SUPREME COURT OF THE STATE OF NY
COUNTY OF NEW YORK: PART 22

GINA LABADY, EDDY C. LEMIEUX, an infant by his mother and natural guardian, MARIE F. LADINY, and MARIE F. LADINY, individually,

Plaintiffs,

-against-

NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSIT AUTHORITY, STAR CRUISER TRANSPORTATION INC., MARATHON TAXI, INC., IGOR KHOMYSHKIN and ALI AGAG,

Defendants.

Index No.: 151882/12
Motion Seq. No. 003

# DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

The motion of defendants New York City Transit Authority, Metropolitan Transportation Authority, Star Cruiser Transportation, Inc. and Igor Khomyshkin (the Van Defendants) seeking summary judgment dismissing the complaint and cross claims on the ground that these defendants are not liable for the motor vehicle accident at issue in this case is granted. The motion of defendants Marathon Taxi, Inc. and Ali Agag (the Taxi Defendants) for summary judgment dismissing this action against them on the ground that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5012 (d) is denied. Plaintiff's cross motion for summary judgment against the Taxi Defendants on liability, on the ground that there is no triable issue of fact that the negligence of these defendants was the proximate cause of the car accident, and her demand for a trial on damages is denied.

In this action, plaintiff, a home health care aide, alleges that, on December 6, 2011, she sustained personal injuries as a passenger in an Access-A-Ride van that she alleges was owned, operated or controlled by the Van Defendants. There is no dispute that the van, driven by defendant Khomyshkin, collided with a taxi driven by defendant Agag.

Previously in this case, by order dated May 8, 2013, the Van Defendants' motion for summary judgment, made before a preliminary conference (PC) had been held, was denied. The Van Defendants' motion was denied because Khomyshkin's submitted affidavit lacked factual detail as to his conduct immediately prior to the collision, and because a police report submitted noted that Agag stated that Khomyshkin had cut him off. The May 8, 2013 decision and order noted that Khomyshkin's affidavit did not state that he had not changed lanes immediately prior to the accident or demonstrate that he had been operating the van within his own lane of traffic. In that same order, plaintiff was granted summary judgment to the extent that the court determined that she, a passenger, was not culpable in causing the accident. By order dated November 19, 2014, this court precluded the Taxi Defendants from offering an affidavit on any motion or testifying at trial, after they repeatedly failed to appear for a deposition.

As a threshold issue,[1] in opposition to plaintiff and the Van Defendants' motions, the Taxi Defendants argue that the motion should be denied because plaintiff and the Van Defendants previously moved for summary judgment. In reply, the Van Defendants maintain that the motion should be considered one to renew and that, pursuant to CPLR 5015 (a) (2), the court may relieve a party of an order based on newly discovered evidence.

A motion for leave to renew is governed by CPLR 2221 (e), which states that the motion:

"1. shall be identified specifically as such;

2. shall be based upon new facts not offered on the prior motion that would

[1] The Taxi Defendants argue that plaintiff has not annexed a complete set of pleadings. As the case is efiled, permitting the court to obtain pleadings, the court will overlook the defect (*Washington Realty Owners, LLC v 260 Wash. St., LLC*, 105 AD3d 675 [1st Dept 2013]).

change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and

3. shall contain reasonable justification for the failure to present such facts on the prior motion."

As the Van Defendants' papers do not identify the motion as one to renew, and their moving submissions do not contain a copy of the prior order, the prior motion papers, a reason for their failure to present facts on the prior motion, or even indicate that a prior motion was made, leave to renew, pursuant to CPLR 2221, is not granted. While the PC was held after the first summary judgment motion was filed, the Van Defendants' argument that the resultant PC order's deadline for the making of dispositive motions constitutes permission to make this motion is unpersuasive. The PC order neither indicate[s] that permission to make such a motion was requested or granted.

However, a party's making of successive summary judgment motions in the same action may be permitted where the later motion raises adduces evidence that was not available at the time of the party's first motion (*see Brown Harris Stevens Westhampton LLC v Gerber*, 107 AD3d 526, 527 [1st Dept 2013] [affirming denial of successive motion where new deposition did not yield additional evidence and where documents were available and used in first summary judgment motion]; *Varsity Tr. v Board of Educ. of City of N.Y.*, 300 AD2d 38, 39 [1st Dept 2002] [exceptions may be made not only for newly discovered evidence but also in other circumstances, such as where matters may be further disposed of or judicial resources conserved]).

In their opposition, the Taxi Defendants argue that no new evidence has been adduced, as the evidence offered in the earlier motion concerning the rear-end collision was essentially the same. That evidence, however, did not include the Khomyshkin deposition, during which he was

questioned concerning lane changes made prior to the accident. As this evidence was provided after the first summary judgment motion, the Van Defendants' motion will be entertained.[2]

In order to prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant demonstrates entitlement to judgment, the burden shifts to the opponent to rebut that prima facie showing (*Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]). In opposing such a motion, the party must lay bare its evidentiary proof. Conclusory allegations are insufficient to defeat the motion; the opponent must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In deciding the motion, the court must draw all reasonable inferences in favor of the non-moving party and must not decide credibility issues (*Dauman Displays v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990]). As summary judgment is a drastic remedy, which deprives a party of trial, it should not be granted where there is doubt as to the existence of a triable issue of fact (*Chemical Bank v West 95th St. Dev. Corp.*, 161 AD2d 218, 219 [1st Dept 1990]).

The Van Defendants argue that summary judgment is warranted because: (1) as the van was rear-ended, they are not liable; and (2) plaintiff did not suffer a serious injury. Vehicle and Traffic Law § 1129, entitled "Following too closely" states that: "(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

[2] The motions here also address the threshold issue of serious injury.

highway." "It is well settled that a rear-end collision with a stopped [or stopping] vehicle creates a presumption that the operator of the [following] vehicle was negligent;" in order to rebut that presumption, the following vehicle's operator must proffer a nonnegligent explanation for his or her involvement in the accident (*Corrigan v Porter Cab Corp.*, 101 AD3d 471, 471-472 [1st Dept 2012], *Agramonte v City of New York*, 288 AD2d 75, 76 [1st Dept 2001]). The claim that the vehicle in front stopped suddenly is insufficient to raise a triable issue of fact (*see Cabrera v Rodriguez*, 72 AD3d 553, 553 [1st Dept 2010]).

In support of the motion, the Van Defendants submit the testimony of Khomyshkin (Scarglato affirmation, exhibit F) and plaintiff's deposition transcript (*id.*, exhibit D at 16). Khomyshkin testified was that he was traveling downtown, on Second Avenue, in New York City, in the right lane, moving at approximately 15 miles per hour in light traffic when he saw, in the left lane, the taxi dropping off a passenger. Khomyshkin further testified that, within 30-40 seconds, as he was approaching the intersection, at which there was a green light, the taxi moved into the right lane hitting the Access-A-Ride van in the middle, back bumper (*id.*, exhibit F at 47-50). When questioned whether any part of his vehicle was in the middle lane before he was hit, Khomyshkin responded "no" (*id.* at 53). Khomyshkin testified that in the five blocks before the accident, he did not try to switch out of the right lane, and that during the ten minutes before the accident he did not change lanes (*id.* at 41, 74, 81). Khomyshkin also testified that he did not apply the brakes until after the accident occurred, but had his foot resting on the accelerator when the van was hit, and that prior to the accident he heard screeching tires as the taxi accelerated, moving to the right. Plaintiff testified that the van was hit by the taxi in the rear, although she could not provide additional details about how the accident occurred.

Here, where both vehicles were moving, and where the Van Defendants offered testimony

of a rear-end collision, and that the lead vehicle did not stop or change lanes immediately prior to the accident, these defendants have met their prima facie burden on summary judgment on the motion.

The Taxi Defendants oppose the motion, stating that, as in the prior motion, the Van Defendants failed to demonstrate what happened in the 30-40 seconds immediately prior to the accident and that plaintiff and the Van Defendants are unable to swear that the van did not switch lanes or stop short. However, as discussed above, Khomyshkin's deposition addressed these issues, including lane changes and sudden braking.

