SHORT FORM ORDER

INDEX No. 12-7361
CAL. No. 13-00921MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 7-22-13 (#001)
MOTION DATE 7-23-13 (#002)
ADJ. DATE 10-1-13
Mot. Seq. # 001 - MotD
002 - XMD

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ERICA M. FARRUGGIO and JOSEPH FARRUGGIO,

Plaintiffs,

- against -

LAUREN LAVENDER a/k/a LAUREN A. LAVENDER,

Defendant.

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DAVID W. McCARTHY, ESQ.
Attorney for Plaintiffs
100 Crossways Park West - Suite 201
Woodbury, New York 11797

MOIRA DOHERTY, ESQ.
Attorney for Defendant
250 Pehle Avenue, Suite 800
Saddle Brook, New Jersey 07663

Upon the following papers numbered 1 to 24 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8; Notice of Cross Motion and supporting papers 9 - 22; Answering Affidavits and supporting papers ___; Replying Affidavits and supporting papers 23 - 24; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff for an order pursuant to CPLR 3217 permitting plaintiffs to withdraw the derivative cause of action on behalf of plaintiff Joseph Farruggio and granting plaintiffs summary judgment on the issue of liability is decided as follows; and it is further

ORDERED that the cross motion by defendant for an order granting summary judgment dismissing the complaint against her on the ground that plaintiff Erica Farruggio did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Erica Farruggio, with a derivative claim on behalf of Joseph Farruggio, when her vehicle collided with a vehicle owned and operated by defendant, Lauren Lavender a/k/a Lauren A. Lavender. The accident occurred on Route 454 in Commack, New York, on March 3, 2011.

1-6-14

Plaintiffs move for an order pursuant to CPLR 3217 permitting them to withdraw the derivative cause of action on behalf of plaintiff Joseph Farruggio. Plaintiffs also move to amend the caption of this action to reflect said discontinuance.

CPLR 3217 (b) provides that, upon an order of the court, an action may be voluntarily discontinued "upon terms and conditions, as the court deems proper." Absent a showing of special circumstances, including prejudice or other improper consequences, a motion for voluntary discontinuance is generally granted (*see* ***Tucker v Tucker***, 55 NY2d 378, 449 NYS2d 683 [1982]; ***Matter of Bianchi v Breakell***, 48 AD3d 1000, 852 NYS2d 454 [3d Dept 2008]; ***Christenson v Gutman***, 249 AD2d 805, 671 NYS2d 835 [3d Dept 1998]). The authority to grant or deny a motion pursuant to CPLR 3217 (b) is within the sound discretion of the trial court (*see* ***Tucker v Tucker***, *supra*).

Here, plaintiffs submit a copy of stipulation withdrawing the second cause of action of the complaint in this action. In response, defendant did not submit any evidence of prejudice or other impropriety. Plaintiffs' motion for an order permitting them to withdraw the second cause of action of the complaint is granted. The caption is amended accordingly.

Plaintiff Erica Farruggio seeks summary judgment in her favor on the issue of liability on the ground that she was not negligent, and that the subject accident was solely the result of defendant's failure to control her vehicle. In support, plaintiff submits, *inter alia*, the pleadings and the transcripts of the deposition testimony given by plaintiff and defendant.

At her examination before trial, plaintiff testified to the effect that she exited a parking lot of a shopping center and made a right turn onto westbound Route 454, which consists of two travel lanes and a left-turn lane. She crossed two travel lanes at a slow rate of speed, about 10 miles per hour, and got into the left-turn lane without incident. When she was making a U-turn from the left-turn lane, the subject accident happened. The left quarter panel of her vehicle was contacted by the defendant's vehicle. At the time of the accident, no part of her vehicle was in the left travel lane, and she had no recollection as to whether she was moving or stopped. Prior to the impact, she observed the defendant's vehicle behind her in the left-turn lane.

At her deposition, defendant testified to the effect that she had been traveling westbound in the left lane of Route 454 at approximately 40 to 45 miles per hour. When she first saw the plaintiff's vehicle, it was "a couple inches" from her vehicle. The plaintiff's vehicle was in the left lane heading into the left-turn lane, traveling at a "very slow" rate of speed, approximately less than 10 miles per hour. Defendant beeped the horn, but it was too late for her to apply the brakes. The passenger headlight of the defendant's vehicle contacted the left rear quarter panel of the plaintiff's vehicle. Defendant testified that the actual impact between the two vehicles took place "mainly in the left lane," although the front of the plaintiff's vehicle was in the left-turn lane. At the time of impact, defendant was driving at 40 miles per hour.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med.***

Ctr., 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*see* ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (*see* ***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

Vehicle and Traffic Law § 1128 states that "whenever any roadway has been divided into two or more clearly marked lanes for traffic ... (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 has the right-of-way is entitled to anticipate that other drivers will obey the traffic laws requiring them to yield to the driver with the right-of-way (*see* Vehicle and Traffic Law § 1128 [a] and § 1143; ***Vazquez v New York City Tr. Auth.***, 94 AD3d 870, 941 NYS2d 887 [2d Dept 2012]; ***Bonilla v Calabria***, 80 AD3d 720, 915 NYS2d 615 [2d Dept 2011]).

Here, plaintiff failed to establish her entitlement to judgment as a matter of law. The deposition testimony of plaintiff and defendant conflict as to the happening of the accident (*see* ***Viggiano v Camara***, 250 AD2d 836, 673 NYS2d 714 [2d Dept 1998]). Several factual issues exist as to how and where the accident happened and whether plaintiff made an unsafe lane change in violation of Vehicle and Traffic Law § 1128 (a) (*see* ***Meng Wai Wang v Dailly News, L.P.***, 90 AD3d 624, 933 NYS2d 888 [2d Dept 2011]). Accordingly, the branch of plaintiff's motion for summary judgment on the issue of liability is denied.

Defendant cross-moves for summary judgment dismissing the complaint against her on the ground that plaintiff Erica Farruggio has not sustained a serious injury as defined in Insurance Law § 5102 (d).

By her bill of particulars, plaintiff Erica Farruggio alleges that, as a result of the subject accident, she sustained serious injuries including herniated discs at C3-C4, C4-C5, and L5-S1; bulging discs at C5-C6, L3-L4, and L4-L5; bilateral S1 radiculopathy; Grade I spondylolisthesis at L5; cervical and lumbar radiculopathy; cervical, thoracic and lumbar vertebral subluxation complex; cervical and lumbar sprain/strain, bilateral carpal tunnel syndrome; cubital tunnel syndrome; bilateral ulnar neuropathy at the elbow; and right and left shoulder injury.

Insurance Law § 5102 (d) defines "serious injury" as "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a 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 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 recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed, or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see* ***Perl v Meher***, 2011 NY Slip Op 8452, 2011 NY Lexis 3320 [2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Akhtar v Santos*** 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff's own deposition testimony and the affirmed medical report of the defendant's own examining physician (*see* ***Moore v Edison***, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; ***Farozes v Kamran*** 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Here, defendant failed to make a prima facie showing that plaintiff Erica Farruggio did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see* ***Reitz v Seagate Trucking, Inc.***, 71 AD3d 975, 898 NYS2d 173 [2d Dept 2010]). On April 15, 2013, approximately two years and one month after the subject accident, defendant's examining orthopedist, Dr. Edward Toriello, examined plaintiff using certain orthopedic tests, including straight leg raising test, impingement sign, Tinel's test, Phalen's test, and Finkelstein's test. All the test results were normal or negative, and there was no spasm or tenderness in the plaintiff's cervical and lumbosacral spine, shoulders, elbows, wrists and hands. Dr. Toriello performed range of motion testing on the plaintiff's cervical and lumbosacral spine, shoulders, elbows, wrists and fingers using a goniometer, and found that she had range of motion restriction: flexion 45 degrees (60 degrees normal) in her lumbosacral spine (*see* ***Jean v New York City Tr. Auth.***, 85 AD3d 972, 925 NYS2d 657 [2d Dept 2011]; ***Reitz v Seagate Trucking, Inc.***, *supra*). Moreover, Dr. Toriello opined that "the range of motion examination is a subjective test under the voluntary control of the individual being tested." Dr. Toriello failed to set forth the objective tests that were performed to support his conclusion that plaintiff Erica Farruggio did not suffer from any limitation of the range of motion in her lumbosacral spine (*see* ***Vazquez v Basso***, 27 AD3d 728, 815 NYS2d 626 [2d Dept 2006]; ***Kennedy v Brown***, 23 AD3d 625, 805 NYS2d 408 [2d Dept 2005]). Rather, Dr. Toriello relied upon the subjective complaints of plaintiff (*see* ***Chiara v Dernago***, 70 AD3d 746, 894 NYS2d 129 [2d Dept 2010]; ***Mannix v Lisi's Towing Serv.***, 67 AD3d 977, 888 NYS2d 773 [2d Dept 2009]). Dr. Toriello's report is insufficient to sustain defendant's prima facie burden. Moreover, although plaintiff Erica Farruggio claimed in the bill of particulars that she sustained cervical and lumbar radiculopathy and ulnar neuropathy at the elbow as a result of this accident, defendant has not submitted

a report from a neurologist who examined the plaintiff to rule out the claimed neurological injury (*see* ***McFadden v Barry***, 63 AD3d 1120, 883 NYS2d 83 [2d Dept 2009]; ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]; ***Lawyer v Albany OK Cab Co.***, 142 AD2d 871, 530 NYS2d 904 [3d Dept 1988]; ***Faber v Gaugler***, 2011 NY Slip Op 32623U, 2011 NY Misc Lexis 4742 [Sup Ct, Suffolk County, 2011]).

On September 26, 2011, defendant's examining radiologist, Dr. Steven Mendelsohn, reviewed two MRI examinations of plaintiff Erica Farruggio's cervical and lumbar spine, performed on June 20, 2011, and found that there was a herniated disc at C3-C4 and bulging discs at C4-C5, C5-C6, L3-L4, and L5-S1 and that there was bilateral L5 spondylolysis with chronic Grade I L5-S1 anterolisthesis. Dr. Mendelsohn concluded that the plaintiff's disc problems were chronic and degenerative and were unrelated to the subject accident. As to an alleged preexisting condition, there is only Dr. Mendelsohn's conclusory notation, itself insufficient to establish that the plaintiff's pain might be chronic and unrelated to the accident (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Linton v Nawaz***, 62 AD3d 434, 879 NYS2d 82 [1st Dept 2009]). Moreover, Dr. Mendelsohn's MRI reports were not paired with a sufficient medical report of an orthopedist or neurologist who examined plaintiff (*cf.* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]).

Inasmuch as defendant failed to meet her prima facie burden, it is unnecessary to consider whether the papers submitted by plaintiff in opposition to the moving defendant's motion for summary judgment were sufficient to raise a triable issue of fact (*see* ***McMillian v Naparano***, 61 AD3d 943, 879 NYS2d 152 [2d Dept 2009]; ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]).

Accordingly, the cross motion by defendant for summary judgment on the issue of serious injury is denied.

Dated: Dec. 30, 2013

W. Gerard Asher
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION