SHORT FORM ORDER

INDEX No. 15-602340
CAL. No. 17-02149MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PUBLISH

PRESENT:

Hon. WILLIAM G. FORD
Justice Supreme Court

MOTION DATE 4-17-18 (003 & 004)
MOTION DATE 4-26-18 (002)
ADJ. DATE 8-30-18
Mot. Seq. # 002 - MG
 # 003 - MD
 # 004 - MD

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RHONDA GLASGOW,

Plaintiff,

- against -

JOSEPH P. LUISE and COMAIRCO EQUIPMENT, INC.,

Defendants.

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Attorney for Plaintiff:
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Attorney for Defendant: *Luise*
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Attorney for Defendant: *Comairco*
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Upon the following papers read on these e-filed motions for summary judgment : Notice of Motion/Order to Show Cause and supporting papers dated February 6, 2018, March 5, 2018, and March 7, 2018 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers dated April 12, 2018 and June 12, 2018 ; Replying Affidavits and supporting papers dated July 10, 2018 and August 29, 2018 ; Other ; (~~and after hearing counsel in support of and opposed to the motion~~) it is,

ORDERED that the following motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by plaintiff for summary judgment in her favor on the issue of liability is granted; and it is further

ORDERED that the motion by defendant Comairco Equipment, Inc. for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied; and it is further

ORDERED that the motion by defendant Joseph Luise for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied.

This is an action to recover damages for injuries sustained by plaintiff when her vehicle was rear-ended by a vehicle owned and operated by defendant Joseph Luise. The accident allegedly occurred on January 14, 2015, at approximately 4:30 p.m., on the exit ramp of the southbound Robert Moses Parkway leading to the eastbound Sunrise Highway south service road, in the Town of Islip, New York. At the time of the accident, Luise was working in the course of his employment with defendant Comairco Equipment, Inc.

Plaintiff moves for summary judgment in her favor on the issue of liability on the ground that she was not negligent, and that the subject accident was solely the result of defendant Luise's failure to control the vehicle. In support, plaintiff submits, *inter alia*, the pleadings and the transcripts of the parties' deposition testimony.

At her deposition, plaintiff testified that prior to the accident, she had been traveling southbound on the Robert Moses Parkway. She testified that as her vehicle was stopped on a Robert Moses Parkway exit ramp for approximately five seconds, awaiting clearance to merge into the right lane of the eastbound Sunrise Highway south service road, it was struck in the rear by the Luise vehicle.

At his deposition, Luise testified that prior to the accident, his vehicle was stopped behind plaintiff's vehicle on a Robert Moses Parkway exit ramp. Luise testified that his vehicle struck plaintiff's vehicle in the rear, after it proceeded to enter the service road, but then stopped.

It is well settled that when a driver of a motor vehicle approaches another automobile from the rear, he or she is bound to maintain a safe rate of speed, to keep control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (*see* Vehicle and Traffic Law § 1129 [a]; ***Gibson v Levine***, 95 AD3d 1071, 944 NYS2d 610 [2d Dept 2012]; ***Zweeres v Materi***, 94 AD3d 1111, 942 NYS2d 625 [2d Dept 2012]; ***Nsiah-Ababio v Hunter***, 78 AD3d 672, 913 NYS2d 659 [2d Dept 2010]). Moreover, a rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability regarding the operator of the moving vehicle and imposes a duty of explanation on the operator of the moving vehicle to excuse the collision by providing a non-negligent explanation, such as a mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on wet pavement or some other reasonable excuse (*see* ***Fajardo v City of New York***, 95 AD3d 820, 943 NYS2d 587 [2d Dept 2012]; ***Giangrasso v Callahan***, 87 AD3d 521, 928 NYS2d 68 [2d Dept 2011]; ***Ortiz v Hub Truck Rental Corp.***, 82 AD3d 725, 918 NYS2d 156 [2d Dept 2011]; ***DeLouise v S.K.I. Wholesale Beer Corp.***, 75 AD3d 489, 904 NYS2d 761 [2d Dept 2010]).

Here, plaintiff established her prima facie entitlement to summary judgment as she demonstrated that her vehicle was struck in the rear by the Luise vehicle (*see* ***Figueroa v MTLR Corp.***, 157 AD3d 861, 69 NYS3d 359 [2d Dept 2018]; ***Nikolic v City-Wide Sewer & Drain Serv. Corp.***, 150 AD3d 754, 53 NYS3d

684 [2d Dept 2017]). The burden then shifted to defendants to come forward with a non-negligent explanation for the accident.

