Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Nicola Fitzgerald and Alan Fitzgerald,

Plaintiff,

-against-

Christine Czubek,

Defendant.

Index No.: 29640/2009

Motion Sequence No.: 001; MG
Motion Date: 8/29/11
Submitted: 10/5/11

Motion Sequence No.: 002; XMD
Motion Date: 8/29/11
Submitted: 10/5/11

Attorney for Plaintiffs:

Jacoby & Jacoby
1737 North Ocean Avenue
Medford, NY 11763

Attorney for Defendant:

Richard T. Lau & Associates
P.O. Box 9040
Jericho, NY 11753-9040

Clerk of the Court

Upon the following papers numbered 1 to 32 read upon this motion and cross motion for summary judgment: Notice of Motion and supporting papers, 1 - 11; 17 - 25; Answering Affidavits and supporting papers, 12 - 14; 26 - 30; Replying Affidavits and supporting papers, 15 - 16.

This is an action to recover damages for injuries allegedly sustained by plaintiff Nicola Fitzgerald ("plaintiff") as a result of a motor vehicle accident that occurred at the intersection of Montauk Highway and Hagerman Avenue in the Town of Brookhaven, New York, on June 11, 2009. The accident allegedly occurred when plaintiff's vehicle, which was coming to a stop for a red light, was struck in the rear by the vehicle owned and operated by defendant Christine Czubek. It is alleged that as a result of the impact between the Fitzgerald and Czubek vehicles, the Fitzgerald vehicle struck the rear of the vehicle in front of it. Plaintiff, by her bill of particulars, alleges that

she sustained various personal injuries as a result of the subject accident, including disc bulges at level C6/C7, levels L2 through S1 and levels T9 through T12; disc herniations at levels C2 through C6 and level T11/T12; cephalgia; myofascitis and lumbar radiculitis. Plaintiff alleges that she was confined to her home for approximately five days and that she was incapacitated from her employment as a switchboard operator at Brookhaven Memorial Hospital for approximately two months as a result of the injuries she sustained in the accident. Plaintiff's husband, Alan Fitzgerald, instituted a derivative claim for loss of services.

Plaintiffs move for summary judgment on the issue of liability arguing that defendant's negligent operation of her vehicle is the sole proximate cause of the subject accident. In support of the motion, plaintiffs submit copies of the pleadings, the parties' deposition transcripts and an uncertified copy of the police accident report. Defendant opposes the motion on the asserted basis that there are material issues of fact and credibility that preclude the granting of summary judgment in plaintiffs' favor on the issue of liability. In opposition to the motion, defendant submits a copy of the police accident report, witness statements and the transcript of her own deposition.

To establish *prima facie* entitlement to judgment as a matter of law, a movant must submit evidentiary proof in admissible form demonstrating the absence of any material issues of fact (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395 [1957]). The failure to make such showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (see, Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]. Once the movant makes such a showing, the opposing party must come forward with evidentiary proof in admissible form sufficient to raise a triable issue of fact (see, Zuckerman v. City of New York, 49 NY2d 557 [1980]; Flomenbaum v. New York Univ., 14 NY3d 901, 903 NYS2d 339 [2010]).

A rear-end collision with a stopped vehicle creates a *prima facie* case of negligence against the operator of the moving vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision (see, Cortes v. Whelan, 83 AD3d 763 [2nd Dept.,2011]; Ramirez v. Konstanzer, 61 AD3d 837 [2nd Dept.,2009]; Hakakian v. McCabe, 38 AD3d 493 [2nd Dept.,2007]). However, the lead vehicle also has a duty not to stop suddenly or slow down without proper signaling so as to avoid a collision (see, Chepel v. Meyers, 306 AD2d 235, 237 [2nd Dept.,2003]; see, Carhuayano v. J&R Hacking, 28 AD3d 413 [2nd Dept.,2006]; Gaeta v. Carter, 6 AD3d 576 [2nd Dept.,2004]; Purcell v. Axelsen, 286 AD2d 379 [2nd Dept.,2001]; Colonna v. Suarez, 278 AD2d 355 [2nd Dept.,2000]; see also Vehicle and Traffic Law §1163). A non-negligent explanation for the collision, such as mechanical failure or the sudden and abrupt stop of the vehicle ahead, is sufficient to overcome the inference of negligence and preclude an award of summary judgment (see, Danner v. Campbell, 302 AD2d 859, 859 [4th Dept.,2003]; see, Davidoff v. Mullokandov, 74 AD3d 862 [2nd Dept.,2010]; Carhuayano v. J&R Hacking, 28 AD3d 413 [2nd Dept.,2006]); Rodriguez-Johnson v. Hunt, 279 AD2d 781 [3rd Dept., 2001]).

Here, plaintiff's testimony at her deposition demonstrates that, prior to being struck in the rear by defendant's vehicle, her vehicle was coming to a stop at a red light behind another vehicle.

Based on this evidence, plaintiffs established *prima facie* that plaintiff was not the proximate cause of the subject accident (see, Cortes v. Whelan, 83 AD3d 763 [2nd Dept.,2011]; Hauser v. Adamov, 74 AD3d 1024 [2nd Dept.,2010]; Hyeon Hee Park v. Hi Taek Kim, 37 AD3d 416 [2nd Dept.,2007]; Bournazos v. Malfitano, 275 AD2d 437 [2nd Dept., 2000], Smith v. Cafiero, 203 AD2d 355 [2nd Dept.,1994]). In opposition to plaintiffs' *prima facie* showing, defendant failed to come forward with a non-negligent explanation for the collision to overcome the inference of negligence and preclude an award of summary judgment (see, Blasso v. Parente, 79 AD3d 923 [2nd Dept.,2010]; Franco v. Breceus, 70 AD3d 767 [2nd Dept.,2010]; Vespe v. Kazi, 62 AD3d 408 [1st Dept.,2009]) or to show that any negligence on the part of plaintiff contributed to the accident's happening (see, Kastritsios v. Marcello, 84 AD3d 1174 [2nd Dept.,2011]; Ramirez v. Konstanzer, 61 AD3d 837 [2nd Dept.,2009]; Smith v. Seskin, 49 AD3d 628 [2nd Dept.,2008]). Contrary to defendant's contention that the vehicle ahead of plaintiff's vehicle "suddenly stopped short," causing both her and plaintiff to veer their vehicles to the right in an attempt to avoid a collision, defendant, as the operator of a motor vehicle, was required to see "that which through proper use of [her] senses [she] should have seen" (Goemans v. County of Suffolk, 57 AD3d 478, 479 [2nd Dept.,2008] quoting Bongiovi v. Hoffman, 18 AD3d 686, 687 [2nd Dept.,2005]; see, Dominguez v. CCM Computers, Inc., 74 AD3d 728, 902 NYS2d 163 [2nd Dept.,2010]; Yelder v. Walters, 64 AD3d 762 [2nd Dept.,2009]). At her deposition, defendant admitted that she struck the rear of plaintiff's slowing vehicle and that the hit caused plaintiff's vehicle to strike the vehicle ahead of it. Defendant also acknowledged that she neither was able to see nor did she see the traffic light at the intersection prior to the accident's occurrence. Under these circumstances, the sole proximate cause of the accident was defendant's failure to drive at a safe speed and to maintain a safe distance behind plaintiff's vehicle (see, Blasso v. Parente, 79 AD3d 923 [2nd Dept.,2010]; Mandel v. Benn, 67 AD3d 746 [2nd Dept.,2009]; Cuccio v. Ciotkosz, 43 AD3d 850 [2nd Dept.,2007]; Mankiewicz v. Excellent, 25 AD3d 591 [2nd Dept.,2006]). Accordingly, plaintiffs' motion for partial summary judgment on the issue of liability is granted.

Defendant cross-moves for summary judgment on the asserted basis that the injuries alleged to have been sustained by plaintiff in the subject accident do not come within the meaning of the "serious injury" threshold requirement of Insurance Law §5102(d). In support of the cross motion, defendant submits copies of the pleadings, plaintiff's deposition transcript, an uncertified copy of plaintiff's employment record and the sworn medical report of Michael Katz, M.D. At defendant's request, Dr. Katz conducted an independent orthopedic examination of plaintiff on August 24, 2010. Plaintiff opposes the cross motion on the ground that defendant failed to make a *prima facie* showing that she did not sustain a serious injury as required by Insurance Law §5102(d). In particular, plaintiff asserts that she sustained an injury within the "limitation of use" categories and the "90/180" category of the Insurance Law as a result of the subject accident. In opposition, plaintiff submits her own affidavit, the affidavit and treatment notes of Dr. Michael Campo, copies of her treatment records from Brookhaven Memorial Center and the unsworn medical reports of David Dynoff, M.D, and Steven Winter, M.D.

