| **Sliman v Tezanos** |
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| 2018 NY Slip Op 30087(U) |
| January 15, 2018 |
| Supreme Court, New York County |
| Docket Number: 154085/14 |
| Judge: Paul A. Goetz |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 22

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IRMA SLIMAN,

Plaintiff,

Index No.:154085/14
DECISION/ORDER

-against-

KATHERINE MARIE TEZANOS, MOHAMMED A. WAHEED and LUCIEN VIXAMA,

Defendants.

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**HON. PAUL A GOETZ, J.S.C.:**

In this automobile injury/negligence action, defendant Katherine Marie Tezanos (Tezanos) and codefendants Mohammed A. Waheed (Waheed) and Lucien Vixama (Vixama) move, pursuant to CPLR 3212, for summary judgment to dismiss the complaint of plaintiff Irma Sliman (Sliman), on the ground that Sliman did not suffer a "serious injury," as defined in Insurance Law § 5102 (d) (motion sequence numbers 001 and 002, respectively). Tezanos also moves for summary judgment on the grounds that she did not breach any duty owed to Sliman. The motions are decided as follows:

BACKGROUND

This action arose on March 30, 2013, when Sliman was injured while walking across the intersection of Central Park West/Columbia Avenue and West 81st Street in the County, City and State of New York. *See* notice of motion (motion sequence number 001), exhibit A (complaint), ¶ 11. At her deposition on June 9, 2015, Sliman specifically asserted that she was struck when a taxi cab, driven by Waheed and belonging to Vixama, rear ended Tezanos's stopped vehicle, and the impact forced Tezanos's vehicle forward into Sliman, knocking her to the street. *Id.*, exhibit

B at 21-34. Sliman stated that the police arrived shortlythereafter, and that, later, an ambulance came and took her to St. Luke's/Roosevelt Hospital, where she spent the day. *Id.* at 40-41, 44-46. Sliman next stated that, three days afterwards, she visited her primary care physician, Paul Barone, MD (Dr. Barone), and thereafter, at her attorney's behest also visited treating specialist Leonard R. Harrison, Jr., MD (Dr. Harrison). *Id.* at 56-59. Sliman saw Dr. Harrison 13 times between April 2013 and November 2016; at Dr. Harrison's direction, she had an MRI performed on her lumbar spine on May 14, 2013 by radiologist John Himelfarb, MD (Dr. Himelfarb), and thereafter underwent physical therapy. *Id.* at 61-71. Sliman has presented copies of the police accident report, as well as the expert medical reports prepared by Drs. Harrison and Himelfarb. *See* Barab affirmation in opposition (motion sequence number 001), exhibits 1, 2, 3. The police report sets forth Waheed's claim that Tezanos's car "stopped abruptly" while attempting to make a right turn into a parking garage, causing his cab to "make contact" with her car, which then "struck" Sliman. *Id.*, exhibit 1. Dr. Harrison's January 10, 2017 report recounts the details of his ongoing treatment of Sliman, including a description of the most recent physical examinations that he performed on her, and sets forth several results and findings. *Id.*, exhibit 2. The results are that Sliman had a below normal range of motion in her lumbar spine of between 10 and 40 degrees, and a below normal range of motion in her left knee of over 20 degrees. *Id.* The findings were that: 1) Sliman had a 33% to 66% loss of flexion in her lumbar spine; 2) Sliman had a 13% loss of flexion in her left knee; 3) these conditions were "chronic" and constituted "permanent limitations" that rendered Sliman "permanently partially disabled"; and 4) Sliman's March 30, 2013 accident was the "proximate competent producing cause" of these conditions. *Id.* Dr. Harrison's report also states that he reviewed Dr. Himelfarb's MRI results, and agreed

with Dr. Himelfarb's findings that Sliman had suffered disc bulges and herniations to her lumbar spine, and chondromalacia and internal derangement to her left knee. *Id.* Dr. Himelfarb's January 20, 2017 report sets forth these findings, and further opines that Sliman's injuries "were not the result of a degenerative, pre-existing condition," but were "acute . . . and therefore the result of a traumatic injury." *Id.*, exhibit 3.

Tezanos has presented a transcript of her June 14, 2016 deposition, at which she stated that, at the time of Sliman's accident, she was driving eastbound on West 81st Street, that she had brought her car to a complete stop, and that she was waiting for pedestrian traffic to clear on the south sidewalk so that she could make a right turn into a parking garage, when she was struck from behind by Waheed's cab. *See* notice of motion, exhibit C at 15-20. Tezanos specifically stated that she had been "stopped for a while," "at least 30 seconds," when the cab "hit me out of nowhere." *Id.* Tezanos specifically denied that she had stopped abruptly. *Id.* Tezanos has also presented a copy of an independent medical examination report, regarding Sliman's injuries, that was prepared by Howard V. Katz, MD (Dr. Katz). *Id.*, exhibit E. Dr. Katz's July 23, 2015 report recites that he reviewed Sliman's emergency room treatment records, Dr. Harrison's treatment records and report, Dr. Himelfarb's MRI results and report, and the records of Sliman's physical therapy. *Id.* Dr. Katz's report states that his physical examination of Sliman showed that she had a normal range of motion in her lumbar spine and left knee, and sets forth his impression that whatever injuries she had suffered to those areas had been "resolved." *Id.*

Waheed and Vixama have presented copies of independent medical examination reports of Sliman's injuries that were prepared by orthopedist Lisa Nason, MD (Dr. Nason) and neurologist Naunihal S. Singh, MD (Dr. Singh). *See* notice of motion (motion sequence number

002), exhibits E, F. Dr. Nason's July 9, 2015 report recites that she reviewed Sliman's bill of particulars, states that her physical examination of Sliman disclosed normal ranges of motion in her lumbar spine and left knee, and concludes with her impression that Sliman's injuries to those areas had been "resolved." *Id.*, exhibit E. Dr. Singh's July 6, 2015 report also recites that he reviewed Sliman's bill of particulars, states that his physical examination of Sliman disclosed normal ranges of motion in her cervical, thoracic and lumbar spine, and concludes with his impression that Sliman's injuries to these areas, as well as her "alleged post-concussion syndrome with headaches," had all been "resolved." *Id.*, exhibit F.

Sliman commenced this action on April 9, 2014, by filing a summons and complaint that sets forth one cause of action for negligence, including a claim that she sustained a "serious injury," as defined in Insurance Law § 5102 (d). *See* notice of motion (motion sequence number 001), exhibit A. On May 9, 2014, Waheed and Vixama filed an answer that includes a cross claim against Tezanos for contribution and indemnification. *See* notice of motion (motion sequence number 002), exhibit C. On June 12, 2104, Tezanos filed an answer that includes a cross claim against Waheed and Vixama for contribution and indemnification. *See* notice of motion (motion sequence number 001), exhibit B.

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form,

sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 (1st Dept 2003).

As was previously noted, Sliman's sole cause of action sounds in negligence. Pursuant to New York law, "the traditional common-law elements of negligence" are: "duty, breach, damages, causation and foreseeability." *Hyatt v Metro-North Commuter R.R.*, 16 AD3d 218, 218 (1st Dept 2005). With respect to the element of "damages," it was also previously noted that Sliman's complaint alleges that she suffered a "serious injury," as that term is defined in Insurance Law § 5102 (d); to wit:

> "'Serious 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."

Here, Sliman's bill of particulars recites that her injuries fall into six of the above categories of "serious injury": 1) significant disfigurement; 2) fracture; 3) permanent loss of use of a body organ, member, function or system; 4) permanent consequential limitation of a body organ or member; 5) significant limitation of use of a body function or system; and/or 6) a medically determined, non-permanent injury that prevented her from performing substantially all of her usual and customary daily activities for 90 of the 180 days following her March 30, 2013 accident. *See* notice of motion (motion sequence number 001), exhibit D, ¶ 21. However, Sliman's opposition papers to the instant motions only raises argument with respect to three of

the above categories, namely: 1) permanent loss of use of a body organ, member, function or system; 2) permanent consequential limitation of a body organ or member; and/or 3) significant limitation of use of a body function or system. *See* Barab affirmation in opposition (motion sequence number 001), ¶ 22; Barab affirmation in opposition (motion sequence number 002), ¶ 20. Because Sliman has evidently abandoned her reliance on the other statutory categories of "serious injury," this decision will confine itself to a review of the three categories on which Sliman chose to rely.

*Liability*

Preliminary to this discussion, however, Tezanos raises the argument that Sliman's claim cannot stand, as against her, because the fact that Waheed's cab hit Tezanos's car from behind establishes that Waheed was the negligent party, as a matter of law. *See* defendant's mem of law (motion sequence number 001) at 1-4 (pages not numbered). Tezanos specifically notes that "a rear end collision with an automobile establishes a prima facie case of negligence on the part of the operator of the rear vehicle and imposes a duty on the operator of the rear vehicle to explain how the incident occurred," and that "when the operator of the rear vehicle cannot come forward with evidence to rebut the inference of negligence, the moving party properly may be awarded judgment as a matter of law." *Id.* Tezanos's statement of the law is largely correct, but incomplete. It is true that "[t]he driver of a stopped vehicle struck from behind by another vehicle is entitled to summary judgment unless the driver of the following vehicle presents a nonnegligent explanation for the accident, or a nonnegligent reason for his failure to maintain a safe distance between his car and the lead car." *Woodley v Ramirez*, 25 AD3d 451, 452 (1st Dept 2006), citing *Mullen v Rigor*, 8 AD3d 104 (1st Dept 2004); *Agramonte v City of New York*, 288

AD2d 75 (1st Dept 2001). It is also true that "[a] claim that the lead vehicle 'stopped suddenly' is generally insufficient to rebut the presumption of nonnegligence on the part of the lead vehicle." 25 AD3d at 452; *see also Francisco v Schoepfer*, 30 AD3d 275, 276 (1st Dept 2006). Thus, Tezanos is correct that the fact of the rear end collision is sufficient to establish a prima facie case of negligence on the part of Waheed and Vixama. However, this does not mean that Tezanos is automatically entitled to summary judgment dismissing Sliman's negligence claim. Rather, the law creates a presumption that Tezanos was "nonnegligent," and affords Waheed and Vixama the opportunity to rebut this presumption.

In their opposition papers to Tezanos's motion, Waheed and Vixama cite a quantity of case law to argue that Tezanos's alleged "sudden stop" does indeed constitute a "nonnegligent reason" for Waheed's failure to stop in time from hitting her. *See* Hung affirmation in opposition (motion sequence number 001), ¶¶ 13-18. After reviewing that case law, however, the court finds that it is all inapposite, and, therefore, unhelpful to Waheed's and Vixama's position. For example, *Carter v Castle Elec. Contr. Co.* (26 AD2d 83 [2d Dept 1966]) was decided before a change to the Vehicle and Traffic Law occasioned the now standard appellate acknowledgment that "[a] claim that the lead vehicle 'stopped suddenly' is *generally insufficient* to rebut the presumption of nonnegligence on the part of the lead vehicle." *Woodley v Ramirez*, 25 AD3d at 452 [emphasis added]. The other cases cited by Waheed and Vixama all involve something more than this bare claim. *Chepel v Meyers* (306 AD2d 235 [2d Dept 2003]) involved a rear end collision with a van that came to an abrupt stop in the middle of the Long Island Expressway, despite the fact that traffic was moving all around it. *Tutrani v County of Suffolk* (10 NY3d 906 [2008]) involved a three car collision that similarly occurred in the middle of the Long Island

Expressway during rush hour, when a police vehicle abruptly and inexplicably decelerated. *Phelps v Fiordilino* (67 AD2d 1032 [3d Dept 1979]) and *Monahan v Devaul* (271 AD2d 895 [3d Dept 2000]) both involved vehicles that had slipped on patches of black ice. None of the factors present in those cases is present in this action. Indeed, Waheed and Vixama have not even presented deposition testimony, but have chosen instead to rely entirely on the unwitnessed allegations in the police report. Because Waheed and Vixama have not presented any evidence beside their claim that Tezanos "stopped short," the court must find that they have not met their burden of rebutting the presumption of nonnegligence that adheres to Tezanos as the result of the instant rear end collision. Therefore, because Tezanos has demonstrated that she was nonnegligent, as a matter of law, she is entitled to summary judgment dismissing Sliman's negligence claim as against her. Accordingly, the court finds that Tezanos's motion should be granted.

*Threhsold*

In their own motion, Waheed and Vixama raise three arguments for dismissal. They first raise the "absence of trauma" argument against Sliman's negligence claim. *See* notice of motion (motion sequence number 002), Pogorzelski affirmation, ¶¶ 20-22. In *Kester v Sendoya* (123 AD3d 418, 418 [1st Dept 2014]), the Appellate Division, First Department, held that "[a]bsent any evidence of contemporaneous, postaccident treatment or evaluation of plaintiff's [injury], she failed to raise an issue of fact as to whether her . . . condition was causally related to the accident." Waheed and Vixama argue that "the medical evidence [that they submitted], coupled with plaintiff's own testimony" shows that Sliman's injuries "were not caused in this minor accident, that no trauma was sustained and/or" that Sliman's injuries are not "serious," within the

