SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 3
NASSAU COUNTY

JOANNE PAVIA,

Plaintiff(s),

-against-

ANN ARTALE, PAUL ARTALE, EUGENE JOSEPH, ANTHONY R. GIARDINA and JOSEPHINE GIARDINA,

Defendant(s).

ORIGINAL RETURN DATE:04/09/10
SUBMISSION DATE: 07/14/10
INDEX No.: 2059/08

MOTION SEQUENCE #1,2,3, 4,5,6

The following papers read on this motion:

Notice of Motion.....	1,2,3
Cross-Motion.....	4,5
Notice of Second Cross-Motion.....	6
Answering Papers.....	7,8,9,10,11
Reply.....	12,13,14,15

All parties in this action have moved for summary judgment. This action arises out of two motor vehicle accidents that occurred on April 30, 2004, and August 29, 2004, respectively.

The accident of April 30, 2004 ("Car Accident #1") arises out a three-car, chain-reaction collision which occurred on North Conduit Avenue, approximately three hundred feet east of Cohancy Street. It is undisputed that the Artale vehicle struck the rear of Joseph's vehicle, propelling it, in turn, into the rear of plaintiff's vehicle.

Four months following the April 30th car accident, on August 29, 2004 ("Car Accident #2"), plaintiff was involved in another accident where, allegedly, while traveling eastbound on Merrick Road in Massapequa, she was caused to strike the vehicle owned by Anthony Giardina and operated by Josephine Giardina as it "suddenly pulled out of Cedar Shore Drive in front of [her] vehicle from [her] right" (*Pavia Aff.*, ¶10).

On a motion for summary judgment it is the proponent's burden to make a *prima facie* showing of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issues of fact (*JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373, 384 [2005]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]). The Court must deny the motion if the proponent fails to make such a *prima facie* showing, regardless of the sufficiency of the opposing papers (*Liberty Taxi Mgt. Inc. v. Gincherman*, 32 AD3d 276 [1st Dept. 2006]). If this showing is made, however, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]).

For the sake of clarity, this Court will address each motion separately.

Motion Sequence 001

In moving for summary judgment on the issue of liability, defendant Joseph relies principally upon: (1) the deposition testimony of defendant Paul Artale; and (2) the deposition testimony of plaintiff.

At his sworn deposition, Paul Artale testified that he was traveling west on North Conduit Avenue (*Artale Tr.*, p. 12). He described the traffic as slow moving (*Id.* at 14). He stated that he first observed Joseph's vehicle when he was approximately 10 feet behind it (*Id.* at 14, 19, 20). Artale testified that Joseph's vehicle was stopped when he first observed it (*Id.* at 20). The front bumper of Artale's vehicle impacted the rear bumper of the Joseph vehicle.

A rear-end collision with a stopped vehicle is prima facie evidence of negligence on the part of the operator of the second, offending and rear-ending vehicle (*Danza v. Longieliere*, 256 AD2d 434 [2d Dept. 1998]; *Carhuayano v. J & R Hacking*, 28 AD3d 413 [2d Dept. 2006]). When such facts are established, the operator of the moving, offending colliding vehicle is required to rebut the inference of negligence with a cognizable excuse (*Id.*). The rationale being that when a vehicle is stopped, anyone traveling behind said vehicle is charged with the duty of coming to a timely halt (*Edney v. Metropolitan Suburban Bus Authority*, 178 AD2d 398 [2d Dept. 1991]) and maintaining a safe distance between itself and the vehicle traveling in front of it (*Rebecchi v. Whitmore*, 172 AD2d 600 [2d Dept. 1991]). Hence, a rear-end collision, when one of the vehicles is stopped, creates a prima facie case of liability with respect to the operator of the moving, rear-ending vehicle (*Id.*). Absent an excuse, it is negligence as a matter of law if a stopped vehicle is hit in the rear (*DeAngelis v. Kirschner*, 171 AD2d 593 [1st Dept. 1991]).

