

Velez v DiProffio

2021 NY Slip Op 33389(U)

April 6, 2021

Supreme Court, Orange County

Docket Number: Index No. EF001265-2019

Judge: Sandra B. Sciortino

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This opinion is uncorrected and not selected for official publication.

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 ORANGE

-----X
ALVINA VELEZ and JUAN VELEZ,

DECISION AND ORDER

Index No.:EF001265-2019

Plaintiffs,

-against-

Motion Date: 1-19-2021

Sequence Nos. 1 - 2

KAREN DIPROFIO and CHRISTOPH DIPROFIO,

Defendants.
-----X

SCIORTINO, J.

The following papers numbered 1 to 29 were considered in the defendants' motion (Sequence #1) for summary judgment on the ground that the plaintiff Alvina Velez failed to establish a serious personal injury as required by Insurance Law §5102 and plaintiffs' motion (Sequence #2) seeking an order granting plaintiffs summary judgment on the issue of liability:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion (Sequence #1) /Affirmation (Condello)/Exhibits A - E; Physician Affirmation (Hendler)	1 - 7
Notice of Motion (Sequence #2)/Affirmation(Campbell)/Exhibits A - G	8 - 17
Affirmation in Opposition (Condello)/Exhibits A - I Physician Affirmation (Rosenblatt)	18 - 28
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This personal injury action arises out of a motor vehicle accident that took place on November 12, 2017, the southbound lanes of I-87 in Clarkstown, New York. Plaintiffs commenced this action by filing a Summons and Complaint on February 11, 2019. Issue was joined with the filing of the defendants answer on March 15, 2019. Plaintiffs served a Bill of Particulars dated May 3, 2019.

Plaintiff Alvina Velez alleges the following injuries/conditions: left carpal tunnel syndrome; permanent significant scarring and disfigurement; left endoscopic carpal tunnel release; cervical spine sprain; lumbar spine sprain; L5 radiculopathy; and cerebral concussion and post concussion syndrome. Plaintiff further claims the aforementioned conditions were either caused or exacerbated by the subject accident.

The Examination Before Trial of plaintiff Alvina Velez was taken on March 31, 2020. The Examination Before Trial of defendant Christopher DiProfio was taken on March 31, 2020. Note of Issue was filed on October 29, 2020.

Plaintiff Alvina Velez' Deposition

On November 12, 2017, plaintiff was traveling, in the left lane, southbound on I-87. The traffic was heavy and "stop and go." Plaintiff approached another vehicle from the rear, came to a gradual stop, and remained stopped for approximately ten seconds. While plaintiff was stopped, defendant's vehicle made contact with the bumper of her vehicle. Plaintiff described the force of the impact as heavy. She did not observe defendant's vehicle before feeling the impact.

Plaintiff was wearing a seatbelt and shoulder harness. As a result of the impact, her head hit the headrest and both hands hit the steering wheel. She felt pain in her neck and lower back and did not get out of her vehicle until the police arrived. After the police arrived, the plaintiff was removed from her vehicle by EMS workers and was carried by stretcher into an ambulance. She was taken to Nyack Hospital.

Plaintiff, while being deposed, was unable to provide an exact time line of her treatment for the claimed injuries. Four days after the accident, she sought treatment from her family physician, Dr. Frank Bariletti, at Ramapo Internal Medicine. She complained of neck, head, and back pain and

pain in her right leg. Plaintiff also, at one point, sought treatment from Dr. Zeitlin, a neurologist and was referred to Dr. Rosenblatt, D.O.

On August 16, 2018, Dr. Gotesman, of Northeast Orthopedics, performed surgery on the plaintiff's left wrist. After the surgery she was given a brace that she wore for about a month, mostly at night. She followed up with Dr. Gotesman once or twice a month for approximately eight months. At the time of deposition, she had resumed wearing the brace at night for four to five months, approximately three nights per week.

Plaintiff testified that the scarring on her left hand bothers her "a little;" the scar "brings her back to the day of the accident." (p. 102)

Plaintiff attended physical therapy at Sports Care Therapy in December of 2017. She received treatment twice a week for approximately one year. Plaintiff also received physical therapy at Hand Therapy of Rockland in early 2018. She received treatment approximately two times per week for approximately one year. Plaintiff has not received any treatment since.

