Short Form Order

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

ADRIANA FLOREZ-VALENCIA,

Plaintiff,

- against -

VENTURE LEASING LLC, JEAN DAVID JEUNE, and XUYAN YANG,

Defendants.

- x

Index No.: 702383/2016

Motion Date: 9/27/17

Motion No.: 68

Motion Seq No.: 2

The following electronically filed documents read on this motion by defendants VENTURE LEASING LLC and JEAN DAVID JEUNE and on this cross-motion by defendant XUYAN YANG for an order pursuant to CPLR 3212, granting defendants summary judgment and dismissing the complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5104(a) and 5102(d); and on this cross-motion by plaintiff ADRIANA FLOREZ-VALENCIA for an Order pursuant to CPLR 3212 granting plaintiff summary judgment on the issue of liability against defendants:

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	EF 27 - 43
Yang's Notice of Cross-Motion-Exhibits	EF 53 - 58
Plaintiff's Notice of Cross-Motion-Aff.-Exhibits	EF 73 - 86
Affirmation in Opposition to Cross-Motion	EF 89 - 32
Affirmation in Opposition to Cross-Motion & in Reply	EF 93
Defendants' Reply Affirmation	EF 94
Yang's Affirmation in Opposition to Cross-Motion	EF 95 - 96
Plaintiff's Reply Affirmation	EF 97

This is a personal injury action in which plaintiff seeks to recover damages for injuries allegedly sustained in a motor vehicle accident that occurred on November 13, 2015 on the Long Island Expressway at or near its intersection with Francis Lewis Boulevard, in Queens County, New York. In the verified Bill of

Particulars, plaintiff alleges that as a result of the accident she sustained serious injuries to her right shoulder, cervical spine, and lumbar spine.

Plaintiff commenced this action by filing a summons and complaint on March 1, 2016. Defendant Xuyan Yang joined issue by service of a verified answer with cross-claims on May 2, 2016. Defendants Venture Leasing LLC and Jean David Jeune joined issue by service of a verified answer with cross-claim on June 28, 2016. All defendants now move for an order pursuant to CPLR 3212, dismissing the complaint on the ground that the injuries claimed fail to satisfy the serious injury threshold requirement of Section 5102(d) of the Insurance Law. Plaintiff cross-moves for an order pursuant to CPLR 3212, granting partial summary judgment on the issue of liability.

Plaintiff appeared for an examination before trial on February 3, 2017. She testified that she was involved in the subject accident. She was wearing her seatbelt at the time of the accident. She was able to exit from her vehicle within one minute following the accident. Her husband drove her home immediately following the accident. She then went to North Shore Hospital in Plainview. She was discharged from the emergency room without any devices such as a cane, crutches, walker, neck brace, or back brace. The first doctor she treated with after she left the hospital was Dr. Mazza. She did not treat with her primary care physician in connection with this accident. She had surgery on her right shoulder and her neck as a result of the accident. Prior to the accident, she never injured any of the same body parts that she injured in the subject accident. Since the accident, she did not reinjure any of the same body parts injured in the subject accident. Since the accident she cannot walk a lot, run, or sit for a long time. Her mother-in-law helps her with household chores. She was not employed at the time of the accident.

Dr. Stacey M. Donegan, M.D., Board Certified Emergency Medicine, reviewed plaintiff's bill of particulars, police report, and the emergency room records on February 1, 2017. Dr. Donegan notes that plaintiff was not transported to the emergency room via EMS. The accident did not cause plaintiff's airbags to deploy. There was no report of right shoulder pain to the emergency room staff. Upon physical examination in the emergency room, plaintiff was not in acute distress there was no documentation of soft tissue swelling or ecchymosis. Plaintiff demonstrated full range of motion in her extremities with no deformity, tenderness to palpation, edema, ecchymosis, effusion, or abrasions. Upon examination of her back, there was no evidence

of any deformity, pain, spasm, decreased range of motion, overlying erythema, ecchymosis, edema or tenderness to palpation. The x-ray performed of the cervical spine revealed a muscle spasm. The x-ray of the lumbar spine revealed osteophytes at L4-L5 and degenerative disease at L5-S1. Plaintiff was discharged from the emergency room without any diagnosis for the right shoulder or the neck. No consultants were called to evaluate plaintiff. Plaintiff was discharged from the emergency room without any braces or splints. Dr. Donegan opines that based upon her review of the relevant medical records, there is no causal relationship between plaintiff's claimed injuries and the subject accident.

Dr. Thomas P. Nipper, M.D., Board Certified Orthopedist, performed an independent medical examination on plaintiff on March 2, 2017. Plaintiff reported current complaints of low back pain. Dr. Nipper identifies the records reviewed prior to rendering his report. He performed range of motion testing with a goniometer, and found normal ranges of motion regarding plaintiff's cervical spine. He found limited ranges of motion regarding plaintiff's lumbar spine and right shoulder. He opines that the decreased ranges of motion in the lumbar spine were voluntary and subjective in nature. There is no need for further orthopaedic care including physical therapy. Dr. Nipper further opines that the speeds and forces experienced by plaintiff were sufficient to have resulted in sprain injuries, but plaintiff did not sustain any significant or permanent injury as a result of the subject accident.

Dr. Edward M. Weiland, M.D. Board Certified Neurologist, performed an independent medical examination on plaintiff on March 21, 2017. Plaintiff reported current complaints of intermittent neck and right shoulder pain as well as more persistent lower back pain, which appears to be provoked with flexion and extension movements and weight bearing maneuvers. Dr. Weiland identifies the records reviewed prior to rendering his report. He performed range of motion testing with a goniometer, and found normal ranges of motion regarding plaintiff's lumbar spine and thoracic spine. He found limited ranges of motion regarding plaintiff's cervical spine. Dr. Weiland concludes that there are subjective complaints of pain with range of motion activities on injured sites including the neck, lower back, and right shoulder. He notes that there are minor restrictions with range of motion activities of the cervical spine consistent with a good response to a surgical procedure performed at the site. Dr. Weiland opines that there is no reason why plaintiff should not perform activities of daily living and seek gainful employment as it relates to any trauma reportedly sustained from the subject accident.

Dr. Mark J. Decker, M.D., Board Certified Radiologist, reviewed plaintiff's lumbar spine MRI dated December 21, 2015, right shoulder MRI dated December 28, 2015, and cervical spine MRI dated December 21, 2015. Dr. Decker opines that the MRI findings are degenerative, longstanding and not causally related to the subject accident. Additionally, there is no evidence to suggest that an acute traumatic injury was sustained.

Defendants contend that the evidence submitted is sufficient to establish, prima facie, that plaintiff has not sustained an injury which resulted in significant limitation of use of a body function or system or a medically determined injury or impairment of a nonpermanent nature which prevented her for not less than 90 days during the immediate 180 days following the occurrence, from performing substantially all of her usual daily activities.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (Wadford v Gruz, 35 AD3d 258 [1st Dept. 2006]). "[A] defendant can establish that a 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" (Grossman v Wright, 268 AD2d 79 [1st Dept. 2000]). Whether a plaintiff has sustained a serious injury is initially a question of law for the Court (Licari v Elliott, 57 NY2d 230 [1982]).

Where the defendant's motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v Eyler, 79 NY2d 955 [1992]; Zuckerman v City of New York, 49 NY2d 557[1980]; Grossman v Wright, 268 AD2d 79 [2d Dept 2000]).