In this case involving a rear-end collision, defendant Joseph has established that he did not act negligently with respect to operation of his vehicle; rather defendant has proffered evidence that he safely brought his vehicle to a complete stop prior to the collision and that he had been propelled into the rear of plaintiff's vehicle after a stop and after being hit in the rear by

another vehicle (*Cerda v. Parsley*, 273 AD2d 339 [2d Dept. 2000]). Counsel for plaintiff states that plaintiff was unable to explain at her deposition the "impact" to her car. While plaintiff correctly answered that there was only one impact to the rear of her car, she, in fact, "felt the force of the second impact within [her] car" (*Chatrath Reply Aff.*, 7/13/10, ¶7). Counsel for plaintiff maintains that plaintiff was not asked about this at her deposition and that had she been asked how many impacts she had "felt," she would have truthfully testified that she felt two impacts: one to her car and the second one to the car which struck hers (*Id.*). This is the sole basis on which plaintiff opposes Joseph's *prima facie* showing of entitlement to judgment as a matter of law (*Alvarez*, 68 NY2d at 324).

It is noted at the outset that plaintiff's sole reliance upon the affirmation of her attorney in opposing Joseph's motion for summary judgment is of no evidentiary value or effect (*Roche v. Hearst Corp.*, 53 NY2d 767 [1981]; *Columbia Ribbon & Carton Mfg. Co. v. A-1-A Corp*, 42 NY2d 496 [1977]). It is well settled that plaintiff, in opposing summary judgment, may not rely solely upon the affirmation of her attorney, who is clearly without personal knowledge of the facts. An attorney's affirmation alone does not supply the evidentiary showing necessary to successfully resist a motion for summary judgment (CPLR 3212[b]; *Rotuba Extruders v. Ceppos*, 46 NY2d 223, 229 [1978]).

Furthermore, without exploring the merits of plaintiff's sworn statements in her affidavit (presented in support of her cross motion and being relied upon by her counsel in opposition to Joseph's motion herein) relating to the number of impacts to her vehicle, it is well settled that a party's affidavit in opposition to a summary judgment motion which contradicts her prior sworn testimony creates only a feigned issue of fact and is insufficient to defeat a properly supported motion for summary judgment (*Marcelle v. New York City Transit Authority,* 289 AD2d 459 [2d Dept. 2001]; *Nieves v. Iss Cleaning Servs. Group*, 284 AD2d 441 [2d Dept. 2001]; *Buziashvili v. Ryan*, 264 AD2d 797 [2d Dept. 1999]). Plaintiff herein cannot "avoid summary judgment by alleging issues of fact created by self-serving affidavits contradicting prior sworn deposition testimony" (*Id.*).

Accordingly, defendant Joseph's motion for summary judgment dismissing plaintiff's complaint against him on the issue of liability is granted.

Motion Sequence 002

Defendants Ann and Paul Artale seek summary judgment dismissal of the plaintiff's complaint on the grounds that her injuries do not satisfy the "serious injury" threshold of Insurance Law §5102(d).

Plaintiff alleges in her bill of particulars that "as a result of the occurrences complained of herein" she sustained the following injuries: to wit, disc herniation at C3-4 and C5-6; disc bulges C4-5, C6-7; sensory deficits in left C5-6 and C6-7 distribution; cervical radiculopathy at C5-6; cervical spine spasm/tenderness; diminished sensation in the right upper extremity;

bilateral carpal tunnel syndrome; straightened cervical spine due to muscle spasm; disc bulge at the L3-4, L4-5 and L5-S1 level; lumbar radiculopathy; lumbosacral spine spasm/tenderness; restriction in flexion of lumbosacral spine; low back pain syndrome; thoracic neuritis; and impingement syndrome (*Bill of Particulars*, ¶9).

Notably, plaintiff does not identify which injuries are caused by which accident. Rather, her counsel simply lumps all alleged injuries together. As a result, it is unclear to this Court as to whether the intention of plaintiff is to allege that she suffered these injuries as a result of *each* of these accidents or whether the intention of plaintiff is to allege that she sustained some of these injuries as a result of Car Accident #1 and the remaining as a result of Car Accident #2. In either case, defendants' separate motions are denied without regard to the sufficiency of the plaintiff's opposition.

In moving for summary judgment, defendants are required to make a prima facie case showing that the plaintiff did not sustain a "serious injury" within the meaning of the statute. Once this is established, the burden shifts to plaintiff to come forward with evidence to overcome the defendants' submissions by demonstrating a triable issue of fact that a "serious injury" was sustained (*see Pommels v. Perez,* 4 NY3d 566 [2005]; *see also Grossman v. Wright,* 268 AD2d 79, 84 [2d Dept. 2000]).

Defendants are not required to disprove any category of serious injury which has not been properly pled by plaintiff (*Melino v. Lauster*, 82 NY2d 828 [1993]). Moreover, even pled categories of serious injury may be disproved by means other than the submission of medical evidence by a defendant, including plaintiff's own testimony and her submitted exhibits (*Michaelides v. Martone*, 186 AD2d 544 [2d Dept. 1992]; *Covington v. Cinnirella*, 146 AD2d 565, 566 [2d Dept. 1989]).

