To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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CAROL JIMENEZ,

Plaintiff,

- against -

DOLORES E. TITO MENDEZ and JORDON L. CARDENAS,

Defendants.

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INDEX NO. 70409/2018

DECISION/ORDER

Mot. Seqs. 2 & 3
Submit Date: 7/22/2020

ECKER, J.

In accordance with CPLR 2219 (a), the decision herein is made upon considering all papers filed in NYSCEF relative to the motion of DOLORES E. TITO MENDEZ, made pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint as against her on the ground that CAROL JIMENEZ (plaintiff) did not sustain a "serious injury" under Insurance Law § 5102 (d) (Mot. Seq. 2); and the motion of JORDON L. CARDENAS, made pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint and cross claims of codefendant MENDEZ as against CARDENAS (Mot. Seq. 3).

On July 18, 2018, plaintiff — then age 43 — together with her infant child, were traveling in the rear seat of a taxi operated by Mendez when the vehicle collided at the intersection of Hale Avenue and Carhart Avenue in the City of White Plains. Mendez's vehicle approached a stop sign, was making a left turn from Carhart Avenue onto Hale Avenue, when it was struck on the left side by a vehicle operated by Cardenas, who was traveling on Hale Avenue. Plaintiff did not witness the collision when it occurred since she was attending to her child's seat belt at the time of impact.

As a result of the accident, plaintiff commenced this negligence action, claiming she sustained a serious injury as defined in Insurance Law § 5102 (d). Mendez disputes this claim and now moves for summary judgment dismissing the complaint as against her. Cardenas separately moves for summary to dismiss the complaint and Mendez's cross claims as against him, alleging that he had the right-of-way and that Mendez's operation of her vehicle was the sole proximate cause of the accident.

The moving party is entitled to summary judgment only if it tenders evidence sufficient to eliminate all material issues of fact from the case (*see* CPLR 3212 [b]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]. Stated another way, "[i]n order to obtain summary judgment, there must be no triable issue of fact presented and even the color of a triable issue of fact forecloses the remedy" (*Matter of Cuttitto Family Trust*, 10 AD3d 656, 656 [2d Dept 2004] [ellipses omitted]; *see Staubitz v Yaser*, 41 AD3d 698, 699 [2d Dept 2007]). If a party makes a prima facie showing of its entitlement to summary judgment, the opposing party bears the burden of establishing the existence of a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d at 562). On a motion for summary judgment, the court's function is to determine if a factual issue exists, and "the court must not weigh the credibility of witnesses unless it clearly appears that the issues are feigned and not genuine, and any conflict in the testimony or evidence presented merely raises an issue of fact" (*Brown v Kass*, 91 AD3d 894, 895 [2d Dept 2012] [brackets omitted]). The court will address each of the defendants' motions in turn.

MENDEZ'S MOTION FOR SUMMARY JUDGMENT (MOT. SEQ. 2)

Turning first to Mendez's motion for summary judgment dismissing the complaint as against her, she argues that plaintiff did not suffer a serious injury under Insurance Law § 5102 (d). In support of her motion, Mendez submitted, among other things, affirmed reports of her medical experts, Dr. Michael Setton, a radiologist, and Dr. John Denton, an orthopedist.

Setton's report stated that he conducted a radiological evaluation on the MRI film of plaintiff's left shoulder, which revealed "moderate degeneration of the superior through posterosuperior labrum, reflecting a degenerative breakdown of the biochemical components of the labrum related to normal age-related degeneration and chronic wear and tear." He determined that there is no evidence of "osseous or soft tissue injury which may have resulted from the accident." In sum, Setton concluded that plaintiff's left shoulder had an "extremely common form of degenerative joint disease" and there was no abnormality to suggest any type of recent traumatic injury to her left shoulder.

Though plaintiff presented to Denton on July 24, 2019 and October 1, 2019, Denton's report states that he was not provided with "authenticated medical records" for his review on either occasion, despite the fact plaintiff had been treated and operated on by Dr. Mark Kramer, plaintiff's orthopedic surgeon. In any event, Denton opined that the decreased ranges of motion in plaintiff's cervical spine and lumbar spine were "on a voluntary basis and likely due to poor effort or claimant guarding, as they were not supported by the remainder of the examination findings." Denton noted that plaintiff previously had left shoulder surgery, but her preexisting condition is unknown because she did not disclose any details. As to plaintiff's left knee, Denton concluded that the decrease of range of motion "carries no medical significance" and the rest of her examination was "within normal limits."

Based on the foregoing, defendant submitted competent medical evidence establishing that plaintiff's alleged injuries did not constitute a serious injury under either the permanent consequential limitation of use or significant limitation of use categories pursuant to Insurance Law § 5102 (d) (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]; *Zaid v Payano*, ___, AD3d ___, ___, 2020 NY Slip Op 04429, *1 [2d Dept 2020]; *Singh v Singh*, 180 AD3d 724, 725 [2d Dept 2020]).

In opposition, plaintiff submitted, among other things, her medical records, X ray reports of her left knee and left shoulder, and affirmed medical reports of Dr. Kramer, as well as Dr. Samuel Mayerfield and Dr. Harold Augenstein, two board-certified radiologists.

The record discloses that on September 4, 2018, Mayerfield conducted an MRI examination of plaintiff's lumbar spine, left knee, and left shoulder. Mayerfield's report sets forth his findings, including bulging discs and levoconvexity to plaintiff's lumbar spine, and that plaintiff suffered a "SLAP tear" and torn labrum with respect to her left shoulder. Also on September 4, 2018, Augenstein performed an MRI examination of plaintiff's cervical spine, finding posterior disc bulges impressing upon her ventral thecal sac.

Kramer's report details plaintiff's medical history after the underlying accident, stating that she first presented to him on November 21, 2018, complaining of anterior left knee and left shoulder pain. Kramer explained that after several examinations and alternative treatment plans which did not improve plaintiff's pain, he performed arthroscopy surgery on plaintiff's left shoulder in April 2019, and arthroscopy surgery on plaintiff's left knee in July 2019. Kramer described that plaintiff's condition improved after the surgeries, along with recommended physical therapy, administering medications, and a home exercise program for continued rehabilitation. Kramer concluded that the subject accident rendered plaintiff unable to perform various activities of work and social life to the same extent that she was able to do so before. He opined that there are significant residuals still affecting plaintiff's ability to perform her prior routine activities of daily and social living, that her prognosis is "guarded," and that her "injuries will require lifetime conservative care." Kramer surmised that the limitations and pain which plaintiff continues to experience are a natural and expected consequence of her diagnosed injuries, which he concluded were "not degenerative, but rather were directly caused by the motor vehicle accident." Ultimately, Kramer opined with a reasonable degree of medical certainty that the injuries sustained by plaintiff were causally related to the accident.

The Court of Appeals has set forth that "[i]n order to prove the extent or degree of physical limitation, an expert's designation of a numeric percentage of a plaintiff's loss of range of motion can be used to substantiate a claim of serious injury. An expert's *qualitative assessment* of a plaintiff's condition also may suffice, provided that the evaluation has an objective basis and compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system" (*Perl v Meher*, 18 NY3d 208, 217 [2011] [emphasis supplied], citing *Toure v Avis Rent A Car Sys.*, 98 NY2d at 350).