This Court finds that the conclusion that plaintiff did not sustain a serious injury was directly contradicted by Drs. Nipper and Weiland's objectively-measured limitations in range of motion (see Ambroselli v Team Massapequa, Inc., 88 AD3d 927 [2d Dept. 2011]; Ballard v Cunneen, 76 AD3d 1037 [2d Dept. 2010]; Sainnoval v Sallick, 78 AD3d 922 [2d Dept. 2010]; Lopez v Sentaroe, 65 NYS2d 1017 [1985][finding that providing evidence of a ten degree

limitation in range of motion is sufficient for the denial of summary judgment to defendants). Although Dr. Nipper states that the restricted ranges in motion in plaintiff's lumbar spine were voluntary and subjective in nature, he never opines as to what extent the positive findings were self-imposed. Dr. Nipper also fails to address the limitations in range of motion regarding plaintiff's right shoulder. Moreover, *assuming, arguendo*, that plaintiff's injuries were caused by degeneration as claimed by Drs. Nipper and Weiland, plaintiff has also made a claim for exacerbation of any pre-existing injuries which in and of itself can be a serious injury (see Ayach v Ghazal, 25 AD3d 742 [2d Dept. 2006]). Defendants' experts fail to address whether plaintiff's injuries were exacerbated by the subject accident.

Based on the above, defendants failed to make a prima facie showing of entitlement to judgment as a matter of law that plaintiffs did not sustain a serious injury within the meaning of Insurance Law § 5102(d), tendering sufficient evidence to demonstrate the absence of any material issues of fact (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Reynolds v Wai Sang Leung, 78 AD3d 919 [2d Dept. 2010]). Where a defendant fails to meet the defendant's prima facie burden, the court will deny the motion for summary judgment regardless of the sufficiency of the opposition papers (see Ayotte v Gervasio, 81 NY2d 1062 [1993]; Barrera v MTA Long Island Bus, 52 AD3d 446 [2d Dept. 2008]; David v Bryon, 56 AD3d 413 [2d Dept. 2008]).

Turning to plaintiff's cross-motion for summary judgment on the issue of liability, plaintiff testified that on the date of the subject accident, the weather was clear and sunny and the roads were dry. She was in the left lane of the Long Island Expressway for about ten minutes before the accident occurred. She remained in the left lane until the accident occurred. There were three vehicles involved in the accident. She felt two impacts to the rear of her vehicle. When the first impact occurred, her vehicle was moving at about thirty to thirty-five miles per hour. Her right foot was on the gas. The impact was hard and pushed her car forward about a car length and a half. There was only seconds between the two impacts.

Plaintiff also submits a copy of the Police Accident Report (MV-104AN). In the accident description portion, the responding officer noted:

> "Veh # 1, 2, 3 East Bound LIE left lane of 3. Veh #3 (plaintiff) slowing with traffic. Veh #1 (Venture Leasing LLC and Jean David Jeune) struck Veh #2 (Xuyan Yang). Veh #2 then struck Veh #3."

Based on the police report and plaintiff's testimony, counsel for plaintiff contends that the accident was caused solely by defendants' negligence in that defendants' vehicles were traveling too closely to the vehicle in front in violation of VTL § 1129, and defendants failed to safely bring their vehicles to a stop prior to rear-ending the vehicle in front. Counsel contends, therefore, that plaintiff is entitled to summary judgment because defendants were solely responsible for causing the accident while plaintiff was free from culpable conduct.

In opposition, counsel for defendants Venture Leasing LLC and Jean David Jeune first contends that the cross-motion is procedurally defective as it lacks an affidavit from someone with knowledge of the facts. This Court finds such argument to be meritless as plaintiff's own sworn deposition testimony is annexed to the motion. Counsel further contends that issues of fact preclude summary judgment based on defendant Jeune's Report of Motor Vehicle Accident (MV-104), which is submitted with the opposition papers. In the Report, defendant Jeune writes that co-defendant Yang stopped short in bumper to bumper traffic causing his vehicle to hit Yang's vehicle, causing a three vehicle collision. The submitted MV-104 accident report is unsworn and thus inadmissible hearsay (see Allstate Ins. Co. v Ramlall, 132 AD3d 617 [2d Dept. 2015]; Bates v Yasin, 13 AD3d 474 [2d Dept. 2004]; Lacagnino v Gonzalez, 306 AD2d 250 [2d Dept. 2003]).

