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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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SVETLANA V. LOVERDE, STEVEN LOVERDE, and ANASTASIA BERESTOVA,

Plaintiff(s),

-against-

DANISH A. GILL and TARIQ MAHMUD,

Defendant(s).

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Index No. 50/10

Motion Submitted: 8/1/11
Motion Sequence: 001, 002

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....XX
Answering Papers.....XX
Reply.....XXX
Briefs: Plaintiff's/Petitioner's.....X
Defendant's/Respondent's.....

Motion by plaintiff, Svetlana V. Loverde, pursuant to CPLR § 3212, for an Order granting her summary judgment on the issue of liability is granted.

Cross motion by defendants, Danish A. Gill and Tariq Mahmud, for an Order, awarding them summary judgment dismissing the plaintiff, Anastasia Berestova's complaint on the grounds that her injuries do not satisfy the "serious injury" threshold requirement of Insurance Law § 5102(d), is granted.

This action arises out of a motor vehicle accident that occurred on December 19, 2008 at approximately 2:36 p.m. at the intersection of Post Avenue and Stone Hill Road in Nassau County, New York. At the time of the accident, plaintiff Svetlana Loverde was traveling

northbound on Post Avenue through a green traffic light controlling the intersection when the Gill vehicle, traveling west on Stone Hill Road, admittedly slid westbound into the intersection controlled by a red traffic light. Plaintiff, Anastasia Berestova, was a passenger in the car being operated by her mother, Svetlana Loverde.

It is undisputed that at the time of the accident, there was snow on the roadway.

At her oral examination before trial, Svetlana Loverde testified that at the time and location of the accident, the ground was wet. She stated that it was only "some split seconds" between the first time that she saw the defendants' vehicle and the moment of impact. She testified that she did not sound the horn, apply the brakes or turn the steering wheel in either direction; she only removed her foot from the gas (Svetlana Tr., p. 24).

Defendant, Danish A. Gill, testified that at the time of the accident, he was operating his employer, defendant Tariq Mahmud's vehicle in the scope of his employment from the Mobil gas station on Jericho Turnpike to the Mobil gas station in Roslyn. He stated that it was snowing when he left the gas station and at the time of the accident. He testified that traffic was light at the subject intersection and that he was traveling approximately 15 to 20 miles per hour westbound on Stone Hill Road when he observed a green traffic light approximately one quarter of a mile in front of him. He stated that he was coming down a hill when he first observed the green traffic light at the subject intersection (Gill Tr., p. 20). He testified that he observed the light turn yellow from a distance of approximately 20 to 30 yards and, as a result, he began to pump his brakes to "build the pressure for the car to stop." He then observed the light turn red. Gill testified that the front portion of his vehicle was already in the intersection when the light changed from yellow to red.

Upon the instant motion, plaintiff Svetlana Loverde, seeks summary judgment on the issue of liability.

On a motion for summary judgment, it is the proponent's burden to make a *prima facie* showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to demonstrate the absence of any material issues fact (***JMD Holding Corp. v. Congress Financial Corp.***, 4 N.Y.3d 373, 384, 828 N.E.2d 604, 795 N.Y.S.2d 502 (2005); ***Andre v. Pomeroy***, 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). The Court must deny the motion if the proponent fails to make such a *prima facie* showing, regardless of the sufficiency of the opposing papers (***Liberty Taxi Mgt. Inc. v. Gincherman***, 32 A.D.3d 276, 820 N.Y.S.2d 49 [1st Dept., 2006]). If this showing is made, however, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial (***Alvarez v. Prospect Hospital***, 68 N.Y.2d 320, 324, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]).

Pursuant to the Vehicle and Traffic Law § 1110, the driver of any vehicle shall obey the instructions of any official traffic-control device. Section 1111, which deals with traffic control devices, provides that a green light is an invitation to proceed. Nonetheless, a driver who has a green light must still use reasonable care under the circumstances (***Shea v. Judson***, 283 N.Y. 393, 398, 28 N.E.2d 885 (1940); ***Costalas v. City of New York***, 143 A.D.2d 573, 532 N.Y.S.2d 868 [1st Dept., 1988]).Thus, if the driver saw or should have seen another vehicle in the intersection or so near the intersection that a collision is likely to occur, the driver is required to use reasonable care to avoid the collision (***Costalas v. City of New York, supra; Crespo v. New York City Hous. Auth.***, 222 A.D.2d 300, 635 N.Y.S.2d 593 (1st Dept., 1995); ***Sontag v. Mulkerin***, 63 A.D.2d 699, 404 N.Y.S.2d 697 [2d Dept., 1978]).