statute's definition. *See* notice of motion (motion sequence number 002), Pogorzelski affirmation, ¶ 20. The "medical evidence" that Waheed and Vixama mention presumably refers to the experts' reports of Drs. Nason and Singh. However, neither of those reports contains any medical opinion on the issue of causality. *Id.*, exhibits E, F. In contrast, Dr. Harrison's report plainly states that Sliman's back and knee injuries were caused by the March 30, 2013 automobile impact. *See* Barab affirmation in opposition (motion sequence number 002), exhibit 1. Dr. Harrison's report also recounts that he began to treat Sliman on April 10, 2013, at which time he ordered an MRI and prescribed medication and physical therapy, and that he saw Sliman on 12 other occasions afterwards. *Id.* This constitutes the type of "evidence of contemporaneous, postaccident treatment or [injury] evaluation" that the First Department mentioned in *Kester*. Therefore, there is a triable issue of fact as to whether Sliman's injuries were caused by accident trauma.

Waheed and Vixama next argue that, because "plaintiff testified that all of her treatment for the alleged injuries discontinued after eleven months . . . plaintiff is obligated to furnish the court with an explanation for the lack of treatment." *See* notice of motion (motion sequence number 002), Pogorzelski affirmation, ¶ 22. In *Pommells v Perez* (4 NY3d 566, 574 [2005]), the Court of Appeals held that:

> "While a cessation of treatment is not dispositive - the law surely does not require a record of needless treatment in order to survive summary judgment - a plaintiff who terminates therapeutic measures following the accident, while claiming 'serious injury,' must offer some reasonable explanation for having done so."

In *Pommells*, the Court found that the plaintiff had failed to present such an explanation. However, in *Pommells'* companion case, *Brown v Dunlap*, decided therein, the Court found that

the:

> "[plaintiff Brown's doctor] explained that, once he determined further medical therapy would 'be only palliative in nature,' he terminated treatment and instructed plaintiff to continue exercises at home. A plaintiff need not incur the additional expense of consultation, treatment or therapy, merely to establish the seriousness or causal relation of his injury. Unlike *Pommells*, plaintiff [Brown]'s cessation of treatment was explained sufficiently to raise an issue of fact and survive summary judgment."

4 NY3d at 577. Here, Dr. Harrison's report states as follows:

> "11. On February 6, 2014, I discussed Ms. Sliman's situation with her. At this time, it was my opinion, to a reasonable degree of medical certainty, that Ms. Sliman had reached the maximum benefit of her isometric exercise therapy. I instructed Ms. Sliman that additional therapy would only be palliative in nature, but that she may continue to do her isometric exercises at home for this purpose if she so chose. Because Ms. Sliman had reached the maximum benefit of her therapy on February 6, 2014, she was instructed at that time to continue to use her lumbar orthoses and to take medication as needed."

*See* Barab affirmation in opposition (motion sequence number 002), exhibit 1. This is plainly the same type of explanation for cessation of treatment as was offered, and found sufficient, in *Brown*; i.e., that continued treatment would only be "palliative in nature." This is a legally sufficient explanation for Sliman's cessation of treatment after 11 months.

Finally, Waheed and Vixama argue that Sliman did not sustain a "serious injury," as defined in Insurance Law § 5102 (d). *See* notice of motion (motion sequence number 002), Pogorzelski affirmation, ¶¶ 23-28. As was previously mentioned, Sliman argues that her injuries fall within one or more of three statutory categories of "serious injuries": 1) permanent loss of use of a body organ, member, function or system; 2) permanent consequential limitation of a body organ or member; and/or 3) significant limitation of use of a body function or system. *See* Barab affirmation in opposition (motion sequence number 002), ¶ 20. Regarding the first of

these, "permanent loss of use of a body organ, member, function or system," Waheed and Vixama assert that "since the medical proofs plainly establish that plaintiff did not sustain a complete loss of use of a body organ or member," this category of statutory injury is inapplicable to her. *See* notice of motion (motion sequence number 002), Pogorzelski affirmation, ¶ 26. In her opposition papers, Sliman asserts that she did suffer a "permanent loss of use of a body organ, member, function or system," but she raises no legal argument and cites to no medical evidence to support this claim. *See* Barab affirmation in opposition (motion sequence number 002), ¶ 43. In *Oberly v Bangs Ambulance* (96 NY2d 295, 298 [2001]), the Court of Appeals held, as follows:

> "The serious injury category at issue, 'permanent loss of use,' has been in place since 1973 without legislative change. Until today, however, the question of how this statutory section should be construed has never been squarely before this Court. We hold that to qualify as a serious injury within the meaning of the statute, 'permanent loss of use' must be total."