The Taxi Defendants argue that the police report for the accident, which contains a notation that Agag reported that the van cut him off, raises a fact issue as to whether or not Khomyshkin contributed to the accident. The parties dispute the admissibility of Agag's statement. A police report may be admissible as a business record (*see e.g. Yant v Mile Sq. Transp., Inc.*, 89 AD3d 492 [1st Dept 2011] [police accident report listing bus passengers]), but hearsay statements in such a document are inadmissible unless the statement falls within a hearsay exception (*Memenza v Cole*, 131 AD3d 1020, 1021-22 [2d Dept 2015] [police accident report admissible as a business record if made based upon officer's observations while carrying out police duties or if the person who gave officer information in the report was under a business duty to relate the facts]; *Roman v Cabrera*, 113 AD3d 541, 542 [1st Dept 2014] [police accident report inadmissible where it recited hearsay and was prepared by an officer who did not observe the accident]). The Taxi Defendants argue that these hearsay statements are admissible as the admissions of a party. However, the statement recorded is not an admission of a fact adverse to the Taxi Defendants (*see Brown v URS Midwest, Inc.*,132 AD3d 936 [2d Dept 2015] [statement in police report admissible as an admission where it "tended to inculpate the defendant in

connection with a material fact"]). The Taxi Defendants offer no other basis for admission of the proffered statement, which is inadmissible as hearsay.

The police report statement offered, as inadmissible evidence, is not, alone, sufficient for denial of the motion (*see Rivera v GT Acquisition 1 Corp.*, 72 AD3d 525, 526 [1st Dept 2010]). However, inadmissible evidence may be considered on summary judgment provided that there is other admissible corroborating evidence (*see e.g. Kovach v PJA, LLC*, 128 AD3d 445, 446 [1st Dept 2015] ["Although hearsay, the police report may be considered, together with the admissible evidence of plaintiff's deposition testimony concerning the cause of her accident, in opposition to the motions for summary judgment"]). As additional evidence that the van cut off the taxi, or otherwise engaged in a dangerous act that may have caused the accident, the Taxi Defendants rely on the testimony of another van passenger, Maria Laboy, who characterized traffic as "a little congested" and "stop and go" (efiling system, document No. 14 at 10, 42).

Laboy testified that she saw the taxi coming up from the left and that the impact was to the rear of the van, and that the van was moving slowly when the impact occurred (*id.* at 11-13). She stated that the van was in the right lane, and just driving straight ahead, and that she thought that Khomyskhin was driving straight (*id.* at 19, 41). While Laboy testified that it was "stop and go" traffic, when asked whether the van was in the process of braking when the accident occurred, she answered that traffic was congested so the driver of the van was driving slowly. Laboy's husband, Carlos Laboy, also a passenger in the van, testified that the van was moving, was hit from behind, and did not change lanes (*id.*, document No. 13 at 13-14). No reasonable inference that the van braked suddenly or changed lanes may be drawn from this testimony or from a contrast between Maria Laboy's general characterization of traffic as congested and Khomyshkin's as light. Therefore, this evidence does not corroborate Agag's statements in the

police report that Khomyshkin cut him off. Absent admissible evidence, the Taxi Defendants have not demonstrated a fact issue that would preclude the granting of the Van Defendants' motion.

The Taxi Defendants' citation to *Tutrani v County of Suffolk* (10 NY3d 906, 907 [2008]) does not aid them. In *Tutrani*, post trial, the Court determined that a jury could find that a police officer's conduct in abruptly slowing his vehicle to a near stop in the travel lane of a busy highway was a substantial cause of a plaintiff's injury, was also negligent and was a proximate cause of the car accident. Here, the Van Defendants offer mere, unsupported speculation about Khomyshkin's conduct, which is not sufficient to avoid summary judgment, and the motion is granted and the complaint and the Taxi Defendants' cross claims against the Van Defendants are dismissed. Consequently, it is unnecessary to reach the Van Defendants' contentions that summary judgment is warranted on the ground that plaintiff did not suffer a serious injury.