Here, the plaintiff, has sufficiently established her cause of action so as to permit this court, as a matter of law, to direct judgment in her favor (***Menekou v. Crean***, 222 A.D.2d 418, 419-420, 634 N.Y.S.2d 532 [2d Dept., 1995]). Specifically, plaintiff's reliance on the deposition testimony of the parties establishes that proximate cause of the accident was defendant Gill's failure to bring his vehicle to a lawful stop.

In opposition, the defendant has failed to produce admissible proof establishing a material issue of fact (***Id.*** at 420).

Defendants' allegation that there are questions of fact as to whether the plaintiff should have observed the Gill vehicle and whether she could have and should have taken steps to avoid the accident are nothing more than mere guesswork and speculation. Defendant's allegations are unsubstantiated by the record before this Court and do not properly create an issue of fact (***Febot v. New York Times Co.***, 32 N.Y.2d 486, 299 N.E.2d 672, 346 N.Y.S.2d 256 [1973]).

Accordingly, the motion by plaintiff Svetlana V. Loverde, for an Order granting her summary judgment on the issue of liability is granted.

The cross motion by defendants for an Order awarding them summary judgment dismissing the plaintiff, Anastasia Berestova's complaint on the grounds that her injuries do not satisfy the "serious injury" threshold requirement of Insurance Law §5102(d), is also granted.

In bringing this action, plaintiff Anastasia Berestova claims that she sustained, *inter alia*, the following serious injuries as a result of the subject accident: lumbar trauma and pain; L1-L2, L2-L3 disc bulge; lumbosacral radiculitis; hypersthesia C7 bilaterally; hypothesia L1 left; lumbosacral spasm; cervical trauma and pain; hypoesthesia C7 bilaterally; cervical spasm; thoracic trauma, pain and spasm; left leg trauma and pain (Bill

of Particulars, ¶5). Plaintiff alleges in her bill of particulars that she was confined to the hospital for one day and to her home for approximately one month following the accident (***Id.*** at ¶6). However, at her sworn examination before trial, plaintiff Berestova stated that she was not confined to her home at all as a result of the injuries she sustained in this accident (Berestova Tr., p. 29).

Further, Berestova also testified that at the time of the accident, she was unemployed (***Id.*** at 6). She stated that she was a full time student at Nassau Community College (***Id.***). Berestova testified that she did not miss any time from school or any classes as a result of this accident (***Id.*** at 7). She also testified that there is nothing that she can no longer do as a result of this accident (***Id.*** at 31).

The 18-year old plaintiff Anastasia Berestova claims that her injuries fall within the following four categories of the serious injury statute: to wit, 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; and 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 (Bill of Particulars, ¶16).

Inasmuch as the plaintiff has, however, failed to allege and claim that she has sustained a "total loss of use" of a body organ, member, function or system, it is plain that her injuries do not satisfy the "permanent loss of use" category of Insurance Law §5102(d) (***Oberly v. Bangs Ambulance, Inc.***, 96 N.Y.2d 295, 751 N.E.2d 457, 727 N.Y.S.2d 378 [2001]).

Similarly, plaintiff's claims that her injuries satisfy the 90/180 category of Insurance Law §5102(d) are also unsupported and contradicted by her own testimony wherein she states that she did not miss any time from her school or classes. Further, inasmuch as she testified that there is nothing that she can no longer do as a result of this accident, plaintiff has failed to otherwise provide any evidence that she was "medically" impaired from doing any activities as a result of this accident for 90 days within the first 180 days following this accident. Therefore, this Court determines that plaintiff has effectively abandoned her 90/180 claim for purposes of defendant's initial burden of proof on a threshold motion (***Joseph v. Forman***, 16 Misc.3d 743, 838 N.Y.S.2d 902 [Sup. Ct. Nassau 2007]).

Accordingly, this Court will restrict its analysis to the remaining two categories as it pertains to the plaintiff; to wit, permanent consequential limitation of use of a body organ or member; and, significant limitation of use of a body function or system.

In support of a claim that the plaintiff has not sustained a serious injury, defendants may rely either on the sworn statements of their examining physician or the unsworn reports of the plaintiff's examining physician (***Pagano v. Kingsbury***, 182 A.D.2d 268, 587 N.Y.S.2d 692 [2d Dept., 1992]).

When a defendants' motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts and it is then incumbent upon the plaintiff, in opposition to defendants' motion, to produce prima facie evidence in admissible form to support the claim for serious injury (***Licari v. Elliot***, 57 N.Y.2d 230, 441 N.E.2d 1088, 455 N.Y.S.2d 570 [1982]). In order to be sufficient to establish a prima facie case of serious physical injury, the affirmation or affidavit must contain medical findings, which are based on the physician's own examinations, tests and observations and review of the record, rather than manifesting only the plaintiff's subjective complaints. However, unlike the movant's proof, unsworn reports of plaintiff's examining doctor or chiropractor are not sufficient to defeat a motion for summary judgment (***Grasso v. Angerami***, 79 N.Y.2d 813, 588 N.E.2d 76, 580 N.Y.S.2d 178 [1991]). Otherwise, a medical affirmation or affidavit, which is based on a physician's personal examination and observations of plaintiff, is an acceptable method to provide a doctor's opinion regarding the existence and extent of a plaintiff's serious injury (*see* ***Reid v. Wu***, 2003 WL 21087012, (N.Y.Sup.), 2003 N.Y. Slip Op. 50816(U) *citing* ***O'Sullivan v. Atrium Bus Co.***, 246 A.D.2d 418, 668 N.Y.S.2d 167 [1st Dept.,1998]).

Essentially, in order to satisfy the statutory serious injury threshold, the legislature requires objective proof of a plaintiff's injury. The Court of Appeals in ***Toure v. Avis Rent A Car Systems***, stated that plaintiff's proof of injury must be supported by objective medical evidence, such as MRI and CT scan tests (***Toure v. Avis Rent A Car Sys.***, 98 N.Y.2d 345, 353, 774 N.E.2d 1197, 746 N.Y.S.2d 865 [2002]). Unsworn MRI reports are not competent evidence unless both sides rely on those reports (***Gonzalez v. Vasquez***, 301 A.D.2d 438, 754 N.Y.S.2d 7 [1st Dept., 2003]). However, even the MRI and CT scan tests and reports must be paired with the doctor's observations during his physical examination of the plaintiff (***Toure v. Avis Rent A Car Systems, supra***).

On the other hand, even where there is ample objective proof of plaintiff's injury, the Court of Appeals held in ***Pommels v. Perez, supra*** that certain factors may override a plaintiff's objective medical proof of limitations and nonetheless permit dismissal of plaintiff's complaint. Specifically, in ***Pommels v. Perez***, the Court of Appeals held that additional contributing factors, such as gap in treatment, an intervening medical problem, or a preexisting condition, would interrupt the chain of causation between the accident and the claimed injury (***Pommels v. Perez,*** 4 N.Y.3d 566, 830 N.E.2d 278, 797 N.Y.S.2d 380 [2005]) The Court held that while "the law surely does not require a record for needless treatment in order to survive summary judgment, where there has been a gap in treatment or cessation of treatment, a plaintiff must offer some reasonable explanation for the gap in treatment or

cessation of treatment" (***Id.; Neugebauer v. Gill***, 19 A.D.3d 567, 797 N.Y.S.2d 541 [2d Dept., 2005]).

Under the no-fault statute, to meet the threshold significant limitation of use of a body function or system or permanent consequential limitation, 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 (***Licari v. Elliot, supra; Gaddy v. Eyler***, 79 N.Y.2d 955, 591 N.E.2d 1176, 582 N.Y.S.2d 990 (1992); ***Scheer v. Koubeck***, 70 N.Y.2d 678, 512 N.E.2d 309, 518 N.Y.S.2d 788 [1987]). A minor, mild or slight limitation shall be deemed "insignificant" within the meaning of the statute (***Licari v. Elliot, supra; Grossman v. Wright***, 268 A.D.2d 79, 83, 707 N.Y.S.2d 233 [2d Dept., 2000]).

When, as in this case, 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" categories, then, in order to prove the extent or degree of the physical limitation, an expert's designation of a numeric percentage of plaintiff's loss of range of motion is acceptable (***Toure v. Avis Rent A Car Systems, Inc., supra***). In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis; and, (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (***Id.***).

With these guidelines in mind, this Court will now turn to the merits of defendants' motion.

In that regard, in support of their motion, defendants submit, *inter alia*, plaintiff's emergency room report from Winthrop University Hospital; the unsworn report from plaintiff's neurologist, Dr. J.R. Alluri, who examined the plaintiff on January 22, 2009; and, the affirmed report of Dr. Mathew M. Chacko, M.D., a neurologist who performed an independent neurological examination of the plaintiff on November 10, 2010.

With this evidence, defendants have established their prima facie entitlement to judgment as a matter of law.

Specifically, Dr. Mathew M. Chacko, a board certified neurologist and psychiatrist, examined the plaintiff, performed quantified range of motion testing on her cervical spine and lumbar spine with a goniometer, compared his findings to normal range of motion values and concluded that the ranges of motion measured were normal. Dr. Chacko also performed motor and sensory testing and found no deficits, and based on his clinical findings and

medical records review, concluded that plaintiff had a resolved cervical and lumbar strains with no permanent or residual disability (***Staff v. Yshua***, 59 A.D.3d 614, 874 N.Y.S.2d 180 (2d Dept., 2009); ***Cantave v. Gelle***, 60 A.D.3d 988, 877 N.Y.S.2d 129 [2d Dept., 2009]).

Having made a prima facie showing that the injured plaintiff did not sustain a "serious injury" within the meaning of the statute, the burden shifts to the plaintiff to come forward with evidence to overcome the defendants' submissions by demonstrating a triable issue of fact that a "serious injury" was sustained (***Pommels v. Perez, supra; see also Grossman v. Wright, supra***).

In opposition, plaintiff submits the sworn affidavit of Stephen Pruden, D.C., a chiropractor who first examined the plaintiff on December 31, 2008; her own affidavit; and, the "affirmation" of Louis Filardi, D.C., a chiropractor.

Initially it is noted that the "affirmed" report of Louis Filardi does not constitute competent medical evidence in opposition to defendants' prima facie showing of entitlement to judgment as a matter of law (***CPLR § 2106***). Chiropractors do not come within the scope of the statute allowing affirmations by certain persons to be given the same force and effect as an affidavit. A chiropractor must first appear before a notary or other such official and formally declare the truth of the contents of the document (***Doumanis v. Conzo***, 265 A.D.2d 296, 696 N.Y.S.2d 201 (2d Dept., 1999); ***Casas v. Montero***, 48 A.D.3d 728, 853 N.Y.S.2d 358 [2d Dept., 2008]). This, Filardi, failed to do. Accordingly, this Court will not consider his "affirmation" in opposition to defendants' motion.

Furthermore, while it is noted that Mr. Pruden' findings are contained in a sworn affidavit and that therefore said affidavit constitutes competent evidence in opposition to defendants' motion (***CPLR § 2106***; *see also* ***Pichardo v. Blum***, 267 A.D.2d 441, 700 N.Y.S.2d 863 [2d Dept., 1999]), said affidavit, nonetheless fails to present an issue of fact herein. Specifically, in his chiropractic examination, performed approximately 12 days after the date of plaintiff's accident, Mr. Pruden claims to have performed range of motion testing on plaintiff's cervical and lumbar spine. In fact, his conclusions are premised almost entirely upon the findings of such range of motion testing. However, it remains unclear to this Court as to how a chiropractor can perform such an examination of the plaintiff. Moreover, although Mr. Pruden sets forth range of motion of the plaintiff's cervical and lumbar spine, he fails to set forth what objective testing was used to determine such measurements. Failure to indicate which objective test was performed to measure the loss of range of motion is contrary to the requirements of ***Toure v. Avis Rent a Car Systems, supra***. It renders the expert's opinion as to any purported loss insufficient, and the Court can not consider such (***Id.***; ***Powell v. Alade***, 31 A.D.3d 523, 818 N.Y.S.2d 600 [2d Dept., 2006]).

Therefore, in the absence of any competent or admissible evidence supporting a claim for serious injury under any one of the nine categories of Insurance Law §5102(d), defendants' motion seeking summary judgment dismissal of Anastasia Berestova's complaint is herewith granted (***Licari v. Elliot, supra***).

The foregoing constitutes the Order of this Court.

Dated: September 30, 2011
Mineola, N.Y.

Karen V. Murphy
J. S. C.