Plaintiff testified that she is unable to support her body weight with her left hand and has trouble lifting over 60 pounds, washing dishes, and doing her daughters' hair. She claimed to be limited in her ability to perform housework. Her injuries have also affected her intimacy with her husband. Plaintiff was intimate with her husband every day before the accident and is now intimate with her husband only three to four times per week. Before the accident, plaintiff went to the gym two to three times per month; since the accident, she has been going to the gym two to three times per week.

At the time of the deposition, the plaintiff was employed at Coach in Woodbury Commons. She works five days a week, 40 hours per week. Her job duties involve opening the store; counting

the registers; doing paperwork; coaching sales associates, and helping with customers. At the time of the accident, she was employed at Victoria's Secret. Her duties were similar to her duties at Coach, except her Victoria's Secret job required heavy lifting, up to 30lbs, and moving fixtures and tables. Plaintiff missed approximately two and a half months of work after the accident; she then returned part time. She testified her injuries prevented her from performing her duties at Victoria's Secret.

The plaintiff's doctor advised her not to climb ladders or bend down. She resumed full time work at Victoria's Secret in April of 2018 and stopped working at Victoria's Secret because the location closed and she was looking for something different.

Plaintiff was involved in a prior car accident on December 13, 2016, in which she injured her neck and back. She received physical therapy at Northeast Orthopedics. She testified to being pain free for approximately eight months before the accident which is the basis for this claim.

Defendant Christopher DiProfio's Deposition

On November 12, 2017, defendant was traveling behind plaintiff in the left lane, traveling approximately 45 to 50 miles per hour. The traffic was "stop and go." Defendant believed plaintiff was in the process of slowing down. He attempted to pass her by changing lanes to the middle lane, passing her on the right side. As he tried to change lanes, a vehicle quickly changed from the right lane to the middle lane, preventing defendant from changing lanes. Defendant swerved back into the left lane, colliding with plaintiff's vehicle. When the police arrived, defendant received a ticket for following too close.

Threshold Motion (Sequence #1)

Defendants assert that plaintiffs have failed to establish a "serious injury" as that term is

defined in Insurance Law §5102(d). The plaintiffs, in their Bill of Particulars, claim to have suffered the following serious injuries as defined in §5102(d): (1) a significant limitation to body organ, member, function or system; (2) a permanent consequential limitation to a body organ, member or system; (3) a medically-determined injury or impairment of a non-permanent nature that prevented plaintiff from performing substantially all of the material acts which constitute her usual and customary daily activities for not less than 90 of the 180 days immediately following the accident; and (4) a significant disfigurement.

In support of their motion, defendants offer the independent medical examination report of certified orthopedic surgeon Robert Hendler, M.D. Dr. Hendler's report, dated June 19, 2020, and the addendum report, are affirmed in compliance with Civil Practice Law & Rules §2106. In preparation, Dr. Hendler reviewed the Bill of Particulars; Emergency Department records of Nyack Hospital dated 11/12/17, including the x-ray of lumbar spine, and the CT report of cervical spine; Emergency Department records of Nyack Hospital dated 3/1/18 including the x-ray report of chest; the operative report of left wrist surgery by Dr. Alan Gotesman and corresponding hospital records of Nyack Hospital Outpatient dated 8/16/2018; EMG testing of upper and lower extremities by Dr. Marc Rosenblatt dated 1/19/2018; Office records of Dr. Alan Gotesman, Northeast Ortho. & Sports Med., dated 1/1/2018 through 9/26/2018; the office records of Dr. Earl Zeitlin, Highland Medical, dated 12/21/2017 through 6/25/2018; the office records of Hand Therapy of Rockland OT, dated 4/3/2018 to 4/10/2019; and the treatment records of Sports Care PT of NY dated 4/3/2018 through 9/1/2018.