The Taxi Defendants move for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a serious injury.[3] In the verified bill of particulars, plaintiff claims that, as a result of the accident, she: (1) underwent trigger point injections to the lumber spine; (2) sustained bulging of the L3-L4, L4-L5 and L5-S1 intervertebral discs with posterior disc bulges impinging upon the anterior spinal canal at L3-4 through L5-S1; (3) sustained straightening of the cervical lordosis; and (4) sustained C3-4, C4-5 and C5-6 posterior subligamentous disc herniations that impress upon the thecal sac (Warner affirmation, exhibit B, ¶ 11). Plaintiff also alleged permanent injury to her cervical and lumbar spine, including nerve

[3] The Taxi Defendants object to plaintiff cross-moving for summary judgment, as she has already been granted partial summary judgment on liability. For the reasons discussed above, and in the interest of judicial economy, the motion will be adjudicated.

root damage, and permanent associated sequelae, including the increased probability of future neck and back injury, degeneration with age and traumatic arthritis (*id.*). Plaintiff claimed that the injuries caused a marked limitation of function, and have compromised her ability to ambulate with full coordination. She also claimed to have been confined to bed for one day, to home for about two days, and to have been totally incapacitated from employment for approximately two months, and partially incapacitated to the date of the July 11, 2012 bill of particulars (*id.*, ¶¶ 13-14). Although plaintiff repeats the Insurance Law § 5012 (d) statutory text concerning various injuries, her bill of particulars and submissions make clear that her claim is that she sustained a permanent consequential or significant limitation to her back/spine and a non-permanent impairment that prevented her from performing substantially all of her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident (90/180-day claim).

To prevail on a motion for summary judgment, the defendant has the initial burden to present competent evidence showing that the plaintiff has not suffered a "serious injury" (*see Rodriguez v Goldstein*, 182 AD2d 396, 397 [1st Dept 1992]). Such evidence includes "affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Shinn v Catanzaro*, 1 AD3d 195, 197 [1st Dept 2003] [internal quotation marks and citation omitted]). Where there is objective proof of injury, the defendant may meet his or her burden upon the submission of expert affidavits indicating that plaintiff's injury was caused by a preexisting condition and not the accident (*Farrington v Go On Time Car Serv.*, 76 AD3d 818, 818-819 [1st Dept 2010]).

In order to establish prima facie entitlement to summary judgment under the 90/180-day claim category of the statute, a defendant must provide medical evidence of the absence of injury

precluding 90 days of normal activity during the first 180 days following the accident (*Elias v Mahlah*, 58 AD3d 434 [1st Dept 2009]). A defendant can establish prima facie entitlement to summary judgment on this category without medical evidence by citing other evidence, such as the plaintiff's own deposition testimony or records demonstrating that the plaintiff was not prevented from performing all of the substantial activities constituting customary daily activities for the prescribed period (*id.* at 435). "[W]here evidence shows, for example, that the plaintiff actually returned to work within the first 90 days after the accident, it is proper to dismiss 90/180 claims, since the ability to return to work may be said to support a legitimate inference that the plaintiff must have been able to perform at least most of his usual and customary daily activities" (*Correa v Saifuddin*, 95 AD3d 407, 409 [1st Dept 2012] [internal citation omitted]).

Defendants met their initial burden with respect to plaintiff's 90/180-day claim by submitting plaintiff's deposition testimony that she returned to work, as a home health care aide, in February 2012 (*Correa,* 95 AD3d at 409). Defendants also made a prima facie showing that plaintiff did not sustain a permanent consequential or significant limitation to her spine/back by offering the affirmed reports of their neurologist, who found normal ranges of motion in plaintiff's cervical, thoracic and lumbar spine, and their radiologist who found that plaintiff's lumbar spine MRI did not demonstrate traumatic injury, but merely degenerative process.

In opposition, plaintiff argues that the examination of defendants' physicians were conducted so long after plaintiff's accident that, considered with plaintiff's testimony, they are insufficient to establish that plaintiff did not sustain a 90/180-day claim. However, as stated above, the Taxi Defendants did meet their prima facie burden.

Also in opposition, plaintiff relies on her records from a medical facility where she was treated after the accident (JCC Medical, Inc.), also submitted by the Van Defendants, but not by

the Taxi Defendants. Assuming, arguendo, the admissibility of these records, the December 7, 2011 visit record notes that plaintiff was able to carry out her customary activities of daily living (Plaintiff's opposition, exhibit 4). Plaintiff was later cleared to return to work, without restriction, approximately two months after the accident.[4] Plaintiff argues that her physician's records support the 90/180-day claim, as plaintiff suffered from pain and decreased range of motion following the accident which necessitated regular treatment throughout the statutory period. She also submits an affidavit stating that she was unable to push or pull more than five pounds and that she could not stand for long periods. However, plaintiff has not provided objective medical documentation demonstrating that she was advised not to engage in certain tasks, or was prevented by injury from engaging in substantially all of her usual and customary daily activities for the entire statutory period. Plaintiff argues that her testimony demonstrates her claim, but fails to cite to what it is in her testimony that does so and has not demonstrated a fact issue as to a 90/180-day claim.

The Taxi Defendants met their prima facie burden to demonstrate the absence of a permanent consequential or significant limitation to plaintiff's back/spine by the affirmed report of Naunihal Sachdev Singh, M.D., who examined plaintiff over two years after the accident and found full range of motion, negative test results, and that plaintiff's alleged condition had resolved (*Kone v Rodriguez*, 107 AD3d 537, 538 [1st Dept 2013]). These defendants also submit the affirmation of radiologist Audrey Eisenstadt, M.D., which has a detailed explanation as to the basis for her conclusion that plaintiff's lumbar spine MRI showed degeneration, not trauma.

In opposition, plaintiff provided evidence of contemporaneous and recent findings of

[4] Even if the later date is used in the Certificate of Disability in the plaintiff's submissions, it is still under 90 days, and plaintiff testified that she went back to work.

limitations by her treating physician, which supplied the requisite proof of limitations and duration of the disc injury to raise an issue of fact as to a significant or permanent consequential limitation (*see Perl v Meher*, 18 NY3d 208, 217–218 [2011]; *Duran v Kabir*, 93 AD3d 566, 567 [1st Dept 2012]; *Torres v Ndongo*, 105 AD3d 480, 480 [1st Dept 2013]).

Specifically, plaintiff submits the affidavit of Debra Ibrahim, D.O., dated June 17, 2015. Ibrahim opined that plaintiff had numerous limitations of range of motion of her cervical, thoracic and lumbar spine, and that measurements of such limitations were taken by inclinometer. Granting plaintiff the benefit of reasonable inferences, as required on this motion, the records demonstrate range of motion limitations of the cervical spine. Plaintiff's radiologist, Steven Winter, M.D., has sworn that plaintiff's January 2012 cervical spine MRI report is accurate. The report reveals disc herniations. Even though the bill of particulars alleges cervical spine injury, Eisenstadt's opinion, submitted by the Van Defendants, concerns only the lumbar spine MRI, and did not challenge the plaintiff's cervical spine MRI results as caused by degenerative process (*compare Graves v L&N Car Serv.*, 87 AD3d 878, 879 [1st Dept 2011] [plaintiff did not raise fact issue where defendants first demonstrated degeneration with radiologist affirmations that addressed the various sections of plaintiff's spine that were at issue]). An inference against plaintiff, the nonmoving party, concerning causation of the injury is impermissible on this motion, and unwarranted where the Taxi Defendants did not submit such evidence about degenerative process of the cervical spine.

Because plaintiff has raised a triable issue of fact as to whether she suffered a significant limitation of use of her spine, it is unnecessary to address the sufficiency of plaintiff's submissions to raise triable issues of fact as to whether plaintiff met the no-fault threshold under a different statutory category of serious injury with respect to her other alleged injuries (*see*

*Johnson v KS Transp., Inc.*, 115 AD3d 425, 426 [1st Dept 2014]).

Plaintiff seeks an order granting summary judgment on liability and a trial on damages, arguing that there is no dispute concerning the Taxi Defendant's liability for rear-ending the van. There is, however, an existing fact issue as to the existence of a serious injury, a threshold issue, and plaintiff has not yet demonstrated entitlement to a trial on damages.

Accordingly, it is

ORDERED that the motion of defendants New York City Transit Authority, Metropolitan Transportation Authority, Star Cruiser Transportation, Inc. and Igor Khomyshkin for summary judgment dismissing the complaint and cross claims asserted against them is granted and the complaint and cross claims against said defendants are severed and dismissed; and it is further

ORDERED that the cross motion of defendants Marathon Taxi, Inc. and Ali Agag for summary judgment dismissing this action is denied; it is further

ORDERED that plaintiff's cross motion for summary judgment and a trial on damages only is denied; and it is further

ORDERED that the balance of the action shall continue; next cc: 2/29/16 at 9:30AM.

This is the Decision and Order of the Court.

Dated: February 9, 2016
New York, NY

**HON. ARLENE P. BLUTH, JSC**