SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

DONNA ARMSTRONG,

Plaintiff,

- against -

HILDA QUINTO,

Defendant.

- x

Index No.: 15572/2010

Motion Date: 07/05/12

Motion No.: 2

Motion Seq.: 1

The following papers numbered 1 to 20 were read on this motion by defendant, HILDA QUINTO, for an order pursuant to CPLR 3212(b) granting defendant summary judgment on the issue of liability and dismissing the plaintiff's complaint; and for an order pursuant to CPLR 3212 granting defendant summary judgment and dismissing the plaintiff's complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104:

Papers Numbered

Notice of Motion-Affidavits-Exhibits.....1 - 9
Affirmation in Opposition-Affidavits-Exhibits.....10 - 16
Reply Affirmation.....17 - 20

In this negligence action, plaintiff, Donna Armstrong, seeks to recover damages for personal injuries she sustained as a result of a motor vehicle accident that occurred on December 17, 2009, between the plaintiff's vehicle and the vehicle owned and operated by defendant, Hilda Quinto. The accident took place on South Conduit Avenue at its intersection with Farmers Boulevard, Queens County, New York. The defendant was traveling eastbound on South Conduit Avenue through the intersection with Farmers Boulevard with a green signal in her favor. As she entered the

intersection intending to go straight across, her vehicle collided with the plaintiff's vehicle which was proceeding southbound on Farmers Boulevard and entered the intersection against a red light. The plaintiff alleges that she moved into the intersection because a fire truck with its sirens and lights on was directly behind her trying to proceed through the intersection.

In her verified bill of particulars, the plaintiff states that as a result of the accident, she sustained, inter alia, a complex tear of the anterior horn of the lateral meniscus of the left knee and a discrete tear of the lateral collateral ligament of the left knee. She states that as a result of the accident, she was confined to her bed and her home for one week immediately following the accident.

The plaintiff commenced this action by filing a summons and complaint dated June 11, 2010. Issue was joined by service of defendant's verified answer dated August 19, 2010. Defendant now moves for an order pursuant to CPLR 3212(b), granting summary judgment on the issue of liability and dismissing the plaintiff's complaint. Defendant also moves for an order pursuant to CPLR 3212(b) for an order granting said defendant summary judgment and dismissing the plaintiff's complaint on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law §§ 5102 and 5104.

In support of the motion, the plaintiff submits an affidavit from counsel, Megan C. Sampson, Esq; a copy of the pleadings; a copy of plaintiff's verified bill of particulars; a copy of the transcript of the examination before trial of the plaintiff, Donna Armstrong and defendant, Hilda Quinto; a copy of the police accident report (MV-104); the affirmed medical report of orthopedist, Dr. Stanley Ross and the affirmed medical report of radiologist, Dr. Sheldon P. Feit.

In the accident description section of the police report, the officer, who did not witness the accident, describes the accident based upon statements of the two drivers as follows:

"At t/p/o Op #1 (defendant) was E/B on S. Conduit and had the green light, so she went. Op #2 (plaintiff) was trying to go to her left to let a fire truck with its lights on go. She was at a red light (fire truck was behind Op #2)."

In her examination before trial, taken on July 20, 2011, the plaintiff, age 54, testified that on the day of the accident, at approximately 2:30 p.m., she was leaving her job as a nursing assistant at Nassau Extended Care and proceeding to P.S. 25 to pick up her grandson. She was traveling on Farmers Boulevard

towards South Conduit. She stopped her vehicle at the intersection of Farmers Boulevard and South Conduit because the light was red. She then observed a fire engine behind her in her rear view mirror with its lights and sirens on. At that time the traffic light at the intersection was red in her direction. She stated that she could not pull over to the right or left because there was traffic. After stopping and waiting for the intersecting traffic to pass on South Conduit, she decided to proceed into the intersection against the red light in order to allow the fire truck to pass. She then stopped in the intersection. After approximately one minute, her vehicle was impacted on the right rear passenger's side by the vehicle being operated by the defendant. Defendant's vehicle came from her right on South Conduit. Plaintiff testified that she did not see defendant's 's vehicle prior to the impact. She told the police officer at the scene that she stopped at the red light but because the fire truck behind her was sounding its sirens and because she could not move to either side she proceeded into the intersection against the red light. She testified that she hit her head, left knee, and right shoulder as a result of the impact. She left the scene in an ambulance and was transported to the emergency room at Franklin General Hospital where she was given x-rays and was released the same day.

The following day she sought treatment with her primary care physician, Dr. Barbara Mandell. She presented to Dr. Mandell with pain in her right shoulder, neck, and left knee. She began a course of physical therapy at Sky Medical in Elmont where she was treated for pain to her right shoulder, left knee and neck. She continued there for about six months at a rate of two or three times per week. When asked if she had ever received treatment to her left knee or leg or right shoulder prior to the instant accident of December 17, 2009, she responded that she had not. However, she stated that she did file a workers compensation claim in 2004 due to an injury she sustained at her job for which she required surgery on her right knee. She also filed a workers compensation claim in 2008 as a result of a fall at work and she again injured her right knee for which she required additional surgery in June 2009. With respect to the injuries sustained in the instant action, she testified that the only physical therapy she had was a six month course at Sky therapy. She stopped because her no-fault carrier stopped paying for it. She stated that a doctor at Sky told her that she had a torn meniscus of the left knee from this accident which requires surgery. She has private health insurance through her union. She missed a week from work due to this accident. She was not placed on modified or light duty when she returned. She states that she still has pain in her right shoulder and left knee.

Defendant, Hilda Quinto, testified at her examination before trial that she is an attorney specializing in civil litigation. At the time of the accident, she was leaving her office in Richmond Hill, Queens, and proceeding to her house in Oceanside. She was traveling eastbound in the right lane on South Conduit and intended to continue straight through the intersection with Farmers Boulevard. She stated that there is a traffic signal at the intersection which was green in her favor as she approached. She testified that when she first observed the plaintiff's vehicle, a few seconds before the accident, it was moving against the red light into the intersection. She tried to avoid a collision by pressing on her brakes. She did not observe a fire truck behind the plaintiff's vehicle prior to the accident or hear fire engine sirens but she observed a fire truck at the scene of the accident that she believed was on the scene before the accident. She did not know where the truck was before the accident. As she entered the intersection the front of her vehicle impacted the front passenger side of the plaintiff's vehicle. When she was approached by a firemen and a police officer she indicated to each person that she had a green light in her favor.

Defendant's counsel submits a copy of the affirmed medical report of orthopedist Dr. Stanley Ross who was retained by the defendant to perform an independent medical evaluation of the plaintiff. His examination took place on August 31, 2011. At that time the plaintiff denied any history of prior accidents and denied undergoing any prior surgery. She told Dr. Ross that she missed one week from her position as a certified nursing assistant but that she is now working full time performing the same duties. Upon performing objective and comparative range of motion testing he found that the plaintiff had no limitations of range of motion of the cervical spine, thoracic spine, lumbar spine, right shoulder and right knee. He states that his impression was a normal exam of the cervical spine, thoracic spine, lumbar spine, right shoulder and left knee. He states that there is no evidence of any injury causally related to the subject accident.

Defendant also submits the radiological report of Dr. Sheldon P. Feit who states that the MRI of the right shoulder shows no evidence of a rotator cuff tear or fracture. He states that the impingement on the supraspinatus muscle at the acromioclavicular joint is entirely degenerative.

Counsel for defendant Quinto contends that the medical report of Drs. Ross and Feit as well as the plaintiff's deposition testimony stating that she went back to work one week after the accident are sufficient to establish, prima facie, that

the plaintiff has not sustained a permanent consequential limitation or use of a body organ or member; a significant limitation of use of a body function or system; or a medically determined injury or impairment of a nonpermanent nature which prevented the plaintiff from performing substantially all of the material acts which constitute her 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 opposition to the motion to dismiss plaintiff's complaint on the issue of serious injury, plaintiff submits the affidavit of Donna Armstrong, the radiological report of Dr. Alan Berlly, the orthopedic report of Dr. Donald Goldman, and the medical report of Dr. Gerald Surya. In her affidavit dated March 23, 2012, plaintiff states that she was 52 years old at the time of the accident and in excellent health. She states that as a result of the accident she had pain in her left knee, right shoulder, neck and back. She states that she did not injure those parts of her body in any prior accident. She received six months of physical therapy following the accident. She states that despite the physical therapy she still experiences pain in her right shoulder left knee and lumbar spine. She states that she stopped treating when her no-fault benefits were terminated because she could not afford to pay out-of-pocket. Despite having private health insurance she states that she could not afford the co-payments as she was living on limited income.

Dr. Surya states that he first examined the plaintiff on December 22, 2009 and found that she had significant limitations of range of motion of the cervical spine, lumbar spine right shoulder and left knee causally related to the accident of December 17, 2009. The limitations which were objectively measured are specified in his report. He states that he was aware of the plaintiff's prior workers compensation cases which did not involve her left knee, left shoulder, neck or back. He states that plaintiff stopped treatment at his facility because her no-fault benefits ran out and could not afford to make the insurance co-payments on her own.

Dr. Goldman, an orthopedist examined the plaintiff on April 10, 2012. His objective and comparative testing of range of motion showed significant limitations of the left knee and right shoulder. He agreed with Dr. Goldstein's MRI report stating that the plaintiff had sustained a complex tear of the lateral meniscus of the left knee. He stated that he was aware of the plaintiff's workers compensations claims and concluded that the plaintiff's injuries were causally related to the accident of

December 17, 2009 and are considered to be permanent.

SERIOUS INJURY

Initially, it is defendant's obligation to demonstrate that the plaintiff has not sustained a "serious injury" by submitting affidavits or affirmations of its medical experts who have examined the litigant and have found no objective medical findings which support the plaintiff's claim (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler, 79 NY2d 955 [1992]). Where defendant's motion for summary judgment properly raises an issue as to whether a serious injury has been sustained, it is incumbent upon the plaintiff to produce evidentiary proof in admissible form in support of his or her allegations. The burden, in other words, shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury (see Gaddy v. Eyler, 79 NY2d 955 [1992]; Zuckerman v. City of New York, 49 NY2d 557[1980]; Grossman v. Wright, 268 AD2d 79 [2d Dept 2000]).

Here, the proof submitted by defendant Quinto, including the affirmed medical report of Drs. Ross and Feit, and the plaintiff's examination before trial in which she stated that she returned to work after missing only one week, were sufficient to meet defendant's prima facie burden by demonstrating that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (see Toure v Avis Rent A Car Sys., 98 NY2d 345 [2002]; Gaddy v Eyler,79 NY2d 955 [1992]).

However, this Court finds that the plaintiff raised triable issues of fact by submitting the affirmed medical reports of Drs. Surya, Goldman and Berlly attesting to the fact that the plaintiff had significant limitations in range of motion both contemporaneous to the accident and in a recent examination, and concluding that the plaintiff's limitations were significant and resulted from trauma causally related to the accident (see Dixon v Fuller, 79 AD3d 94 [2d Dept. 2010]; Ortiz v Zorbas, 62 AD3d 770 [2d Dept. 2009]; Azor v Torado, 59 AD3d 367 [2d Dept. 2009]). As such, the plaintiff raised a triable issue of fact as to whether she sustained a serious injury of her right shoulder, left knee and back under the permanent consequential and/or the significant limitation of use categories of Insurance Law § 5102(d) as a result of the subject accident (see Khavosov v Castillo, 81 AD3d 903[2d Dept. 2011]; Mahmood v Vicks, 81 ADd 606[2d Dept. 2011]; Compass v GAE Transp., Inc., 79 AD3d 1091[2d Dept. 2010]; Evans v Pitt, 77 AD3d 611 [2d Dept. 2010]).

In addition, the plaintiff adequately explained the gap in her treatment by submitting her own affidavit, saying that no-fault had stopped her benefits and she not afford to pay out of pocket for the co-payments for her treatments (see Abdelaziz v Fazel, 78 AD3d 1086 [2d Dept. 2010]; Tai Ho Kang v Young Sun Cho, 74 AD3d 1328 [2d Dept. 2010]; Domanas v Delgado Travel Agency, Inc., 56 AD3d 717 [2d Dept. 2008]; Black v Robinson, 305 AD2d 438 [2d Dept. 2003]).

LIABILITY

Defendant's counsel contends, based upon the deposition testimony of the parties, that the defendant bears no liability for the causation of the accident. He states that the defendant was proceeding lawfully on Farmers Boulevard with the green light in her favor when she observed the plaintiff's vehicle stopped in the intersection. Counsel contends that defendant attempted to avoid the accident by applying her brakes with heavy pressure. Defendant also stated that she did not hear sirens or see fire engine lights. Defendant contends that the sole proximate cause of the accident was the plaintiff's admittedly moving into the intersection against the red light and stopping her vehicle in the middle of the intersection. Counsel contends that the police report indicates that plaintiff was cited by the police at the scene for "driver/distraction." Counsel contends, therefore, that the defendant is entitled to summary judgment dismissing the plaintiff's complaint as the plaintiff driver was solely responsible for causing the accident while the defendant was completely free from culpable conduct.

In opposition to the motion, plaintiff's counsel, Mark J. Linder, Esq., contends that the defendant has failed to establish, prima facie, its entitlement to summary judgment because there are conflicting versions of how the accident occurred and questions regarding the comparative negligence of each party. Counsel argues that defendant's deposition testimony does not establish her freedom from culpable conduct. Counsel contends that there are questions of fact as to whether the fire truck did in fact have its lights and sirens on, why the defendant did not slow down when she approached the intersection to allow the fire truck through the intersection, and what efforts the defendant made to avoid the accident after she observed the plaintiff's vehicle in the intersection.

Upon review of the defendant's motion, the plaintiff's opposition and the defendant's reply thereto this court finds as follows:

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form in support of his position (see Zuckerman v City of New York, 49 NY2d 557[1980]).

Pursuant to VTL § 1144. Operation of vehicles on approach of authorized emergency vehicles

"(a) Upon the immediate approach of an authorized emergency vehicle equipped with at least one lighted lamp exhibiting red light visible under normal atmospheric conditions from a distance of five hundred feet to the front of such vehicle other than a police vehicle or bicycle when operated as an authorized emergency vehicle, and when audible signals are sounded from any said vehicle by siren, exhaust whistle, bell, air-horn or electronic equivalent; the driver of every other vehicle shall yield the right of way and shall immediately drive to a position parallel to, and as close as possible to the right-hand edge or curb of the roadway, or to either edge of a one-way roadway three or more lanes in width, clear of any intersection, and shall stop and remain in such position until the authorized emergency vehicle has passed, unless otherwise directed by a police officer."

Here, although the plaintiff testified that she entered the intersection against a red light to permit the fire truck to pass, there is a question of fact as to whether the fire truck had its lights and sirens on and whether plaintiff was complied with VTL § 1144 or whether she was negligent in entering the intersection against the red light. In addition, there are questions of fact as to whether the defendant was negligent as well and whether the defendant's actions were a proximate cause of the accident.

The defendant, as the operator of a vehicle with the right-of-way, was entitled to assume that the opposing driver will obey the traffic laws requiring her to yield (see Ahern v Lanaia, 85 AD3d 696 [2d Dept. 2011]; Mohammad v Ning, 72 AD3d 913 [2d Dept. 2010]; Loch v Garber, 69 AD3d 814 [2d Dept. 2010]; Yelder v Walters, 64 AD3d 762 [2d Dept. 2009]). However, "a driver who has the right-of-way has a duty to exercise reasonable care to avoid a collision with another vehicle already in the intersection" (Todd v Godek, 71 AD3d 872 [2d Dept. 2010]; also see Steiner v Dincesen, 95 AD3d 877 [2d Dept. 2012]; Pollack v Margolin, 84 AD3d 1341 [2d Dept. 2011]). Thus, even though the

defendant had the green light in her favor, there is testimony that she observed the plaintiff's car in the intersection for approximately one minute prior to the accident. In this regard there is a question of fact as to when the defendant first saw plaintiff's vehicle and whether defendant had adequate time to perceive and react to its entry into the intersection (see Bonilla v Gutierrez, 81 AD3d 581 [2d Dept. 2011]).

Therefore, there is a question of facts as to whether defendant, exercised reasonable care when she entered the intersection or if she failed to use reasonable care to avoid a collision with the plaintiff's vehicle which was already in the intersection (see Wilson v Rosedom, 82 AD3d 970 [2d Dept. 2011]; Cox v Weil, 66 AD3d 634 [2d Dept. 2009]; Borukhow v Cuff, 48 AD3d 726 [2d Dept. 2008]). Thus, the defendant's evidentiary submissions did not prove her freedom from negligence as a matter of law, and as such, were insufficient to establish, prima facie, that the plaintiff's actions were the sole proximate cause of the accident or to eliminate all issues regarding the facts surrounding the accident and whether either or both parties were negligent (see Allen v Echols, 88 AD3d 926[2d Dept. 2011]; Pollack v Margolin, 84 AD3d 1341 [2d Dept. 2011]; Myles v Blain, 81 AD3d 798 [2d Dept. 2011]; Sayed v Aviles, 72 AD3d 1061 [2d Dept. 2010]).

Accordingly, as triable questions exist as to whether both drivers exercised due care as they entered the intersection and, if not, whether such lack of care was a proximate cause of the accident (see Gorham v Methun, 57 AD3d 480 [2d Dept. 2008]), it is hereby

ORDERED, that the motion by defendant to dismiss the plaintiff's complaint on the ground that she did not sustain a physical injury as defined in the Insurance Law is denied, and it is further,

ORDERED, the motion by defendant for summary judgment dismissing the complaint on the ground of liability is denied, and it is further,

ORDERED and the Clerk of Court is authorized to enter judgment accordingly.

Dated: September 10, 2012
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.