Dr. Hendler saw the plaintiff on June 15, 2020. On that day, with respect to her cervical spine, plaintiff complained of intermittent aches pain and stiffness with radiation of pain into her

proximal right shoulder. With respect to her lower back, she complained of intermittent aches and pain with no radiation of the pain to her legs. With respect to her wrist, plaintiff expressed that the surgery was helpful. She has some residual numbness and parasthesias, mostly in her ring finger and the anterior wrist. The plaintiff offered no other significant complaints.

Dr. Hendler conducted a physical examination. Neurologically, plaintiff was entirely within normal limits and non-focal. Motor systems were 5+/5+ in upper and lower extremities. Hand grip was within normal limits. There were no sensory deficits. Reflexes were equal and normal. Cerebellar functions were intact. Gait was normal.

Ranges of motion, measured by goniometer, were within normal limits¹ for cervical spine flexion (0-60/0-60); extension (0-60/0-60); lateral rotation to left (0-80/0-80) and right (0-80/0-80). All joints of the upper extremities had full range of motion. No pain was elicited on palpation of the cervical spine area.

Lumbar spine flexion was 0-80/0-25; extension was 0-25/0-25 with no complains of pain. These normal values represent full range of motion of the lumbar spine. No palpable spasm of the lumbar paravertebral musculature was found. No pain in either sciatic notch was evidenced on palpation.

Examination of both wrists were performed. Two, small, endoscopic surgical scars were present on the proximal left wrist and palm area. Range of motion; grip strength, and sensory examination were normal.

X-rays were taken in Dr. Hendler's office during the examination. The x-ray showed the

¹Using the standards of the American Medical Association Guidelines for the Evaluation of Permanent Impairment

overall alignment of the cervical spine essentially within normal limits. There was normal cervical lordosis with no significant degenerative changes and no evidence of subluxations, fractures or dislocations. The disc spaces were well maintained.

The x-rays also showed the overall alignment of the lumbosacral spine to be within normal limits. No fractures or dislocations were noted; normal lumbar lordosis was noted. No evidence of spondylolisthesis or degenerative change was found. The disc spaces are well maintained.

With respect to the left wrist, x-rays showed no evidence of any fractures or dislocations. Carpal bones were all in normal alignment with no evidence of any subluxations. No periarticular soft tissue calcifications were noted.

Dr. Hendler's examination of plaintiff and review of her medical records led him to the finding that, at the time of the accident, plaintiff sustained a cervical and lumbosacral sprain which have resolved. Present physical examinations of the cervical spine and lumbosacral spine were completely normal. There were no positive objective neurologic tests that would have any clinical correlation with a herniated disc in the neck or back or cervical or lumbar radiculopathy.

Dr. Hendler concluded, with a reasonable degree of medical certainty, that there is no present disability and plaintiff will have no permanent findings in her neck or lower back that would be causally related to the accident of record. No further causally related orthopedic treatment, including surgery, is indicated.

Other than the small surgical scars, Dr. Hendler found the plaintiff's left wrist to be normal. There was no present disability and will be no permanent functional lost of use of her left wrist that would be causally related to the accident of record. With respect to the wrist surgery, Dr. Hendler notes that there is no documentation of any wrist problems until 1/9/2018, nearly two months after

the underlying accident, when Dr. Rosenblatt performed EMG testing of the upper extremities. Dr. Hendler opines, based on the medical records, the need for the surgical procedure on her left wrist “does not appear to have been causally related to the accident of record.”

Defendants argue that plaintiff cannot proceed under the “permanent consequential limitation” or “significant limitation” categories because the medical records show no permanent or serious injuries; all injuries have resolved and the pain plaintiff alleges to continue to experience cannot constitute serious injuries. Dr. Hendler concluded there is no residual disability and plaintiff has returned to her pre-accident condition. While plaintiff may have sustained a cervical and lumbosacral sprain at the time of the accident, these sprains have since resolved and no further treatment is indicated.

Defendants further argue plaintiff cannot proceed under the “medically determined injury or impairment of a non-permanent nature” category that 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 (90) days during the one hundred and eighty (180) days immediately following the accident. Plaintiff’s own testimony regarding her ability to care for her child and perform daily activities, as well as her return to work approximately ten weeks after the incident, demonstrate the absence of a triable issue of fact as to this category.

