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SHORT FORM ORDER

INDEX No. 11-14358
CAL. No. 12-02415MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 2-7-13 (#003 & #004)
MOTION DATE 3-8-13 (#005 & #006)
ADJ. DATE 9-9-13
Mot. Seq. # 003 - MD # 004 - XMD
005 - XMotD # 006 - XMG

DAPHNE M. KING,	:	JOHN L. JULIANO, ESQ.
	:	Attorney for Plaintiff
Plaintiff,	:	39 Doyle Court
	:	East Northport, New York 11731
	:	
-against-	:	ROBERT P. TUSA, ESQ.
	:	Attorney for Defendants Andriotty & Bara
	:	898 Veterans Memorial Highway, Suite 320
ELENE J. ANDRIOTTY, GORDON BARA,	:	Hauppauge, New York 11788
GERALD J. MULDERIG and JASON	:	
MULDERIG,	:	ANDREA G. SAWYERS, ESQ.
	:	Attorney for Defendants Mulderig
Defendants.	:	P.O. Box 9028
		Melville, New York 11747

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendants Gerald Mulderig and Jason Mulderig, dated January 4, 2013, and supporting papers; (2) Notice of Cross Motion/Order to Show Cause by the defendants Elene Andriotty and Gordon Bara, dated January 16, 2013, and supporting papers; (3) Notice of Cross Motion/Order to Show Cause by the plaintiff, dated February 12, 2013, and supporting papers; (4) Notice of Cross Motion/Order to Show Cause by the defendants Elene Andriotty and Gordon Bara, dated February 5, 2013, and supporting papers; (5) Affirmation in Opposition by the defendants Elene Andriotty and Gordon Bara, dated February 25, 2013, and supporting papers; (6) Affirmation in Opposition by the defendants Gerald Mulderig and Jason Mulderig, dated July 3, 2013, and supporting papers; (7) Reply Affidavit by the defendants Elene Andriotty and Gordon Bara, dated February 25, 2013, and supporting papers; (8) Reply Affirmation by the defendants Gerald Mulderig and Jason Mulderig, dated July 3, 2013, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion (# 003) by defendants Gerald Mulderig and Jason Mulderig for summary judgment dismissing the complaint against them 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 the cross motion (# 004) by defendants Elene Andriotty and Gordon Bara for summary judgment dismissing the complaint against them 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 the cross motion (# 005) by plaintiff for an order granting her summary judgment on the issue of liability is decided as follows; and it is further

ORDERED that the cross motion (# 006) by defendants Elene Andriotty and Gordon Bara for summary judgment dismissing the complaint and all cross claims against them is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, Daphne King, as a result of a chain-reaction, rear-end motor vehicle collision which occurred on Nichols Road, a two-way roadway with one lane in each direction, in the Town of Smithtown, New York, on December 31, 2010. The following facts are undisputed. There were three vehicles involved in the accident. The lead vehicle was the vehicle owned by defendant Gordon Bara and operated by defendant Elene Andriotty; behind it was the plaintiff's vehicle; and last in line was the vehicle owned by defendant Gerald Mulderig and operated by defendant Jason Mulderig.

Defendants Gerald Mulderig and Jason Mulderig now move for summary judgment dismissing the complaint against them on the ground that plaintiff has not sustained a serious injury as defined in Insurance Law § 5102 (d).

By her bill of particulars, plaintiff alleges that, as a result of the subject accident, she sustained serious injuries including bulging discs at L4-L5 and L5-S1 with a left herniated nucleus pulposus at L1-L2; paralumbar muscle spasm bilaterally with palpable tenderness; increased low back pain/stiffness; and right lumbosacral spine radiculopathy secondary to strain/sprain.

