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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEVEN M. JAEGER,
Acting Supreme Court Justice

MARVIN MARTINEZ and LUCRECAI HERNANDEZ,

Plaintiffs,

-against-

YARITZA RODRIGUEZ,

Defendant.

YARITZA RODRIGUEZ,

Third-Party Plaintiff,

-against-

HILDA M. GONZALEZ-PAZ and JOSE A. CARLOS,

Third-Party Defendants.

TRIAL/IAS, PART 41
NASSAU COUNTY
INDEX NO.: 26457-09

MOTION SUBMISSION
DATE: 3-22-12

MOTION SEQUENCE
NOS. 002 and 003

The following papers read on this motion:

Notice of Motion, Affirmation, and Exhibits	X
Notice of Cross-Motion, Affirmation, and Exhibits	X
Affirmation in Opposition and Exhibits (Plaintiffs)	X
Memorandum of Law (Plaintiffs)	X
Affirmation in Opposition (Rodriguez)	X
Reply Affirmation (Rodriguez)	X
Reply Affirmation (Gonzalez-Paz and Carlos)	X

Defendant/Third-Party Plaintiff, Yaritza Rodriguez ("Rodriguez"), moves pursuant to CPLR §3212 for an Order granting summary judgment dismissing Plaintiff's complaint, alleging that Plaintiffs' injuries do not satisfy the "serious injury" threshold requirement of Insurance Law §5102(d). Third-Party Defendants, Hilda M. Gonzalez-Paz and Jose A. Carlos, ("Gonzalez-Paz" and "Carlos"), cross move pursuant to CPLR §3212 for an Order granting summary judgment dismissing Plaintiffs' complaint and the Third-Party complaint, alleging that Plaintiffs' injuries do not satisfy the "serious injury" threshold requirement of Insurance Law §5102(d) and that Third-Party Defendants are not liable for the happening of the accident.

This action arises out of a motor vehicle accident that occurred on May 13, 2009 on Hempstead Turnpike near its intersection with Merrick Avenue, Town of Hempstead, County of Nassau. Plaintiffs were the middle car in a three car accident in which Rodriguez's vehicle struck Plaintiffs' vehicle in the rear and Plaintiffs' vehicle struck Third-Party Defendants' vehicle in the rear. Plaintiff, Marvin Martinez ("Martinez") was the operator of Plaintiffs' vehicle and Plaintiff, Lucreai Hernandez ("Hernandez") was a passenger. As a result of the accident, Martinez allegedly sustained serious personal injuries, including but not limited to, posterior herniated disc at L5-S1; right L5-S1 lumbosacral radiculopathy; and posterior disc protrusion at C3-4; and posterior disc protrusion at C4-5. As a result of the accident, Hernandez allegedly sustained serious personal injuries, including but not limited to, posterior herniated disc at T12-L1; posterior herniated disc at L1-2; posterior herniated disc at L2-3; posterior herniated disc at L3-4; posterior herniated disc at L4-5; posterior herniated disc at L5-S1; and left L4-5 lumbosacral radiculopathy.

In a motion for summary judgment the moving party bears the burden of making a prima facie showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact. *Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2D 395 (1957); *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 (1979); *Zuckerman v. City of New York*, 49 NY2d 5557 (1980); *Alvarez V. Prospect Hospital,* 68 NY2d 320 (1986).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *Winegard v. New York University Medical Center,* 64 NY2d 851 (1985). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman v. City of New York, supra*. The primary purpose of a summary judgment motion is issue finding not issue determination, *Garcia v. J.C. Duggan, Inc.,* 180 AD2d 579 (1st Dept. 1992), and it should only be granted when there are no triable issues of fact. *Andre v. Pomeroy,* 35 NY2d 361 (1974).

Within the context of a summary judgment motion that seeks dismissal of a personal injury action resulting from a motor vehicle accident for the alleged failure of the plaintiff to sustain a "serious injury" within the meaning of Insurance Law §5102(d), the defendant bears the burden of establishing a prima facie case that the plaintiff's injuries do not meet the threshold requirements of the statute. *Gaddy v. Eyler*, 79 NY2d 955 (1992). Upon such a showing, it becomes incumbent on the plaintiff to come forward with sufficient evidence, in admissable form, to demonstrate the existence of a

question of fact on the issue. *Id.* The court must then decide whether the plaintiff has established a prima facie case of sustaining a "serious injury". *Licari v. Elliot*, 57 NY2d 230 (1983).

Insurance Law §5102(d) defines "serious injury" as a personal injury which results in: (1) death; (2) dismemberment; (3) significant disfigurement; (4) a fracture; (5) loss of fetus; (6) permanent loss of a body organ, member, function or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) 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 (90) days during the one-hundred-eight (180) days immediately following the occurrence of the injury or impairment.

The defendant is not required to disprove any category of "serious injury" that has not been pled by the plaintiff. *Melino v. Lauster*, 82 NY2d 828 (1993). Whether the plaintiff can demonstrate the existence of a compensable "serious injury" depends upon the quality, quantity, and credibility of admissable evidence. *Manrique v. Warshaw Woolen Associates, Inc.*, 297 AD2d 519 (1st Dept. 2002).

Essentially, in order to satisfy the statutory "serious injury" threshold, objective proof of the plaintiff's injury is required. *In Toure v. Avis Rent-A-Car Systems,* 98 NY2d 345 (2002), the Court of Appeals held that a plaintiff's proof of injury must be supported by objective medical evidence, in admissible form, such as sworn MRI and CT scan tests. However, these sworn tests must be paired with the doctor's observations during

the physical examination of the plaintiff. Unsworn MRI reports can also constitute competent evidence if both the plaintiff and the defendant rely on those reports. *Gonzalez v. Vasquez,* 301 AD2d 438 (1st Dept. 2003).

Conversely, even where there is ample proof of a plaintiff's injury, certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of a plaintiff's complaint. Specifically, additional contributing factors such as a gap in treatment, an intervening medical problem, or a pre-existing condition would interrupt the chain of causation between the accident and the claimed injury. *Pommels v. Perez*, 4 NY3d 566 (2005).

While a herniated or bulging disc, or the presence of radiculopathy may constitute a "serious injury" within the ambit of Insurance Law §5102(d), a plaintiff is required to provide, inter alia, objective medical evidence which demonstrates the extent and degree of the alleged physical limitation resulting from the disc injury and its duration. *Perl v. Meher*, 18 NY3d 208 (2011); *Ifrach v. Neiman,* 306 AD2d 380 (2nd Dept. 2003); *Jason v. Danar,* 1 AD3d 398 (2nd Dept. 2003); *Felix v. New York City Tr. Auth.,* 32 AD3d 529 (2nd Dept. 2006); *Garcia v. Sobles,* 41 AD3d 426 (2nd Dept. 2007); *Bestman v. Seymour*, 41 AD3d 629 (2nd Dept. 2007).

When examining medical evidence offered by a plaintiff on a threshold motion, the court must ensure that the evidence is objective in nature and that a plaintiff's subjective claims as to pain or limitation of motion are sustained by verified objective medical findings. *Grossman v. Wright,* 268 AD2d 79 (2nd Dept. 2000). Further, the plaintiff must provide competent medical evidence containing verified objective findings

based upon a recent examination wherein the expert must provide an opinion as to the significance of the injury. *Perl v. Meher, supra*; *Kauderer v. Penta,* 261 AD2d 365 (2nd Dept. 1999); *Constantinou v. Surinder,* 8 AD3d 323 (2nd Dept. 2004); *Brown v. Tairi Hacking Corp.,* 23 AD3d 325 (2nd Dept. 2005).

To meet the threshold regarding significant limitation of use of a body function or system or permanent consequential limitation of a body function or system, the law requires that the limitation be more than minor, mild, or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition. *Gaddy v. Eyler, supra; Licari v. Elliot, supra.* A minor, mild, or slight limitation will be deemed insignificant within the meaning of the statute. *Licari v. Elliot, supra.* A claim raised under the "permanent consequential limitation of use or a body organ or member" or "significant limitation of use of a body function or system" categories can be made by an expert's designation of a numeric percentage of a plaintiff's loss of motion in order to prove the extent or degree of the physical limitation. *Toure v. Avis, supra.* In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided: (1) the evaluation has an objective basis; and (2) the evaluation compares the plaintiff's limitation to the normal function, purpose, and use of the affected body organ, member, function, or system. *Id.*

In applying the foregoing standards and principles to the instant matter the Court finds that Defendant/Third Party Plaintiff and Third-Party Defendants have met their initial burden of establishing a prima facie face that Plaintiffs' injuries do not satisfy the

threshold requirements of Insurance Law §5102(d). In response, Plaintiffs submitted sufficient evidence to raise a triable question of fact on the issue. As such, summary judgment in favor of Defendant/Third-Party Plaintiff and Third-Party Defendants on the threshold issue is not warranted.