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (Dufel v. Green, 84 NY2d 795

[1995]; see also, Toure v. Avis Rent A Car Sys., 98 NY2d 345 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (see, Licari v. Elliott, 57 NY2d 230 [1982]; Porcano v. Lehman, 255 AD2d 430 [2nd Dept., 1988]; Nolan v. Ford, 100 AD2d 579 [2nd Dept., 1984], aff'd 64 NY2d 681 [1984]).

Insurance Law §5102 (d) defines a "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."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a *prima facie* case that the plaintiff did not sustain a "serious injury" (see, Toure v. Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v. Eyler, 79 NY2d 955 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, [such as], affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (see, Pagano v. Kingsbury, 182 AD2d 268, 270 [2nd Dept.,1992]). A defendant may also establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (see, Fragale v. Geiger, 288 AD2d 431 [2nd Dept.,2001]; Grossman v. Wright, 268 AD2d 79 [2nd Dept.,2000];Vignola v. Varrichio, 243 AD2d 464 [2nd Dept.,1997]; Torres v. Micheletti, 208 AD2d 519 [2nd Dept.,1994]). Once a defendant has met this burden, the plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (see, Dufel v. Green, 84 NY2d 795 [1995]; Tornabene v. Pawlewski, 305 AD2d 1025 [4th Dept., 2003]; Pagano v. Kingsbury, 182 AD2d 268 [2nd Dept.,1992]). However, if a defendant does not establish a *prima facie* case that the plaintiff's injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff's opposition papers (see, Burns v. Stranger, 31 AD3d 360 [2nd Dept.,2006]; Rich-Wing v. Baboolal, 18 AD3d 726 [2nd Dept.,2005]; see generally, Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Moreover, a plaintiff claiming a significant limitation of use of a body function or system must substantiate his or her complaints with objective medical evidence showing the extent or degree of the limitation caused by the injury and its duration (see, Ferraro v. Ridge Car Serv., 49 AD3d 498 [2nd Dept.,2008]; Mejia v. DeRose, 35 AD3d 407 [2nd Dept.,2006]; Laruffa v. Yui Ming Lau, 32 AD3d 996 [2nd Dept.,2006]; Kearse v. New York City Tr. Auth., 16 AD3d 45 [2nd Dept.,2005]). "Whether a limitation of use or function is 'significant' or 'consequential' (i.e. important . . .), relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (Dufel v. Green, 84 NY2d 795, at 798 [1995]). A plaintiff claiming injury under either of the "limitation of use" categories also must present

medical proof contemporaneous with the accident showing the initial restrictions in movement or an explanation for its omission (see, Magid v. Lincoln Servs. Corp., 60 AD3d 1008 [2nd Dept.,2009]; Hackett v. AAA Expedited Freight Sys., 54 AD3d 721 [2nd Dept.,2008]; Ferraro v. Ridge Car Serv., 49 AD3d 498 [2nd Dept.,2008]; Morales v. Daves, 43 AD3d 1118 [2nd Dept.,2007]), as well as objective medical findings of restricted movement that are based on a recent examination of the plaintiff (see, Nicholson v. Allen, 62 AD3d 766 [2nd Dept.,2009]; Diaz v. Lopresti, 57 AD3d 832 [2nd Dept.,2008]; Laruffa v. Yui Ming Lau, 32 AD3d 996 [2nd Dept.,2006]; John v. Engel, 2 AD3d 1027 [3rd Dept.,2003]). 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 may also suffice (see, Toure v. Avis Rent A Car Systems, Inc., 98 NY2d 345 [2002]; Dufel v. Green, 84 NY2d 795 [1995]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (see, Licari v. Elliott, 57 NY2d 230 [1982]). Further, a plaintiff alleging injury within the "limitation of use" categories who ceases treatment after the accident must provide a reasonable explanation for having done so (see, Pommells v. Perez,; see, Ferebee v. Sheika, 58 AD3d 675 [2nd Dept., 2009]; Besso v. DeMaggio, 56 AD3d 596 [2nd Dept., 2008]).