In support of a claim that plaintiff has not sustained a serious injury, defendants may rely either on the sworn statements of the their examining physician or the unsworn reports of plaintiff's examining physician (*see Pagano v. Kingsbury*, 182 AD2d 268 [2d Dept 1992]). However, unlike the movant's proof, unsworn reports of plaintiff's examining doctor or chiropractor are not sufficient to defeat a motion for summary judgment (*Grasso v. Angerami*, 79 NY2d 813 [1991]). Essentially, in order to satisfy the statutory serious injury threshold, the legislature requires objective proof of a plaintiff's injury. The Court of Appeals in *Toure v. Avis Rent A Car Systems,* 98 NY2d 345 stated that plaintiff's proof of injury must be supported by objective medical evidence, such as MRI and CT scan tests (*Toure v. Avis Rent A Car Sys.*, supra at 353). However, the MRI and CT scan tests and reports must be paired with the doctor's observations during his physical examination of plaintiff (*see Toure v. Avis Rent A Car Systems,* supra). In addition, unsworn MRI reports are not competent evidence unless both sides rely on those reports (*see Gonzalez v. Vasquez*, 301 AD2d 438 [1st Dept. 2003].

On the other hand, even where there is ample objective proof of plaintiff's injury, the Court of Appeals held in *Pommels v. Perez, supra*, that certain factors may nonetheless override a

plaintiff's objective medical proof of limitations and permit dismissal of plaintiff's complaint. Specifically, in *Pommels v. Perez*, the Court of Appeals held that additional contributing factors, such as a gap in treatment, an intervening medical problem, or a preexisting condition would interrupt the chain of causation between the accident and the claimed injury (*Pommels v. Perez*, 4 NY3d 566).

Initially it is noted that plaintiff has failed to identify the specific categories of the serious injury statute into which her injuries fall. Nevertheless, whether she can demonstrate the existence of a compensable serious injury depends upon the quality, quantity and credibility of admissible evidence (*Manrique v. Warshaw Woolen Associates, Inc.* , 297 AD2d 519 [1st Dept. 2002]). Based upon a plain reading of the papers submitted, it is obvious that plaintiff is not claiming that her injuries fall within the first five categories of "serious injury," to wit: death; dismemberment; significant disfigurement; a fracture; or loss of a fetus. Further, insofar as plaintiff has failed to allege that she has sustained a "total loss of use" of a body organ, member, function or system, it is plain that her injuries do not satisfy the "permanent loss of use" category of Insurance Law §5102(d) (*Oberly v. Bangs Ambulance, Inc.,* 96 NY2d 295 [2001]).

Therefore, this Court will restrict its analysis to the remaining three categories as they pertain to plaintiff, to wit: 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.

To meet the threshold significant limitation of use of a body function or system or permanent consequential limitation, the law requires that the limitation be more than minor, mild or slight and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition (*Gaddy v. Eyler*, 79 NY2d 955 [1992]; *Licari v. Elliot*, 57 NY2d 230 [1982]; *Scheer v. Koubeck*, 70 NY2d 678 [1987]). A minor, mild or slight limitation shall be deemed "insignificant" within the meaning of the statute (*Licari v. Elliot*, supra; *see also Grossman v. Wright*, 268 AD2d 79, 83 [2d Dept. 2000]).

When, as in this case, a claim is raised under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, in order to prove the extent or degree of the physical limitation, an expert's designation of a numeric percentage of plaintiff's loss of range of motion is acceptable (*see Toure v. Avis Rent A Car Systems, Inc.,* 98 NY2d 345). In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis and (2) the evaluation compares plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (*Id.*).

To prevail under the "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" category, a plaintiff must demonstrate through competent, objective proof a "medically determined injury or impairment of a non permanent nature" (Insurance Law §5102[d]) "which would have caused the alleged limitations on plaintiff's daily activities (*Monk v. Dupuis*, 287 AD2d 187, 191 [3d Dept. 2001]). Furthermore, a curtailment of the plaintiff's usual activities "to a great extent rather than some slight curtailment" (*Licari v. Elliott*, supra at 236; *see also Sands v. Stark*, 299 AD2d 642 [2d Dept. 2002]).

