| **Friedman v Herway** |
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| 2021 NY Slip Op 33306(U) |
| September 6, 2021 |
| Supreme Court, Rockland County |
| Docket Number: Index No. 031592/2019 |
| Judge: Sherri L. Eisenpress |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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BRUCHA FRIEDMAN and FEIGE FRIEDMAN,,

**DECISION AND ORDER**

*Plaintiffs*,

*-against-*

Index No. 031592/2019

(Motions #3-6)

CATHERINE HERWAY, YTIZCHOK FRIEDMAN, NILT TRUST, as Grantor and UTI Beneficiary, NISSAN MOTOR ACCEPTANCE CORPORATION, as Services, NILT, INC. as Titling Trustee, WILMINGTON TRUST COMPANY, as Delaware Trustee, and as Trust Agent 2017-B SUBI SUPPLEMENT and TRANIE FRIEDMAN,

*Defendants*.

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HON. SHERRI L. EISENPRESS, A.J.S.C.

The following papers, numbered 1-15, were read in connection with (i) Defendant Catherine Herway's Notice of Motion for summary judgment and dismissal of the action on the ground that the Plaintiffs cannot meet the serious injury threshold requirement as mandated by Insurance Law Sections 5104(a) and 5102(d) (Motion #3); (ii) Defendant Yitzchok Friedman and Tranie Friedman's Notice of Motion for summary judgment and dismissal of the action (a) with respect to liability and (b) on the ground that the Plaintiffs cannot meet the serious injury threshold requirement as mandated by Insurance Law Sections 5104(a) and 5102(d) (Motion #4); (iii) Plaintiff's Notice of Cross-Motion for an Order granting Plaintiffs' summary judgment against Defendant Catherine Herway on the issue of liability (Motion #5); and (iv) Defendant Catherine Herway's Notice of Motion for an Order pursuant to CPLR 602(a) joining the above captioned action with the action entitled Friedman v. Herway, Index No. 030088/2021 for trial and discovery (Motion #6):

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**LIABILITY**

This action arises out of a two-vehicle accident, which occurred on November 20, 2018, on eastbound Route 59 approximately 100 feet east of its intersection with Besso Street, in Clarkstown, New York. Plaintiffs, passengers in the vehicle operated by defendant Yitzchok Friedman, and leased by Tranie Friedman, claim to have sustained serious personal injuries when that vehicle came into contact with a vehicle operated by defendant Catherine Herway. Yitzchok Friedman testified that he was driving a vehicle with his wife Feige Friedman, and daughter, Brucha Friedman, as seat-belted passengers. He was in the left lane of the two-lane roadway on Route 59. Defendant Herway was coming from an entrance ramp onto Route 59. Friedman testified that Herway failed to stop at the stop sign, entered Route 59 and impacted his vehicle. He claims that once he saw the Herway vehicle, he did not have a chance to take any evasive actions before contact.

Although Defendant Herway was unable to state the roads she traveled on prior to the accident, she testified that at some point she attempted to take a ramp from the road

she on, in order to enter Route 59. She testified that she stopped at the end of the ramp at a stop sign, where she was able to see the vehicles coming from her left towards her on Route 59. She admits to seeing the Friedman vehicle approaching, but decided to move into the lane, stating that she "thought I had time to do that." She further testified that she "guessed" that she attempted to enter the same lane that the car was traveling. The impact occurred in the lane she was trying to enter. Ms. Herway confirmed at her examination before trial, her statement to the police that "I failed to yield." Although she also told the police that the Friedman vehicle was "speeding," she conceded at her examination before trial that she could not estimate the rate of speed of the vehicle, did not know the actual speed of the Friedman vehicle, could not state whether his car was traveling faster or slower than the other vehicles on Route 59 and did not know if the Friedman car was going over the speed limit.

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a Court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v Citibank Corp., et al., 100 N.Y.2d 72 (2003) (citing Alvarez v Prospect Hosp., 68 N.Y.2d 320 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v Gonzalez, 306 A.D.2d 250 (2d Dept 2003). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124 (2000). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

It is axiomatic that a violation of a standard of care imposed by the Vehicle and Traffic Law constitutes negligence per se. Barbieri v. Vokoun, 72 A.D.3d 853, 856, 900 N.Y.S.2d 315 (2d Dept. 2010); Coogan v. Torrisi, 47 A.D.3d 669, 849 N.Y.S.2d 621 (2d Dept. 2008).

Moreover, a driver is bound to see what is there to be seen through the proper use of his or her senses, and is negligent for the failure to do so. Shui-Kwan Lui v. Serrone, 103 A.D.3d 620, 959 N.Y.S.2d 270 (2d Dept. 2013). Thus, a driver also has a duty to exercise reasonable care under the circumstances to avoid an accident. Id. Moreover, a driver who has the right-of-way is entitled to anticipate that other drivers will obey traffic laws which require them to yield. Smith v. Omanes, 123 A.D.3d 691, 998 N.Y.S.2d 198 (2d Dept. 2014).

VTL Sec. 1128 "Driving on Roadways Lane for Traffic", states:

> (a) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

A driver who fails to yield the right of way after stopping at a stop sign controlling traffic is negligent as a matter of law. Maliza v. Puerto-Rican Transportation Corp., 50 A.D.3d 650 A.D.3d 650, 651, 854 N.Y.S.2d 763 (2d Dept. 2008). In the instant matter, Defendant Herway is negligent as a matter of law with respect to her failure to yield and her entry into Friedman's lane of travel when attempting to merge onto Route 59. As such, Plaintiffs have demonstrated their entitlement to summary judgment as against Defendant Herway.

In opposition to the Friedman Defendants' motion for summary judgment and dismissal of the action against them, Defendant Herway argues that same must be denied because there are triable issue of fact as to whether Friedman was speeding and whether he was negligent. There is no merit to this argument. Defendant Herway conceded throughout her examination before trial that she was unable to actually estimate the speed of Friedman's vehicle and could not say that he was in fact traveling in excess of the speed limit.

Moreover, "[w]hile a driver is required to 'see that which through proper use of [his or her] senses [he or she] should have seen,' a driver who has the right-of-way is entitled to anticipate that the other motorist will obey the traffic law requiring him or her to yield." [internal citations omitted], Vainer v. DiSalvo, 79 A.D.3d 1023, 1024, 914 N.Y.S.2d 236 (2d

Dept. 2010). See also Dileo v. Barreca, 16 A.D.3d 366, 367, 793 N.Y.S.2d 52 (2d Dept. 2005). Additionally, a driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision. Yelder v. Walters, 64 A.D.3d 762, 764, 883 N.Y.S.2d 290 (2d Dept. 2009). In the instant matter, neither Plaintiff nor co-defendant Herway have raised a triable issue of fact as to Friedman's negligence. As such, he is entitled to summary judgment and dismissal of the Complaint and any cross-claims against him.

**No-Fault Threshold**

Defendants Herway and Friedman move for summary judgment with respect to Plaintiffs' failure to meet the no-fault "serious injury" threshold. As an initial matter, since the Friedman Defendants have been dismissed from this action based upon their lack of liability, there is no need for the Court to address the threshold portion of their summary judgment motion.[1] Plaintiff, Brucha Friedman, 19 years old at the time of the occurrence, claims that as a result of the accident, she sustained a sprain of her left shoulder; lumbosacral acute post-traumatic myofascitis; cervical spine radiculopathy; post-traumatic stress disorder, insomnia, flashbacks, anxiety and panic. Plaintiff Feige Friedman, 39 years old and pregnant with her tenth child at the time of the accident, claims to have sustained cervical disc bulges at C3-C4, C4-5, and C5-c6 with bilateral radiculopathy; post traumatic lumbar myofascitis and radiculopathy; early delivery (20 days before due date) of her baby due to the trauma; insomnia, dizziness; anxiety; panic attacks and blurry vision; post traumatic syndrome and acute post-traumatic cephalgia.