Based upon the adduced evidence, defendant established, *prima facie*, her entitlement to judgment as a matter of law on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d) (see, Toure v. Avis Rent A Car Systems, Inc., 98 NY2d 345 [2002]; Dufel v. Green, 84 NY2d 795 [1995]). Defendant's examining orthopedist, Dr. Katz, states in his medical report that an examination of plaintiff reveals that she has full range of motion in her cervical and thoracolumbosacral regions and in her right shoulder. Dr. Katz states that there was no swelling, erythema or induration in plaintiff's right shoulder; that her gait was normal; that there was no paravertebral muscle spasm in her cervical or thoracolumbosacral spine; and that the straight leg raising test was negative. Dr. Katz opines that the cervical and thoracolumbosacral strain and the right shoulder contusion that plaintiff sustained as a result of the accident have resolved and that she exhibits no signs or symptoms of permanent loss of use relative to her musculoskeletal system causally related to the accident. Dr. Katz concludes his report by stating that plaintiff is not disabled, is capable of gainful employment as a switchboard operator and is capable of performing her daily living activities without restriction. Therefore, defendant has shifted the burden to plaintiff to come forward with evidence in admissible form to raise a material triable issue of fact as to whether she sustained an injury within the meaning of the Insurance Law (see, Pommells v. Perez, 4 NY3d 566, 574 [2005]; see generally, Zuckerman v. City of New York, 49 NY2d 557 [1980]).

In opposition to defendant's *prima facie* showing, plaintiff has come forward with admissible evidence that raises a triable issue of fact as to whether she sustained a serious injury to her cervical and thoracolumbosacral regions of her spine within each of the limitations of use categories of Insurance Law § 5102(d) (see, Pommells v. Perez., 4 NY3d 566 [2005], Licari v. Elliott, 57 NY2d 230 [1982]; Evans v. Pitt, 77 AD3d 611 [2nd Dept.,2010], *lv. denied* 16 NY3d 736 [2011]; Harris v. Boudart, 70 AD3d 643 [2nd Dept.,2010]). "The mere existence of bulging discs and herniations, in the absence of objective evidence as to the extent of the alleged physical limitations resulting from the injuries and their duration, is not evidence of serious injury" (Pierson v. Edwards, 77 AD3d 642, 643 [2nd Dept.,2010]; see, Lozusko v. Miller, 72 AD3d 908 [2nd Dept.,2008]; Zarate v. McDonald,

31 AD3d 632 [2nd Dept.,2006]). However, when evidence of disc bulges and herniations are coupled with evidence of range of motion limitations, positive MRI findings and objective test results, this is sufficient to defeat summary judgment (see, Wadford v. Gruz, 35 AD3d 258 [2nd Dept.,2006]; Meely v. 4 G's Truck Renting Co., Inc., 16 AD3d 26 [2nd Dept.,2005]; Kearse v. New York City Tr. Auth., 16 AD3d 45 [2nd Dept.,2005]). Plaintiff primarily relies upon the affidavit of Dr. Campo, her treating chiropractor, which states that he began treating plaintiff for pain in her cervical and thoracolumbosacral regions on June 19, 2009, and that he re-examined her on August 29, 2010. Dr. Campo explains that his initial examination of plaintiff revealed significant decreases in her ranges of motion in her spine, that her movements were slow and guarded and noticeably difficult and that he recommended that she not return to work until August 10, 2009. Dr. Campo states that his review of plaintiff's MRI reports revealed that she is suffering from disc bulges and herniations in her cervical and thoracolumbosacral regions of her spine. He also states that a recent examination of plaintiff revealed decreased ranges of motion in her cervical and lumbar spines and marked spasm in her cervical and thoracolumbosacral regions upon palpation. Dr. Campo opines that plaintiff's injuries are chronic and permanent in nature and that her injuries are the direct result of the subject accident. Thus, plaintiff has submitted objective medical proof, based upon contemporaneous and recent examinations, demonstrating that she sustained significant range of motion limitations in her cervical and thoracolumbosacral regions of her spine as a result of the subject accident (see, Kanarad v. Setter, 87 AD3d 714 [2nd Dept.,2011]; Khavosov. v. Castillo, 81 AD2d 903 [2nd Dept.,2011]; Dixon v. Fuller, 79 AD3d 1094 [2nd Dept.,2010]; Gussack v. McCoy, 72 AD3d 644 [2nd Dept.,2010]). Accordingly, it is

ORDERED that the motion by plaintiffs Nicola Fitzgerald and Alan Fitzgerald seeking summary judgment in their favor on the issue of liability is granted; and it is further

ORDERED that the cross motion by defendant Christine Czubek seeking summary judgment dismissing the complaint is denied.

Dated: 12/21/11

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION