Enfered BHC

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**
**COUNTY OF NASSAU**

Present:

**Hon. Thomas Feinman**
Justice

TRIAL/IAS, PART 9
NASSAU COUNTY

ISMALLA PIMENTEL, AN INFANT UNDER THE AGE OF EIGHTEEN YEARS OLD BY HER MOTHER AND NATURAL GUARDIAN SANTA B. AMADOR AND SCARLEN PIMENTEL, AN INFANT UNDER THE AGE OF EIGHTEEN YEARS OLD BY HER MOTHER AND NATURAL GUARDIAN SANTA B. AMADOR,

Plaintiffs,

- against -

HAYDEE R. FELICIANO, ROQUE ROSA-SANTANA AND LUIS A. MARTINEZ,

Defendants.

INDEX NO. 13702/10

MOTION SUBMISSION DATE: 3/30/12

MOTION SEQUENCE NOS. 2, 3

Action 1

DAISA FIGUEORA individually and as parent and natural guardian of JENNIFER ROSA and MARIOLBIS ROSA,

Plaintiffs,

- against -

LISA MARTINEZ and ROQUE ROSA,

Defendants.

INDEX NO. 23257/10

Action 2

The following papers read on this motion:

| | |
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| Notice of Motion and Affidavits ..... | X |
| Notice of Cross-Motion and Affidavits..... | X |
| Affirmations in Opposition..... | X |
| Reply Affirmations..... | X |

The defendants, Haydee R. Feliciano and Roque Rosa-Santana, move for an order pursuant to CPLR §3212 granting defendants summary judgment dismissing all claims and cross-claims by plaintiffs, Ismalla Pimentel and Scarlen Pimentel, on the ground that the defendants are not liable for the happening of plaintiffs' accident, or in the alternative, on the ground that the injuries of the plaintiffs, Ismalla Pimentel , Scarlen Pimentel, and Jennifer Rosa do not, as a matter of law, constitute serious injury as defined by Insurance Law §5102(d). The defendant, Luis A. Martinez, cross-moves for summary judgment and opposes only that branch of the motion on the issue of liability. The plaintiffs, Ismalla Pimentel and Scarlen Pimentel, submit opposition to the motion and cross-motion. The movants each submit reply affirmations.

Notably, the above action bearing Index Number 23257/10 settled, and therefore, that branch of defendants' motion concerning plaintiff, Jennifer Rosa, is now moot.

Threshold Motion

The defendants move, pursuant to CPLR §3212, for an order granting summary judgment in their favor and dismissing the plaintiffs' complaint on the grounds that the plaintiffs, Ismalla Pimentel and Scarlen Pimentel, did not suffer a "serious injury" as defined by Insurance Law §5102(d), and thus, plaintiffs' claim for non-economic loss is barred by §5104(a) of the New York Insurance Law. The plaintiffs submit opposition. The defendants submit a reply affirmation.

The plaintiffs commenced an action to recover for personal injuries sustained as a result of an automobile accident which occurred on February 4, 2010. The plaintiff, Ismalla Pimentel, alleges injuries including cervical internal derangement, cervical and lumbar radiculitis, thoracic and lumbar subluxation, and decreased range of motion of the cervical and lumbar spines. The plaintiff, Scarlet Pimentel, alleges injuries including cervical internal derangement, cervical and lumbar radiculitis, thoracic and lumbar subluxation, and decreased range of motion of the cervical and lumbar spines, and bilateral shoulder and knee internal derangement.

The defendants submit the affirmed medical reports of Dr. Raghava Polavarapu, M.D., orthopedist. Dr. Polavarapu examined the plaintiff, Ismalla Pimentel, on April 21, 2011 and found that her cervical, thoracic and lumbar sprain/strain was resolved and found no objective evidence of any disability or permanency. Dr. Polavarapu also examined the plaintiff. Scarlen Pimentel, on April 21, 2011 and found that her cervical, lumbosacral and thoracic sprain/strain were resolved, as well as her bilateral knee contusions. Dr. Polavarapu found no objective evidence of any disability or permanency.

The defendants also submit the affirmed medical report of Dr. Maria DeJesus, M.D., neurologist, who examined Ismalla Pimentel and Scarlen Pimentel on April 21, 2011. Dr. DeJesus found no objective evidence of any disability or permanency for either plaintiff.

Plaintiffs submit, in opposition, the reports of Dr. Walter Mendoza, D.C., chiropractor. Dr. Mendoza conducted a physical examination of each of the plaintiffs on March 1, 2012. Dr. Mendoza states, essentially, that the plaintiffs suffered from objectively determined restriction of the range of motion of the cervical spine which constitutes a significant limitation of use of body functions and motion.

"Serious Injury" is defined in Insurance Law §5102(d) as:

> "...[A] personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member, significant limitation of use of a body function or system; or a medically determined injury or impairment or a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitutes such person's usual and customary daily activities for not less than ninety day during the one hundred eighty days immediately following the occurrence of the injury or impairment."

"A defendant can establish that the plaintiff's injuries are not serious within the meaning of the Insurance Law §5102(d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Grossman v. Wright*, 268 AD2d 79). The courts have consistently held a "plaintiff's subjective claim of pain and limitation of motion must be supported by verified objective medical findings". (*Grossman v. Wright*, 268 AD2d 79, *Kauderer v. Penta*, 261 AD2d 365). The threshold question in determining a summary judgment motion on the issue of serious injury focuses on the sufficiency of the moving papers. Once the defendants submit evidence establishing that the plaintiffs did not suffer a serious injury within the meaning of Insurance Law §5102(d), the burden shifts to the plaintiff to produce evidence in admissible form demonstrating the existence of a triable issue of fact. (*Gaddy v. Eyler*, 582 NYS2d 990). The proof shall be viewed in a light most favorable to the non-moving party. (*Cammarer v. Villanova*, 562 NYS2d 808).

When a claim is raised under the "permanent consequential limitation of use of a body organ or member", or "significant limitation of use of a body function or system," or "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 eighty days immediately following the occurrence of the injury or impairment," in 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 is acceptable. (*Toure v. Avis Rent A Car Systems, Inc.*, 746 NYS2d 865). An expert's qualitative assessment of a plaintiff's condition is also probative provided that the evaluation has an objective basis, and the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system. (*Id.*)

The defendants have met their burden of establishing that the plaintiffs have not sustained a serious injury. As the defendants have met the initial burden of proof, the burden shifts to the plaintiffs to provide evidence in admissible form to demonstrate the existence of a triable issue of fact. (*Gaddy v. Eyler*, 582 NYS2d 990).

The plaintiffs, in its opposition, have submitted admissible evidence indicating the plaintiffs sustained objectively-measured, causally related specifically-quantified limitations of motion in their her cervical and/or lumbar spine. (*Molina v. Choi*, 298 AD2d). An expert's designation of a numeric percentage or a plaintiff's loss of motion can be used to substantiate a claim of serious injury. Here, as in *Toure v. Avis*, 98 NY2d 345, we cannot say that the plaintiff's claimed limitations are so 'minor, mild or slight' as to be considered insignificant.

Therefore, while the defendants have met the initial burden of establishing that the plaintiffs have not sustained a serious injury as set forth in the insurance law, as the plaintiffs have submitted competent objective evidence for the purposes of overcoming the defendants' submission that there are not triable issues of fact in this case, the defendants' motion for summary judgment on the issue of threshold is denied.

Liability Motion

The defendants, Haydee R. Feliciano and Roque Rosa-Santana, (hereinafter referred to as Rosa-Santana), move for summary judgment pursuant to CPLR dismissing all claims and cross-claims against Rosa-Santana on the ground that the movant is not liable for the happening of plaintiffs' accident. The defendant, Luis A. Martinez, (hereinafter referred to as "Martinez"), cross-moves and opposes this branch of defendants' motion. The defendants submit a reply affirmation.

The plaintiffs were passengers in the Rosa-Santana vehicle which collided with the Martinez vehicle at or near the intersection of South Bayview Avenue and Pine Street, Village of Freeport, County of Nassau, State of New York. Rosa-Santana submits that the Martinez vehicle made a left-hand turn in front of the Rosa-Santana vehicle, hit the Rosa-Santana vehicle, and pushed the Rosa-Santana vehicle to the right side of the street where it came to a stop.

Vehicle and Traffic Law §1141, "Vehicle turning left" provides as follows:

> "The driver of a vehicle intending to turn to the left within an intersection or into an alley, private road, or driveway shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard."

A driver of a vehicle intending to turn left as a green traffic signal must yield the right of way to any oncoming traffic within the intersection. (*Vogel v. Gilbo*, 276 AD2d 977). Failure to do so is a violation of Vehicle and Traffic Law §1141. (*Mattera v. Avis Rent a Car System, Inc.*, 245 AD2d 274). Violation of Vehicle and Traffic Law §1141 constitutes negligence *per se*. (*Ciatto v. Lieberman*, 266 AD2d 494).

Rosa-Santana has made a *prima facie* showing entitlement to summary judgment by establishing that Martinez was negligent as a matter of law in failing to yield the right-of-way to Rosa-Santana when Martinez made a left-hand turn directly in the path of the Rosa-Santana vehicle as Rosa-Santana legally proceeded through the intersection. (*Welch v. Lorman*, 282 AD2d 448, *Stiles v. Dutchess*, 278 AD2d 304, *Cancelieno v. Johnston*, 264 AD2d 405). Rosa-Santana demonstrated that Martinez violated Vehicle and Traffic Law §1141 when Martinez failed to yield the right of way to the Rosa-Santana vehicle approaching from the opposite direction as to constitute an immediate hazard. Martinez testified at his examination before trial that he did not see the Rosa-Santana vehicle until impact. Inasmuch as Rosa-Santana had the right of way, Rosa-Santana is entitled to anticipate that Martinez would obey the traffic laws which required him to yield. (*Jacino v. Sugerman*, 10 AD3d 593).

Martinez, in opposition to the motion, fails to raise the existence of any bona fide issues of fact. Martinez's argument that Rosa-Santana did not reduce his speed by taking his foot off the gas pedal, apply his brakes, or change lanes to avoid impact is unpersuasive. As already provided, Rosa-Santana, who had the right-of-way, is entitled to anticipate that Martinez would obey the traffic laws which required Martinez to yield. (*Agin v. Rehfeildt*, 284 AD2d 352).

Conclusion

Upon the foregoing, it is hereby

ORDERED that branch of the defendants' motion for summary judgment on the ground that the plaintiffs' injuries do not constitute serious injuries as defined by Insurance Law §5102(d), is denied, and it is hereby

ORDERED that branch of the defendants' motion for summary judgment on liability on the ground that the defendants are not responsible for the happening of plaintiffs' accident is granted, and therefore, it is hereby

ORDERED that the plaintiffs' complaint, and any and all cross-claims, as and against the defendants, Haydee R. Feliciano and Roque Rosa-Santana, are hereby dismissed.

ENTER:

J.S.C.

Dated: May 10, 2012



cc: Mallilo & Grossman, Esqs.
Lavin, O'Neil, Ricci, Cedrone & DiSipio, Esqs.
Malone Tauber & Sohn, P.C.
Law Offices of Robert P. Tusa
Cassisi & Cassisi, P.C.