Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Laurence L. Love IAS PART 43
Justice

KENDRA T. WILLIAMS,

Plaintiff(s),

-against-

LOURDS LOYD,

Defendant(s).

Index No.: 702802/2018

Motion Submitted: Sept. 5, 2019

Cal. No.: 23 & 24
Seq. No.: 1 & 2

The following papers numbered EF 10 - 19, 21 - 28 read on i) defendant's motion for summary judgment, CPLR 3212, and dismissing plaintiff's complaint on the grounds that plaintiff did not incur a "serious injury" as defined under NY Insurance Law 5102(d) and hence has no cause of action under NY Insurance Law 5104(a); and ii) plaintiff's motion for partial summary judgment, CPLR 3212, on the issue of liability.

	Papers Numbered
Notice of Motion, Affirmation, Exhibits	10 - 18
Affirmations in Opposition, Exhibits	19, 22 - 27
Affirmations in Reply, Exhibits	21, 28

Upon the foregoing papers, it is ordered that this motion is determined as follows:

This litigation involves a collision between two motor vehicles on September 29, 2017, at approximately 9:00 AM, at or near the intersection of 263rd Street and Union Turnpike, Queens County, City and State of New York.

CPLR § 3212 (b) states that, the [summary] motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented (*see Glick & Dolleck, Inc. V. Tri-Pac Export Corp.*, 22 N.Y.2d 439, 441 [1968]). On summary judgment, "facts must be viewed in the light most favorable to the non-moving party" (*see Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503 [2012]).

The Court of Appeals has stated that where alleged limitations are so minor, mild or slight as to be considered insignificant within the meaning of the Insurance Law 5102(d), summary judgment is warranted (*see, Licari v Elliot*, 57 NY2d 203 [1982]).

Of the various definitions in NY Insurance Law 5102(d) for "serious injury," plaintiff alleges a permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; and 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 and eight days immediately following the occurrence of the injury or impairment.

Where the defendant moves for summary judgment on the issue of serious injury, the defendant has the initial burden of establishing a prima facie entitlement to summary judgment by submitting admissible evidence demonstrating that plaintiff did not sustain a serious injury arising out of the subject motor vehicle accident (*see Kears v New York City Transit Authority*, 16 AD3d 45 [2nd Dept 2005]). In order to satisfy a threshold matter, a defendant is required to "submit the affidavits or affirmations of medical experts who examined the plaintiff and concluded that no objective medical findings support the plaintiff's claim" (*see Grossman v Wright*, 268 AD2d 79 [2nd Dept 2000]).

Defendant submits the affirmations of Edward A. Toriello MD, a diplomate of the American Board of Orthopaedic Surgery, and Steven M. Peyser MD, a diplomate of the American Board of Radiology. Dr. Edward A. Toriello affirms, "[t]he claim reveals no objective evidence of continued disability. She is able to return to work and normal daily living activities without restriction. The resolved injuries are causally related to the accident."

Dr. Steven M. Peyser affirms, "[s]pondylitic changes with posterior central disc herniations at C4-5 and C5-6 with findings more pronounced at C5-6 impinging the anterior margin of the cervical spinal cord. These findings are most likely related to longstanding degenerative disc disease. The small left paracentral disc herniation at C6-7 is of indeterminate age. No definitive post traumatic - type etiologies related to the accident date of September 29, 2017 can be determined." The Court notes the findings of Dr. Peyser are ambiguous as to the cause of the herniated discs in questions. Dr. Peyser's own report fails to definitively state the conditions are degenerative and not causally related to the accident, thereby leaving the issue in question.

Consideration [for summary judgment] is only given to opposing papers once the moving defendant has established a prima facie case that plaintiff failed to sustain a "serious" injury (*see Rampello v Ferguson*, 280 AD2d 986 [4th Dept 2001]).

Plaintiff submits various medical reports but this Court notes the affirmation of Sunil H. Butani MD, a physical medicine and rehabilitation type doctor. Dr. Sunil H. Butani affirms under the penalties of perjury that "[t]he patient continues with neck pain and low back pain caused by motor accident on 09/20/2017. The patient has not had no neck and low back injuries to this accident. The patient is on permanent partial disability with regard to neck and low back." Dr. Sunil H. Butani has this affirmation with a date of service, DOS, of July 25, 2019.

Due to the differences in opinions of plaintiff's doctor and defendants' doctors, along with the ambiguity of defendant's radiologist, a question of fact has been raised (*see McDowall v Abreu*, 11 AD 3d 590 [2d Dept 2004]). Conflicting expert opinions may not be resolved on a motion for summary judgment (*Williams v Lucianatelli*, 688 NYS2d 294 [4th Dept 1999]).

Plaintiff seeks a partial summary judgment Order on the issue of liability. Defendant highlights *Thoma*, "[a]s to a summary judgment motion on liability, it is well settle that the moving party has the burden of not only showing that the opposing party is negligent as a matter of law but the moving party must also demonstrate their freedom from comparative fault as well" (*see Thoma v Ronai*, 82 NY2d 736 [1993]). However, this Court notes the Court of Appeals decision of *Rodriguez*, "held that worker was not required to demonstrate absence of his own comparative fault to obtain partial summary judgment on issue of liability" (*see Rodriguez v City of New York*, 31 NY3d 312 [2018]).

Both parties use the sworn testimony of the examination before trial of Kendra T. Williams and Lourds Loyd. The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*see Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [1986]). Plaintiff's affirmation states, in paragraph 13, "[d]efendant was negligent per se in failing to yield the right of way in violation of Vehicle and Traffic Law 1141, and failing to see that which there was to be seen, namely, the Plaintiff's vehicle, which was traveling with the right of way and was so close to the intersection as to pose an immediate hazard." Plaintiff's affirmation continues in paragraph 14, "[t]he defendant was also negligent in failing to see that which a reasonable person should have seen under the circumstances, namely, the Plaintiff's vehicle travelling on eastbound Union Turnpike, with a green traffic signal, continuing straight on Union Turnpike, when the Defendant executed a left turn directly in front of her."

Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (*see Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). Defendant's affirmation states, in paragraph 4, "[d]efendant Loyd testified ... [t]he subject intersection was controlled by traffic light ... [w]hen she first saw the traffic light, it was green ... [s]he kept the light under constant observation until the accident and it remained green."

Every driver has the duty to operate his or her vehicle with reasonable care with regard to actual and potential hazards existing from road and traffic conditions; to keep his or her vehicle under reasonable control; and to see that which, under the facts and circumstances, should have been seen by the proper use of his or her senses (*see McCarthy v Miller*, 139 AD2d 500 [2d Dept 1988]). Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable (*see Forrest v. Jewish Guild for the Blind*, 3. N.Y.3d 295, 315 [2004]).

Plaintiff and defendant have failed to provide sufficient evidence to this Court about who had the right of way. There are allegedly two travel lanes and a left turn lane on Union Turnpike in both directions at the location of the accident. Plaintiff's affirmation states that, "the defendant was in

the middle lane of Union Turnpike approaching 263rd Street." Later in plaintiff's affirmation, "[w]hen the defendant first observed the traffic signal controlling her direction of travel, she was in the left turning lane." Plaintiff Williams testified that her vehicle was in the right lane.

There are questions of fact that still need to be addressed. It is unclear whether there are dedicated lanes for turning on Union Turnpike with their own directional light, or just a regular lane with a standard traffic light for all vehicles. As both parties state they had the green light, it is unclear if the parties are referring to a directional traffic signal or an all-purpose traffic signal. The facts surrounding this litigation still need to be ascertained to determine the circumstances surrounding this motor vehicle accident.

Defendant's motion for summary judgment on the grounds that plaintiff did not incur a "serious injury" per NY Insurance Law 5102(d) is DENIED.

Plaintiff's motion for partial summary judgment on the issue of liability is DENIED.

Date: October 7, 2019

Laurence L. Love, J.S.C.