Here, plaintiff submitted competent medical evidence raising a triable issue of fact as to whether she sustained a serious injury within the meaning of Insurance Law § 5102 (d) (*see Karademir v Mirando-Jelinek*, 153 AD3d 509, 510 [2d Dept 2017]). She did so based upon the conflicting experts' opinions, plaintiff's description of her physical complaints, and Kramer's conclusion that she suffered injuries proximately caused by the accident (*see Zaid v Payano*, 2020 NY Slip Op 04429 at *1). Though Mendez submitted objective findings of her medical expert to demonstrate that plaintiff was not injured to the extent she claimed, plaintiff, in opposition, presented objective findings of her medical expert to sufficiently rebut Mendez's assertions that she had significant limitations in her range of motion to her left knee and left shoulder (*see Perl v Meher*, 18 NY3d at 217; *Toure v Avis Rent A Car Sys.*, 98 NY2d at 350; *Cheour v Pete & Sals Harborview Transp., Inc.*, 76 AD3d 989, 989 [2d Dept 2010]). Moreover, Kramer's notes and ultimate opinion as to causation is uncontradicted by Mendez's expert orthopedist, Denton (*see Bonafede v Bonito*, 145 AD3d 842, 844 [2d Dept 2016]). It is not for the court to decide whether an orthopedist's medical opinion should be accepted over that of a chiropractor's opinion — a prototypical example of a battle of the experts. The trier of fact is to resolve any such factual issues (*see Pantojas v Lajara Auto Corp.*, 117 AD3d 577 [1st Dept 2014]). Thus, Mendez's motion for summary judgment is denied.

CARDENAS' MOTION FOR SUMMARY JUDGMENT (MOT. SEQ. 3)

Turning to Cardenas' motion, he argues that Mendez be ascribed all liability for the accident. Relying on the parties' deposition testimony, Cardenas contends that Mendez had a duty to yield to cross traffic and that she improperly attempted to make a left turn against traffic despite observing his vehicle approaching. As the driver with the right-of-way, Cardenas asserts that it was reasonable for him to anticipate that Mendez would remain stopped at the stop sign. Mendez, however, contends that there are issues of fact as to whether Cardenas was comparatively negligent inasmuch as he was allegedly speeding, and that Cardenas could have maneuvered his car so as to avoid the accident.

"A defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie, that he or she was not at fault in the happening of the subject accident. There can be more than one proximate cause of an accident, and the issue of proximate cause is generally one for the jury" (*Heaney v Kahn*, 180 AD3d 1018, 1019 [2d Dept 2020] [internal citations omitted]). "A driver with the right-of-way has a duty to use reasonable care to avoid a collision" (*Cox v Nunez*, 23 AD3d 427, 427 [2d Dept 2005] [internal citations omitted]).

Here, defendants' testimony is replete with factual issues that cannot be determined on this record. The court is unable to determine whether Cardenas or Mendez was responsible for the collision given the credibility issues that are dependent on assessing whose version of the accident should be accepted. The fact that Cardenas allegedly had the right-of-way, yet Mendez proceeded to make a left turn does not preclude a finding that Cardenas may have been comparatively negligent in contributing to the accident (*see Canales v Arichabala*, 123 AD3d 869, 870 [2d Dept 2014]; *Cox v Nunez*, 23 AD3d at 427-

428). Therefore, Cardenas' motion is denied insomuch that he failed to establish his entitlement to judgment as a matter of law (*see Merola v Beard*, ___ AD3d ___; ___, 2020 NY Slip Op 03776, *1-2 [2d Dept 2020]; *Heaney v Kahn*, 180 AD3d at 1019).

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby:

ORDERED that the motion of DOLORES E. TITO MENDEZ, made pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint as against her on the ground that CAROL JIMENEZ (plaintiff) did not sustain a "serious injury" under Insurance Law § 5102 (d), is denied (Mot. Seq. 2); and it is further

ORDERED that the motion of JORDON L. CARDENAS, made pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint and cross claims of codefendant MENDEZ as against CARDENAS, is denied (Mot. Seq. 3); and it is further

ORDERED that the remaining parties shall appear at the Settlement Conference Part of the Court, at a date, time, and manner as hereafter directed by that Part.

The foregoing constitutes the Decision/Order of the court.

Dated: August 7, 2020
White Plains, New York

ENTER:

HON. LAWRENCE H. ECKER, J.S.C.

APPEARANCES:
Parties appearing via NYSCEF.