In support of her summary judgment motion, Defendant Herway submits the affirmed medical report of Jeffrey Salkin, M.D., orthopaedic surgeon. Examination of Ms. Brucha Friedman's cervical spine revealed limitations in movement including flexion of 40 degrees

[1]It should also be noted that the Friedman Defendants did not submit any of their own evidence but rather parroted the motion of Defendant Herway.

(normal 50); extension of 45 degrees (normal 60); left and right rotation of 50 degrees (normal 80) and right and left lateral flexion of 35 degrees (normal 45). There were also slight limitations of movement in the lumbar spine including flexion of 50 degrees (normal 60) and flexion and extension of 20 degrees (normal 25). There were limitations of movement in both the right and left shoulder. Dr. Salkin opines that "range of motion is voluntary, active, and subjective."

With respect to Feige Friedman, Defendant Salkin notes that she was admitted to Westchester Medical Center for three days after the occurrence. Upon examination, Dr. Salkin notes "minimal trapezii tenderness to palpation in the cervical spine. He found limitations in her cervical spine including flexion of 40 degrees (normal 50) extension of 45 degrees (normal 60); right and left rotation of 45 degrees (normal 80) and right and left lateral flexion of 30 degrees (normal 45). Limitations were found in Feige's thoracic spine including flexion of 35 degrees (normal 45), right and left rotation of 20 degrees (normal 30) and right and left lateral bending of 35 degrees (normal 45) There were also slight limitations in her lumbar spine. Dr. Salkin diagnosed Feige with cervical, thoracic and lumbar sprain with left shoulder pain referred from cervical spine resolved, all of which he found to be causally related. Once again he notes that "range of motion is voluntary, active and subjective." Defendant also submits Plaintiffs' psychological records which reference post-traumatic issues from the accident but does not submit an expert report stating that there are no psychological conditions arising out of the accident.

In order to be entitled to summary judgment it is incumbent upon the defendant to demonstrate that plaintiff did not suffer from any condition defined in Insurance Law §5102(d) as a serious injury. Healea v Andriani, 158 A.D.2d 587, 551 N.Y.S.2d 554 (2d Dept 1990). Precedent in the Second Department holds that where a defendant relies upon the affirmed medical report of its examining physician in support of its motion for summary judgment which notes a significant limitation of motion in a body part, the defendant has failed

to meet his prima facie burden and the Court need not consider the sufficiency of the plaintiff's opposition papers. Robinson v. Yeager, 62 A.D.3d 684, 880 N.Y.S. 88 (2d Dept. 2009); Locke v. Buksh, 58 A.D.3d 698; 872 N.Y.S.2d 148 (2d Dept. 2009); Bentivegna v. Stein, 42 A.D.3d 555; 841 N.Y.S.2d 316 (2d Dept. 2007); Zamaniyan v. Vrabeck, 41 A.D.3d 472; 835 N.Y.S.3d 903 (2d Dept. 2007); Kovalenko v. General Electric Capital Auto Lease Inc., 37 A.D.3d 664; 831 N.Y.S.2d 438 (2d Dept. 2007).

In Meyer v. Gallardo, 260 A.D.2d 556; 688 N.Y.S.2d 624, 625 (2d Dept. 1999), the Second Department affirmed a denial of summary judgment where one of the physicians who examined the injured plaintiff on behalf of the defendant stated that the lateral rotation of his cervical spine was 80 degrees to the right and 50 degrees to the left. The Court found that this alone raised an issue of fact as to whether the injured plaintiff suffered a "significant limitation of use of a body function or system." Id. See also Rodriquez v. Ross, 19 A.D.3d 395, 396; 796 N.Y.S.2d 398 (2d Dept. 2005)(since defendants' own examining physician recorded some significant limitations in the plaintiff's movement of his cervical and lumbar spines, and his right shoulder, he did not make a prima facie showing of entitlement to summary judgment.); Korpalski v. Lau, 17 A.D.3d 536; 793 N.Y.S.2d 195 (2d Dept. 2005)(dismissal of complaint reversed because defendant failed to make prima facie showing that plaintiff did not sustain a serious injury where defendant's experts reported finding a limitation of motion in plaintiff's left shoulder and lower back.); Alam v. Karim, 61 A.D.3d 904, 879 N.Y.S.2d 1151 (2d Dept. 2009); Bagot v. Singh, 59 A.D.3d 368; 871 N.Y.S.2d 917 (2d Dept. 2009); Colon v. Chu, 61 A.D.3d 805; 878 N.Y.S.2d 127 (2d Dept. 2009).

In the instant matter, upon examination, Dr. Salkin found significant physical limitations in both Plaintiffs' cervical spines, to Feige's thoracic spine and to a lesser extent, both Plaintiff's lumbar spines. Additionally, Defendant failed to affirmatively address the psychological injuries. As such, Defendant Herway has failed to sustain her prima facie burden upon summary judgment with respect to the categories of permanent consequential limitation

and significant limitation, and the Court need not address the sufficiency of Plaintiffs' opposition papers with respect to these categories. The Court finds that Dr. Salkin's blanket statement that "range of motion is voluntary, active and subjective" negates the findings of limitation of movement as well the plethora of case law on this issue.

The Court reaches a different conclusion with respect to the 90/180 day category. The Plaintiffs allegations of limitations to everyday activities, coupled with their failure to submit medical evidence which documents that they were prevented from performing "substantially all" of their usual and customary activities for the requisite period is insufficient to sustain their burden upon summary judgment. See Rubin v. SMS Taxi Corp., 71 A.D.3d 548, 898 N.Y.S.2d 110 (1st Dept. 2010). As such, that claim is hereby dismissed.

**Motion for a Joint Trial**

Lastly, Defendant Herway moves for an Order joining the above captioned matter for discovery and trial with the case Yitzchock Friedman v. Catherine Herway, Index No. 030088/2021. Since these actions arise from identical facts and circumstances and involve common questions of law and fact they should be joined for trial, and the requested relief is granted. It appears, however, that the second action is in its infancy, as an RJI has yet been filed. Moving Defendant is directed to file an RJI and a request for a Preliminary Conference in the second action within 20 days, and indicate that it has a related matter and has been joined for trial with the above captioned action.

Accordingly, it is hereby

**ORDERED** that Defendant Herway's Notice of Motion (#3) for summary judgment and dismissal of the action on the ground that Plaintiffs have failed to meet the "serious injury" threshold of the no-fault law is DENIED, except with respect to the 90/180 no-fault category which is dismissed; and it is further

**ORDERED** that Defendant Yitzchok and Tranie Friedman's Notice of Motion (#4) for summary judgment, pursuant to CPLR § 3212, and dismissal of the Complaint and all cross-

claims against them is GRANTED on liability grounds, and the Complaint and cross-claims are hereby dismissed; and it is further

**ORDERED** that Plaintiffs' Notice of Cross-Motion (#5)for summary judgment as to liability against Defendant Catherine Herway is GRANTED in its entirety; and it is further

**ORDERED** that the Motion for Joint Trial (#6) is GRANTED and the above captioned action is joined for trial with the case of Yitzchock Friedman v. Catherine Herway, Index No. 030088/2021; and it is further

**ORDERED** that this matter is scheduled for a settlement conference via Microsoft Teams on **November 19, 2021** at 10 a.m. Counsel shall be fully familiar with the matter and have settlement authority.

The foregoing constitutes the Opinion, Decision & Order of the Court on Motions #3, #4 and #5.

Dated: New City, New York
September 6, 2021

**HON.SHERRI L. EISENPRESS, A.J.S.C.**

TO:
All Parties (by e-file)