Counsel for defendant Xuyan Yang also opposes plaintiff's cross-motion on the grounds that it is premature as discovery remains outstanding and that issues of fact exist regarding the number of impacts plaintiff felt.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form in support of his or her position (see Zuckerman v. City of New York, 49 NY2d 557[1980]). "A court deciding a motion for summary judgment is required to view the evidence presented in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and proof submitted by the parties in favor of the opponent to the motion" (Myers v Fir Cab Corp., 64 NY2d 806 [1985]).

"When the driver of an automobile approaches another automobile from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with

the other vehicle" (Macauley v ELRAC, Inc., 6 AD3d 584 [2d Dept. 2003]). It is well established law that a rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence on the part of the driver of the rearmost vehicle, requiring the operator of that vehicle to proffer an adequate, non-negligent explanation for the accident (see Klopchin v Masri, 45 AD3d 737 [2d Dept. 2007]; Hakakian v McCabe, 38 AD3d 493 2d Dept. 2007]; Reed v New York City Transit Auth., 299 AD2 330 [2d Dept. 2002]; Velazquez v Denton Limo, Inc., 7 AD3d787 [2d Dept. 2004].

Here, plaintiff submitted sufficient evidence to demonstrate that her vehicle was rear-ended by defendant Yang's vehicle. Thus, plaintiff satisfied her prima facie burden of establishing her entitlement to judgment as a matter of law on the issue of liability (see Volpe v Limoncelli,74 AD3d 795 [2d Dept. 2010]; Vavoulis v Adler, 43 AD3D 1154 [2d Dept. 2007]; Levine v Taylor, 268 AD2d 566 [2d Dept. 2000]).

Having made the requisite prima facie showing of entitlement to summary judgment, the burden then shifted to the non-moving parties to raise a triable issue of fact as to whether plaintiff was also negligent, and if so, whether that negligence contributed to the happening of the accident (see Goemans v County of Suffolk,57 AD3d 478 [2d Dept. 2007]).

This Court finds that defendants failed to provide evidence as to a non-negligent explanation for the accident sufficient to raise a triable question of fact (see Lampkin v Chan, 68 AD3d 727 [2d Dept. 2009]; Cavitch v Mateo, 58 AD3d 592 [2d Dept. 2009]; Garner v Chevalier Transp. Corp, 58 AD3d 802 [2d Dept. 2009]; Kimyagarov v Nixon Taxi Corp., 45 AD3d 736 [2d Dept. 2007]).

Moreover, the argument that this motion for summary judgment is premature is without merit. Defendants already have personal knowledge of the relevant facts, but failed to submit an affidavit denying the accuracy of plaintiff's testimony. Additionally, defendants failed to offer any evidentiary basis to suggest that discovery may lead to relevant evidence. The mere hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery is an insufficient basis upon which to deny the motion (see CPLR 3212[f]; Medina v Rodriguez, 92 AD3d 850[2d Dept. 2012]; Hanover Ins. Co. v Prakin,81 AD3d 778 [2d Dept. 2011]; Essex Ins. Co. v Michael Cunningham Carpentry, 74 AD3d 733 [2d Dept. 2010]; Peerless Ins. Co. v Micro Fibertek, Inc., 67 AD3d 978 [2d Dept. 2009]; Gross v Marc, 2 AD3d 681 [2d Dept. 2003]).

Accordingly, for the reasons set forth above, it is hereby,

ORDERED, that the motion by defendants VENTURE LEASING LLC and JEAN DAVID JEUNE for an order granting summary judgment is denied; and it is further

ORDERED, that the cross-motion by defendant XUYAN YANG for an order granting summary judgment is likewise denied; and it is further

ORDERED, that the cross-motion by plaintiff for an order granting partial summary judgment on the issue of liability is granted, plaintiff shall have partial summary judgment on the issue of liability against defendants, and the Clerk of the Court is authorized to enter judgment accordingly; and it is further

ORDERED, that upon completion of discovery on the issue of damages, filing a Note of Issue, and compliance with all the rules of the Court, this action shall be placed on the trial calendar of the Court for a trial on serious injury and damages.

Dated: October 4, 2017
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.