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

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ELSA J. CORCINO,

Plaintiff,

Index #: 157006/14
Motion Seq. 03

-against-

DECISION/ORDER

TIMOTHY J. MILES and ALLCAR RENT-A-CAR,

Defendants.

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Defendants' motion, pursuant to CPLR §3212, seeking summary judgment on the basis that plaintiff did not sustain a serious injury in accordance with Insurance Law §5102(d) and plaintiff's cross- motion, pursuant to CPLR §3212, seeking summary judgment on the issue of liability. The motions are decided as follows:

It is well settled that summary judgment is a drastic remedy and cannot be granted where there is any doubt as to the existence of a triable issue of fact or if there is even arguably such an issue. *Hourigan v McGarry, 106 A.D.2d 845*, appeal dismissed *65 N.Y.2d 637 (1985); Andre v Pomeroy, 35 N.Y.2d 361 (1974).* The function of the court in deciding a summary judgment motion is to determine whether any issues of fact exist that preclude summary resolution of the dispute between the parties on the merits. *Consolidated Edison Co. v Zebler, 40 Misc.3d 1230A (Sup. Ct. N.Y. 2013); Menzel v Plotnick, 202 A.D.2d 558 (2nd Dept. 1994).* In deciding motions for summary judgment, the Court must accept, as true, the non-moving party's recounting of the facts and must draw all reasonable inferences in favor of the non-moving party. *Warney v Haddad, 237 A.D.2d 123 (1st Dept. 1997); Assaf v Ropog Cab Corp., 153 A.D.2d 520 (1st Dept. 1989).*

An acute sprain or strain that causes a significant physical limitation may constitute a "serious injury" within the meaning of §5102(d) of the New York State Insurance Law. *Licari v Elliot, 57 N.Y.2d 230 (1982); Smith-Carter v Valdez, 2008 NY Slip OP 31231U (Sup. Ct. N.Y. 2008); Rodriguez v Russell, 2013 NY Slip Op 33954U, (Sup. Ct. Bronx 2013); Maenza v Letkajornsook, 172 A.D.2d 500 (2nd Dept. 1991); Konco v E.T.C. Leasing Corp., 160 A.D.2d*

680 (2nd Dept. 1990). Furthermore, a tendon or ligament tear, or a bulging or herniated disc may also constitute evidence of a "serious injury" in accordance with the Insurance Law. *Jacobs v Perciballi Container Service, Inc., 2013 NY Slip Op. 31350U (Sup. Ct. NY 2013)*; *Chen v Caroprese, 2012 NY Slip Op. 31142U (Sup. Ct. NY 2012); Cruz v Lugo, 29 Misc.3d 1225(A) (Sup. Ct. Bronx 2008); Shvartsman v Vildman, 47 A.D.3d 700 (2nd Dept. 2008); Tobias v Chupenko, 41 A.D.3d 583 (2nd Dept. 2007); Lewis v White, 274 A.D.2d 455 (2nd Dept. 2000)*. However, such claims must be supported by objective competent medical evidence demonstrating a significant physical limitation resulting therefrom. *Licari v Elliot, 57 N.Y.2d 230 (1982)*; *Pommells v Perez, 4 N.Y.3d 566 (2005)*.

In this action, plaintiff sufficiently raised triable issues of fact as to whether she sustained, *inter alia*, a tear of the posterior horn of the medial meniscus of the right knee; disc herniations at C3-4, C4-5, C5-6, C6-7 and/or L4-5; an acute cervical sprain and/or strain; or an acute lumbar sprain and/or strain; as a result of the subject accident on September 23, 2013 and whether she sustained a "significant limitation" or a "permanent consequential limitation" of her right knee, cervical spine or lumbar spine as a result of the subject accident with the affirmed report of Dr. Maxim Tyorkin dated October 17, 2013 and the affirmed report of Dr. Gabriel Dassa dated April 29, 2016 as well as the unsworn right knee MRI report dated October 23, 2013 and the unsworn cervical and lumbar MRI reports dated November 1, 2013. Although these MRI reports are unsworn, as they were reviewed and considered by the defendants' expert, they are properly before the Court for consideration. *Nelson v Distant, 308 A.D.2d 308 (1st Dept. 2003)*.

It is well settled that the finder of fact must resolve conflicts in expert medical opinions. *Ugarriza v. Schmider, 46 N.Y.2d 471 (1979); Andre v. Pomeroy, 35 N.Y.2d 361 (1974); Moreno v. Chemtob, 706 N.Y.S.2d 150 (2nd Dept. 2000)*.

Accordingly, those portions of defendants' motion seeking dismissal of plaintiff's claim of sustaining a "serious injury" based upon the "significant limitation" and "permanent consequential limitation" categories are denied. *Hourigan v. McGarry, 106 A.D.2d 845*, appeal dismissed *65 N.Y.2d 637 (1985); Andre v. Pomeroy, 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 (1974)*.

However, that portion of defendants' motion seeking dismissal of plaintiff's claim of

sustaining a "serious injury" based upon the "90/180" category is granted. Plaintiff failed to raise a triable issue of fact as to whether she was prevented from performing substantially all of her usual and customary daily activities for not less than 90 days during the 180 days immediately following the subject accident. Plaintiff testified that she was not confined to bed and was only confined to home for eight days during the requisite time period. As such, plaintiff's claim of sustaining a "serious injury" based upon the "90/180" category is dismissed.

This Court need not evaluate the remainder of plaintiff's claimed injuries to determine whether they meet the "serious injury" threshold, since if plaintiff is able to establish a "serious injury" at trial, plaintiff may recover for all injuries sustained in the subject accident. *McClelland v Estevez, 77 A.D.3d 403 (1st Dept. 2010).*

Plaintiff's Sur-Reply, which was improperly submitted without leave of court, was not considered.

Accordingly, defendants' summary judgment motion is denied in part and granted in part, as explained herein.

Next, plaintiff cross- moves, pursuant to CPLR§3212, seeking summary judgment on the issue of liability. Defendants opposes, alleging that plaintiff's sudden stop was the cause of the accident.

Summary judgment is only appropriate where there is no genuine triable issue of fact and where the papers submitted warrant that the court directs judgment in favor of the moving party as a matter of law. *Andre v Pomeroy, 35 N.Y.2d 361 (1974).* In moving for summary judgment, the movant must submit admissible evidence to demonstrate that there are no material issues of fact that require a trial. *Zuckerman v City of New York, 49 N.Y.2d 557 (1980); Winegrad v New York Univ. Med. Ctr., 64 N.Y.2d 851 (1985); Alvarez v Prospect Hosp., 68 N.Y.2d 320 (1986).*

A review of the papers submitted in support of this cross-motion reveals that on September 23, 2013, between 2 p.m. and 3 p.m., plaintiff was driving on Amsterdam Avenue in Manhattan, when she approached a school bus with its stop sign in operation. Thereupon, plaintiff alleges that she stopped for approximately one and a half minutes and then was struck in

the rear by defendant[1].

It is well settled that a rear-end collision with a stopped or stopping vehicle establishes a *prima facie* case of negligence on the part of the rear vehicle and imposes a duty on the driver of the rear vehicle to come forward with an adequate non-negligent explanation for the accident. *Cruz v Lise, 123 A.D.3d 514 (1st Dept. 2014).* Moreover, a claim that the foremost vehicle stopped suddenly, standing alone, is insufficient to raise a triable issue of fact *Cruz, supra. See also, Corrigan v Porter Cab Corp., 101 AD3d 471 (1st Dept. 2012).*

A review of the papers submitted in opposition fail to reveal any non-negligent explanation for the accident. Defendants' claim of a sudden stop, without more, is unavailing and fails to raise a triable issue of fact.

Accordingly, plaintiff's cross-motion for summary judgment on the issue of liability is granted.

The Court has considered the parties' remaining arguments as to both motions and finds them to be without merit.

Plaintiff is directed to serve a copy of this Decision with Notice of Entry upon all parties within 20 days of this Decision.

This constitutes the Decision and Order if this Court.

Dated: December 1, 2016
New York, New York

HON. LETICIA M. RAMIREZ, J.S.C.

[1]Defendant Timothy Miles has been precluded from submitting an affidavit in opposition to the instant motion, as he has failed to appear for a deposition pursuant to Court Order.