Defendants argue that plaintiff’s deposition testimony establishes that she missed 10 weeks of work and stopped treating in mid-2018 for the carpal tunnel injury, which is unrelated to the underlying accident. Plaintiff’s limitations in performing recreational and household activities are insufficient to establish a 90/180 claim.

With respect to the “significant disfigurement” category, Dr. Hendler notes two small

endoscopic surgical scars on the proximal left wrist and palm area. In his Addendum Report, Dr. Hendler opines, based on plaintiff's lack of symptoms at the time of the initial trauma, plaintiff "did not sustain any injury to her left wrist to have required the carpal tunnel release surgery performed by Dr. Gotesman."

Defendants argue plaintiff admitted to being involved in a prior accident in December 2016. She claimed to have injured the same parts of her body as from the underlying accident. Plaintiff has failed to establish that any claim of injury from this matter is separate and distinct from the injuries incurred in the prior accident.

Based on the affirmed report of Dr. Hendler, which noted a normal examination of the plaintiff without any residuals causally related to the accident, and plaintiff's deposition testimony, defendants have met their burden of establishing plaintiff did not sustain a "serious injury."

With respect to plaintiff Juan Velez, his claims are a derivative claim in relation to the subject accident as Ms. Velez's husband. As such, dismissal of Ms. Velez's claims require dismissal of Mr. Velez's claims.

Opposition (Sequence #1)

With respect to the left hand, plaintiffs argue plaintiff's January 8, 2018 appointment with Dr. Rosenblatt demonstrates that Ms. Velez had wrist pain prior to that date. The time between the accident and when Ms. Velez sought treatment specific to her left hand was not so prolonged as to deem it unrelated.

With respect to her cerebral concussion and post concussion syndrome, plaintiffs argue Dr. Hendler's report makes no reference to these claims. His report also does not address the left hand/wrist scarring that Ms. Velez sustained as a result of the carpal tunnel surgery.

With respect to plaintiff's lumbosacral and cervical sprains, Dr. Hendler concludes that the plaintiff suffered sprains, but does not comment on the significance or duration of these injuries. Therefore, defendants have failed to meet their burden for the "significant limitation" category.

With respect to plaintiff's 90/180 claim, Dr. Hendler's report is deficient, as it makes no reference to this claim.

In support of their motion, defendants offer the narrative report of orthopedic surgeon Alan Gotesman, M.D. Dr. Gotesman's report, dated August 28, 2020 is affirmed in compliance with Civil Practice Law & Rules §2106. Dr. Gotesman summarizes plaintiff's treatment from January 2018 through September 16, 2019.

Plaintiff was first referred to him on January 15, 2018, for evaluation of her left wrist. Plaintiff presented with persistent numbness and tingling sometimes waking her up at night. On exam her left hand showed diminished sensation in the median nerve distribution with positive Tinel's and median nerve compression. There was no atrophy, but some mild weakness of the thenar muscles with full range of motion and no instability. An EMG showed evidence of carpal tunnel syndrome. Plaintiff was given a brace and discussed the possibility of injections and surgery. Plaintiff was seen again on February 12, 2018; March 12, 2018; and May 11, 2018. In May of 2018, plaintiff elected to proceed with wrist endoscopic carpal tunnel surgery, which was performed on August 16, 2018. She was seen on August 24, 2018 for a postoperative visit, numerous visits from September 26, 2018 to September 16, 2019.

Dr. Gotesman's examinations of plaintiff and review of her medical records led him to the finding that plaintiff sustained a cervical strain and left carpal tunnel syndrome. With respect to causality, Dr. Gotesman finds that, "based on the patient's history and available medical records,

there is no evidence of any pre-existing condition and surgical intervention was necessitated as a direct result of this injury.” Dr. Gotesman concluded the patient may have mild to moderate residual permanent disability of the left hand with some persistent discomfort as well as decreased strength and diminished sensation due to the injury and subsequent surgery. The patient may require further surgical intervention.

Plaintiffs also submit the report of Dr. Marc J. Rosenblatt, D.O., dated January 9, 2018. This report is not affirmed in compliance with Civil Practice Law & Rules §2106.

Reply

In reply, defendants argue that D. Rosenblatt’s physician affirmation submitted in opposition to the motion is not sworn to or affirmed under oath, and are therefore cannot be considered. With respect to the records submitted in opposition, these medical records were not relied upon in Dr. Hendler’s report, therefore defendants did not “open the door” to permit plaintiff to submit the unsworn medical reports in opposition to the motion.

Plaintiff argues Dr. Gotesman’s affirmation is dated August 28, 2020, five months after plaintiff’s deposition, and nearly two years after plaintiff stopped treating with him. Dr. Gotesman’s report fails to indicate whether plaintiff continues to have any restrictions in range of motion.

Plaintiffs having failed to submit competent and objective medical evidence in opposition, they have failed to meet their burden in opposing the instant motion.

Discussion (Sequence #1)

As the proponent of the summary judgment motion, defendants have the threshold burden to establish, by competent medical evidence, that plaintiff did not suffer a serious injury causally related to the subject accident (*see Toure v Avis Rent a Car Sys.*, 98 NY2d 345, 352 [2002]; *Peterson*

v Cellery, 93 AD3d 911, 912 [3d Dept. 2012]. To that end, defendants submitted plaintiff's deposition testimony, medical records and the affirmed reports of examining orthopedist, Robert Hendler, M.D.

It is well-established that proof under the significant limitation of use category requires "comparative determination of the degree or qualitative nature of the injury based on the normal function, purpose and use of the body part and must be supported by objective medical evidence." (*Toure*, 98 NY 2d at 350-351) "[A]ny assessment of the significance of a bodily limitation necessarily requires consideration not only of the extent or degree of limitation, but of its duration as well." (*Estrella v. GEICO Ins. Co.*, 102 AD3d 730 [2d Dept. 2013]) However, a "significant limitation" need not be permanent in order to constitute a serious injury. (*Toure*, 98 NY 2d at 351) A lack of recent examination, while sometimes relevant, is not dispositive. (*Vasquez v. Almanzar*, 107 AD3d 538, 539 [1st Dept 2013]). A "permanent consequential limitation" requires a greater degree of proof than a "significant limitation," as only the former requires proof of permanency. (*Vasquez v. Almanzar*, 107 AD3d at 539]) To qualify as a serious injury, a "permanent loss of use" must be total. (*Oberly v. Bangs Ambulance Inc.*, 96 NY2d 295, 298 [2001])

For an injury to constitute a significant disfigurement within the meaning of Insurance Law § 5102(d), a "reasonable person viewing" the injury would have to "regard" it as "unattractive" or "objectionable," or as "the object of pity" or "scorn," and the disfigurement must also be causally related to the subject accident. (*Knight v. M&M Sanitation Corp*, 122 Ad3d 683, 684 [2d Dept. 2014])

Section 4518 of the Civil Practice Law & Rules provides that a medical record is admissible provided that it bears a certification or authentication by the head of the hospital, laboratory,

department or bureau of a municipal corporation or of the state, or by an employee designated for that purpose or by a qualified physician. The opinions of treating physicians must be sworn to or affirmed under penalty of perjury. (*McLoud v. Reyes*, 82 AD3d 848 [2d Dept. 2011]; *Rush v. Kwan Chiu*, 79 AD3d 1004 [2d Dept. 2010]; *Pagano v. Kingsbury*, 182 AD2d 268 [2d Dept. 1992])

Wrist

With respect to plaintiff's claims regarding her wrist, Dr. Hendler finds, upon examination, that her left wrist was normal, other than the small surgical scars. There is no present disability, and she will have no permanent functional loss of use of her left wrist that would be causally related to the accident of record. With respect to the need for wrist surgery, Dr. Hendler opines, plaintiff "did not sustain any injury to her left wrist to have required the carpal tunnel release surgery performed by Dr. Gotesman." (Seq. 1 Exhibit D) Hendler bases his opinion on the absence of complaints of wrist pain in any medical records for the first two months preceding the accident. He opines that, with this type of injury, symptoms would present symptoms at the time of trauma. (Seq. 1 Exhibit E)

