[* 1]

SHORT FORM ORDER

INDEX No. 08-22643
CAL. No. 10-01349-MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Supreme Court

MOTION DATE (001) & (002) 9-29-10
ADJ. DATE (001)&(002) 12-22-10
Mot. Seq. # 001 - MD
002 - MG

CHERYL CASHER,

Plaintiff,

- against -

ADAM F. BACKHAUS, HAROLD K. OMROW AND FELICIA OMROW,

Defendants.

SIBEN & SIBEN
Attorney for Plaintiff
90 East Main Street
Bay Shore, New York 11706

MARTYN TOHER & MARTYN
Attorney for Defendant Adam F. Backhaus
330 Old Country Road, Suite 211
Mineola, New York 11501

RICHARD T. LAU & ASSOCIATES
Attorney for co-Defendants Harold and Felicia Omrow
300 Jericho Quadrangle, P.O. Box 9040
Jericho, New York 11753

Upon the following papers numbered 1 to 31 read on this motion and cross-motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 8 ; Notice of Cross Motion and supporting papers (002) 9-19 ; Answering Affidavits and supporting papers 20-29- ; Replying Affidavits and supporting papers 30-31 ; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by the defendant, Adam F. Backhaus, pursuant to CPLR 3212 and Insurance Law §5102(d) for summary judgment dismissing the complaint on the issue that plaintiff's injuries do not meet the serious injury threshold is denied; and it is further

ORDERED that this cross motion (002) by the defendants, Harold K. Omrow and Felicia Omrow, pursuant to CPLR 3212 for summary judgment dismissing the complaint against them on the basis they bear no liability for the occurrence of the accident is granted and the complaint and cross claims asserted against them are dismissed with prejudice.

This is an action for damages for personal injury allegedly sustained by the plaintiff, Cheryl Casher, arising out of a motor vehicle accident which occurred on December 18, 2007 on Belt Parkway at or near the intersection with Exit 18B, Queens County, State of New York . The accident allegedly occurred when the vehicle being operated by the defendant Adam F. Backhaus struck her vehicle, allegedly causing her vehicle to strike the vehicle in front of hers operated by defendant Felicia Omrow.

As a result of this accident, the plaintiff is claiming to have sustained a severe contusion of the right knee exacerbating advanced osteoarthritis of the lateral compartment of the right knee with extrusion of the lateral

meniscus requiring right total knee arthroplasty; scarring and disfigurement of the right knee; post traumatic arthritis of the right knee; bilateral knee contusions; cervical myofascitis; lumbar myofascitis; and total disability from the date of the accident until the present with partial disability remaining. The defendant claims entitlement to an order granting summary judgment dismissing the complaint, asserting the plaintiff did not sustain serious injuries sufficient to meet the threshold pursuant to Insurance Law of the State of New York §5102(d).

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. To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, supra). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499 [2nd Dept 1989]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.***, 79 AD2d 1014 [2nd Dept 1981]). Summary judgment shall be granted only when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065 [1979]).

Pursuant to Insurance Law §5102(d), " '[s]erious injury' means 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."

The term "significant" as it appears in the statute has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (***Licari v Elliot***, 57 NY2d 230 [1982]).

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 Inc.***, 96 NY2d 295 [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 "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 (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott,*** supra).

It is for the court to determine in the first instance whether a prima facie showing of "serious injury" has been made out (see, ***Tipping-Cestari v Kilhenny***, 174 AD2d 663 [2nd Dept 1991]). The initial burden is on the defendant "to present evidence, in competent form, showing that the plaintiff has no cause of action" (***Rodriguez v Goldstein,*** 182 AD2d 396 [1st Dept 1992]). Once defendant has met the burden, plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (***Gaddy v Eyler***, 79 NY2d 955 [1992]).