In evaluating Plaintiffs' allegations contained in their verified bill of particulars it is apparent Plaintiffs are not claiming that their injuries fall within categories "1", "2", "3", "4", "5", or "6" of Insurance Law §5102(d) as outlined hereinabove. Plaintiffs' claims of "serious injury" fall within categories "7", "8", and "9", and the Court will confine the decision to those categories.

Upon the submission of the affirmed reports of Jonathan D. Glassman, M.D., an orthopedist, and Melissa Sapan Cohn, M.D., a radiologist, Defendant/Third-Party Plaintiff and Third-Party Defendants have met their initial burden of establishing a prima facie case that Plaintiffs have failed to meet the statutory threshold of a "serious injury". According to Dr. Glassman's reports, after reviewing Plaintiffs' medical records, he conducted physical examinations on March 28, 2011.

Dr. Glassman's examination of Martinez found him to have resolved sprains of the cervical and lumbar spines superimposed on prior cervical and lumbar spine injuries sustained in a motor vehicle accident prior to the subject accident. There were no objective findings of radiculopathy, and the examinations of Martinez's shoulders and knees were unremarkable. Dr. Glassman found normal ranges of motion and concluded that Martinez has no objective evidence of a disability, that there is no need for him to limit his activities, and that he is capable of working without limitations. Dr. Cohn reviewed the MRI films taken of Martinez's cervical and lumbar spines on July 15,

2009. She found the cervical spine to be normal with disc desiccation and disc bulging of the lumbar spine at L4-5 and L5/S1. She found this to be evidence of degenerative disc disease and unrelated to trauma.

Martinez counters with the affidavit of his treating chiropractor, Drew Demarco. According to Dr. Demarco's affidavit he treated Martinez for injuries allegedly sustained in the subject accident as well as for injuries allegedly sustained in the prior accident of September 2, 2006.

Martinez stopped treating with Dr. Demarco for the September 2, 2006 accident on July 3, 2007, at which time he had only occasional complaints of neck and back pain. Martinez did not treat with Dr. Demarco again until shortly after the subject accident, and as such it is Dr. Demarco's opinion that all of Martinez's present injuries, which purportedly restrict his daily activities, are causally related to the subject accident. He stopped treating in May 2010 for the injuries allegedly sustained in the subject accident because it was Dr. Demarco's opinion that further treatment would have been palliative.

Dr. Demarco conducted an examination of Martinez on January 2, 2012 and used a goniometer to objectively test the range of motion of Martinez's cervical and lumbar spines. He found a loss of range of motion of the lumbar spine ranging from a low of 11% to a high of 44%, and a loss of range of motion of the cervical spine ranging from a low of 22% to a high of 67%. This loss or range of motion is significant enough to raise a triable issue of fact. *Perl v. Meher, supra*; *Nelms v. Khokhar,* 12 AD3d 426 (2nd Dept. 2004). Whether the loss of range of motion is the result of degenerative changes, the prior accident, or the subject accident is a question for the trier of fact. As

such, Martinez has met his burden of raising a triable issue of fact as to whether his injuries fall within categories "7", "8", or "9" of Insurance Law §5102(d), and thus whether he sustained a "serious injury".

Dr. Glassman's examination of Hernandez found her to have a resolved sprain of the left shoulder superimposed on pre-existing degenerative changes; resolved sprain of the lumbar spine superimposed on pre-existing multilevel degenerative disc disease; resolved sprains of the thoracic and cervical spines; and a Parkinsonian-type disease not causally related to the subject accident. There was no objective evidence of radiculopathy. Dr. Glassman found normal ranges of motion and concluded that Hernandez has no causally related disability. Dr. Cohn reviewed the MRI films taken of Hernandez's cervical and lumbar spines on July 14, 2009. She found a C6-7 disc bulge resulting from degenerative changes and unrelated to trauma. She found disc herniations at T12/L1 and L1-2 with multilevel degenerative disc disease. She found disc desiccation throughout the lumbar spine, which is the commencement of degenerative disc disease, and which is chronic in nature. She found no evidence of acute traumatic injury of the lumbar spine.

Hernandez counters with the affidavit of her treating chiropractor, Drew Demarco. According to Dr. Demarco's affidavit, Hernandez began treating with him shortly after the subject accident. She stopped treating in May 2010 because it was Dr. Demarco's opinion that further treatment would have been palliative.

Dr. Demarco conducted an examination of Hernandez on January 2, 2012 and used a goniometer to objectively test the range of motion of Hernandez's cervical and lumbar spines. He found a loss of range of motion of the lumbar spine ranging from a

low of 11% to a high of 40%, and a loss of range of motion of the cervical spine ranging from a low of 11% to a high of 33%. This loss of range of motion is significant enough to raise a triable issue of fact. *Perl v. Meher, supra; Nems v. Khokhar, supra.*

Dr. Demarco further found that while Hernandez does have disc degeneration, she was asymptomatic prior to the accident and that the cause of her pain and limitations is the accident. Whether the loss of range of motion is the result of degenerative changes or the subject accident is a question for the trier of fact. As such, Hernandez has met her burden of raising a triable issue of fact as to whether her injuries fall within categories "7", "8", or "9" of Insurance Law §5102(d), and thus whether she sustained a "serious injury".

As to Third-Party Defendants' cross-motion, it is well established that a rear-end collision is sufficient to establish a prima facie case of liability against the operator of the offending vehicle and imposes a duty upon said operator to rebut the inference of negligence by providing a sufficient explanation. *Young v. City of New York,* 113 AD2d 844 (2nd Dept. 1985); *Benyarko v. Avis Rent A Car System, Inc.,* 162 AD2d 572 (2nd Dept. 1990); *Ayach v. Ghazal,* 25 AD3d 742 (2nd Dept. 2006); *Connors v. Flaherty*, 32 AD3d 891 (2nd Dept. 2006). This same principle applies here where the owner and operator of the vehicle that was struck in the rear (Third-Party Defendants) have moved for summary judgment, alleging that there cannot be any liability attributable to them.

It is undisputed that Defendant/Third Party Plaintiff's vehicle struck Plaintiffs' vehicle in the rear, which then struck Third-Party Defendants' vehicle in the rear. Thus, there can be no liability attributable to Third-Party Defendants unless a sufficient

explanation is provided as to what negligent actions were taken by Third-Party Defendants that would result in their vehicle being struck in the rear. Therefore, Third-Party Defendants have met their initial burden of establishing entitlement to summary judgment by submitting the examination before trial transcripts of Rodriguez and Gonzalez-Paz, which support that Third-Party Defendants' vehicle was stopped when struck in the rear. Further, both Plaintiffs testified at their examinations before trial that their vehicle was stopped prior to being struck in the rear by Defendant/Third Party Plaintiff's vehicle, which then caused their vehicle to strike Third-Party Defendants' vehicle. Martinez testified that he was stopped for three seconds prior to the impact from the rear.

Defendant/Third Party Plaintiff attempts to allege that Third-Party Defendants' vehicle may have moved in front of Plaintiffs' vehicle in an unsafe manner, thus contributing to the happening of the accident. However, Martinez testified that he was able to bring Plaintiffs' vehicle to a safe stop prior to the impact from the rear, and there is no testimony that disputes it.

Defendant/Third-Party Plaintiff's testimony that she observed Third-Party Defendants' vehicle move in front of Plaintiffs' vehicle prior to the accident is not sufficient to establish a material issue of fact as to whether Third-Party Defendants' vehicle moved unsafely into the lane when viewed together with Plaintiffs' testimony. Similarly, Defendant/Third-Party Plaintiff's allegation that Gonzalez-Paz's testimony is contradictory regarding whether Third-Party Defendant's vehicle was stopped or moving at the time of the accident is not accurate. Although she appears to have been

confused by some of the questioning, she clearly testified that her vehicle was stopped for two seconds before being struck in the rear. As such, there is no credible evidence to establish the existence of a material issue of fact as to whether Third-Party Defendants were negligent.

Accordingly, Defendant/Third-Party Plaintiffs' motion is DENIED. Third-Party Defendants' cross-motion on the threshold issue is similarly DENIED. Third-Party Defendants' cross-motion on the issue of liability is GRANTED, and the Third-Party complaint is dismissed.

This constitutes the Decision and Order of the Court.

Dated: April 23, 2012

STEVEN M. JAEGER, A.J.S.C.

ENTERED
APR 25 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE