full-course meal, as she can only stand for fifteen minutes at most. She cannot jump rope with her daughter, exercise, bend to tie a shoelace, and has difficulty even stepping into the shower. She cannot garden and tend to her flower beds. Prior to the accident she went to the gym everyday, but she stopped going due to the pain in her back. She can no longer clean house. She cannot use the pool. She now has to walk slowly and in a tilted position to relieve the pain. She sleeps with a special pillow, and sometimes at night, she experiences wrenching pain in her back. The plaintiff also testified that in 2004, she was involved in a motor vehicle accident when her vehicle was tapped in the rear, but she did not sustain any injuries. She was pregnant at the time and considered high risk. She did not have an MRI of her lower back until months later. In 2009, her vehicle was struck by another vehicle which was backing out of a driveway. She did not recall having any injuries after that accident.

Based upon the foregoing, the defendant has failed to demonstrate entitlement to summary judgment on either category of injury defined in 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]).

Accordingly, motion (002) by the defendant 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.

Dated: May 27, 2014

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**