In support of this motion the defendant Backhaus has submitted, inter alia, an attorney's affirmation; a copy of the summons and complaint; defendants' verified answers with crossclaims; a copy of the plaintiff's verified bill of particulars; a copy of the sworn letter of Michael J. Katz M.D. dated May 11, 2010 concerning his independent orthopedic examination of the plaintiff; and an unsigned copy of the transcripts of the examinations before trial of Cheryl Casher dated January 29, 2010. It is noted that the copy of the transcript of the examination before trial of the plaintiff is not signed and, therefore, is not in admissible form pursuant to CPLR 3212. Nor has the moving defendant submitted an affidavit pursuant to CPLR 3116. Therefore, such transcript is not considered in this motion (*see*, ***Martinez v 123-16 Liberty Ave. Realty Corp,*** 47 AD3d 901 [2nd Dept 2008]; ***McDonald v Maus,*** 38 AD3d 727 [2nd Dept 2007]; ***Pina v Flik Intl. Corp.*** 25 AD3d 772 [2nd Dept 2006]).

Upon review of the evidentiary submissions, it is determined that the moving defendant has not demonstrated prima facie entitlement to summary judgment on the issue that the plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d).

Dr. Katz has set forth in the report relative to his independent orthopedic examination of the plaintiff that she was a fifty-six year old female who had a history of a total knee arthroplasty on the right and left knees, had weighed 300 pounds but lost 100 pounds after bypass surgery, and had significant advanced degenerative arthritis in both knees pre-existing the accident herein. Although he states that the knee arthroplasties are unrelated to the accident, he does not address the injury claimed in the bill of particulars concerning extruding meniscus after the accident. Nor does he discuss the reasons set forth for the surgeries in Dr. Mulrad's records, which records, he states, he reviewed but have not been provided to this court. Nor does Dr. Katz set forth the basis for his conclusory opinion. Upon examination, he states that the range of motion of the right knee is normal, but then indicates that the range of motion is 0-110 in the flexion/extension arc and that the normal is 135. Upon examination of the left knee, he states the range of motion is normal, but measured the range of motion at 0-90 degrees and stated the normal is 135 degrees in the flexion/extension arc. These range of motions exhibit a deficit when compared with the normal range of motion of the knees. He indicates that at the time of his examination that the plaintiff is still recovering from the left knee surgery, but no follow-up examination has been submitted by the defendant, leaving it to this court to speculate as to whether the plaintiff has made recovery from the surgery and to what degree. Dr. Katz does not opine as to whether or not the plaintiff has a disability relating to the accident as claimed in her bill of particulars. Thus, the defendant has not demonstrated that the plaintiff did not sustain an injury within the meaning of Insurance Law §5102(d).

To prevail on the motion for summary judgment dismissing the complaint, the defendant was required to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d) (*see, **Toure v Avis Renta A Car Sys.,*** 98 NY2d 345 [2002]; ***Gaddy v Eyler,*** 79 NY2d 955 [1992]). Here, the defendant failed to satisfy the burden of establishing, prima facie, that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) (*see*, ***Agathe v Tun Chen Wang***, 33 AD3d 737 [2nd Dept 2006]; *see also*, ***Walters v Papanastassiou***, 31 AD3d 439 [2nd Dept 2006]). Inasmuch as Dr. Katz's orthopedic report does not exclude the possibility that plaintiff suffered a serious injury in the accident, the

defendant is not entitled to summary judgment (*see*, ***Peschanker v Loporto***, 252 AD2d 485 [2nd Dept 1998]). Since defendant failed to establish prima facie entitlement to judgment as a matter of law, it is not necessary to consider whether plaintiff's papers in opposition to defendant's motion were sufficient to raise a triable issue of fact (see, ***Walker v Village of Ossining***, 18 AD3d 867 [2nd Dept 2005]; ***Krayn v Torella,*** 40 AD3d 588 [2nd Dept 2007]), as the burden has not shifted to plaintiff to establish that there are issues of fact to preclude an order granting summary judgment (CPLR 3212[b];***Zuckerman v City of New York***, supra), and it is unnecessary to reach the question of whether or not plaintiff has raised a triable issue of fact. However, in opposition to this motion, the plaintiff has submitted, inter alia, the report concerning the prior independent orthopedic examination by Dr. Paul Miller conducted on May 12, 2008. Upon review of the report, it is noted that Dr. Miller found deficits in the range of motion upon examination of the plaintiff's knees. Dr. Miller opined that the plaintiff's condition warrants further treatment, and based upon the history provided, found a causal relationship between the accident and the plaintiff's symptomatology. He further stated that the plaintiff was capable of working and could perform sedentary duties only with restrictions. There was to be no repetitive right knee use and no prolonged standing. Dr. Miller further opined, as of the date of his examination, that the plaintiff's condition warrants further treatment and that an end result in his specialty has not been reached. Based upon the foregoing, said report raises factual issues which would preclude summary judgment had the defendant demonstrated prima facie entitlement to summary judgment on the issue of whether or not the plaintiff sustained a serious injury as a result of the accident herein.

Accordingly, motion (001) for summary judgment dismissing the complaint on the basis that plaintiff did not sustain a serious injury pursuant to Insurance Law §5102 is denied.

Turning to motion (002), the Omrow defendants seek summary judgment dismissing the complaint and cross-claims asserted against them, and have submitted, inter alia, an attorney's affirmation; copies of the pleadings and answers with cross-complaints; plaintiff's verified bills of particulars; and signed copies of the transcripts of the examinations before trial of Felicia Omrow dated April 12, 2010, and Cheryl Casher and Adam Backhaus, both dated January 29, 2010.

It is determined upon a review of the admissible evidence that the Omrow defendants have established prima facie entitlement to summary judgment dismissing the complaint and cross-claims asserted against them on the issue of liability. The plaintiff does not oppose the granting of summary judgment to the Omrow defendants on the issue of liability based upon the testimony of the parties. The adduced testimony establishes that the Omrow vehicle came to a stop when traffic stopped in the third westbound travel lane of the Belt Parkway. The Omrow vehicle remained stopped for a period of approximately ten seconds when it was struck in the rear by the plaintiff's vehicle. While there are factual issues concerning whether the Backhaus vehicle struck the plaintiff's vehicle prior to the impact by plaintiff's vehicle to the Omrow vehicle, such issue does not preclude summary judgment as it is undisputed that the Omrow vehicle was stopped at the time it was struck in the rear by the plaintiff's vehicle.

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 and has the duty to keep control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (*see,* ***Chepel v Meyers,*** 306 AD2d 235 [2nd Dept 2003]; ***Power v Hupart,***, 260 AD2d 458 [2nd Dept 1999]; *see also,* Vehicle and Traffic Law § 1129[a]). 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, and unavoidable skidding on a wet pavement or some other reasonable excuse (*see,* ***Rainford v***

Han, 18 AD3d 638 [2nd Dept 2005]; ***Thoman v Rivera***, 16 AD3d 667 [2nd Dept 2005]; ***Power v Hupart***, *supra*).

Whether a vehicle stops abruptly or quickly is not a sufficient defense to rebut the presumption of negligence (***Danza v Longieliere,*** 256 Ad2d 434 [2nd Dept 1998]; ***Mitchell v Gonzales,*** 269 AD2d 250 [1st Dept 2000]). The "driver of a motor vehicle has a duty to keep proper control of that vehicle, and to not stop suddenly or slow down without proper signaling so as to avoid a collision" (***Maschka v Newman,*** 262 AD2d 615 [2nd Dept 1999]). When the only explanation provided for the accident is that the vehicle in front had stopped suddenly and without warning, as such, the driver's failure to maintain a safe distance between the two vehicles, in the absence of an adequate, nonnegligent explanation, constitutes negligence as a matter of law (***Silberman v Surry Cadillac Limousine Service, Inc.*** 109 AD2d 833 [2nd Dept 1985]; ***Barile v Lazzarini,*** 222 AD2d 635 [2nd Dept 1995]; ***Brando-Twomey v Richheimer,*** 229 AD2d 554 [2nd Dept 1996]).

In the instant action, it is determined that no negligence can be imputed to Felicia Omrow. The plaintiff claims her vehicle was struck in the rear by the Backhaus vehicle after her vehicle came to a stop. Backhaus testified that the plaintiff's vehicle came to an abrupt stop and that he struck her vehicle in the rear causing it to strike the Omrow vehicle in the rear. It is undisputed that the Omrow vehicle was at a complete stop for ten seconds at the time of the impact to her vehicle. There has been no testimony which raises a factual issue to preclude summary judgment being granted to Felicia Omrow on the issue of liability.

Accordingly, motion (002) is granted.

Dated: February 24, 2011

HON. JOSEPH C. PASTORESSA

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION