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SHORT FORM ORDER

PUBLISH

INDEX No. 14-1534
CAL. No. 16-01593MV

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 11-10-16 (002)
MOTION DATE 1-26-17 (003, 004)
ADJ. DATE 3-30-17
Mot. Seq. # 002 - MD
003 - MD
004 - MD

ANNMARIE CALANDRA-BRESCIA,

Plaintiff,

- against -

SILGU BEDRETTIN and L.I. TONE LEASING CORP.,

Defendants.

THE BONFANTE LAW FIRM, P.C.
Attorney for Plaintiff
1355 Motor Parkway
Islandia, New York 11749

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP
Attorney for Defendant/Third-Party Plaintiffs
1133 Westchester Avenue
White Plains, New York 10604

SILGU BEDRETTIN and L.I. TONE LEASING CORP.,

Third-Party Plaintiffs,

- against -

DOMINICK BRESCIA,

Third-Party Defendant.

RUSSO & TAMBASCO
Attorney for Third-Party Defendant
115 Broad Hollow Road, Suite 300
Melville, New York 11747

Upon the following papers numbered 1 to 65 read on these motions for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; 13 - 27; 28 - 44 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 45 - 50; 51 - 57; 58 - 59 ; Replying Affidavits and supporting papers 60 - 65 ; Other ___; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion (# 002) by the plaintiff for an order granting summary judgment in her favor on the issue of liability is denied; and it is further

ORDERED that the motion (# 003) by the defendants for an order granting summary judgment and dismissing the complaint on the ground that the plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102 (d) is denied; and it is further

ORDERED that the motion (# 004) by the third-party defendant for an order granting summary judgment and dismissing the third-party complaint on the issue of liability is denied.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff, when the vehicle in which she was a passenger collided with a vehicle owned by defendant L.I.-Tone Leasing Corp. and operated by defendant Silgu Bedrettin. The accident allegedly occurred on September 2, 2012, at approximately 11:40 p.m., at the intersection of Ocean Avenue and Gibson Street in Bay Shore, New York. At the time of the accident, the plaintiff was a front seat passenger in a vehicle operated by her husband, third-party defendant Dominick Brescia.

Plaintiff now moves for summary judgment in her favor on the issue of liability on the ground that she was not negligent, and that she did not engage in any culpable conduct that contributed to the happening of the subject accident. In support of the motion, the plaintiff submits, *inter alia*, the pleadings and the transcripts of the parties' deposition testimony.

At his deposition, defendant Bedrettin testified that he had been traveling westbound on Gibson Street. He stopped at the stop sign at the intersection with Ocean Avenue for approximately two to five seconds. He testified that while stopping at the stop sign, he looked both ways, and did not see any vehicles stopped at the stop sign on Ocean Avenue. When he proceeded straight ahead through the intersection at five miles per hour, he collided with the Brescia vehicle. He testified that he did not see the Brescia vehicle until it struck his vehicle. He testified that "like a second" elapsed from the time that he began to enter the intersection until the two vehicles collided.

At his deposition, third-party defendant Brescia testified that several hours before the subject accident, he drank two beers. He had been traveling northbound on Ocean Avenue. He stopped at the stop sign at the intersection with Gibson Street for about four seconds. He testified that while stopping at the stop sign, he looked both ways. When he looked to his right, he first saw the Bedrettin vehicle approaching the stop sign on Gibson Street at 40 miles per hour, which was approximately four car length away from the intersection. Brescia testified he entered the intersection, looking straight ahead. When his vehicle was fully into the intersection and traveled at 10 miles per hour, the plaintiff told him, "Honey, I don't think this guy is going to stop." After he observed the Bedrettin vehicle running through a stop sign, he honked and tried to speed up to avoid the accident, but was unable to avoid the collision. The front of the Bedrettin vehicle came into contact with the passenger side of his vehicle. Brescia testified that the plaintiff did nothing to contribute to the happening of the subject accident.

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]). To prevail on a motion for summary judgment on the issue of liability, a plaintiff must establish, prima facie, not only that the opposing party was negligent, but also that the plaintiff was free from comparative fault, since there can be more than one proximate cause of an accident (*see* ***Hollis v Marinelli***, 149 AD3d 922, 2017 NY Slip Op 02974 [2d Dept 2017]; ***Al-Mamar v Terrones***, 146 AD3d 737, 44 NYS3d 529 [2d Dept 2017]; ***Phillip v D&D Carting Co., Inc.***, 136 AD3d 18, 22 NYS3d 75 [2d Dept 2015]). A plaintiff's right as an innocent passenger to summary judgment on the issue of liability is not barred or restricted by any potential issue of comparative fault as between the owners and operators of the two vehicles involved in the accident (*see* ***Phillip v D & D Carting Co., Inc.***, *supra*; ***Rodriguez v Farrell***, 115 AD3d 929, 983 NYS2d 68 [2d Dept 2014]; ***Medina v Rodriguez***, 92 AD3d 850, 939 NYS2d 514 [2d Dept 2012]).

Here, while Brescia testified that the accident occurred when the Bedrettin vehicle ran through a stop sign, Bedrettin testified that he stopped at the stop sign for about four seconds, and that while stopping at the stop sign, he did not see any vehicles approaching the subject intersection. Brescia testified that the plaintiff did not contribute to the happening of the accident. Although the plaintiff established that she did not engage in any culpable conduct that contributed to the happening of the accident, as she was a passenger within the Brescia vehicle, she failed to meet her prima facie burden with respect to both aspects of the twofold test. The parties' conflicting deposition testimony failed to eliminate triable issues of fact as to whether defendant Brescia was free from fault in the happening of the accident and, if not, whether defendant Bedrettin's alleged negligence was the sole proximate cause of the accident (*see* ***Gobin v Delgado***, 142 AD3d 1134, 38 NYS3d 63 [2d Dept 2016]; ***Cabrera v Magussen***, 130 AD3d 664, 11 NYS3d 862 [2d Dept 2015]). "There is a significant distinction between granting a plaintiff summary judgment on her lack of culpable conduct on liability and granting a plaintiff summary judgment on a defendant's negligence" (***Oluwatayo v Dulinayan***, 142 AD3d 113, 119, 35 NYS3d 84 [1st Dept 2016]). A granting of partial summary judgment on the issue of the plaintiff's lack of fault or culpability is a much narrower finding established by demonstrating that as an innocent passenger, the plaintiff is free of any negligence (*see id.*). In contrast, a granting of partial summary judgment against a defendant on liability in a negligence case is the equivalent of finding that the defendant owed the plaintiff a duty of care, the defendant breached that duty by his or her negligence, and such breach proximately caused the plaintiff injury (*see id.*; ***Ortega v Liberty Holdings, LLC***, 111 AD3d 904, 976 NYS2d 147 [2d Dept 2013]). Thus, plaintiff's motion for summary judgment on the issue of liability is denied (*see* ***Buffa v Carr***, 148 AD3d 606, 50 NYS3d 352 [1st Dept 2017]; ***Oluwatayo v Dulinayan***, *supra*).

The defendants move for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain a "serious injury" as defined by Insurance Law §5102 (d).

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, a 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***, 18 NY3d 208, 936 NYS2d 655 [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]; ***Cebron v Tuncoglu***, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]).

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 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.***, *supra*; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Here, the defendants failed to make a prima facie showing that the plaintiff 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 July 23, 2015, approximately three years after the subject accident, the defendants' examining orthopedist, Dr. Noah Finkel, examined the plaintiff and performed certain orthopedic and neurological tests, including the straight leg raising test. Dr. Finkel found that all the test results were negative or normal. Dr. Finkel also performed range of motion testing on the plaintiff's cervical, thoracic and lumbar regions and shoulders. Dr. Finkel found that the plaintiff exhibited the following range of motion restrictions in her spine: 5 degrees of flexion (60 degrees normal), 20 degrees of extension (35 degrees normal), and 5 degrees of rotation (80 degrees normal) in her cervical region; 60 degrees of rotation (80 degrees normal) in her thoracic region; and 20 degrees of flexion (60 degrees normal), 20 degrees of extension (35 degrees normal), and 10 degrees of lateral flexion (35 degrees normal) in her lumbar region. He also determined that the plaintiff exhibited the following range of motion restriction in her shoulders: 50 degrees of external rotation (80 degrees normal) in her right shoulder and 150 degrees of abduction and flexion (180 degrees normal) in her left shoulder (*see* ***Jean v New York City Tr. Auth.***, 85 AD3d 972, 925 NYS2d 657 [2d Dept 2011]; ***Reitz v Seagate Trucking, Inc.***, *supra*). Dr. Finkel stated that "there appears to be a significant strength withheld phenomena when testing muscle strength testing with a similar apparently subjective and suboptimal effort related the clinical examination and range of motion and strength testing." Although Dr. Finkel indicated that the range-of-motion limitations in the plaintiff's cervical, thoracic and lumbar

regions and left shoulder were self-imposed, he failed to explain or substantiate, with objective medical evidence, the basis for that conclusion (*see* ***Mercado v Mendoza***, 133 AD3d 833, 834, 19 NYS3d 757 [2d Dept 2015]; ***Uvaydov v Peart***, 99 AD3d 891, 951 NYS2d 912 [2d Dept 2012]; ***Iannello v Vazquez***, 78 AD3d 1121, 911 NYS2d 654 [2d Dept 2010]). Moreover, Dr. Finkel failed to state how he measured the joint function in plaintiff's cervical, thoracic and lumbar regions and shoulders. The Court can only assume that Dr. Finkel's tests were visually observed with the input of the plaintiff. The failure to state and describe the tests used will render the opinion insufficient (*see* ***Grisales v City of New York***, 85 AD3d 964, 925 NYS2d 633 [2d Dept 2011]; ***Mannix v Lisi's Towing Serv., Inc.***, 67 AD3d 977, 888 NYS2d 773 [2d Dept 2009]; ***Smith v Quicci***, 62 AD3d 858, 880 NYS2d 652 [2d Dept 2009]). In view of the foregoing, Dr. Finkel's report is insufficient to establish a prima facie case that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d).

Inasmuch as the defendants failed to meet their prima facie burden, it is unnecessary to consider whether the papers submitted by the plaintiff in opposition to the motion 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 defendants' motion for summary judgment dismissing the complaint on the issue of serious injury is denied.

Third-party defendant Brescia moves for summary judgment dismissing the third-party complaint on the issue of liability on the ground that he was not negligent as a matter of law. Brescia alleges that Bedrettin was negligent in failing to yield the right of way in violation of Vehicle and Traffic Law § 1140. As discussed above, the parties' conflicting deposition testimony failed to eliminate triable issues of fact as to whether Brescia was free from fault in the happening of the accident and, if not, whether defendant Bedrettin's alleged negligence was the sole proximate cause of the accident (*see* ***Gobin v Delgado***, *supra*; ***Cabrera v Magussen***, *supra*). Thus, the third-party defendant's motion for summary judgment on the issue of liability is denied.

Dated: JUN 06 2017

HON. JOSEPH A. SANTORELLI
J.S.C.

____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**