[* 1]

SHORT FORM ORDER

INDEX No. 13-16349
CAL. No. 15-01637MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 1-20-16 (001)
MOTION DATE 1-20-16 (002)
ADJ. DATE 3-30-16
Mot. Seq. # 001 - MD
002 - MG

----------X

PAULA GIULIANO,

Plaintiff,

- against -

DANIEL NASSHORN,

Defendant.

----------X

JACOBY & JACOBY
Attorney for Plaintiff
1737 North Ocean Avenue, Suite D
Medford, New York 11763

DECICCO, GIBBONS & McNAMARA, PC
Attorney for Defendant
232 Madison Avenue, Suite 1409
New York, New York 10016

Upon the following papers numbered 1 to 64 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 33; Notice of Cross Motion and supporting papers 50 - 64; Answering Affidavits and supporting papers 34 - 45; Replying Affidavits and supporting papers 46 - 49; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Daniel Nasshorn for an order granting summary judgment in his favor dismissing the complaint is denied; it is further

ORDERED that the cross motion by plaintiff Paula Giuliano for an order granting partial summary judgment in her favor on the issue of liability is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff Paula Giuliano as a result of a motor vehicle accident which occurred on May 31, 2012, near the intersection of Route 25 and Highview Drive, in Selden, New York. The accident allegedly happened when a vehicle operated by plaintiff was struck by a vehicle owned and operated by defendant Daniel Nasshorn as he was attempting to make a left turn from Highview Drive onto Route 25. By her verified complaint, as amplified by her verified bill of particulars, plaintiff alleges that, as a result of the accident, she suffered serious injuries,

including a closed head injury, paresthesias, and bulging and herniated discs in her cervical and lumbar regions.

Defendant now moves for summary judgment dismissing the complaint, alleging that Insurance Law § 5104 precludes plaintiff from pursuing a personal injury claim because she did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d). In support, defendant submits, among other things, transcripts of plaintiff's deposition testimony, and the sworn medical reports of orthopedic surgeon Dr. Craig B. Ordway, M.D. and neurologist Dr. Howard B. Reiser, M.D. At defendant's request, Dr. Ordway and Dr. Reiser conducted examinations of plaintiff and reviewed medical records related to the injuries alleged in this action.

Plaintiff opposes defendant's motion, arguing that, as a result of the accident, she sustained a "serious injury" as defined by the statute because she suffers from, among other things, a significant limitation of movement in her cervical spine, tinnitus, and vertigo. In opposition, plaintiff submits several documents, including her own affidavit, an affidavit of Dr. Michael Campo, D.C., her treating chiropractor, and her medical records relating to the subject accident.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320). Once this showing has been made, the burden shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853).

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."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred by the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345; ***Gaddy v Eyler***, 79 NY2d 955; ***Beltran v Powow Limo, Inc.***, 98 AD3d 1070). When such a defendant's motion relies upon the findings of the defendant's own witnesses, those findings must be in admissible form, such as affidavits and affirmations, and not unsworn reports, to demonstrate entitlement to judgment as a matter of law (*see* ***Brite v Miller***, 82 AD3d 811; ***Damas v Valdes***, 84 AD3d 87, *citing* ***Pagano v Kingsbury***, 182 AD2d 268). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony (*see* ***Beltran v Powow Limo, Inc.***, *supra*; ***Bamundo v Fiero***, 88 AD3d 831; ***McIntosh v O'Brien***, 69 AD3d 585). Once a defendant meets this burden, the plaintiff must present proof, in admissible form, which

creates a material issue of fact (*see* ***Gaddy v Eyler***, *supra*; ***Zuckerman v City of New York***, *supra*; ***Beltran v Powow Limo, Inc.***, *supra*).

A plaintiff claiming injury within the "permanent consequential limitation" or "significant limitation" of use categories of the statute must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitation of movement caused by the injury and its duration (*see* ***Schilling v Labrador***, 136 AD3d 884; ***Rovelo v Volcy***, 83 AD3d 1034; ***McLoud v Reyes***, 82 AD3d 848). To prove significant physical limitation, a plaintiff must present either objective quantitative evidence of the loss of range of motion and its duration based on a recent examination or 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***, 18 NY3d 208; ***Toure v Avis Rent A Car Systems, Inc.***, *supra*; ***McEachin v City of New York***, 137 AD3d 753, 756). A plaintiff seeking to recover damages under the "90/180-days" category of "serious injury" must prove the injury is "medically determined," meaning that the condition must be substantiated by a physician, and the condition must be causally related to the accident (*see* ***Pryce v Nelson***, 124 AD3d 859; ***Strenk v Rodas***, 111 AD3d 920; ***Beltran v Powow Limo, Inc.***, *supra*).

The evidence submitted by defendant in support of his motion is insufficient to demonstrate, prima facie, that plaintiff did not suffer a serious injury to her spine within the meaning of Insurance Law § 5102 (d) as a result of subject motor vehicle accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Beltran v Powow Limo, Inc.***, *supra*). The affirmed medical report by orthopedist Dr. Ordway states, among other things, that while there was no palpable spasm in the paravertebral musculature, the trapezii, or the anterior strap muscles during his examination, plaintiff reported substantial limited cervical joint movement during range of motion testing. More particularly, Dr. Ordway's report states that, during testing of her cervical spine, plaintiff's "downward gaze [was] limited to 15 degrees (50 degrees)," although she exhibited full range of motion in "upwards gaze (extension), lateral bending, and rotation." Dr. Ordway notes that this testing was accompanied by "allegations of severe of pain." However, the report states that plaintiff exhibited normal joint function during range of motion testing of her thoracic and lumbar regions. Further, in his report, Dr. Ordway states that plaintiff "complains of tingling and numbness radiating down her entire left leg," yet there was no sensory loss, no atrophy in the upper extremity musculature, and brisk and equal deep tendon reflexes. As to plaintiff's lower extremities, the report states that the deep tendon reflexes were normal, brisk and equal bilaterally, and that there was no sensory loss. Dr. Ordway concludes that, while plaintiff "has a minor limitation of motion by subjective testing of her cervical spine," the findings of the "objective orthopedic examination" were within normal limits, and that plaintiff is not impaired as a result of the subject accident.

Similarly, the affirmed report by neurologist Dr. Reiser states, in relevant part, that an examination of plaintiff's upper and lower extremities revealed normal muscle strength and tone, normal deep tendon reflexes, and normal sensation. It states that plaintiff's gait and cerebellar functions were normal. Further, Dr. Reiser's report states that the straight leg raise test was negative and that the thoracic and lumbosacral regions were nontender. However, it also states that plaintiff reported mild discomfort upon palpation of the bitemporal scalp and posterior cervical regions, as well as mild reduction to pin and thermal stimulation on the radial aspect of her left forearm and hand. However, Dr. Reiser concludes that these complaints are

not accompanied by any motor or reflex finding or to any diagnostic abnormality on plaintiff's cervical spine imaging or electrodiagnostic studies. Further, Dr. Reiser concludes that plaintiff's complaints of headaches, vertigo, tinnitus, posterior neck pain, and weakness in her left upper extremity are subjective in nature and that they are not due to any objective involvement of the central, peripheral, or autonomic nervous system.

Dr. Ordway and Dr. Reiser's reports fail to present competent medical evidence that plaintiff's alleged injuries do not fall under the "permanent consequential limitation" or "significant limitation" of use categories of the statute (*see* ***Perl v Meher***, *supra*; ***Schilling v Labrador***, *supra*; ***Rovelo v Volcy***, *supra*). As Dr. Reiser's report does not indicate that he performed any range of motion testing on plaintiff's spinal regions, it fails to address plaintiff's claims, set forth in her bill of particulars, that she suffered serious injuries to those areas (*see* ***Barkley v Thomas***, 128 AD3d 87; ***Fu Yan Wang v Uruchima***, 125 AD3d 600; ***Tanious v Sawyers***, 104 AD3d 671). Further, Dr. Ordway's report fails to explain how his finding of a 30 percent reduction in flexion of plaintiff's cervical spine does not evidence a significant limitation in joint function causally related to the subject accident (*see* ***Kearney v Garrett***, 92 AD3d 725; ***Swensen v MV Transportation, Inc.***, 89 AD3d 924; ***Taylor v Taylor***, 87 AD3d 1129; ***Smith v Hartman***, 73 AD3d 736). Moreover, although Dr. Ordway opines that the limitations in spinal joint function are subjective, as they were not accompanied by a spasm, he failed to explain or substantiate the basis for his implication that they were self-imposed with any objective medical evidence (*see* ***Farrah v Pinos***, 103 AD3d 831; ***Swensen v MV Transportation, Inc.***, *supra*; ***Artis v Lucas***, 84 AD3d 845). As defendant failed to make a prima facie showing of entitlement to summary judgment, the Court need not address the sufficiency of plaintiff's opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*).

Plaintiff also cross-moves for partial summary judgment on the issue of liability, arguing that defendant's negligence was the sole legal and proximate cause of the collision. In support of her cross motion, plaintiff submits several documents, including transcripts of the parties' deposition testimony. Defendant has not submitted any papers in opposition to plaintiff's cross motion.

As there can be more than one proximate cause of an accident, a plaintiff in a personal injury action who moves for summary judgment on the issue of liability must establish, prima facie, both that the defendant was negligent and that he or she was free from comparative fault (*see* ***McLaughlin v Lunn***, 137 AD3d 757; ***Farrugio v Lavender***, 123 AD3d 875; ***Ramos v Bartis***, 112 AD3d 804). Once this prima facie showing has been made, the burden shifts to the defendant driver to submit proof, in admissible form, providing a non-negligent explanation for the collision or that raises a triable issue of fact as to whether the plaintiff was also negligent (*see* ***Zuckerman v City of New York***, *supra*; ***Orellana v Maggies Paratransit Corp.***, 138 AD3d 941; ***Drakh v Levin***, 123 AD3d 1084).

The Vehicle and Traffic Law establishes standards of care for motorists and an unexcused violation of such standards of care constitutes negligence per se (*see* ***Estate of Cook v Gomez***, 138 AD3d 675; ***Adobea v Junel***, 114 AD3d 818; ***Marcel v Sanders***, 123 AD3d 1097). Vehicle and Traffic Law § 1141 provides that a vehicle intending to turn left within an intersection must yield the right of way to any vehicle approaching from the opposite direction which is within the intersection. A driver who attempts to make a left turn when it is not reasonably safe to do so, such as when another vehicle is lawfully present in the intersection and the driver fails to see this through proper use of his senses, is in violation of this provision of the Vehicle and

Traffic Law (*see* ***Foley v Santucci***, 135 AD3d 813; ***Krajiniak v Jin Y Trading, Inc.***, 114 AD3d 910; ***Ducie v Ippolito***, 95 AD3d 1067). The operator of a vehicle with the right of way is entitled to assume that the opposing driver will obey traffic laws requiring him or her to yield (*see* ***Kassim v Uddin***, 119 AD3d 529; ***Ducie v Ippolito***, *supra*; ***Ahern v Lanaia***, 85 AD3d 696). Although a driver with a right-of-way also has a duty to use reasonable care to avoid a collision, such a driver who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision (*see* ***Ricciardi v Nelson***, 142 AD3d 492; ***Marcel v Sanders***, *supra*; ***Adobea v Junel***, *supra*).

Here, plaintiff's submissions establish, prima facie, that the defendant was negligent and that she was free from comparative fault in the happening of the accident (*see* ***McLaughlin v Lunn***, *supra*; ***Farrugio v Lavender***, *supra*; ***Ramos v Bartis***, *supra*). Plaintiff's deposition testimony demonstrates that, by failing to yield the right of way when entering the intersection while making a left turn, defendant violated the Vehicle and Traffic Law and was negligent as a matter of law, and that plaintiff was not comparatively at fault for the collision (*see* Vehicle and Traffic Law § 1141; ***Foley v Santucci***, *supra*; ***Krajiniak v Jin Y Trading, Inc.***, *supra*; ***Ducie v Ippolito***, *supra*). At her deposition, plaintiff testified that the accident occurred while her vehicle was traveling eastbound on Route 25. Plaintiff testified that she was not faced with a traffic control device governing her travel at the intersection, that she was traveling at approximately 30 to 35 miles per hour at the time of the accident, and that she saw defendant's vehicle for only one second before the collision. As plaintiff had the right of way, her vehicle was lawfully in the intersection at the time of impact (*see* ***Krajiniak v Jin Y Trading, Inc.***, *supra*), and she was entitled to assume that defendant would obey traffic laws requiring him to yield (*see* ***Kassim v Uddin***, *supra*; ***Ducie v Ippolito***, *supra*; ***Ahern v Lanaia***, *supra*). Although plaintiff had a duty to use reasonable care to avoid a collision, she is not comparatively at fault because she had only seconds to react to defendant's failure to yield the right of way (*see* ***Ricciardi v Nelson***, *supra*; ***Marcel v Sanders***, *supra*; ***Adobea v Junel***, *supra*). Defendant's deposition testimony further demonstrates that plaintiff was not at fault for the accident (*see* ***McLaughlin v Lunn***, *supra*; ***Farrugio v Lavender***, *supra*; ***Ramos v Bartis***, *supra*). Defendant's testimony that he saw plaintiff's vehicle on Route 25 when it was approximately 300 feet away from the intersection, yet he proceeded into the intersection anyway, establishes that he violated Vehicle and Traffic Law § 1141, as he attempted to make a left turn when plaintiff's vehicle was lawfully present in the intersection (*see* ***Foley v Santucci***, *supra*; ***Krajiniak v Jin Y Trading, Inc.***, *supra*; ***Ducie v Ippolito***, *supra*). As defendant has not submitted any papers in opposition to the cross motion, he failed to rebut plaintiff's prima facie showing that his negligence was the sole proximate cause of the accident (*see* ***Zuckerman v City of New York***, *supra*; ***Orellana v Maggies Paratransit Corp.***, *supra*; ***Drakh v Levin***, *supra*).

In light of the foregoing, defendant's motion for summary judgment is denied and plaintiff's cross motion for partial summary judgment is granted.

Dated: October 31, 2016

HON. JOSEPH C. PASTORESSA, J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**