Here, neither Dr. Harrison's report, nor any of Sliman's other proffered evidence, claims that she suffered the "total" loss of either her back or her left knee. In the absence of such evidence, the court must agree that the "permanent loss" category of "serious injuries" listed in Insurance Law § 5102 (d) does not apply to Sliman's injuries, and concludes that she may not base her negligence claim on this portion of the statute.

The court now turns to the two remaining possible categories of "serious injuries": "permanent consequential limitation" injuries and "significant limitation of use" injuries. In *Toure v Avis Rent A Car Sys.* (98 NY2d 345 [2002]), the Court of Appeals held that:

> "plaintiff's proffered evidence raises issues of material fact as to whether he sustained a 'permanent consequential limitation of use of a body organ or member' or a 'significant limitation of use of a body function or system.'

> "For these two statutory categories, we have held that '[w]hether a limitation of use or function is "significant" or "consequential" (i.e., important ...) relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part.' While [plaintiff's doctor's] affirmation does not ascribe a specific percentage to the loss of range of motion in plaintiff's spine, he sufficiently describes the 'qualitative nature' of plaintiff's limitations 'based on the normal function, purpose and use of the body part.' [Plaintiff's doctor] further attributes the limitations in plaintiff's physical activities to the nature of the injuries sustained by opining that plaintiff's 'difficulty in sitting, standing or walking for any extended period of time and his inability to lift heavy boxes at work are a natural and expected medical consequence of his injuries.'
>
> "We cannot say that the alleged limitations of plaintiff's back and neck are so 'minor, mild or slight' as to be considered insignificant within the meaning of Insurance Law § 5102 (d). As our case law further requires, [plaintiff's doctor's] opinion is supported by objective medical evidence, including MRI and CT scan tests and reports, paired with his observations of muscle spasms during his physical examination of plaintiff. Considered in the light most favorable to plaintiff, this evidence was sufficient to defeat defendants' motion for summary judgment."

98 NY2d at 352-353 (internal citations omitted). Here, Waheed and Vixama argue that, "by finding no current limitations, and also normal results on a variety of objective clinical tests, defendants' doctors . . . ruled out any basis" for Sliman to rely on either of the above categories of "serious injuries." *See* notice of motion (motion sequence number 002), Pogorzelski affirmation, ¶ 27. Drs. Nason's and Singh's reports do, indeed, support Waheed's and Vixama's assertion; however, they are flatly contradicted by Drs. Harrison's and Himelfarb's reports. Further, those latter reports plainly do set forth the "comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" that the Court of Appeals spoke of in *Toure*. Drs. Harrison's and Himelfarb's reports also set forth the "specific percentage to the loss of range of motion" in Sliman's lumbar spine and left knee, and the degree of her loss of functionality in those areas that the Court in *Toure* indicated

would be persuasive evidence of the plaintiff's claim. This court finds that Sliman's medical evidence is sufficient to satisfy the *Toure* criteria regarding injuries claimed to be "permanent consequential limitations" or "significant limitations of use," within the ambit of Insurance Law § 5102 (d) . Therefore, there is a triable issue of fact as to whether Sliman's injuries fall within either of the two aforementioned categories of "serious injuries." Accordingly, the court finds that Waheed's and Vixama's motion should be denied.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

**ORDERED** that the motion, pursuant to CPLR 3212, of defendant Katherine Marie Tezanos (motion sequence number 001) is granted, and the complaint in this action is severed and dismissed as against said defendant with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

**ORDERED** that the Clerk is directed to enter judgment accordingly; and it is further

**ORDERED** that the motion, pursuant to CPLR 3212, of codefendants Mohammed A. Waheed and Lucien Vixama (motion sequence number 002) is GRANTED as to plaintiff's permanent loss of use claim and DENIED as to her permanent consequential liminitation and significant limitation of use claims; and it is further

**ORDERED** that the parties are directed to appear for a settlement conference in Part 22 at 80 Centre Street, Room 136 on February 27, 2018, at 9:30 a.m.

Dated: New York, New York
January 15, 2018

ENTER:

Hon. Paul A. Goetz, J.S.C.