By their reliance on the affirmed report of Dr. Hendler, affirmed in compliance with Civil Practice Law & Rules §2106, which finds the injuries sustained in the accident to have been resolved, and the complaints of pain to be without a causally-related medical basis, defendants initially met their *prima facie* burden of showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d) as a result of the accident, with respect to the claims of "permanent loss of use" category. (*see Toure v. Avis Rent A Car Sys.*, 98 N.Y.2d 345 [2002]; *Gaddy v. Eycler*, 79 NY 2d 955 [1992]) Once defendants have met this burden, plaintiffs must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet

the threshold of the statutory standard. (*Heege v. Falisi*, 2013 WL 3713600 [Slip. Op., Suffolk Co. 2013])

In opposition, plaintiffs rely on the unsworn report of Dr. Rosenblatt and the narrative report of Dr. Gotesman. Dr. Rosenblatt's unsworn and unaffirmed report submitted in opposition to the motion is inadmissible, without probative value, and may not properly be placed before the Court as a business record exception to the hearsay rule. (*Irizarry v. Lindor*, 110 AD3d 846 [2d Dept. 2013]²; *Rodriguez v. Cesar*, 40 AD3d 731, 732 [2d Dept. 2007]; *Shvartsman v. Vildman*, 47 AD3d 700 [2d Dept. 2008])

Dr. Gotesman finds that surgical intervention was necessitated as a direct result of this injury. Gotesman finds that plaintiff may have mild to moderate residual permanent disability of the left hand with some persistent discomfort as well as decreased strength and diminished sensation due to the injury and subsequent surgery. The patient may require further surgical intervention.

In opposition, plaintiffs have raised a triable issue of fact. On that basis, defendants' application for summary judgment is denied with respect to the "permanent loss of use" category.

Plaintiff alleges that the injuries to her hand and wrist as a result of the August 16, 2018 surgery constitute a "significant disfigurement" and, therefore, qualify as a serious injury within the meaning of Insurance Law § 5102(d). Plaintiff testified the scarring on her left hand bothers her "a little," and the scar "brings her back to the day of the accident." (Plaintiff Deposition p. 102) Dr. Hendler's report notes two, small, endoscopic surgical scars were present on the proximal left wrist

²The Court recognizes that an exception may lie when the uncertified records have been relied upon by defendant's expert in his report. (*see Tomeo v. Beccia*, 127 AD3d 1071 (2d Dept. 2015)) In this matter, however, although Dr. Hendler asserts that he reviewed the records, nothing in Dr. Hendler's report suggests any reliance upon them.

and palm area.

In his June 25, 2020 Addendum Report, Dr. Hendler opines, plaintiff “did not sustain any injury to her left wrist to have required the carpal tunnel release surgery performed by Dr. Gotesman.” (Seq. 1 Exhibit D) Dr. Gotesman’s report concludes that the underlying accident was the cause of the left wrist surgery, but makes no reference to the plaintiff’s resulting scarring. Plaintiff submits five photographs of her left hand. Three of the five photographs are illegible. The two legible photographs depict a small endoscopic surgical scar on the plaintiff’s palm and wrist.

Assuming the surgery and scarring were causally related, contrary to the plaintiff’s contention, the photographs submitted in opposition to the defendants’ motion refute the claim that a reasonable person viewing the plaintiff’s hand and wrist would, as a result of the injury, regard it as unattractive or objectionable, or as the object of pity and scorn. (*Maldonado v. Piccirilli*, 70 AD3d 785 [2d Dept. 2010]) On that basis, as a matter of law, defendants’ application for summary judgment is granted with respect to plaintiffs claim of “significant disfigurement.”

Cerebral

Dr. Hendler’s reports make no reference to plaintiff’s claim for cerebral concussion and post concussion syndrome. As defendants have failed to meet their burden with respect to these claims, defendants’ application for summary judgment is denied with respect to this injury.

