SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ADAM SILVERA** **PART** **IAS MOTION 22**

Justice

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KATHERINE ALTAVILLA,

Plaintiff,

- v -

VENTI TRANSPORT, INC.,VENTI TOWING & TRANSPORT, INC.,PERRY WEST

Defendant.

INDEX NO. 153314/2016

MOTION DATE 10/29/2018

MOTION SEQ. NO. 002

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 71, 72, 73, 74, 75, 76, 77, 78, 81, 82, 83, 84

were read on this motion to/for REARGUMENT/RECONSIDERATION.

Upon the foregoing documents, it is ORDERED that after consideration of plaintiff Katherine Altavilla's motion to reargue the Decision of this Court dated September 5, 2018, the Court grants the motion to reargue and it is ORDERED that defendants' motion for summary judgment to dismiss plaintiff's complaint is denied and plaintiff's Cross-Motion for summary judgment on the issue of liability is granted.

The present action stems from a motor vehicle accident which occurred on April 21, 2014 on Route 222 in Maidencreek Township, Pennsylvania. Since, plaintiff was domiciled in New Jersey, defendants were domiciled in New York and the subject accident occurred in Pennsylvania, a choice of law analysis was necessary. In its September 5, 2018 Decision, the Court used the choice of law analysis set forth in *Neumeier v Kuehner*, 31 NY2d 121, 128 [1972], in which the Court of Appeals addressed motor vehicle cases involving conflicts of choice of law between New York and foreign states and delineated the three following principles:

> 1. When the guest-passenger and the host-driver are domiciled in the same state, and the car is there registered, the law of that state should control and determine the standard of care which the host owes to his guest.
> '2. When the driver's conduct occurred in the state of his domicile and that state does not cast him in liability for that conduct, he should not be held liable by reason of the fact that liability would be imposed upon him under the tort law of the state of the victim's domicile. Conversely, when the guest was injured in the state of his own domicile and its law permits recovery, the driver who has come into that state should not—in the absence of special circumstances—be permitted to interpose the law of his state as a defense.
> '3. In other situations, when the passenger and the driver are domiciled in different states, the rule is necessarily less categorical. Normally, the applicable rule of decision will be that of the state where the accident occurred but not if it can be shown that displacing that normally applicable rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants. (Cf. Restatement, 2d, Conflict of Laws, P.O.D., pt. II, ss 146, 159 (later adopted and promulgated May 23, 1969).)'

The Court found that the third principle is applicable to plaintiff's case stating that: "Plaintiff and defendants are domiciled in different states and thus the law of Pennsylvania, where the accident occurred, should govern unless it can be shown that 'displacing the applicable [New York] rule will advance the relevant substantive law purposes without impairing the smooth working of the multi-state system or producing great uncertainty for litigants'" (*id.*)

Upon reargument, plaintiff notes that the Court misapplied the law. Plaintiff correctly states that the Court erred in finding that New York is the normally applicable rule of law. The third Neumeier Rule established that the normally applicable rule of law is that of the state where the accident occurred, not where the case was brought. Thus, the applicable rule is Pennsylvania law. However, the Court finds that under the third principle of the Neumeier analysis, the outcome of the case remains the same in that New York law should be applied to the present action.

Displacing Pennsylvania law with that of New York law would advance relevant substantive law purposes for cases brought in New York. Allowing for the use of Pennsylvania

law runs contrary to the Legislature's intent for enacting New York's no-fault insurance law. One of the law's purposes was to "establish a quick, sure and efficient system for obtaining compensation for economic loss suffered" (*Walton v Lumbermens Mut. Cas. Co.*, 88 NY2d 211, 214 [1996]). In order to prevent the overcompensation for lesser injuries and under compensation for those with more serious injuries, the Legislature enacted the No-Fault law to demarcate "rules easily and readily applied to avoid the expenditure of time and money in investigation and determination on which side of the line each particular claim would fall" (*Montogmery v Daniels*, 38 NY2d 41, 70 [1975]).

The application of Pennsylvania law makes ambiguous to New York litigants who affirmatively choose to commence an action in the State of New York, whether they will benefit from New York threshold law or be held to that of a foreign state. The use of Pennsylvania law would be contrary to the Legislature's intent and would unnecessarily expend time and money in order to make a determination on which side of the line plaintiff's claim would fall under.

As New York No-Fault law applies to the case at bar, defendants' motion to dismiss must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure … to do [so]" (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

In order to satisfy their burden under Insurance Law § 5102(d), a plaintiff must meet the "serious injury" threshold (*Toure v Avis Rent a Car Systems, Inc.*, 98 NY2d 345, 352 [2002]

[finding that in order establish a prima facie case that a plaintiff in a negligence action arising from a motor vehicle accident did sustain a serious injury, plaintiff must establish the existence of either a "permanent consequential limitation of use of a body organ or member [or a] significant limitation of use of a body function or system"]).

To demonstrate a "permanent consequential limitation" plaintiff has the burden of establishing that the injury is medically shown to be significant under No-Fault law and "present objective medical proof of a serious injury causally related to the accident in order to survive summary dismissal" (*Pommells v Perez*, 4 NY3d 566, 576 [2005] [finding that proof of a herniated disc or other soft-tissue injury alone is insufficient to support a finding of a serious injury under no-fault law. Such objective proof must be supported by evidence of the claimed injury compared to the full range of what is normal]).

Here, Defendants claim that plaintiff Katherine Altavilla's injuries stem from prior motor vehicle accidents, that plaintiff has a full range of motion, and that all injuries claimed are either not serious or due to preexisting conditions. In support of their claims, defendants point to the deposition of plaintiff in which she states that she has been involved in four prior motor vehicle accidents, one of which was a few months prior to the subject incident (Exh E, at 85,88-89, & 93). Defendants allege that plaintiff's injury is merely that of a herniated disc and thus not sufficient to support a finding of serious injury under No-Fault law. Further, defendants allege that plaintiff did not miss any time from work following the accident.

Defendants provide the examination report of Dr. Ashok Anant which states that plaintiff has a normal range of motion, suffered a mild cervical sprain from the accident at issue, and has a preexisting chronic mild degenerative disc disease (Exh F at 3). Additionally, defendants note that plaintiff proffers the medical report of Dr. Steven Waldman which states that plaintiff has

suffered a reduction in range of motion of the cervical spine. Defendants highlight that Dr. Waldman's treatment of plaintiff began 15 months after the accident immediately after she spoke with her attorney. Pursuant to *Henry v Peguero*, 72 AD3d 600, 603 [1st Dep't 2010], in which the Court citing *Pommells v Perez*, 4 NY3d 566, 572 [2005], found that plaintiff's "fail[ure] to explain the two-week gap between the accident and the commencement of treatment, … 'interrupt[s] the chain of causation between the accident and the claimed injury." Thus, defendants have satisfied their burden and the burden shifts to plaintiff to demonstrate an issue of fact.

In opposition, plaintiff notes that the Court overlooked plaintiff's treatment with Dr. Jeffrey Culbert with whom Ms. Altavilla treated from the date of the accident continuously until the present (Aff in Support, ¶ 40). Dr. Culbert treated plaintiff consistently after the accident until present and concluded that plaintiff's injuries are due to the accident at issue and not because of her degenerative disc disease. In *Rosa v Delacruz*, 32 NY3d 1060, 2018 N.Y. Slip Op. 07040 [2018], the Court of Appeals found that where a plaintiff's doctor opined that tears were causally related to the accident, but did not address findings of degeneration or explain why the tears and physical deficits found were not caused by the preexisting degenerative conditions, plaintiff failed to raise a triable issue of fact as it "failed to acknowledge, much less explain or contradict, the radiologist's finding. Instead, plaintiff relied on the purely conclusory assertion of his orthopedist that there was a causal relationship between the accident" (*See id.*)

While plaintiff's doctors have found plaintiff to suffer from degenerative disc disease, Dr. Jeffrey Culbert's affirmation raises an issue of fact as to the degeneration. Dr. Culbert states:

> The degenerative changes found on the MRI films would be expected for the patient's age of 52 and are not the cause of her current complaints. While the degenerative changes may have existed before the accident, the patient was asymptomatic. During my 15 years of pre accident chiropractic care and

> treatment, Ms. Altavilla did not present with cervical spine pain or related limitations. It is my opinion to a reasonable degree of chiropractic certainty that the trauma induced by the accident on already weakened and deteriorated the tissue and ligaments that hold and support the spine, thereby causing the cervical spine pain, disc herniation and symptomology suffered by the patient after her accident. As such, it is my opinion that although there was a degenerative disease in the cervical spine, it was significantly aggravated and exacerbated by the subject accident.

The Court finds that Dr. Culbert's affirmation differs from that of the doctor in *Rosa v Delacruz.* Dr. Culbert explains that his finding that plaintiff suffered injuries from the underlying incident is based upon the plaintiff's asymptomatic condition before the accident, the changes after the accident, and plaintiff's age. Dr. Culbert's explanation is not a purely conclusory assertion and finds a causal relationship between the accident and the injuries. Thus, plaintiff has demonstrated that the Court mistakenly found a gap in treatment, has raised an issue of fact and demonstrated the existence of a serious injury. Defendants' motion to dismiss plaintiff's Complaint is denied.

Summary Judgment (liability)

Plaintiff alleges that she was the driver of a motor vehicle that was struck in the rear by defendants' vehicle while stopped at a red light. "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure … to do [so]" (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

"A rear-end collision with a stopped vehicle, or a vehicle slowing down, establishes a prima facie case of negligence on the part of the operator of the rear-ending vehicle, which may be rebutted if that driver can provide a non-negligent explanation for the accident" (*Baez v MM Truck and Body Repair, Inc.*, 151 AD3d 473, 476 [1st Dep't 2017]).

Plaintiff submits the testimony of defendant, driver Perry J.West, who testified at deposition that he observed plaintiff's vehicle stopped at a red light behind a tractor trailer when he attempted but failed to break his vehicle before it struck the rear of the plaintiff's vehicle propelling it into the tractor trailer (Mot, Exh B, West deposition, at 26, 34, 50-51). Further plaintiff highlights that defendant testified that he received tickets and pled guilty for failure to stop and excessive speed from the Police Officer at the accident scene (*id.* at 45-46). Thus, plaintiff has made a prima facie showing of entitlement to summary judgment and the burden shifts to defendants to raise an issue of fact or non-negligent explanation for the accident.

Defendants oppose plaintiff's motion for summary judgment on the issue of liability. om filing the instant summary judgment motion. Defendants oppose the motion and point to the rules of this Court which state that any summary judgment motion be made within 60 days of the filing of the Note of Issue. Defendants claim that the Note of Issue was filed on October 18, 2017 and the 60-day deadline passed on December 17, 2017. However, in response plaintiff demonstrates that she did indeed file within the 60-day deadline. Plaintiff initially filed a Note of Issue in the incorrect case, Index 3 152323/2016. Upon discovery the error, plaintiff filed a Note of Issue in the instant action on December 15, 2017 and then filed the instant motion within 60 days thereafter. Thus, plaintiff's motion for summary judgment on the issue of liability is proper.

As defendants have failed to proffer a valid non-negligent explanation for the accident and failed to raise an issue of fact, plaintiff's motion on the issue of liability is granted in favor of plaintiff and against defendants.

Accordingly, it is

ORDERED that plaintiff's motion to reargue is granted; and it is further

ORDERED that, upon reargument, the Court vacates its prior order, dated 9/5/18, and finds that NY Law is the applicable rule of law herein, denies defendants' motion for summary judgment on the issue of serious injury, and grants plaintiff's cross-Motion for summary judgment on the issue of liability against defendants is granted; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon plaintiff with notice of entry.

This constitutes the Decision/Order of the Court.

12/18/2018
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE