

Fernandes v Ramsahai
2016 NY Slip Op 30498(U)
March 2, 2016
Supreme Court, Suffolk County
Docket Number: 12-17443
Judge: Joseph Farneti
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ORDERED that the cross-motion (seq. #006) by plaintiff on the counterclaim, Manuel Fernandes, for summary judgment in his favor on the counterclaim is granted.

Plaintiffs Manuel Fernandes and Ana Fernandes commenced this action to recover damages for personal injuries they allegedly sustained as the result of a motor vehicle accident that occurred on Fifth Avenue, at its intersection with Spur Drive South, in the Town of Islip on April 7, 2010. The accident allegedly happened when the vehicle driven by defendant Sunita Ramsahai made a sudden left turn in the path of the vehicle driven by plaintiff Manuel Fernandes as it entered the intersection with Spur Drive South. Plaintiff Ana Fernandes allegedly was riding as a passenger in the vehicle driven by Manuel Fernandes, her husband, at the time of the collision. As relevant to the instant motions, the bill of particulars alleges Ana Fernandes suffered various injuries and symptoms due to the accident, including disc herniations at levels C5-C6 and C6-C7, cervical radiculopathy, and right shoulder tendinosis. It further alleges she was confined to her home for four months due to her injuries.

Defendant now moves for summary judgment dismissing the claim asserted by Ana Fernandes on the ground she did not sustain "serious injury" within the meaning of Insurance Law § 5102 (d). Defendant's submissions in support of the motion include copies of the pleadings and the bill of particulars, a transcript of Ana Fernandes' deposition testimony, and a sworn medical report prepared by Dr. Edward Toriello. At defendants' request, Dr. Toriello, an orthopedic surgeon, conducted an independent orthopedic examination of Ana Fernandes in October 2013 and reviewed medical records and reports related to her alleged injuries.

Plaintiffs oppose the motion, arguing defendant's submissions are insufficient to establish as a matter of law that Ana Fernandes did not suffer "serious injury" as a result of the accident. Plaintiffs also argue evidence submitted in opposition to defendant's motion raises a triable issue as to whether she suffered injury within the "limitation of use" categories or the 90/180 category of Insurance Law § 5102 (d). In opposition, plaintiffs submit an affirmation of her treating orthopedist, Dr. Alexandre de Moura, and an uncertified copy of the police report for the subject accident. The Court notes the police accident report record is inadmissible and was not considered in the determination of defendant's cross motion (*see* CPLR 4518; *Adobea v Junel*, 114 AD3d 818, 980 NYS2d 564 [2d Dept 2014]; *Cheul Soo Kang v Violante*, 60 AD3d 991, 877 NYS2d 354 [2d Dept 2009]).

Relying on the same arguments and the same submissions as defendant, particularly the sworn medical report of Dr. Edward Toriello, Manuel Fernandes, as plaintiff on the counterclaim, cross-moves for an order dismissing Ana Fernandes' cause of action for failure to meet the serious injury threshold. Manuel Fernandes also cross-moves for an order granting summary judgment in his favor on the counterclaim, arguing that defendant's negligence in failing to yield the right of way and making a sudden left turn at the intersection when it was not safe to do so was the sole proximate cause 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 moving for 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 Eycler*, 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 Eycler*, 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 Ana Fernandes did not sustain serious injury to her cervical spine or right shoulder as a result of the subject accident (*see Farrah v Pinos*, 103 AD3d 831, 959 NYS2d 741 [2d Dept 2013]; *Cruz v Advanced Concrete Leasing Corp.*, 101 AD3d 666, 954 NYS2d 491 [2d Dept 2012]; *Frasca-Nathans v Nugent*, 78 AD3d 651, 909 NYS2d 918 [2d Dept 2010]; *Page v Belmonte*, 45 AD3d 825, 846 NYS2d 351 [2d Dept 2007]). In his affirmed report, Dr. Toriello states that Ana Fernandes presented at the October 2013 examination with complaints of “neck and left [sic] shoulder pain.” He states, in relevant part, that range of motion testing revealed normal joint function in plaintiff’s cervical region, with “bilateral lateral bending of 45 degrees, bilateral rotation of 80 degrees, flexion of 50 degrees and extension of 60 degrees with complaints of pain at the extremes of motion.” He also

states that palpation of Ana Fernandes' spine revealed no muscle spasms or atrophy, and that she exhibited normal deep tendon reflexes, muscle strength, and sensation in her upper extremities. Further, Dr. Toriello states that Ana Fernandes had full range of motion in her shoulders, with 150 degrees of abduction, 150 degrees of flexion, 80 degrees of internal rotation, 90 degrees of external rotation, 40 degrees of extension and 30 degrees of adduction, and that there was no evidence of shoulder instability or impingement. Dr. Toriello concludes that Ana Fernandes suffered only cervical and right shoulder strains due to the accident, and that the examination revealed no evidence of any orthopedic disability. However, Dr. Toriello's report is insufficient to meet defendant's burden on the motion, as it failed to compare the findings of joint function obtained during his testing of Ana Fernandes' cervical spine and right shoulder with the accepted normal range of motion measurements for such joints (*see Ambroselli v Team Massapequa, Inc.*, 88 AD3d 927, 931 NYS2d 652 [2d Dept 2011]; *Grisales v City of New York*, 85 AD3d 964, 925 NYS2d 633 [2d Dept 2011]; *Chiara v Dernago*, 70 AD3d 746, 894 NYS2d 129 [2d Dept 2010]; *Page v Belmonte*, 45 AD3d 825, 846 NYS2d 351 [2d Dept 2007]).

Moreover, defendant failed to present admissible evidence negating the elements of Ana Fernandes' 90/180 claim. Significantly, the bill of particulars alleges she was confined to home for four months. At her deposition, Ana Fernandes testified she was confined to home for about three months after the accident, leaving only to attend doctor appointments, and that she began going out more frequently after she began receiving physical therapy treatments. Despite such allegations, defendant's expert failed to address the issue of whether Ana Fernandes suffered an injury within the 90/180 day category (*see Greene-Manzi v A to Z Landscaping, Inc.*, 105 AD3d 702, 962 NYS2d 645 [2d Dept 2013]; *Cruz v Advanced Concrete Leasing Corp.*, 101 AD3d 666, 954 NYS2d 491; *Reynolds v Wai Sang Leung*, 78 AD3d 919, 911 NYS2d 431 [2d Dept 2010]; *Menezes v Khan*, 67 AD3d 654, 889 NYS2d 54 [2d Dept 2009]; *Takaroff v A.M. USA, Inc.*, 63 AD3d 1142, 882 NYS2d 265 [2d Dept 2009]; *Rahman v Sarpaz*, 62 AD3d 979, 880 NYS2d 125 [2d Dept 2009]; *Greenidge v Righton Limo, Inc.*, 43 AD3d 1109, 841 NYS2d 791 [2d Dept 2007]). Thus, defendant failed to make a *prima facie* showing that Ana Fernandes' claim for damages based on nonpermanent injuries is barred under the No-Fault Insurance Law (*see Greene-Manzi v A to Z Landscaping, Inc.*, 105 AD3d 702, 962 NYS2d 645; *Reynolds v Wai Sang Leung*, 78 AD3d 919, 911 NYS2d 431; *Negassi v Royle*, 65 AD3d 1311, 885 NYS2d 760 [2d Dept 2009]; *Ismail v Tejada*, 65 AD3d 518, 882 NYS2d 915 [2d Dept 2009]; *Takaroff v A.M. USA, Inc.*, 63 AD3d 1142, 882 NYS2d 265). Accordingly, defendant's motion for summary judgment dismissing Ana Fernandes' cause of action for failure to meet the serious injury threshold is denied. For the same reasons, Manuel Fernandes' cross-motion for summary judgment dismissing Ana Fernandes' claim, which relies on the same proof and legal arguments as defendant's motion, is denied.

As to the cross-motion seeking summary judgment in favor of Manuel Fernandes on the counterclaim against him, the Vehicle and Traffic Law establishes standards of care for motorists, and an unexcused violation of such standards constitutes negligence *per se* (*see Shui-*

Kwan Lui v Serrone, 103 AD3d 620, 959 NYS2d 270 [2d Dept 2013]; *Barbieri v Vokoun*, 72 AD3d 853, 900 NYS2d 315 [2d Dept 2010]; *Coogan v Torrissi*, 47 AD3d 669, 849 NYS2d 621 [2d Dept 2008]). Pursuant to Vehicle and Traffic Law § 1141, a driver attempting a left turn at an intersection is required to yield the right of way to a vehicle approaching from the opposite direction “which is within the intersection or so close as to constitute an immediate hazard.” Vehicle and Traffic Law § 1163 provides that no person shall turn a vehicle at an intersection “until such movement can be made with reasonable safety.” Furthermore, every driver has a common law duty to see that which should be seen through the proper use of his or her senses and to exercise reasonable care to avoid colliding with another vehicle (see *Weigand v United Traction Co.*, 221 NY 39, 116 NE 345 [1917]; *Shui-Kwan Lui v Serrone*, 103 AD3d 620, 959 NYS2d 270; *Colpan v Allied Cent. Ambulette, Inc.*, 97 AD3d 776, 949 NYS2d 124 [2d Dept 2012]; *Domanova v State of New York*, 41 AD3d 633, 838 NYS2d 644 [2d Dept 2007]).

The evidence submitted in support of the cross-motion is sufficient to establish a *prima facie* case that defendant’s negligence in making a left turn directly in the path of plaintiffs’ oncoming vehicle, when it was not reasonably safe to do so, was the sole proximate cause of the accident (see *Anzel v Pistorino*, 105 AD3d 784, 962 NYS2d 700 [2d Dept 2013]; *Ahern v Lanaia*, 85 AD3d 696, 924 NYS2d 802 [2d Dept 2011]; *Kann v Maggies Paratransit Corp.*, 63 AD3d 792, 882 NYS2d 129 [2d Dept 2009]). At the subject intersection, Fifth Avenue has four travel lanes, two running northbound and two running southbound, as well as left turn lanes for northbound and southbound traffic, and Spur Drive South has two lanes of travel, one running eastbound and one running westbound. Traffic lights control all four directions of travel at the intersection. Manuel Fernandes testified that prior to the accident he was driving his vehicle in the left northbound lane of Fifth Avenue and stopped on the roadway for a couple of seconds, because a school bus traveling in the right northbound lane had stopped to let students disembark. He testified that when he started moving again the traffic light at the intersection controlling the northbound lanes was green, and that he observed defendant’s vehicle stopped in the southbound turning lane, waiting to make a left onto Spur Drive South. Manuel Fernandes testified that as his vehicle entered the intersection, traveling at approximately 30 to 35 miles per hour, defendant made a sudden left turn directly across his path, and that, though he forcibly applied his brakes, he could not avoid colliding with the front right side of her vehicle.

Defendant Sunista Ramsahai testified that before the accident she was driving southbound on Fifth Avenue and that, intending to travel east on Spur Drive South, she moved her vehicle into the left turning lane and stopped at the intersection for oncoming traffic. She testified that her vehicle was the first vehicle in the left turning lane, that she waited at the intersection for two to three minutes before attempting to make a left turn, and that she did not observe the Fernandes vehicle as it approached from the opposite direction. Defendant testified that the accident occurred as she was in the process of making the left turn, but that she did not remember the actual moment of impact with the Fernandes vehicle. When questioned about the traffic signal controlling southbound traffic on Fifth Avenue, plaintiff initially testified that the

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light was green as she approached the intersection, and that it changed “to a solid green” prior to the accident. After taking a recess, defendant testified that the left turn light was illuminated as she approached the intersection and that it remained illuminated as she waited to make a left turn. She also testified that “the front end” of the passenger side of her vehicle, “from the wheel to the front of the car,” was damaged in the accident.

The Court finds such testimony establishes *prima facie* that Manuel Fernandes had the right-of-way and was entitled to anticipate that defendant would obey the traffic laws requiring her to yield to his oncoming vehicle (*see Carroll-Batista v Bennett*, 122 AD3d 661, 995 NYS2d 718 [2d Dept 2014]; *Kann v Maggies Paratransit Corp.*, 63 AD3d 792, 882 NYS2d 129; *Aristizabal v Aristizabal*, 37 AD3d 503, 829 NYS2d 701 [2d Dept], *lv denied* 9 NY3d 808, 844 NYS2d 784 [2007]; *Russo v Scibetti*, 298 AD2d 514, 748 NYS2d 871 [2d Dept 2002]; *Cenovski v Lee*, 266 AD2d 424, 698 NYS2d 868 [2d Dept 1999]). It further shows that defendant violated Vehicle and Traffic Law §§ 1141 and 1163 by making a sudden left turn as the Fernandes vehicle was passing through the intersection, that such negligence was the proximate cause of the subject accident, and that Manuel Fernandes was free of comparative fault (*see Foley v Santucci*, 135 AD3d 813, 23 NYS3d 338 [2d Dept 2016]; *Ducie v Ippolito*, 95 AD3d 1067, 944 NYS2d 275 [2d Dept 2012]; *Socci v Levy*, 90 AD3d 1020, 935 NYS2d 332 [2d Dept 2011]; *Stiles v County of Dutchess*, 278 AD2d 304, 717 NYS2d 325 [2d Dept 2000]). Contrary to the assertions by defense counsel, defendant’s deposition testimony does not raise a triable issue as to whether Manuel Fernandes was comparatively negligent in failing to take evasive actions or in entering the intersection (*see Vainor v DiSalvo*, 79 AD3d 1023, 914 NYS2d 236 [2d Dept 2010]; *Yelder v Walters*, 64 AD3d 762, 883 NYS2d 290 [2d Dept 2009]; *Batts v Page*, 51 AD3d 833, 858 NYS2d 748 [2d Dept 2008]). In particular, the material change in defendant’s deposition testimony after the recess, namely, that the left turn light was illuminated during the entire time she was stopped at the intersection, does not create an issue as to whether Manuel Fernandes improperly entered the intersection, as defendant testified that she waited two to three minutes for oncoming vehicles to pass, that she did not see the Fernandes vehicle before the collision, and that the right front portion of her vehicle was damaged in the accident (*see Rosario v Sebco I. Assoc.*, 305 AD2d 307, 761 NYS2d 607 [1st Dept 2007]). As defendant failed to submit evidence raising a triable issue as to whether Manuel Fernandes’ conduct was a proximate cause of the accident, the cross-motion for summary judgment dismissing the counterclaim against Manuel Fernandes is granted.

Dated: March 2, 2016


 Hon. Joseph Farneti
 Acting Justice Supreme Court

 FINAL DISPOSITION X NON-FINAL DISPOSITION