Cervical and Lumbar Spine

The Court has examined the range of motion report of Dr. Hendler, which compares his findings, in each instance, to what is normal. (*Walker v. Public Adm’r of Suffolk County*, 60 AD3d 757 [2d Dept. 2009]) The report of Dr. Hendler sufficiently establishes that the actual ranges of motion fall within the normal range.

Dr. Hendler's examination of plaintiff and review of her medical records led him to the finding that, at the time of the accident, plaintiff sustained a cervical and lumbosacral sprain which have resolved. As of the date of examination, the cervical spine and lumbosacral spine were completely normal, and there was no sign of a herniated disc in the neck or back, or a cervical or lumbar radiculopathy. Dr. Hendler concluded, with a reasonable degree of medical certainty, that there is no present disability, plaintiff will have no permanent findings in her neck or lower back that would be causally related to the accident of record, and there is no need of continued treatment.

With respect to the "permanent loss of use" and "permanent consequential limitation" categories, through submission of the affirmed report of Dr. Hendler, which finds the injuries sustained in the accident to have been resolved, and the complaints of pain to be without a causally-related medical basis, defendants initially met their *prima facie* burden.

Once defendants have met this burden, plaintiffs must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard. (*Heege v. Falisi*, 2013 WL 3713600 [Slip. Op., Suffolk Co. 2013]) In light of defendants' showing, the burden shifted to plaintiffs to demonstrate, by admissible evidence, that the injuries sustained by plaintiff Alvina Velez meet the threshold of Insurance Law §5012(d).

In opposition, plaintiff's rely on the unsworn report of Dr. Rosenblatt and the narrative report of Dr. Gotesman. Dr. Rosenblatt's unsworn and unaffirmed report submitted in opposition to the motion is inadmissible and without probative value. (*Rodriguez*, 40 AD3d at 732) With respect to Dr. Gotesman's report, the only reference to the cervical spine injury is "Diagnosis: ...cervical strain." (Exhibit I to Opposition) In opposition, plaintiffs have failed to raise a triable issue of fact. On that basis, defendants' application for summary judgment is granted with respect to the

“permanent loss of use” and “permanent consequential limitation” categories.

With respect to the “significant limitation” category, Dr. Hendler’s reports makes no reference to the duration of any limitation, therefore defendants have failed to meet their initial burden. (*Estrella*, 102 AD3d 730) Therefore, defendant’s application is denied with respect to the “significant limitation” category.

90/180

The Second Department has made it clear that the report of an independent examination of plaintiff, conducted over a year after the accident, must relate its findings to the 90/180 claim. (*Volpetti v. Yoon Kap*, 28 AD3d 750 [2d Dept. 2006]) A report which fails to do so falls short of satisfying the burden of proof necessary to establish the absence of a serious injury. (*Scinto v. Hoyte*, 57 AD3d 646 [2d Dept 2008])

Defendants’ expert having failed to adequately address the 90/180 claim, clearly set forth in plaintiffs Bill of Particulars, the motion for summary judgment on that basis must be denied. (*Torres v. Performance Automobile Group, Inc.*, 36 AD3d 894 [2d Dept 2007])

Pre-Existing Condition

To the extent that defendants claim that plaintiff had pre-existing conditions, Dr. Hendler concludes that the cervical and lumbosacral sprains “are causally related to the accident of record.” (Seq. #1 Exhibit E) Defendants’ reliance on plaintiff’s deposition testimony in which she indicates that she was involved in a prior accident is insufficient to demonstrate a lack of serious injury by reason of pre-existing condition. To the extent that defendants seek summary judgment by reason of pre-existing condition, the application is denied.

Motion for Summary Judgment on Liability (Sequence #2)

By Notice of Motion originally filed on December 28,2020, plaintiff moves for summary judgment on the issue of liability. Plaintiff asserts that she is entitled to summary judgment on liability, based on the rear-end collision, which establishes a *prima facie* case of negligence on the part of defendant.

Based on the plaintiff's deposition testimony, plaintiff was stopped for approximately ten seconds before being struck from behind by defendant's vehicle. Plaintiff argues the defendant's purported non-negligent explanation, that another vehicle moving into the middle lane prevented him from passing plaintiff's vehicle on the right, is insufficient to raise a triable issue of fact. The Vehicle & Traffic Law requires a driver to maintain a safe distance between his vehicle and the vehicle in front of him. (McKinney's Veh. & Traffic Law §1129)

Opposition (Sequence #2)

With respect to plaintiff's liability motion, defendants' opposition is silent.

Reply (Sequence #2)

In reply, plaintiff argues that defendant has failed to raise a triable issue of fact precluding summary judgment on the issue of liability for violating Vehicle and Traffic Law Section 1129(a).

Discussion (Sequence #2)

Summary judgment is a drastic remedy and is appropriate only when there is a clear demonstration of the absence of any triable issue of fact. (*Piccirillo v. Piccirillo*, 156 AD2d 748 [2d Dept 1989], citing *Andre v. Pomeroy*, 35 NY2d 361 [1974]) The function of the Court on such a motion is issue finding, and not issue determination. (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]) The Court is not to engage in the weighing of evidence; rather, the Court's function is to determine whether "by no rational process could the trier of facts find for the non-

moving party.” (*Jastrzebski v. N. Shore Sch. Dist.*, 232 AD2d 677, 678 [2d Dept 1996]) The Court is obliged to draw all reasonable inferences in favor of the non-moving party. (*Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 [2d Dept 1995])

A rear-end collision with a stopped or stopping vehicle establishes a *prima facie* case of negligence on the part of the driver of the moving vehicle, in the absence of any negligence on the part of the plaintiff. (*Velazquez v. Denton Limo, Inc.*, 7 AD3d 787 [2d Dept 2004]; *Trombetta v. Cathone*, 59 AD3d 526 [2d Dept 2009]) A driver of an automobile is charged with the duty to maintain a reasonably safe rate of speed and control over his vehicle and to exercise reasonable care to avoid a collision. A driver has a duty to see what should be seen. (*Filippazzo v. Santiago*, 277 AD2d 419 [2d Dept 2000]) Vehicle and Traffic Law Section 1129(a) provides, “The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the conditions of the highway.

In the matter at bar, plaintiff established *prima facie* entitlement to summary judgment. The parties’ deposition testimony establishes that plaintiff’s vehicle was struck from behind by defendant’s vehicle. Such testimony is sufficient to establish plaintiff’s claim. Such a showing requires defendant to come forward with a non-negligent explanation for the accident. (*Velazquez*, citing *Shamah v. Richmond County Ambulance Serv.*, 279 AD2d 564 [2d Dept 2001]) If the operator of the trailing vehicle cannot come forward with evidence to rebut the inference of negligence, the operator of the lead vehicle is entitled to summary judgment on liability. (*Cortes v. Whelan*, 83 AD3d 763 [2d Dept 2011])

Here, defendant’s opposition fails to rebut the inference of negligence by providing a non-negligent explanation for the collision. (*id.*) In light of the foregoing, plaintiff’s application for summary judgment is granted.

Conclusion

On the basis of the foregoing, it is hereby

ORDERED that, with respect to the wrist, defendants' application for summary judgment is denied with respect to the "permanent loss of use" category and granted with respect to the "significant disfigurement" category;

ORDERED that, with respect to the cerebral injuries, defendants' application for summary judgment is denied; and it is further

ORDERED that, with respect to the cervical and lumbar spine, defendants' application for summary judgment is granted with respect to the "permanent loss of use" and "permanent consequential limitation" categories, and denied with respect to "significant limitation" category; and it is further

ORDERED that defendants' summary judgment motion is denied with respect to plaintiff's 90/180 claim; and it is further

ORDERED that, to the extent that defendants seek summary judgment by reason of pre-existing condition, the application is denied; and it is further


ORDERED that plaintiffs' motion for summary judgment on the issue of liability is granted.

This matter shall be scheduled for virtual conference on May 6, 2021 at 11:45 a.m. A link will be provided during the week prior to the conference date.

This decision shall constitute the order of the Court.

Dated: April 6, 2021
Goshen, New York

ENTER


HON. SANDRA B. SCIORTINO, J.S.C.

To: *Counsel of Record Via NYSCEF*