SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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MARISOL GARCIA,

Plaintiffs,

-against-

KATHLEEN BARBARA CACCAMO,

Defendants.

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Index No.: 710481//2019

Motion Seq. No. 001

Decision and Order

Present: **HONORABLE ULYSSES B. LEVERET**:

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	EF-08-19
Affirmation In Opposition-Exhibits.....	EF-22- 38
Notice of Cross Motion-Exhibits-Memo.....	EF-39-45
Reply Affirmation/Motion.....	EF-43

Upon the foregoing papers, it is ordered that defendant Kathleen Barbara Caccamo's motion for an order pursuant to CPLR § 3212 for summary judgment in favor of defendant, and dismissing the complaint of plaintiff Marisol Garcia on the grounds that plaintiff has failed to meet the serious injury threshold requirement mandated by Insurance Law § 5102 (d) is denied. Plaintiff's cross motion for an order granting partial summary judgment on the issue of liability against defendant and striking the affirmative defense of comparative negligence from the answer is granted.

Plaintiff Marisol Garcia seeks to recover for personal injuries allegedly sustained as a result of a motor vehicle accident which occurred on October 23, 2017 on the Cross Island Parkway near the Linden Boulevard underpass, County of Queens, State of New York.

Plaintiff Marcia Garcia asserts that on October 23, 2017, as she was driving on the Cross Island Parkway on her way to work, her vehicle was suddenly and without warning struck in the rear by a vehicle operated by defendant Kathleen Barbara Caccamo. Plaintiff alleges that as a result of the accident, she sustained injuries to her neck, left shoulder, left hand, and lower back.

Insurance Law § 5102 (d) defines a "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 permanent nature which prevents the injured from performing substantially all of the material acts, which constitute such person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment."

Defendant Kathleen Barbara Caccamo allege that plaintiff has not suffered a serious injury within the meaning of the No Fault Law. In support of the motion, defendant submitted an orthopedic evaluation dated September 30, 2020 of plaintiff by Dr. Arnold T. Berman, an orthopedic surgeon, who examined plaintiff on 8/26/2020 using a goniometer and reviewed

plaintiff's medical records. Dr. Berman reports that the examination of plaintiff's cervical spine range of motion revealed flexion to 50 degrees (normal 50 degrees), extension to 60 degrees (normal 60 degrees), right/left lateral flexion 45 degrees(normal 45 degrees), right/left rotation to 80 degrees (normal 80 degrees). Dr. Berman states that inspection of the cervical spine revealed no tenderness, spasm or pain with palpation but mild pain on range of motion.

Plaintiff's lumbar spine range of motion examination revealed flexion 60 degrees (normal 60 degrees), extension to 25 degrees (normal 25 degrees), right/left lateral bending to 25 degrees (normal 25 degrees). There was no tenderness, spasm or pain with palpation and mild pain on range of motion. Heel and toe walk was normal.

Plaintiff's right/left hand range of motion revealed findings of proximal interphalangeal joint flexion 100 degrees (normal 100 degrees), distal interphalangeal joint flexion 70 degrees (normal 70 degrees), and extension 0 degrees (normal 0 degrees). There was full closing of the hands to the distal palmer crease, no atrophy, tenderness, swelling, erythema or ecchymosis noted.

Dr. Berman states that plaintiff sustained a cervical/lumbar strain/sprain, left shoulder contusion/strain/sprain and left hand contusion as a result of the subject accident which is now resolved with no clinical residuals. There was no radiculopathy, no atrophy of the upper/lower extremities indicating normal usage. Dr. Berman states that plaintiff did not sustain any permanency of injury or disability. Plaintiff's left shoulder surgery is not related to the subject accident and was done for pre-existing disease and not this injury. Dr. Berman states that plaintiff can participate in all aspects of daily living and she may work at her regular employment, full time, without restrictions.

Defendant submitted a sworn report dated August 22, 2020 by Dr. Jonathan S. Luchs, a board certified radiologist who reviewed plaintiff's 12/2/2017 cervical spine MRI. The MRI review revealed no post traumatic findings causally related to the subject accident but degenerative disc disease and degenerative arthropathy, most prominent at C5/6 resulting in flattening of ventral thecal sac.

Plaintiff's 11/21/2017 left shoulder MRI review showed mild subacromial impingement resulting in mild supraspinatus tendinosis that are chronic and degenerative and not post traumatic.

Plaintiff's 12/2/2017 lumbar spine MRI utilizing multiplanar imaging techniques found degenerative disc disease and degenerative arthropathy as well as dextroscoliosis of the lumbar spine and minimal retrolisthesis of L5 which are all chronic and not post traumatic.

When defendant has established that plaintiff's injuries are not serious within the meaning of No-Fault Law, the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law. See *Jin v Reilly*, 296 AD 2d 373 (2002).

Plaintiff in opposition to defendants motion for summary judgment asserts that plaintiff sustained a serious injury in that she sustained both permanent consequential limitations and significant limitations of the use of her cervical, lumbar spine and left shoulder and a medically determined injury or impairment of a non permanent nature to her cervical spine, left shoulder and lumbar spine which prevented her from performing her usual and customary daily activities for not

less than 90 days during the 180 days immediately following the occurrence of the injury or impairment. Plaintiff submitted a sworn physician affirmation dated of Dr. Mark S. McMahon, a board certified orthopedic surgeon who examined plaintiff on April 21, 2021 and reviewed plaintiff's medical records relating to the subject accident. Dr. McMahon's examination of plaintiff's cervical spine range of motion by use of a goniometer revealed flexion to 50 degrees (normal 50 degrees), extension to 60 degrees (normal 60 degrees), left bending 35 degrees(normal 45 degrees), right bending 35 degrees (normal 40 degrees). Plaintiff has decreased sensation to light touch on her left upper extremity.

Plaintiff's lumbar spine range of motion examination found flexion 35 degrees (normal 90 degrees), extension to 10 degrees (normal 20 degrees), left bending 15 degrees with pain (normal 25 degrees) right bending 25 degrees with pain (normal 25). Plaintiff has decreased sensation to light touch on her left upper extremity

Plaintiff's left shoulder examination revealed four healed arthroscopic portals with mild atrophy of her deltoid. Elevation 160 degrees with pain (normal 180 degrees), internal rotation to the posterior, superior, iliac spine with pain (normal T10), external rotation 30 degrees with pain (normal 70). Plaintiff is tender to palpation.

Dr. McMahon's diagnosis is that plaintiff's left shoulder has multiple round foci of abnormal signal in the proximal humerus secondary to trauma. Fraying of the posterior, superior labrum and degeneration of the interior, inferior labrum. Glenohumeral joint effusion. Cervical spine C4-5 disc bulge with thecal sac indentation, C5-6 disc bulge and flattening of the ventral margin of the cord, lumbar spine L3-4 and L4-5 subligamentous disc bulges, L5-S1 shallow central subligamentous disc herniation impressing on the midline ventral thecal sac. Dr. McMahon states that plaintiff's condition interferes with plaintiff's quality of life and her activities of daily living, is permanent and causally related to the subject accident.

Plaintiff submitted medical records from Staten Island University Hospital and Total Neuro Care, P.C. However, the medical records are inadmissible as they are unsworn and unafffirmed.. See *Bernier v Torres*, 79 Ad 3d 776 (2010).

It is well established that the proponent of summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact. See *Zuckerman v City of New York*, 49 NY 2d 557 (1980). Here the affirmed medical reports of the parties' doctors directly contradict each other. Where parties offer conflicting medical evidence on the existence of a serious injury, the existence of such injury is a matter for a jury's determination. See *Cracchiolo v Omerza*, 87 AD 3d 674 (2011).

Plaintiff cross moves for summary judgment on the issue of liability against defendant and striking the affirmative defense of comparative negligence from the answer. Plaintiff alleges that her vehicle was struck in the rear as a result of defendant's negligence and that defendant is unable to provide any reasonable excuse for the rear end collision. Plaintiff asserts that defendant is the sole proximate cause of the subject accident.

A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence against the operator of the moving vehicle, thereby requiring that operator to rebut the

inference of negligence by providing a non-negligent explanation for the collision. See *Kimyagarov v Nixon Taxi Corp., et al*, 45 A.D. 3d 736, 846 N.Y.S. 2d 309 (2007). If the operator of the moving vehicle cannot come forward with the evidence to rebut the inference of negligence, the occupants and owner of the stationary vehicle are entitled to summary judgment on the issue of liability. See *Piltser v Donna Lee Mgt Corp*., 29 AD 3d 973, 816 NYS 2d 543 (2006).

Vehicle and Traffic Law (VTL) § 1129 (a) provides that "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 highway". Failure to do so constitutes negligence per se, entitling the plaintiff whose vehicle was rear-ended to summary judgment in the absence of an adequate non-negligent explanation. See *Comas-Bourne v City of New York*, 146 AD 3d 855 (2017).

Here, defendant does not oppose plaintiff's cross motion for summary judgment on the issue of liability and striking the affirmative defense of comparative negligence from the answer. The Court finds that plaintiff has met his burden of establishing his prima facie entitlement to judgment on the issue of liability against defendants without opposition

Accordingly, defendant Kathleen Barbara Caccamo's motion for an order pursuant to CPLR § 3212 for summary judgment in favor of defendant, and dismissing the complaint of plaintiff Marisol Garcia on the grounds that plaintiff has failed to meet the serious injury threshold requirement mandated by Insurance Law § 5102 (d) is denied. Plaintiff's cross motion for an order granting partial summary judgment on the issue of liability against defendant and striking the affirmative defense of comparative negligence from the answer is granted.

This is the decision and order of this Court.

Dated: November 18, 2021

Ulysses B. Leverett, JSC

FILED
11/23/2021
COUNTY CLERK
QUEENS COUNTY