SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IA-12

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Marcia F. Russell,

Plaintiff(s),

- against -

INDEX. NO.: 6418/06

Wayne A. Mitchell, Carlton Stewart and
Daryl S. Paynter,

Defendant(s).

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HON. JOHN A. BARONE:

The motion by defendant Daryl S. Paynter for an order pursuant to CPLR Sec. 3212 granting summary judgment and dismissing the complaint of plaintiff Marcia F. Russell on the grounds that plaintiff has not suffered a serious injury as defined in New York State Insurance Law Sections 5102(d) and 5104(a) is denied. The separate motion by plaintiff for an order pursuant to CPLR sec. 3212 granting partial summary judgment against defendant Daryl S. Paynter on the issue of liability is granted.

Plaintiff in this action is seeking damages for personal injuries allegedly sustained as the result of a motor vehicle accident in which she was a passenger in the vehicle owned by defendant Wayne A. Mitchell and operated by defendant Carlton Stewart while it was stopped on the Van Wyck Expressway service road, at or near its intersection with Linden Boulevard, Queens, NY. At the time it was stopped, the vehicle was struck in the rear by a vehicle owned and operated by Daryl S. Paynter.

Addressing the defendant's motion first, under NY Insurance Law Sec. 5104(a), there is no right of recovery for non-economic loss in a motor vehicle accident between two insured

parties, except in the case of "serious injury". The term "serious injury" is defined in Sec. 5102 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 of a non-permanent nature which prevents the injured person from performing all of the material acts which constitutes such persons usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment.

In determining a motion for summary judgment, the defendant bears the initial burden to present evidence that the plaintiff has not suffered a serious injury and thus has no cause of action. Brown v. Achy, 9 AD 3d 30. If defendant meets this burden, the burden then shifts tot he plaintiff to submit evidence, in admissible form, showing the existence of a triable issue of fact as to whether plaintiff suffered a serious injury under the Insurance Law. Shinn v. Catanzaro, 1 AD 3d 195. Additionally, plaintiff must establish that the injuries sustained are causally related to the alleged accident. Pommells v. Perez, 4 NY 3d 566.

In the present case, the defendant has met the initial burden and demonstrated that a prima facie case exists showing that plaintiff has not suffered a serious injury under the Insurance Law. In support of its motion, the defendant has suppled the court with a affirmed report from Dr. Jonathan D. Glassman, an orthopaedic surgeon, an affirmed report by Dr. Michael S. Carciente, a neurologist, and an affirmed report by Dr. Melissa Sapan Cohn, a radiologist.

Dr. Glassman conducted an independent orthopedic examination of the plaintiff on May 7, 2007. Cervical compression testing of the cervical spine was negative. Sitting Lasegue's testing, straight leg raising and Patrick's testing of the lumbar spine were negative. Drop arm and apprehension testing, Yergason's, Speed's and O'Briens testing, and subscapularis push-

off and posterior relocation testing of the left and right shoulder were all negative. Dr. Glassman also performed range of motion tests on the cervical spine, thoracic spine, lumbar spine, right shoulder and left shoulder were found all to be within normal limits. Dr. Glassman diagnosed a resolved sprain of the cervical and lumbar spine and indicated he found "no significant objective evidence of radiculopathy."

Dr. Carciente conducted an independent neurological examination of the plaintiff on May 14,2 007, noting a "normal neurological examination", with "no objective neurological findings". Dr. Carciete found no myotomal weakness, dermatomal sensory deficits, asymmetric reflexes, or atrophy supporting the diagnosis of a radiculopathy. Furthermore, he found "no correlation between the alleged C6-C7 disc herniation as mentioned in the Bill of Particulars and today's exam."

Dr. Cohn, in a report dated June 19, 2007, reviewed an x-ray of plaintiff's cervical spine taken on August 5, 2005 and found "small anterior osteophytes at the C6-C7 level" indicating degenerative disease. Dr. Cohn also found disc bulging at the C6-C7 level, which is unrelated to trauma, as opposed to disc herniation.

As the defendant has made out a prima facie case that the plaintiff did not suffer a serious injury under the Insurance Law the burden shifts to the plaintiff to show that questions of fact exist. Plaintiff's proof of a serious injury must not only be admissible, but it must also be objective. Toure v. Avis Rent a Car Systems, Inc., 98 NY 2d 345.

In opposition to the defendant's motion, plaintiff has supplied the court with a narrative report from Dr. Yolande Bernard, relied upon and referenced by defendant's Dr. Glassman in his affirmed report, an affirmation by Dr. Christopher Kyriakides of New York Orthopedic and Rehabilitation, and an affirmation by Dr. Davis R. Adin.

Dr. Bernard initially evaluated plaintiff on August 12, 2005 and commenced a therapy regime through September 21, 2005. At the time of the initial examination, Dr. Bernard performed range of motion testing and found the cervical spine moderately-considerably restricted in flexion, extension, lateral bending and rotation, and the lumbar spine mildly restricted in flexion, extension, lateral bending and rotation. Dr. Bernard also performed Spurling's test of the cervical spine which was positive, and straight leg raising of the lumbar spine which was negative. Plaintiff commenced a physical therapy program at Dr. Bernard's facilities which included therapeutic exercises, massage, ultrasound and hot packs. Dr. Bernard's impression was as follows: vertebral derangement ; acute traumatic strain/sprain of the cervical & lumbosacral paraspinal muscles and ligaments; myofascitis; r/o cervical radiculopathy/HNP; cervical radicular syndrome; cophalgia vertbrogenic. Plaintiff then sought treatment at New York Orthopedic and Rehabilitation, where plaintiff was able to treat on a lien basis because plaintiff's private health insurance would no longer pay for additional treatment with Dr. Bernard. Dr. Kyriakides at New York Orthopaedic and Rehabilitation initially evaluated plaintiff on September 28, 2005, and commenced a therapy regime rendered through January 12, 2006. Initial examination revealed limitations in range of motion in flexion, extension, side bending and rotation in the cervical and lumbar areas, positive straight leg raising testing on the left side and positive Spurling's testing on the left side.

Range of motion testing On October 10, 2005 with a Dual Inclinometer revealed limitations in both the plaintiff's cervical and lumbar spine. An MRI of the cervical spine on October 3, 2005 revealed a disc herniation of the C6-C7 level which impinged on the thecal sac. On October 8, 2005 Dr. Kyriakides performed a cervical and lumbar spine sonography which revealed bilateral facet capsular inflammation with bilateral myositis C4-C7 and L1-L5 and bilateral sacroilits. At the sacroiliac joint and left and right facet capsular inflammation and bilateral myositis at C3. An EMG conducted on November 18, 2005 revealed bilateral cervical radiculopathy . Dr. Kyriakides affirmed that these injuries were permanent and a proximate result of the August 3, 2005 accident.

Finally, Dr. Adin examined the plaintiff on January 10, 2008 and performed range of motion testing on February 4, 2008. Range of motion testing revealed limitations of both the cervical and lumbar spine and Dr. Adin opined that the plaintiff sustained the same permanent injuries as a proximate result of the accident that Dr. Kyriakides found.

In light of the above evidence, the court finds the plaintiff has raised a triable issue of fact on the question of serious injury under the New York State Insurance Law. Plaintiff has submitted evidence based on objective testing, together with affirmations of qualified physicians, which show limitations in range of motion of the cervical and lumbar spine as well as a C6-C7 disc herniation, affirmed to be permanent in nature and a proximate cause of the August 3, 2005 car accident. These findings are in direct conflict with those of the defendant's doctors and thus raise a triable issue of fact. Conflicting medical evidence on the issue of serious injury does not provide a sufficient basis for the court to grant summary judgment. Cassaanol v. Williamsburg Plaza Taxi, 234 AD 2d 208.

Nor is the gap in treatment between Dr. Kyriakides and Dr. Adin fatal to plaintiff's case as a gap in treatment when properly explained is not fatal. Brown supra. In the present case, while undergoing therapy with Dr. Bernard, plaintiff was advised her insurance benefits would no longer pay for treatment. Plaintiff then began using her private heath insurance and paying co-payments out of pocket. When plaintiff's private insurance ceased paying for treatment she began treatment at New York Orthopedic and Rehabilitation on a lien basis for four months. At this point plaintiff ceased therapy as additional treatment would not alleviate the pain and she did not want to accrue a large outstanding balance. In Brown v. Dunbar, the companion case to Pommells, supra at 577, the Court of Appeals stated, "A plaintiff need not incur the additional expense of consultation, treatment or therapy, merely to establish the seriousness or causal relation of the injury."

As such, these are triable issues of fact as to the question of serious injury best reserved

for trial and the defendant's motion for summary judgment is denied. The motion by plaintiff seeking summary judgment on liability due to a rear end collision is granted.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law. Alvarez v. Prospect Hospital, 68 NY 2d 320. Once movant meets his initial burden, then burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact. Zuckerman v. City of New York, 49 NY 2d 557. The Court of Appeals has stated in the case of Friends of Animals v. Associated Fur Mfrs., 46 NY 2d 1065:

> [t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the Court as a matter of law in directing judgment' in his favor (CPLR 3212[b]) and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact'. Normally if the opponent is to succeed in defeating a summary judgment motion, he too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate acceptable excuse for his failure to meet strict requirement of tender in admissible form. Whether the excuse offered will be acceptable must depend on the circumstances in the particular case... .

In the case at hand, the deposition testimony of both the plaintiff and defendant confirm that the car in which plaintiff was a passenger was stopped at a red light at the time it was struck in the rear.

It is not settled that a rear end collision with a stopped or stopping car creates a prima facie case of liability against the rear most vehicle, requiring the operator to provide a non-negligent explanation for the collision. Argiro v. Norfolk Contract Carrier, 275 AD 2d 384, 385.

In neither the opposition testimony nor the affirmation in opposition has the defendant provided a non-negligent explanation for the collision.

As, the plaintiff has established her right to summary judgment on the issue of liability.

This constitutes the decision and order of this Court.

Date: 7/3/08

John A. Barone, JSC

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