Insurance Law § 5102 (d) defines "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."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed, or there must be 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 (*see* ***Perl v Meher***, 2011 NY Slip Op 8452, 2011 NY Lexis 3320 [2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Akhtar v Santos*** 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may satisfy this burden by submitting the plaintiff's own deposition testimony and the affirmed medical report of the defendant's own examining physician (*see* ***Moore v Edison***, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; ***Farozes v Kamran*** 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Here, defendants Gerald Mulderig and Jason Mulderig failed to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see* ***Reitz v Seagate Trucking, Inc.***, 71 AD3d 975, 898 NYS2d 173 [2d Dept 2010]). On August 2, 2012, approximately one year and seven months after the subject accident, the Mulderig defendants' examining orthopedist, Dr. Isaac Cohen, examined plaintiff using certain orthopedic tests, including straight leg raising test and Patrick test. Dr. Cohen found that all the test results were negative or normal, and that there was no tenderness, spasm or trigger points in the plaintiff's lumbosacral spine. Dr. Cohen performed range of motion testing on plaintiff's lumbosacral spine using a goniometer and/or a bubble inclinometer, and indicated that spine flexion was "possible about" 50 degrees (60 degrees normal); hyperextension was "possible" to 25 degrees (25 degrees normal); lateral bending was bilaterally "in the 30-degree range" (25 degrees normal); and rotational motion was bilaterally "in the 30-degree range" (30 degrees normal), leaving it unclear as to what range the plaintiff actually demonstrated (*see* ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]). Dr. Cohen's report is insufficient to sustain defendants' prima facie burden. Moreover, although plaintiff claimed in the bill of particulars that she sustained lumbosacral radiculopathy and low back stiffness as a result of this accident, defendants have not submitted a report from a neurologist who examined plaintiff to rule out the claimed neurological injury (*see* ***McFadden v Barry***, 63 AD3d 1120, 883 NYS2d 83 [2d Dept 2009]; ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]; ***Lawyer v Albany OK Cab Co.***, 142 AD2d 871, 530 NYS2d 904 [3d Dept 1988]; ***Faber v Gaugler***, 2011 NY Slip Op 32623U, 2011 NY Misc Lexis 4742 [Sup Ct, Suffolk County, 2011]).

Inasmuch as the Mulderig defendants failed to meet their prima facie burden, it is unnecessary to consider whether the papers submitted by plaintiff in opposition to the moving defendants' motion for summary judgment were sufficient to raise a triable issue of fact (*see* ***McMillian v Naparano***, 61 AD3d 943, 879 NYS2d 152 [2d Dept 2009]; ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]). Thus, the motion (# 003) by defendants Gerald Mulderig and Jason Mulderig for summary judgment is denied.

Defendants Elene Andriotty and Gordon Bara cross-move (# 004) for summary judgment dismissing the complaint against them on the grounds that plaintiff has not sustained a serious injury as defined in Insurance Law § 5102 (d). In support, defendants Andriotty and Bara submit, *inter alia*, an affidavit of one of their attorneys which attempts to "incorporate by reference all of the facts, testimony, evidence, documents, medical reports, law and arguments" submitted in the motion by defendants Gerald Mulderig and Jason Mulderig. The cross motion by defendants Andriotty and Bara is denied, as discussed above.

Plaintiff cross-moves (# 005) for summary judgment in her favor on the issue of liability on the ground that she was not negligent, and that the subject accident was solely the result of defendant Jason Mulderig's failure to control his vehicle. In support, plaintiff submits, *inter alia*, the pleadings and the transcripts of the deposition testimony given by plaintiff, defendant Elene Andriotty and defendant Jason Mulderig.

Defendants Andriotty and Bara cross-move (# 006) for summary judgment dismissing the complaint and all cross claims against them, asserting that they bear no liability for the plaintiff's accident. In support, they submit, *inter alia*, the pleadings and the transcripts of the deposition testimony given by plaintiff, defendant Elene Andriotty and defendant Jason Mulderig.

At her deposition, defendant Elene Andriotty testified that on the day of the accident, after having traveled southbound on Nichols Road, she stopped and illuminated her left turn signal, intending to turn left into the driveway of her house, which is located on the northbound lane of Nichols Road. She had waited 20 to 25 seconds for northbound traffic to clear, when she heard a loud noise and felt one impact to the rear of her vehicle.

At her deposition, plaintiff testified to the effect that she had been traveling southbound on Nichols Road. When she observed the Andriotty vehicle in front of her activating its left turn signal, she slowed down. As the Andriotty vehicle stopped, she came to a complete stop about a car length behind it. Subsequently, she was struck from the rear by the Mulderig vehicle, and was propelled into the rear of the Andriotty vehicle, which was stopped.

