Lopera v Zydor
2014 NY Slip Op 33440(U)
December 29, 2014
Supreme Court, Suffolk County
Docket Number: 09181/2013
Judge: William B. Rebolini
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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Rosa Lopera,

Plaintiff,

-against-

Erik D. Zydor,

Defendant.

Index No.: 09181/2013

Motion Sequence No.: 001; MD
Motion Date: 8/8/14
Submitted: 10/1/14

Motion Sequence No.: 002; XMG
Motion Date: 8/8/14
Submitted: 10/1/14

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Clerk of the Court

Upon the following papers numbered 1 to 39 read upon this motion and cross motion for summary judgment: Notice of Motion and supporting papers, 1 - 19; Notice of Cross Motion and supporting papers, 27 - 35; Answering Affidavits and supporting papers, 20 - 24; 36 - 37; Replying Affidavits and supporting papers, 24 - 26; 38 - 39; it is

ORDERED that the motion by defendant for summary judgment in his favor is denied; and it is further

ORDERED that the cross motion by plaintiff for summary judgment in her favor on the issue of negligence is granted.

Plaintiff Rosa Lopera commenced this action to recover damages for personal injuries she allegedly sustained as a result of a motor vehicle accident that occurred in the Town of Islip on August 16, 2012. The accident allegedly happened when a vehicle driven by defendant Erik Zydor collided with plaintiff's vehicle as it was stopped in heavy traffic on the Long Island Expressway. By her bill of particulars, plaintiff alleges she suffered various injuries due to the collision, including disc herniations at levels C5-C6, L3-L4, and L5-S1; cervical and lumbar radiculopathy; and left shoulder acromioclavicular arthropathy and supraspinatus tendinopathy.

Defendant now moves for summary judgment dismissing the complaint on the ground plaintiff is precluded by Insurance Law § 5104 from recovering for non-economic loss, as she did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d). In support of the motion, defendant submits copies of the pleadings and the bill of particulars, the transcript of plaintiff's deposition testimony, a sworn medical report prepared by Dr. Joseph Stubel. At defendant's' request, Dr. Stubel, an orthopedic surgeon, performed an examination of plaintiff on May 13, 2014, and examined various medical records relating to the neck, back and shoulder injuries alleged in this action.

Plaintiff opposes the motion, arguing that defendants' submissions are insufficient to make out a prima facie case of entitlement to judgment in his favor. Alternatively, plaintiff asserts medical evidence raises a triable issue as to whether she suffered injuries within the limitation of use categories of Insurance Law § 5102 (d). In opposition, plaintiff submits the transcript of her deposition testimony, her own affidavit, an affidavit of Jayesh Patel, D.C., and copies of various medical records and reports related to treatment she received for her alleged injuries from physicians and other medical care providers. The Court notes the unsworn medical records and reports submitted by plaintiff are not in admissible form (*see* ***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]; ***Balducci v Velasquez***, 92 AD3d 626, 938 NYS2d 178 [2d Dept 2012]; ***Vasquez v John Doe #1***, 73 AD3d 1033, 905 NYS2d 188 [2d Dept 2010]). Plaintiff also cross-moves for an order granting summary judgment in her favor on the issue of defendant's negligence, arguing his actions were the sole proximate cause of the accident. In support of her motion, she submits copies of the pleadings, the bill of particulars, and the transcripts of the parties' deposition testimony. Defendant opposes the motion, arguing an issue exists as to whether plaintiff's actions contributed to the happening of the accident.

It is for the court to determine in the first instance whether a plaintiff claiming personal injury as a result of a motor vehicle accident has established a prima facie case that he or she sustained "serious injury" and may maintain a common law tort action (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Tipping-Cestari v Kilhenny***, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). 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."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred by 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, 746 NYS2d 865 [2002]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of a serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, i.e., affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant also may 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, 733 NYS2d 901 [2d Dept 2001]; ***Torres v Micheletti***, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]; ***Craft v Brantuk***, 195 AD2d 438, 600 NYS2d 251 [2d Dept 1993]; ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990; ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

Defendant's submissions fail to establish a prima facie case that plaintiff did not sustain serious injury to her left shoulder as a result of the subject accident (*see* ***Miller v Bratsilova***, 118 AD3d 761, 987 NYS2d 444 [2d Dept 2014]; ***Cruz v Advanced Concrete Leasing Corp.***, 101 AD3d 666, 954 NYS2d 491 [2d Dept 2012]; ***Uvaydov v Peart***, 99 AD3d 891, 951 NYS2d 912 [2d Dept 2012]; ***India v O'Connor***, 97 AD3d 796, 948 NYS2d 678 [2d Dept 2012]; ***Raguso v Ubriaco***, 97 AD3d 560, 947 NYS2d 343 [2d Dept 2012]). The report prepared by Dr. Stubel states that plaintiff presented at the May 2014 examination with complaints of pain in her neck, back and shoulders. Dr. Stubel's report states, in relevant part, that a physical examination of plaintiff's left shoulder revealed no swelling, ecchymosis, or erythema, though anterior and posterior tenderness was reported. It states that during range of motion testing of the left shoulder, plaintiff exhibited 90 degrees of abduction (150 degrees normal), 90 degrees of flexion (150 degrees normal), 30 degrees of flexion (30 degrees normal), 30 degrees of internal rotation (80 degrees normal), and 30 degrees of external rotation (80 degrees normal). In contrast, range of motion testing of plaintiff's right shoulder revealed normal joint function. Dr. Stubel's report further states that while certain clinical tests for biceps tendon pathology were negative, tests for rotator cuff pathology were positive.

Although concluding that plaintiff suffered sprains to her neck, back and shoulders, and has a "mild disability referable to the left shoulder," Dr. Stubel does not explain his findings of significant restrictions in joint function measured during range of motion testing of plaintiff's left shoulder (*see* ***Farrah v Pinos***, 103 AD3d 831, 959 NYS2d 741 [2d Dept 2013]; ***Artis v Lucas***, 84

AD3d 845, 921 NYS2d 910 [2d Dept 2011]; ***Jean v New York City Tr. Auth.***, 85 AD3d 972, 925 NYS2d 657 [2d Dept 2011]; ***Astudillo v MV Transp., Inc.***, 84 AD3d 1289, 923 NYS2d 722 [2d 2011]; ***Chun Ok Kim v Orourke***, 70 AD3d 995, 893 NYS2d 892 [2d Dept 2010]; ***Ortiz v S&A Taxi Corp.***, 68 AD3d 734, 891 NYS2d 112 [2d Dept 2009]). Rather, he obliquely states that the subject accident "has a causal relationship to the symptoms described with this overlying pre-existing degenerative changes" (*see* ***Raguso v Ubriaco***, 97 AD3d 560, 947 NYS2d 343; ***Williams v Fava Cab Corp.***, 90 AD3d 912, 935 NYS2d 90 [2d Dept 2011]; ***Swensen v MV Transp., Inc.***, 89 AD3d 924, 933 NYS2d 96 [2d Dept 2011]; ***Artis v Lucas***, 84 AD3d 845, 921 NYS2d 910; ***Bengaly v Singh***, 68 AD3d 1030, 890 NYS2d 352 [2d Dept 2009]). Defendant's motion for summary judgment dismissing the complaint based on plaintiff's failure to meet the serious injury threshold, therefore, is denied.

As to plaintiff's cross motion for summary judgment in her favor on the issue of negligence, when a driver approaches another vehicle from the rear, he or she is bound to maintain a reasonably safe rate of speed, to maintain control of his or her vehicle, and to use reasonable care to avoid colliding with the other vehicle (*see* ***Taing v Drewery***, 100 AD3d 740, 954 NYS2d 175 [2d Dept 2012]; ***Martinez v Martinez***, 93 AD3d 767, 941 NYS2d 189 [2d Dept 2012]; ***Ortiz v Hub Truck Rental Corp.***, 82 AD3d 725, 918 NYS2d 156 [2d Dept 2011]; ***Tutrani v County of Suffolk***, 64 AD3d 53, 878 NYS2d 412 [2d Dept 2009). Thus, the occurrence of a rear-end collision creates a prima facie case of negligence on the part of the operator of the following vehicle and imposes a duty on that operator to come forward with a non-negligent explanation for the collision (*see* ***Billis v Tunjian***, 120 AD3d 1168, 992 NYS2d 319 [2d Dept 2014]; ***Menelas v Yearwood-Bobb***, 100 AD3d 603, 953 NYS2d 286 [2d Dept 2012]; ***Martinez v Martinez***, 93 AD3d 767, 941 NYS2d 189; ***Napolitano v Galletta***, 85 AD3d 881, 925 NYS2d 163 [2d Dept 2011]). This burden is placed on the driver of the offending vehicle, as he or she is in the best position to explain whether the collision was due to a mechanical failure, a sudden stop of the vehicle ahead, unavoidable skidding on wet pavement, or some other reasonable cause (*see* ***Moran v Singh***, 10 AD3d 707, 782 NYS2d 284 [2d Dept 2004]; ***Barile v Lazzarini***, 222 AD2d 635, 635 NYS2d 694 [2d Dept 1995]). However, "[v]ehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent. must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her car and the car ahead" (***Shamah v Richmond County Ambulance Serv.***, 279 AD2d 564, 565, 719 NYS2d 287 [2d Dept 2001]; *see* ***Taing v Drewery***, 100 AD3d 740, 954 NYS2d 175; ***Plummer v Nourddine***, 82 AD3d 1069, 919 NYS2d 187 [2d Dept 2011]; ***Volpe v Limoncelli***, 74 AD3d 795, 902 NYS2d 152 [2d Dept 2010]).

Here, plaintiff's submissions are sufficient to make a prima facie case of entitlement to summary judgment on the issue of negligence (*see* ***Guiterrez v Trillium USA, LLC***, 111 AD3d 669, 974 NYS2d 563 [2d Dept 2013]; ***Taing v Drewery***, 100 AD3d 740, 954 NYS2d 175; ***Cortes v Whelan***, 83 AD3d 763, 922 NYS2d 419 [2d Dept 2011]; ***Staton v Ilic***, 69 AD3d 606, 892 NYS2d 486 [2d Dept 2010]). In opposition, defendant failed to offer any evidence rebutting the inference of negligence created by the rear-end collision, alleging only that plaintiff's vehicle stopped suddenly while in stop-and-go traffic (*see* ***Plummer v Nourddine***, 82 AD3d 1069, 919 NYS2d 187; ***Staton v Ilic***, 69 AD3d 606, 892 NYS2d 486; ***Jumandeo v Franks***, 56 AD3d 614, 867 NYS2d 541 [2d

Dept 2008]). Accordingly, plaintiff's cross motion for summary judgment in her favor on the issue of negligence is granted.

Dated: 12/29/2014

William B. Rebolini

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

_____ **FINAL DISPOSITION** _X_ **NON-FINAL DISPOSITION**