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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GEORGE J. SILVER J.S.C. PART 22

Index Number : 109149/2007

SHEPPARD, TINA D.

VS

BREMBS, JOHN L.

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on ... is motion to/for _____

FILED
MAR 24 2010
COUNTY CLERK'S OFFICE
NEW YORK

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	2, 3
Answering Affidavits — Exhibits	4
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

In this action to recover for personal injuries allegedly sustained in a motor vehicle accident, defendant Ava Branch (hereinafter Branch) moves for summary judgment dismissing the complaint of plaintiff Tina D. Sheppard (hereinafter plaintiff) and the cross-claims asserted against her by co-defendant Verizon New York, Inc. (hereinafter Verizon) and co-defendant John Brembs (hereinafter Brembs) on the ground that she is not liable for the alleged accident. Branch also moves for summary judgment dismissing plaintiff's complaint on the ground that plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 [d].

Liability

According to her November 21, 2008 deposition testimony, Branch was operating a gold 2005 Volvo on the date of the accident, March 27, 2007. Branch had just dropped her son off at a daycare center in Executive Park in Yonkers when she entered the Saw Mill River Parkway (hereinafter the Saw Mill) northbound from Executive Boulevard. Branch was traveling in the left hand lane of the two lanes heading northbound on the Saw Mill. Traffic was busy as it was the morning rush hour and Branch was driving slowly. Branch testified that she first the traffic light at the intersection of the Saw Mill and Hearst Street while she was on the Saw Mill, between Executive Boulevard and Hearst Street. There were other vehicles between her and the traffic light at the Hearst Street intersection when she first saw the traffic light. The traffic light was red. It then turned green and Branch proceeded forward with the flow of traffic. Branch testified that she first the Verizon truck after the traffic light had turned green. Branch testified

Dated: _____ _____ J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

that the Verizon truck "just appeared.[1]" Branch did not know if the Verizon truck was moving or had stopped but the front portion of the Verizon truck was in Branch' lane of travel. Branch put her foot on the brake when she first saw the Verizon truck. There were no vehicles in front of Branch when she first saw the Verizon truck. Branch testified that she was not traveling very fast when she first saw the Verizon truck and estimated that her vehicle was traveling ten miles-per-hour prior to her applying the brakes and ten miles-per-hour just before the impact. Branch testified that more than two seconds and probably more than five elapsed between the time she first saw the Verizon truck and the time of impact. Branch did not turn the steering wheel of her vehicle, she only applied the break. The front of her vehicle came into contact with right front portion of the Verizon truck. Branch testified that her vehicle was in the middle of the left northbound lane of the Saw Mill at the time of the impact. Branch also testified that her vehicle came into contact with a vehicle on her right, the vehicle driven by plaintiff. When the three vehicle came to a stop, Branch's vehicle was still in the lefthand lane, the Verizon truck was still blocking a portion of that lefthand lane and plaintiff's vehicle was in the right lane. According to Branch, the traffic was green the last time she saw it prior to the collision.

Brembs testified at his deposition that he was operating the Verizon truck, what he described as a bucket truck, on Hearst Street. He testified that he was approximately a half a block away when he first saw the traffic control device at the intersection of Hearst Street and the Saw Mill. The light was red. Brembs came to a stop at the intersection. There was a vehicle to his left but no vehicle in front of him. Brembs waited at the red light for approximately ten seconds. After the light turned green, Brembs waited for the vehicle to his left to make a lefthand turn and then proceeded into the intersection of Hearst Street and the Saw Mill. The traffic control device was still green as Brembs drove the Verizon truck into the intersection. Brembs then brought the Verizon truck to a complete stop while it was between the northbound and southbound lanes of the Saw Mill. Brembs was stopped for approximately two-to-three seconds. Brembs testified that he brought the Verizon truck to a stop because a mini van traveling westbound on Hearst Street suddenly turned southbound into the southbound lanes of the Saw Mill, cutting Brembs off. Brembs turned the Verizon truck to the left and braked in the hopes of avoiding the mini van. The Verizon truck and the mini van did not collide. Brembs looked in his side-view mirror at the mini van then looked up and the saw the oncoming traffic on the Saw Mill. Brembs testified that his foot may have come off the brake for a moment but he put his foot back onto the brake because he determined that he could not make it across the intersection. Contrary to branch's testimony, Brembs testified that there were no vehicles stopped in the northbound lanes of the Saw Mill at the intersection of Hearst Street. According to Brembs, the northbound traffic on the Saw Mill was coming from the intersection of the Saw Mill and Executive Boulevard. Brembs testified that he saw two vehicles traveling northbound on the Saw Mill toward his vehicle. Brembs testified that the two vehicles were approximately seven-to-eight car lengths away when he first saw them. He first saw these vehicles after they came out of a curve on the Saw Mill that Brembs testified begins approximately sixty-to-seventy feet north of Executive Boulevard. Branch testified that this portion of the Saw Mill is straight. According to Brembs, the Verizon truck was stopped in the intersection for approximately three-

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[1] Branch deposition transcript at pages 30-31.

to-four seconds before the accident occurred. Brembs testified that he heard the brakes screeching on Branch's vehicle. Brembs testified that Branch's vehicle was traveling fast but he did not know if it was speeding.

Plaintiff testified that on the day of the accident she entered the Saw Mill at Yonkers Avenue and proceeded north. Plaintiff then stopped her vehicle at a red light at the intersection of the Saw Mill and Executive Boulevard. Plaintiff's vehicle was in the right northbound lane of the Saw Mill. There were no vehicles in front of her at the intersection of Executive Boulevard and a beige car, Branch's vehicle, to her left. After the light turned green, plaintiff proceeded north. As plaintiff proceeded north, Branch's vehicle was one car length ahead of plaintiff when, according to plaintiff, the Verizon truck went through a red light and hit Branch's vehicle, pushing Branch's vehicle into plaintiff's vehicle. Plaintiff testified that her vehicle was traveling just slightly less than fifty miles-per-hour when the impact occurred and that she and Branch had a green light. Plaintiff testified that the Verizon truck was moving at the time it collided with Branch's vehicle. Plaintiff was three car lengths away from the Hearst Street intersection when she first saw the Verizon truck. Plaintiff also testified that this portion of the Saw Mill is straight.

In moving for summary judgment on the issue of liability, Branch argues that she was presented with an emergency situation due to the fact that the Verizon truck crossed over into oncoming traffic. Branch's contends that it was Brembs act of crossing the center dividing line and striking Branch's vehicle was the proximate cause of the accident and branch, therefore, cannot be held liable. Plaintiff and co-defendants Brembs and Verizon argue that summary judgment is inappropriate because questions of fact exist regarding whether Branch was negligent in failing to avoid the accident.

An emergency situation arises when one is confronted with a sudden and unexpected event or combination of events not of one's own making that leaves little or no time for reflection or the exercise of deliberate judgment (*Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327, 569 NE2d 432, 567 NYS2d 629 [1991]). A party may not rely on the emergency doctrine if he or she caused or contributed to the emergency (*see Mead v Marino*, 205 AD2d 669 [2d 1994]; *Sweeney v McCormick*, 159 AD2d 832 [3rd 1990]). Here, there is conflicting testimony regarding the speed at which Branch's vehicle was traveling immediately prior to the accident. While Branch testified that she was traveling approximately ten miles-per-hour, plaintiff testified that immediately prior to the accident her vehicle was traveling just slightly under fifty miles-per-hour and Branch's vehicle, which had been stopped next to plaintiff's vehicle at the intersection of the Saw Mill and Executive Boulevard, was approximately one car length ahead of plaintiff's vehicle. This conflicting testimony raises an issue of fact with respect to the details of this three car accident and whether Branch could have avoided the impact by reducing speed (*Tossas v Ponce*, 2005 NY Slip Op 9467 [1st Dept 2005]). Moreover, there is testimony that the crossover by Brembs occurred several seconds before the collision, raising a triable issue of fact as to whether Branch was in fact confronted by an emergency situation and, concomitantly, as to whether Branch had a reasonable opportunity to avoid the collision (*Trevino v Castro*, 256 AD2d 6 [1st Dept 1998]; *Raposo v Raspaso*, 250 AD2d 420 [1st Dept 1998]). Accordingly, that portion of Branch's motion seeking summary judgment on the issue of liability is denied.

Serious Injury

The Verified Bill of Particulars alleges that plaintiff sustained *inter alia* central extruded disc herniation at C4-5 with compression of the cord; left foraminal disc herniation causing left foraminal stenosis at C4-5; central disc herniation at C5-6 with mild compression upon the ventral aspect of the cord; acute cervical radiculopathy on the left; permanent decreased range of motion in the neck; left side herniation at L4-5 causing stenosis to the proximal portion of the left sided neural foramina causing impingement on the exiting L4-5 nerve root; central disc protrusion at L5-S1; and permanent decreased range of motion in the back. The Verified Bill of Particulars further alleges that plaintiff was confined to her bed for approximately three days after the accident and intermittently thereafter and to her home for approximately one week after the accident and intermittently thereafter. Plaintiff alleges that as a result of the accident she sustained a fracture, permanent loss of use of a body organ, member, function or system, a permanent consequential limitation of use of a body organ or member; a significant limitation of use of a body function or system; and a medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all of the material acts which constituted her 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.

On a motion for summary judgment, where the issue is whether the plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (*Wadford v. Gruz*, 2006 NY Slip Op 9381 [1st Dept])"[A] defendant can establish that [a] plaintiff's injuries are not serious within the meaning of Insurance Law § 5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Grossman v Wright*, 268 AD2d 79, 83-84 [1st Dept 2000]). If this initial burden is met, "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" (*id.* at 84). The plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is serious within the meaning of Insurance Law § 5102(d), but also that the injury was causally related to the accident (*Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]). In support of her motion, Branch submits an affirmed report from Dr. Issac Cohen, an orthopedist who examined plaintiff on December 16, 2008. Based upon his examination, in which he found that plaintiff had normal cervical and lumbar ranges of motion through the use of a goniometer, Dr. Cohen concluded that plaintiff had resolved cervical and lumbrosacral strains with herniated discs at C4/5, C5/6 and L4/5. Branch also offers a second affirmed report by Dr. Cohen, dated March 24, 2009 which Dr. Cohen drafted after reviewing additional medical records, specifically, the MRIs and x-rays of plaintiff's cervical and lumbar spines. Dr. Cohen states that radiology films confirmed that plaintiff did not have any evidence of significant pathology. Dr. Cohen found the x -rays to be unremarkable except for some early degenerative changes in the lumbar and cervical spines areas. The MRI of plaintiff's cervical spine indicated evidence of degenerative disc disease at C2-3, C3-4, C5-6 and C6-7 and disc herniation at C4-5 which was in contact with the anterior aspect of the cervical cord but which did not produce deformity and did not compromise the cord

in any fashion. The MRI of lumbrosacral spine demonstrated degenerative disc disease at L5-S1 and a small herniation at L4-5 which Dr. Cohen found was of no clinical significance and was without evidence of nerve root compromise.

Branch also submits the affirmed report of Dr. Robert April, who performed a neurological examination of plaintiff on or about December 16, 2008. Dr. April noted that plaintiff had limited range of motion of her low back in that plaintiff was only able to bend forward to approximately sixty degrees, with the normal range of motion on flexion being ninety degrees. Dr. April also found that plaintiff had limited lateral rotation of her neck to only forty five degrees, with Dr. April describing the normal as seventy five ninety. Dr. April found that plaintiff had normal range of motion in her upper limbs but stated that plaintiff complained of pain when he lifted her leg to sixty on either side. Despite these findings, Dr. April concluded that plaintiff's neurological exam was normal and that there were no objective findings to correlate with any spinal or nerve root injury. As Branch did with Dr. Cohen, she also submits an affirmed addendum from Dr. April in which he notes his review of additional medical records and comments on certain aspects of his physical findings. Specifically, Dr. April explains that, with respect to his reported ranges of motion in plaintiff's neck, elevation of her leg, movements at her low back and movements of her upper limbs, his examination consists of observation of the subject's active range of motion. Dr. April states that when range of motion is limited, as it was in plaintiff's neck, the examiner always attempts to extend the range of motion by passive movement of the particular body part. According to the addendum, plaintiff complained of pain locally at attempts to move her neck passively beyond the limit of active movement. Dr. April also notes that straight leg raising is by nature a passive induced movement. Dr. April further states that he would have been "loathe to push the flexed lumbar spine more into flexion when the active movement had ceased because of back pain. One runs a risk to induce severe back pain." Dr. April also notes in the addendum that he reviewed x-rays and an MRI of plaintiff's cervical spine, items he did not have at the time his report was drafted. Dr. April concluded that the films showed a ridge-disk complex, which is a chronic degenerative finding, at C4-5. Dr. April's impression is that the new data corroborates the conclusions reached in his original report, that there is evidence of preexisting spinal arthritis with multilevel changes and that there no objective evidence for neurological involvement of the cervical spinal cord or its nerve roots.

Finally, Branch submits the affirmed report of Dr. Stewart Berliner, a radiologist who reviewed the April 25, 2007 MRI of plaintiff's lumbrosacral spine and found degenerative disc changes mild-to-moderate at L4-L5 and L5-S1. Dr. Berliner noted a small diffuse bulge at L4-L5 causing minor stenosis and mild bilateral foraminal narrowing. Dr. Berliner also noted a small-to-moderate broad bulge causing minor stenosis at L5-S1. Dr. Berliner opined that these bulges were associated with degenerative disc changes and stated that the findings were most likely long-standing in nature. Dr. Berliner found no focal disc herniation and no evidence of acute traumatic injury.

Branch also argues that plaintiff sought treatment shortly after the March 27, 2007 accident and ceased treatment in or about June 2007 and that, therefore, an unexplained gap in treatment exists.

Because of the contradictory range of motion findings made by Dr. Cohen and Dr. April[2] as well as the equivocal nature of Dr. Berliner's impression that plaintiff's bulges were most likely long-standing (*see Glynn v Hopkins*, 2008 NY Slip Op 8267 [1st Dept]), Branch has failed to sustain her initial burden of establishing that plaintiff did not suffer a serious injury causally related to the accident (*Martinez v. Pioneer Transp. Corp.*, 2008 NY Slip Op 1441 [1st Dept]) and it is not necessary to consider whether plaintiff's opposition is sufficient to raise a triable issue of fact on plaintiff's claims under the permanent consequential and significant limitation categories of Insurance Law § 5102 [d] (*Frias v. James*, 2010 NY Slip Op 301 [1st Dept]). Moreover, while plaintiff admitted in her deposition testimony that she treated with Dr. Bradley Cash for only approximately three months following the accident, plaintiff also testified that she stopped ceased treatment because Allstate stopped paying for it. Termination of no-fault benefits is an adequate explanation for a gap in treatment (*see Wadford*, 2006 NY Slip Op 9381 [1st Dept]). However, with respect to plaintiff's claim under the 90/180 day category of Insurance Law § 5102 [d], plaintiff's Verified Bill of Particulars, attached to Branch's motion, alleges that plaintiff was confined to her bed for approximately three days after the accident and intermittently thereafter, and to her home for approximately one week and intermittently thereafter. While the Bill of Particulars also alleges, and plaintiff testified at her deposition, that plaintiff missed three months from work, this fact is not determinative (*Blake v Portexit*, 2010 NY Slip Op 65 [1st Dept]). Dr. Cash's statements in his affirmed report that he advised plaintiff to stay out of work because she could not bend or lift and that he further advised on a proof of disability form that plaintiff stay home from work through the end of July 2007 are too general to raise the inference that plaintiff was unable to perform her usual and customary activities during the statutorily required time period or that her lost time from work was medically required (*Antonio v Gear Trans Corp.*, 2009 NY Slip Op 6379 [1st Dept]). Moreover, plaintiff's testimony that she could not inter alia pick up her grandchildren, walk around a track for exercise, carry heavy grocery bags, lift heavy items, sit in a normal position and stand for long periods of time is insufficient to raise a triable issue of fact as to whether there was a curtailment of her customary activities during the requisite 90/180 period (*see Taylor v Am. Radio Dispatcher*, 2009 NY Slip Op 4271 [1st Dept]). In addition, while the Verified Bill of Particulars alleges that plaintiff sustained a fracture under Insurance Law § 5102 [d], none of the injuries set forth in the Bill of Particulars includes any type of fracture. Nor is there any evidence that plaintiff sustained a total loss of use of her cervical spine, lumbar spine or any other part of her body (*Hock v. Aviles*, 2005 NY Slip Op 6732 [1st Dept]).

Accordingly, it is hereby

ORDERED that defendant Branch's motion for summary judgment is granted solely to the extent that plaintiff's claim under the fracture, permanent loss of use and 90/180 categories of Insurance Law § 5102 [d] are dismissed. Defendant's Branch's motion is denied in all other respects; and it is further

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[2] Dr. April's explanation in his affirmed addendum regarding plaintiff's ranges of motion is unpersuasive.

ORDERED that counsel for defendant Branch is to serve a copy of this order, with Notice of Entry, upon all parties within 30 days.

This constitutes the decision and order of the court.

George J. Silver, J.S.C.

Dated: March 18, 2010
New York County

GEORGE J. SILVER
J.S.C.

FILED
MAR 24 2010
COUNTY CLERK'S OFFICE
NEW YORK