With these guidelines in mind, this Court will now turn to the merits of defendants' motion at hand. In support of their motion, the Artale defendants submit, *inter alia*, plaintiff's unsworn, unaffirmed x-ray examination of her cervical spine dated May 4, 2004; plaintiff's unsworn, unaffirmed physical therapy initial evaluation paperwork dated May 5, 2004; the sworn affirmed report of Dr. John Leppard III, M.D., F.A.C.S., an orthopedist who performed an independent orthopedic examination of the plaintiff on June 24, 2009; and the sworn, affirmed report of Ira M. Turner, M.D., Diplomate American Board of Psychiatry and Neurology, who performed an independent neurological examination of plaintiff on December 23, 2009.

Defendants' proof, including plaintiff's unsworn and unaffirmed reports, constitutes competent admissible evidence in support of defendants' motion (*Pagano v. Kingsbury*, supra). Said proof, however, fails to establish defendants' *prima facie* showing that plaintiff did not sustain a "serious injury" within the meaning of the statute.

Dr. Leppard, in his sworn report notes a difference in the range of motion testing observed for plaintiff's cervical and lumbar spines as compared to what is considered normal range of motion. Dr. Leppard plainly states in his affirmation that "[t]he claimant is not able to achieved [sic] full range of motion secondary to purported pain on the part of the claimant or inability to cooperate with that portion of the examination stating that it hurts when she moves those movements." In light of the restricted range of motion observed by the defendant's independent physician, this Court is precluded from shifting the defendant's burden with respect to the "permanent consequential limitation of use" and "significant limitation of use" categories of Insurance Law §5102(d) (*Picott v. Lewis*, 26 AD3d 319 [2d Dept. 2006]).

Dr. Turner, a neurologist, who performed a cranial nerve examination, a motor examination and a sensory examination, failed to perform any range of motion testing. In the absence of any objective testing and medical proof establishing that plaintiff was physically "limited" in any way, this Court finds that the threshold significant limitation of use of a body function or system or permanent consequential limitation are not met. Dr. Turner does not rely upon any objectively measured and quantified medical injury or condition (*Gaddy v. Eyler*, supra; *Licari v. Elliot*, supra).

Moreover, insofar as defendant's proof does not consist of the deposition testimony of plaintiff, defendants have also failed to carry their prima facie burden with respect to the 90/180 category of Insurance Law §5102(d). With regard to the 90/180 rule, defendant's medical expert must relate specifically to the 90/180 claim made by plaintiff before dismissal is appropriate (*Scinto v. Hoyte*, 57 AD3d 646 [2d Dept. 2008]; *Faun Thau v. Butt*, 34 AD3d 447 [2d Dept. 2006]). This is particularly so when defendants' medical reports, as in this case, are conducted after a substantial time since the accident (*Miller v. Bah*, 58 AD3d 815 [2d Dept. 2009]; *Carr v. KMP Transportation, Inc.*, 58 AD3d 783 [2d Dept. 2009]). In light of defendants' medical experts failure to do so, and without the plaintiff's deposition testimony as supporting proof, defendant is unable to establish that plaintiff's alleged injuries do not meet the 90/180 threshold outlined in the statute.

Therefore, Artale's motion for summary judgment on the issue of serious injury is denied without regard to the sufficiency of plaintiff's papers (*Pommels v. Perez,* supra; *Grossman v. Wright,* supra).

Motion Sequence 003

Having granted defendant Joseph's motion for summary judgment on the issue of liability, his motion for summary judgment on the grounds that plaintiff's injuries do not satisfy the serious injury threshold requirement of Insurance Law §5102(d) is therefore denied as academic.

Motion Sequence 004

At her deposition, Josephine Giardina testified that she was traveling on Cedar Shore Drive when she arrived at the intersection of Merrick Road. This was a T-intersection requiring the traffic on Cedar Shore Drive to turn either right or left. Giardina testified that it was her intention to turn left onto Merrick Road and travel in a westbound direction. Giardina stated that while traffic on Cedar Shore Drive was controlled by a stop sign, traffic on Merrick Road was not controlled by any traffic control device.

Inasmuch as counsel for the Giardina defendants also adopt the arguments and supporting evidence set forth by Artale, Giardina's cross motion for summary judgment on the issue of serious injury for Car Accident #2 is also denied.

Motion Sequences 005 and 006

Finally, plaintiff's separate cross motions for summary judgment on the issue of liability are also denied. Plaintiff's cross motions are both dated June 25, 2010. Having been filed by the plaintiff beyond the 60-day time period from the filing of the note of issue, as set forth in the certification order of this Court dated October 13, 2009 (Phelan, J.), said cross motions are untimely made. Further, in the absence of any reason and a "good cause" for plaintiff's lateness, the Court denies plaintiff's cross motion (*Brill v. City of New York*, 2 NY3d 648

[2004]; *Miceli v. State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725 [2004]).

It is plain that the Court is empowered to set a time limit for the making of the motion for summary judgment, but if the court sets none, the motion may not be made after the 120th day following the filing of the note of issue. The court can, however, set aside the time restriction and allow a late summary judgment motion if "good cause" is shown (CPLR 3212[a]).

Here, there is no question that plaintiff's applications for summary judgment are late. Plaintiff fails to advance a good cause for her lateness such that it may be excused by this Court. The Court of Appeals in *Brill v. City of New York*, 2 NY3d 648 made it explicitly clear that lateness will not be excused until the movant first shows a satisfactory reason for the delay in the motion's making. Unless and until the delay is excused, the merits of the motion should not even be examined. This is so even if the party moved against can show no prejudice in the fact of the delay (*see e.g., First Union Auto Finance, Inc. v. Donat*, 16 AD3d 372 [2d Dept. 2005]). In light of plaintiff's failure to show a satisfactory reason for the delay in making these cross motions on the issue of liability said cross motions are denied.

Insofar as there is authority that an untimely cross motion for summary judgment may be considered by the court where a timely motion for summary judgment has been made on nearly identical grounds (*Bressingham v. Jamaica Hosp. Med. Ctr.*, 17 AD3d 496, 497 [2d Dept. 2005]; *Boehme v. A.P.P.L.E.*, 298 AD2d 540 [2d Dept. 2002]; *Miranda v. Devlin*, 260 AD2d 451 [2d Dept. 1999]), plaintiff's cross motions are nonetheless denied. Here, with the exception of Eugene Joseph's motion, the remaining motions all dealt with the issue of serious injury. Liability was not at issue. Eugene Joseph's motion however dealt with his liability in Car Accident #1. In that regard, for the reasons stated above, including plaintiff's misuse of her own self-serving affidavit in support of her cross motion, plaintiff's cross motion as against Artale and Joseph herein would nonetheless still be denied.

Under these circumstances, the cross motion as against the Giardina defendants would also be denied because the issue of liability in Car Accident #2 is not before this court. In such circumstances, the issues raised by the untimely cross motion may not be considered. The requisite "nearly identical nature of the grounds" is absent and therefore would not provide the requisite good cause (CPLR 3212[a]) permitting this Court to review the untimely cross motion on the merits (*Grande v. Peteroy*, 39 AD3d 590 [2d Dept. 2007]). Therefore, since the grounds upon which plaintiff premises her cross motion are not nearly identical to those upon which the Giardina defendants involved in Car Accident #2 relied in connection with their motion (*Bickelman v. Herrill Bowling Corp.*, 49 AD3d 578, 580 [2d Dept. 2008]; *cf. Grande v. Peteroy*, supra at 591-592), there is no basis upon which this Court may impute good cause for plaintiff's delay in submitting her cross motion (*Podlaski v. Long Island Paneling Center of Centereach, Inc.*, 58 AD3d 825 [2d Dept. 2009]).

The caption of this action is amended to read as follows:

"JOANNE PAVIA,

Plaintiff,

-against-

ANN ARTALE, PAUL ARTALE, ANTHONY R. GIARDINA and JOSEPHINE GIARDINA,

Defendants."

This decision constitutes the order of the court.

Dated: 9-1-10

HON THOMAS P. PHELAN

J.S.C.

Attorneys of Record

The Chatrath Law Firm, P.C.
Attn: Sandeep Chatrath, Esq.
Attorneys for Plaintiff
494 Eighth Avenue, Suite 505
New York, NY 10001

John C. Buratti & Associates
Attn: Julie M. Sherwood, Esq.
Attorneys for Defendants Ann Artale and Paul Artale
140 Broadway, 46th Floor
New York, NY 10005

Russo, Apoznanski & Tambasco
Attn: Susan J. Mitola, Esq.
Attorneys for Defendant Eugene Joseph
875 Merrick Avenue
Westbury, NY 11590

Robert P. Tusa
Attn: Peter S. Graziosi, Esq.
Attorneys for Defendants Anthony R. Giardina
and Josephine Giardina
1225 Franklin Avenue, Suite 500
Garden City, NY 11530-1659