SHORT FORM ORDER

INDEX No. 10-20437
CAL No. 11-02207MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 10-21-11 (#001)
MOTION DATE 12-22-11 (#002)
ADJ. DATE 3-29-12
Mot. Seq. # 001 - MD
002 - MG

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MARIE JUDE FRANCOIS,

Plaintiff,

- against -

DANIEL J. SOCCI and JOANN L. MARINO,

Defendants.

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Upon the following papers numbered 1 to 18 read on this motion and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers with Memorandum of Law 1 - 5 ; Notice of Cross Motion and supporting papers 6 - 9 ; Answering Affidavits and supporting papers 10 - 14 ; Replying Affidavits and supporting papers 15 - 18 ; Other ___; it is,

ORDERED that this motion (seq. #001) by defendants for an Order, pursuant to CPLR 3212, granting summary judgment in their favor dismissing the complaint on the ground that plaintiff did not sustain a serious injury as defined in Insurance Law § 5102 (d) is denied; and it is further

ORDERED that this cross-motion (seq. #002) by plaintiff for summary judgment on the issue of liability is granted.

Plaintiff seeks to recover damages for serious injuries allegedly sustained in a rear-end motor vehicle accident on October 3, 2008, near the intersection of Park Avenue and Main Street in Huntington, New York. Plaintiff was stopped at a red light behind a line of traffic in the southbound lane of Park Avenue when her vehicle was rear-ended by the vehicle owned by defendant JoAnn Marino and operated by defendant Daniel Socci.

In her complaint as amplified by her bill of particulars, plaintiff alleges that she sustained various injuries, including multiple disc bulges, and strains/sprains and spasms in her cervical, thoracic and lumbar regions, which have resulted in pain and limitations in the range of motion of her spine, hips and lower extremities. Plaintiff also alleges that she was totally disabled and incapacitated from employment as a nursing assistant for approximately eight weeks and partially disabled thereafter to date.

In support of the motion for summary judgment dismissing the complaint, defendants have submitted, *inter alia*, the pleadings, the transcript of plaintiff's deposition testimony, and reports from Maria Audrie DeJesus, M.D., a neurologist, Michael J. Katz, M.D., an orthopedic surgeon, and David A. Fisher, M.D., a radiologist. Plaintiff testified that prior to the accident she worked full-time as a nursing assistant at Huntington Hospital, and on a per diem basis at the Northport VA Medical Center. Her duties entailed lifting patients into and out of beds and chairs and patient care which included taking their vital signs, cleaning, feeding, clothing and transporting them. Plaintiff testified that after the subject accident on October 3, 2008, she did not return to either job until the beginning of December 2008. Plaintiff also testified that when she returned to both jobs, she was able to perform her duties without restrictions or limitations, but needed help lifting patients.

Dr. DeJesus, who was hired by the defendants, examined plaintiff on June 28, 2011. At that time, plaintiff complained of on and off localized pain to her lower back and occasional localized neck pain. Dr. DeJesus, with the assistance of a goniometer and comparing the measurements to normal, found no limitations in range of motion or spasms in plaintiff's cervical spine and thoracic/lumbar spine; however, upon lateral bending plaintiff complained of pain (4/10) in the thoracic/lumbar spine. Patrick and Kernig's tests were negative. Plaintiff's mental functions were normal as were her cranial nerves, fundi and visual fields. Upon motor examination, no atrophy, weakness or fasciculations were noted and plaintiff's muscle tone and bulk were normal. Reflexes were symmetric in the upper and lower extremities, and sensory examination and cerebellar functions were normal. Dr. DeJesus reports that plaintiff's neurologic examination was normal and diagnosed cervical, thoracic and lumbar spine sprain/strain, resolved. Dr. DeJesus opines that there is no indication of a neurologic disability as a result of the subject accident and that plaintiff can work and perform all usual daily activities without restriction or limitation.

Dr. Katz, hired by defendants, examined plaintiff on July 12, 2011, at which time she complained of neck and back pain. Dr. Katz reports that upon physical examination, using a goniometer and comparing the measurements to what is normal, he found no limitations in the range of motion in plaintiff's cervical and thoracolumbosacral spine, her shoulders, thighs, hips, knees or legs. Dr. Katz also found no muscle spasms, no swelling or contusions. He sets forth the objective tests performed, i.e., Adson's and straight leg raising testing, and states that they were negative. Dr. Katz diagnosis indicates that plaintiff's cervical and thoracolumbosacral strains are resolved, as are the contusions to her shoulders, arms, legs, thighs and knees. Dr. Katz also noted the significance of the MRI report of the cervical spine indicating changes that are degenerative in nature. Dr. Katz opines that plaintiff is not disabled and is capable of working full time as a nursing assistant and is capable of performing the activities of daily living.

The August 23, 2011 affirmed reports of defendants' radiologist, Dr. Fisher, indicates that he reviewed the MRI images of plaintiff's cervical spine and lumbar spine from November 2008. Dr. Fisher indicates that there are no disc herniations or bulges and that the studies were normal. Dr. Fisher concludes that there were no findings that could be attributed to the subject accident of October 3, 2008.

Based on the defendants' submission, they have met their *prima facie* burden of demonstrating entitlement to judgment as a matter of law by showing, through the affirmed reports of their medical experts and plaintiff's deposition testimony, 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* ***Hayes v Vasilios***, 96 AD3d 1010, 947 NYS2d 550 [2d Dept 2012]; ***Seongho Choi v Guerrero***, 82 AD3d 1080, 918 NYS2d 897 [2d Dept 2011]; ***Harris v Boudart***, 70 AD3d 643, 893 NYS2d 631 [2d Dept 2010]; ***Meely v 4 G's Truck Renting Co., Inc.***, 16 AD3d 26, 789 NYS2d 277 [2d Dept 2005]). It is indisputable that plaintiff's alleged injuries are not "total" and, thus, do not constitute a serious injury under the permanent loss of use category set forth in Insurance Law § 5102 (d) (*see* ***Oberly v Bangs Ambulance, Inc.***, 96 NY2d 294, 727 NYS2d 378 [2001]). Morever, based on the defendants' evidence, none of the injuries plaintiff allegedly sustained constitute a serious injury under the permanent consequential limitation of use or the significant limitation of use categories of Insurance Law § 5102 (d) (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Quintana v Arena Transport, Inc.***, 89 AD3d 1002, 933 NYS2d 379 [2d Dept 2011]). Defendants also established *prima facie* that plaintiff did not sustain a serious injury under the 90/180 category of Insurance Law § 5102 (d) (*see* ***Knox v Lennihan***, 65 AD3d 615, 884 NYS2d 171 [2d Dept 2009; ***Rico v Figuero***, 48 AD3d 778, 853 NYS2d 129 [2d Dept 2008]). Thus, the burden shifts to plaintiff to submit competent evidence based upon objective medical findings and diagnostic tests to raise an issue of fact necessary to satisfy the threshold requirement that a serious injury was sustained (*see, **Gaddy v Eyler**, supra*).

A plaintiff claiming injury within the "limitation of use" categories must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitation of movement caused by the injury and its duration (*see* ***Ferraro v Ridge Car Serv.***, 49 AD3d 498, 854 NYS2d 408 [2d Dept 2008]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 772 [2d Dept 2006]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]; ***Meyers v Bobower Yeshiva Bnei Zion***, 20 AD3d 456, 797 NYS2d 773 [2d Dept 2005]). In this regard, "[w]hether a limitation of use or function is 'significant' or 'consequential' (i.e., important: *see* ***Countermine v Galka***, 189 AD2d 1043, 1045, 593 NYS2d 113) 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" (***Toure v Avis Rent A Car Sys., Inc.***, 98 NY2d 345, 353, 746 NYS2d 865 [2002]; ***Dufel v Green***, 84 NY2d 795, 798, 622 NYS2d 900 [1995]).

In opposition, plaintiff has submitted, *inter alia*, her own affidavit and sworn statements and reports from Dr. Marc Albert Lewandoski, an osteopathic physician, Dr. William F. Palmer, her treating chiropractor, Thomas J. Dowling, Jr., her treating orthopedist, and Dr. Richard Rosenberg, a radiologist. Plaintiff avers that more than three years after the accident, she still suffers neck and back pain, and a burning sensation in her lower back, that she has back pain whenever she performs her regular work lifting patients and now needs daily assistance performing this task when prior to the subject accident

she did not. Plaintiff states that after work she goes home in pain which is not fully alleviated with medication. Plaintiff also asserts she has neck pain that causes frequent headaches, making it difficult to concentrate and disturbing her sleep. Plaintiff states that she gets neck pain when she reads for an hour or writes for more than 30 minutes, and back pain when she sits or stands for more than an hour or drives. She can no longer shovel snow or push her lawnmower without pain. Plaintiff claims that the pain limits her ability to pull or lift objects, bend, stoop or squat. Plaintiff also claims that due to her physical limitations, she has hired a landscaper and must rely on her children's help to perform household chores, lift groceries and do the laundry. Plaintiff asserts that prior to the accident, she was a healthy adult raising her three children, and did not even have a primary care physician; now she is in pain, tense and anxious and under the care of doctors.

An x-ray of plaintiff's cervical spine was conducted on October 8, 2008. Dr. Richard Rosenberg, a radiologist, interpreted the films, and in his January 23, 2012 affirmation, opines that the films reveal straightening of the upper cervical lordosis. MRIs of plaintiff's spine performed in November 2008 reveal a disc bulge at T11/12, and disc bulges at C3/4, C4/5, C5/6 and C6/7.

Dr. Lewandoski evaluated and treated plaintiff on October 7, 2008 for injuries she sustained in the subject accident. In his January 23, 2012 affirmation, Dr. Lweandowski states that consistent with her complaints of pain, and the x-ray taken on October 8, 2008 which revealed straightening of the upper cervical spine, his examination of plaintiff revealed evidence of sternocleidomastoid strain, upper trapezius strain, muscle spasms, and a sprained shoulder and upper arm. He opined that plaintiff was totally disabled and unable to work at the time of his examination and he advised her to remain out of work for one week, with her return being dependent on her symptoms.

Dr. Palmer treated plaintiff continuously from October 6, 2008 to December 15, 2008. Dr. Palmer asserts that throughout the course of treatment, plaintiff complained of pain in her neck and her upper and mid-back regions consistent with findings of spasm, palpated tenderness, trigger points, hypertonicity in her trapezius musculature and fixed segments/restricted range of motion in her spine which he causally related to the October 3, 2008 motor vehicle accident. Dr. Palmer lists the tests he performed which he characterizes as objective, and revealed positive results, namely, Becherew Test/seated straight leg raising test, Lindner's Test, Spurling's Test and Soto-Hall Test. Dr. Palmer also indicates that upon palpation plaintiff had spasms in her shoulder and cervical spine. Based on these findings, Dr. Palmer took x-rays, a review of which revealed straightening of the cervical spine with slight reduction in flexion and extension. In his affidavit, Dr. Palmer explains that spasms are an involuntary muscle contraction and is an objective finding, and that trigger points are areas of localized tenderness that cause radiating pain or spasm in other parts of the body. Dr. Palmer further explains that hypertonicity is an increased tension of the muscles where the muscle tone is abnormally rigid, hampering proper movement, which can cause joint compression, excess lactic acid and a decrease in movement. Dr. Palmer asserts that as a result of the subject accident, plaintiff was totally disabled and unable to return to work as of October 6, 2008. Dr. Palmer notes that plaintiff returned to work on December 1, 2008, but states that she was not asymptomatic and that her injuries were not resolved as she continued to have neck and mid back pain with marked tenderness, hypertonic trapezial musculature and trigger points. Dr. Palmer states that plaintiff had made limited progress, that further chiropractic

treatment would have only been palliative in nature and could not cure her injury or eliminate the cause of her pain.

Dr. Dowling, plaintiff's treating orthopedist, asserts that he performed an initial evaluation on October 29, 2008, and saw her in follow-up visits on November 14, 2008, January 2, 2009, and February 13, 2009, and most recently on January 10, 2012. At each examination, Dr. Dowling reports that he performed passive range of motion testing by visual observations, and found restricted movement and muscle spasms and tenderness in the spinal region, and after each visit, advised plaintiff to continue with the chiropractic treatments. When the treatments became ineffective, on January 2, 2009, Dr. Dowling referred plaintiff to physical therapy. Dr. Dowling concludes that the restricted movement in plaintiff's spine is causally related the subject accident. He quantifies the loss of range of motion in plaintiff's spine, and although he does not compare the findings to the normal range of motion, he sets forth a qualitative assessment of her limitations as compared to the normal function of the spine. He opines to a reasonable degree of medical certainty that plaintiff sustained serious permanent disabling injuries to her neck and back with permanent limitation and loss of use of her neck and back secondary to discogenic neck and back pain. Dr. Dowling relates his assessment to plaintiff's complaints of pain when engaged in prolonged activities such as sitting, standing, reaching, and carrying heavy objects, lifting and moving patients, gardening, cooking and household chores. Dr. Dowling opines that plaintiff's injuries will likely continue to cause acute aggravations and exacerbations with pain and restrictions of function in the effected body parts, thereby requiring future care.

Plaintiff's treating chiropractic and physicians opined, based upon contemporaneous and recent examinations, as well as upon their view of the reports of MRI scans which showed bulging discs that plaintiff's cervical and thoracolumbosacral spine injuries and the observed range of motion limitations are permanent, significant and causally related to the subject accident. Therefore, the evidence submitted in opposition to the motion is sufficient to raise an issue of fact as to whether plaintiff suffered a serious injury as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys., Inc.***, 98 NY2d 345, *supra*; ***Johnson v Cristino***, 91 AD3d 604, 936 NYS2d 275 [2d Dept 2012]; ***Sin v Singh***, 74 AD3d 1320, 904 NYS2d 744 [2d Dept 2010]). Also, plaintiff's treating doctors' findings that her injuries were traumatic and causally related to the collision are sufficient to implicitly address the defendants' contention that the injuries were degenerative (*see* ***Fraser-Baptiste v New York City Tr. Auth.***, 81 AD3d 878, 917NYS2d 670 [2d Dept 2011]; ***Harris v Boudert***, 70 AD3d 643, 893 NYS2d 631 [2d Dept 2010]). Furthermore, the conflicting medical opinions of the plaintiff's and the defendants' radiologists regarding the nature and etiology of the injuries to her spine, i.e., degenerative or traumatic and causally related to the subject accident, raise a triable issue of fact (*see* ***Gaviria v Alvardo***, 65 AD3d 567, 884 NYS2d 134 [2d Dept 2009]; *see also* ***Seecooman v Ly***, 43 AD3d 900, 841 NYS2d 624 [2d Dept 2007]).

Additionally, contrary to the defendants' contention, plaintiff's treating doctors sufficiently addressed a prior work-related injury to plaintiff's back 15 years before the subject accident, noting that she was asymptomatic and without treatment, returning to work approximately two months thereafter (*see* ***Harris v Boudert***, *supra*). Further, there were no "gaps" in medical treatment since the plaintiff's treating doctors each explained that continued chiropractic and physical therapy would be palliative and she would experience no further improvement (*see* ***Gaviria v Alvardo***, *supra; see also* ***Seecooman v Ly***.

supra). Moreover, plaintiff explained that her no-fault benefits were terminated, that after the subject accident she separated from her husband and had to return to work, and that although her health insurance covered physical therapy treatments, she could not afford the co-payments, but continued on her own to do the home therapy exercises prescribed by her treating chiropractic and the physical therapist (*see* ***Gaviria v Alvardo***, *supra*; ***Domanas v Delgado Travel Agency, Inc.***, 56 AD3d 717, 868 NYS2d 132 [2d Dept 2008]). Accordingly, as plaintiff has raised an issue of fact, the defendants' motion for summary judgment dismissing the complaint based on plaintiff's failure to meet the serious injury threshold is denied.

Turning to plaintiff's cross-motion for summary judgment on the issue of liability, a rear-end collision with a stopped vehicle creates a *prima facie* case of negligence on the part of the driver of the rearmost vehicle, and imposes a duty on that driver to proffer a non-negligent explanation for the collision (***Tutrani v County of Suffolk***,10 NY3d 906, 861 NYS2d 610 [2008]; ***Cortes v Whelan***, 83 AD3d 763, 922 NYS2d 419 [2d Dept 2011]; ***Plummer v Nourddine***, 82 AD3d 1069, 919 NYS2d 187 [2d Dept 2011]; ***Volpe v Limoncelli***, 74 AD3d 795, 902 NYS2d 152 [2d Dept 2010]; ***Ditrapani v Marciante***, 10 AD3d 628, 781 NYS2d 611 [2004]). The presumption of negligence in rear-end cases arises from the duty of the driver of the vehicle behind to keep a safe distance and not collide with the traffic ahead (*see* Vehicle and Traffic Law § 1129 [a] ["The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway"]). If the driver of the offending vehicle cannot come forward with evidence to rebut the inference of negligence, the driver of the lead vehicle is entitled to summary judgment on the issue of liability (*see* ***Cortes v Whelan***, *supra*).

Here, based on evidence before the Court, including the deposition testimony of plaintiff and her affidavit wherein she attests that she was stopped at a red light when she was rear-ended by defendants' vehicle, plaintiff has sustained her burden of establishing a *prima facie* case of the defendant driver's negligence and entitlement to judgment as a matter of law. Having made the requisite *prima facie* showing, the burden shifts to defendant to rebut the inference of negligence by offering a non-negligent explanation for the happening of the accident.

Defendants have not come forward with any evidence that plaintiff negligently operated her vehicle. Rather, submitted in opposition is the affirmation of defendants' counsel wherein it is asserted that plaintiff's proof is facially deficient for lack of an affidavit of merit and incomplete unsigned deposition transcripts. However, the entire unsigned but certified transcript of plaintiff's deposition is annexed to the defendants' papers in support of their motion, the relevant pages of which are annexed to the plaintiff's cross-motion. Plaintiff's transcript is certified by the reporter, and the excerpts are being used to support her own motion, and therefore, adopted as accurate (*see* ***Zalot v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011], *lv denied* 17 NY3d 703, 929 NYS2d 93 [2011]; ***Ashif v Won Ok Lee***, 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]). Moreover, the papers before the Court include an affidavit of plaintiff wherein she sets forth that her vehicle was hit in the rear by the defendants' vehicle, thereby satisfying CPLR 3212 (b). Furthermore, the defendant driver acknowledged during his deposition and in a written statement that the accident occurred when he looked down to check his fuel gauge, thereby establishing his negligence (*see* ***Hauswirth v Transcare New York, Inc.***, 97 AD3d 792,

949 NYS2d 154 [2d Dept 2012]; ***Gibson v Levine***, 95 AD3d 1071, 944 NYS2d 610 [2d Dept 2012]). Therefore, plaintiff is entitled to summary judgment in her favor on the issue of liability.

As defendant is liable for the collision and has failed to establish that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d), plaintiff is entitled to partial summary judgment on the issue of liability (*see* ***Ditrapani v Marciante***, *supra*). The extent of plaintiff's injuries, including whether she suffered a serious injury as a result of the accident, will be adjudicated during the trial on damages (*see* ***Van Nostrand v Froehlich***, 44 AD3d 54, 844 NYS2d 293 [2d Dept 2007], *appeal dismissed* 10 NY3d 837, 859 NYS2d 609 [2008]).

Accordingly, the motion by defendants for summary judgment is denied and the cross-motion by plaintiff is granted.

Dated: September 18, 2012

Hon. Joseph Farneti
Acting Justice Supreme Court

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**