At his deposition, defendant Jason Mulderig testified to the effect that he had been traveling southbound on Nichols Road at approximately 20 to 25 miles per hour. While he was observing the Andriotty vehicle in front of the plaintiff's vehicle decelerate and come to a gradual stop for about five to ten seconds, he saw the plaintiff's vehicle stop suddenly in front of him. He then hit the brakes and pulled the emergency brakes, but was unable to stop in time to avoid the collision. At the time of the impact, he was driving at the speed of 20 miles per hour. Prior to the accident, there was nothing obstructing his view of the roadway in front of him.

It is well settled that when a driver of a motor vehicle approaches another automobile from the rear, he or she is bound to maintain a safe rate of speed, to keep control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (*see* Vehicle and Traffic Law § 1129 [a]; ***Gibson v Levine***, 95 AD3d 1071, 944 NYS2d 610 [2d Dept 2012]; ***Zweeres v Materi***, 94 AD3d 1111, 942 NYS2d 625 [2d Dept 2012]; ***Nsiah-Ababio v Hunter***, 78 AD3d 672, 913 NYS2d 659 [2d Dept 2010]). Moreover, a rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability regarding the operator of the moving vehicle and imposes a duty of explanation on the operator of the moving vehicle to excuse the collision by providing a non-negligent explanation, such as a mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on wet pavement or some other reasonable excuse (*see* ***Fajardo v City of New York***, 95 AD3d 820, 943 NYS2d 587 [2d Dept 2012]; ***Giangrasso v Callahan***, 87 AD3d 521, 928 NYS2d 68 [2d Dept 2011]; ***Ortiz v Hub Truck Rental Corp.***, 82 AD3d 725, 918 NYS2d 156 [2d Dept 2011]). A claim that the driver of the lead vehicle made a sudden stop, standing alone, is insufficient to rebut the presumption of negligence (*see* ***Zdenek v Safety Consultants, Inc.***, 63 AD3d 918, 883 NYS2d 57 [2d Dept 2009]; ***Jumandeo v Franks***, 56 AD3d 614, 867 NYS2d 541 [2d Dept 2008]). If

the operator of the moving vehicle cannot come forward with any evidence to rebut the inference of negligence, the driver of the lead vehicle may properly be awarded judgment as a matter of law (*see* ***Russ v Investech Sec.***, 6 AD3d 602, 775 NYS2d 867 [2d Dept 2004]; ***Reid v Courtesy Bus Co.***, 234 AD2d 531, 651 NYS2d 612 [2d Dept 1996]).

Here, the adduced evidence indicates that the Andriotty vehicle and the plaintiff's vehicle were stopped or stopping when they were struck from the rear, and that defendant Jason Mulderig started the chain of events. Thus, the requisite prima facie case of negligence has been established and there is no material triable issue of fact as to the negligence of defendant Jason Mulderig regarding the subject accident (*see* ***Volpe v Limoncelli***, 74 AD3d 795, 902 NYS2d 152 [2d Dept 2010]; ***Johnson v Spoto***, 47 AD3d 888, 850 NYS2d 204 [2d Dept 2008]).

In opposition, the Mulderig defendants have failed to rebut the inference of negligence by providing a non-negligent explanation for the collision. Defendant Jason Mulderig's testimony that, although he observed the Andriotty vehicle in front of the plaintiff's vehicle slowing and come to a stop, he was unable to avoid the collision with the plaintiff's vehicle because its stop was sudden and unexpected does not adequately rebut the inference of negligence. Defendant Jason Mulderig was obligated to take appropriate precautions, including maintaining a safe distance (*see* ***Volpe v Limoncelli***, *supra*; ***Harrington v Kern***, 52 AD3d 473, 859 NYS2d 480 [2d Dept 2008]).

In view of the foregoing, the cross motion (# 006) by defendants Elene Andriotty and Gordon Bara for summary judgment is granted, and the complaint and cross claims against them are severed as well as dismissed. The branch of the cross motion (# 005) by plaintiff for summary judgment on the issue of liability against the Mulderig defendants is granted, and the branch of the cross motion (# 005) by plaintiff for summary judgment on the issue of liability against defendants Elene Andriotty and Gordon Bara for summary judgment is denied as moot. Plaintiff is directed to serve a copy of this order with notice of entry upon the Calendar Clerk of this Court. Upon such service, the Calendar Clerk is directed to place this matter on the Calendar Control Part Calendar for the next available date.

Dated: 12/6/13

PETER H. MAYER, J.S.C.

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