In opposition, Luise submits only the affirmation of his attorney. The affirmation from an attorney having no personal knowledge of the facts is without evidentiary value and thus, is insufficient to raise a triable issue of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Hubbard v County of Madison***, 93 AD3d 939, 939 NYS2d 619 [3d Dept 2012]; ***Sanabria v Paduch***, 61 AD3d 839, 876 NYS2d 874 [2d Dept 2009]; ***Prince v Accardo***, 54 AD3d 837, 863 NYS2d 819 [2d Dept 2008]). Defendants failed to provide a nonnegligent explanation for the rear-end collision (*see* ***Bene v Dalessio***, 135 AD3d 679, 22 NYS3d 237 [2d Dept 2016]; ***Brothers v Bartling***, 130 AD3d 554, 13 NYS3d 202 [2d Dept 2015]; ***Xian Hong Pan v Buglione***, 101 AD3d 706, 955 NYS2d 375 [2d Dept 2012]). Accordingly, plaintiff's motion for summary judgment in her favor on the issue of liability is granted.

Defendant Comairco Equipment, Inc. ("Comairco Equipment") moves for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law §5102 (d). By the bill of particulars, plaintiff alleges that, as a result of the accident, she sustained various serious injuries and conditions, including bulging and herniated discs in the cervical, thoracic and lumbar regions, cervical, thoracic and lumbar radiculopathy, and labrum tears in both shoulders. Luise also moves for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law §5102 (d).

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."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or a "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed, or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see* ***Perl v Meher***, 18 NY3d 208, 936 NYS2d 655 [2011]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Cebron v Tuncoglu***, 109 AD3d 631, 970 NYS2d 826 [2d Dept 2013]).

On a motion for summary judgment, the defendant has the initial burden of making a prima facie showing, through the submission of evidence in admissible form, that the injured plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Akhtar v Santos***, 57 AD3d 593, 869 NYS2d 220 [2d Dept 2008]). The defendant may

satisfy this burden by submitting the plaintiff's deposition testimony and the affirmed medical report of the defendant's own examining physician (*see* ***Moore v Edison***, 25 AD3d 672, 811 NYS2d 724 [2d Dept 2006]; ***Farozes v Kamran***, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Here, Comairco Equipment failed to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see* ***Reitz v Seagate Trucking, Inc.***, 71 AD3d 975, 898 NYS2d 173 [2d Dept 2010]). On December 21, 2015, approximately 11 months after the subject accident, an independent examining orthopedist, Dr. John Waller, examined plaintiff and performed certain orthopedic and neurological tests, including the straight leg raising test and the impingement test. Dr. Waller found that all the test results were negative or normal. Dr. Waller also performed range of motion testing on plaintiff's cervical and lumbar regions and shoulders, using a goniometer to measure her joint movement. Dr. Waller found that plaintiff exhibited the range of motion restrictions in her cervical region of 40 degrees of flexion (50 degrees normal) and 50 degrees of extension (60 degrees normal). Dr. Waller indicated that plaintiff also exhibited the range of motion restrictions in her shoulders: 150 degrees of flexion and abduction (180 degrees normal) and 70 degrees of external rotation (90 degrees normal) in the right shoulder and 80 degrees of external rotation (90 degrees normal) in the left shoulder (*see* ***Jean v New York City Tr. Auth.***, 85 AD3d 972, 925 NYS2d 657 [2d Dept 2011]; ***Reitz v Seagate Trucking, Inc.***, *supra*). Dr. Waller's report, therefore, is insufficient to establish a prima facie case that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d).

Inasmuch as Comairco Equipment failed to meet its prima facie burden, it is unnecessary to consider whether the papers submitted by plaintiff in opposition to the motion were sufficient to raise a triable issue of fact (*see* ***McMillian v Naparano***, 61 AD3d 943, 879 NYS2d 152 [2d Dept 2009]; ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]). Thus, Comairco Equipment's motion for summary judgment dismissing the complaint is denied. Accordingly, Luise's motion for summary judgment dismissing the complaint on the issue of serious injury is denied, as moot.

Dated: September 19, 2018
Riverhead, New York

HON. WILLIAM G. FORD J.S.C.

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION