SHORT FORM ORDER

INDEX No. 15-10439
CAL. No. 17-01954MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

PRESENT:

Hon. DAVID T. REILLY
Justice Supreme Court

MOTION DATE 3-6-18 (001, 002 & 003)
MOTION DATE 3-7-18 (004)
ADJ. DATE 5-16-18
Mot. Seq. # 001 - MG # 003 - XMD
002 - XMD # 004 - XMD

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MARTHA CABRERA-VERDUZO and FREDDY MONTENEGRO,

Plaintiffs,

- against -

JESSICA SHORTIS, LYNN SHORTIS, MARITA I. DERLE and MARITA A. DERLE,

Defendants.

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Upon the following papers numbered 1 to 51 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers 13 - 25; 26 - 28; 29 - 37; Answering Affidavits and supporting papers 38 - 45; Replying Affidavits and supporting papers 46 - 51; Other__; (~~and after hearing counsel in support and opposed to the motion~~) it is,

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

ORDERED that the unopposed motion by plaintiff/defendant on the counterclaim, Freddy Montenegro, for summary judgment dismissing the counterclaim against him on the issue of liability is granted; and it is further

ORDERED that the cross-motion by defendants Marita I. Derle and Marita A. Derle for summary judgment dismissing the complaint against them on the ground that plaintiffs did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied; and it is further

ORDERED that the cross-motion by defendants Jessica Shortis and Lynn Shortis for summary judgment dismissing the complaint against them on the ground that plaintiffs did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied, as moot; and it is further

ORDERED that the cross-motion by plaintiff/defendant on the counterclaim, Freddy Montenegro, for summary judgment dismissing the counterclaim against him on the ground that plaintiff Martha Cabrera-Verduzo did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied, as moot.

This is an action to recover damages for injuries sustained by plaintiffs as a result of a chain-reaction, rear-end motor vehicle collision which occurred on Hempstead Turnpike in the Town of Hempstead, New York, on June 23, 2012, at approximately 10:15 a.m. The following facts are undisputed. There were three vehicles involved in the accident. The lead vehicle was operated by plaintiff Freddy Montenegro; behind it was the vehicle operated by defendant Marita I. Derle and owned by defendant Marita A. Derle; and behind the Derle vehicle was the vehicle operated by defendant Jessica Shortis and owned by defendant Lynn Shortis. At the time of the accident, plaintiff Martha Cabrera-Verduzo was a passenger in a vehicle operated by plaintiff Freddy Montenegro.

Montenegro moves for summary judgment dismissing the counterclaim against him on the ground that he was not negligent, and that the subject accident was solely the result of defendants' failure to control their vehicles. In support, plaintiff submits, *inter alia*, the pleadings and the transcripts of the parties' deposition testimony.

At his deposition, Montenegro testified that prior to the accident, he had been traveling in the eastbound left lane of Hempstead Turnpike. He stopped at a red light. Montenegro testified that approximately 10 to 15 seconds after he stopped for the red light, his vehicle was struck in the rear "twice" by the Derle vehicle. He testified that several seconds elapsed between the two impacts.

At her deposition, Marita I. Derle testified that prior to the accident, she had been traveling eastbound on Hempstead Turnpike. She stopped behind the Montenegro vehicle for approximately two to four seconds. While she was completely stopped, her vehicle was struck from the rear by the Shortis vehicle, and was propelled forward one to two feet into the rear of the Montenegro vehicle, which was stopped.

At her deposition, Jessica Shortis testified that two vehicles traveling in front of her vehicle stopped suddenly, and that, though she attempted to stop her vehicle, she was unable to avoid hitting the

rear of the Derle vehicle. She testified that prior to the collision, she saw the Derle vehicle stopped for less than three seconds. She also testified that she did not see the Derle vehicle come into contact with the Montenegro 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, 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, while Montenegro testified that he felt two impacts to the rear of his vehicle, Marita I. Derle testified her vehicle was propelled into the rear of the Montenegro vehicle when it was struck from the rear by the Shortis vehicle. Although the accident may have occurred in different ways, no version suggests any negligence on the part of Montenegro, as it is undisputed that the Montenegro vehicle was stopped at a red traffic light when it was hit (*see* ***Strickland v Tirino***, 99 AD3d 888, 952 NYS2d 599 [2d Dept 2012]; ***Harriott v Pender***, 4 AD3d 395, 772 NYS2d 341 [2d Dept 2004]; ***Harris v Ryder***, 292 AD2d 499, 739 NYS2d 195 [2d Dept 2002]). Moreover, Jessica Shortis was under a duty to maintain a safe distance between her vehicle and the Derle vehicle. Since no party opposes Montenegro's motion for summary judgment dismissing the counterclaim against him on the ground he was not negligent, his motion is granted. Montenegro's cross-motion for summary judgment dismissing the counterclaim against him on the ground Cabrera-Verduzo did not suffer a serious injury is denied, as moot.

The Derle defendants cross-move for summary judgment dismissing the complaint on the ground that plaintiffs did not sustain a "serious injury" as defined in Insurance Law §5102 (d). By the bill of particulars, Cabrera-Verduzo alleges that, as a result of the accident, she sustained various serious injuries and conditions, including aggravation to prior right knee injuries, which "created a right lateral meniscus tear and chondromalacia of the patella." Montenegro alleges that, as a result of the accident, he sustained various serious injuries and conditions, including right knee medial collateral ligament sprain and appendicitis. The Shortis defendants cross-move for summary judgment dismissing the complaint on the ground that plaintiffs did not sustain a "serious injury" as defined in Insurance Law §5102 (d). In support, the Shortis defendants submit only an affirmation of their attorney, which attempts to adopt arguments submitted in the motion by the Derle defendants.

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; [or] significant limitation of use of a body function or system." The 90/180 day serious injury category requires proof of a "[m]edically 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" (Insurance Law § 5102 [d]). To satisfy this category, plaintiff must establish that his or her usual and customary activities were curtailed "to a great extent rather than some slight curtailment" based upon objective medical findings (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; *see* ***Monk v Dupuis***, 287 AD2d 187, 734 NYS2d 684 [3d Dept 2001]).

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, 853, 487 NYS2d 316 [1985]; ***Boone v New York City Tr. Auth.***, 263 AD2d 463, 692 NYS2d 731 [2d Dept 1999]).

Here, the Derle defendants failed to make a prima facie showing that Cabrera-Verduzo did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Spann v City of New York***, 145 Ad3d 932, 43 NYS3d 143 [2d Dept 2016]). In her bill of particulars, Cabrera-Verduzo alleges that following the subject accident, she was confined to her bed for approximately two weeks and to her home for approximately four months. During the four month period, she allegedly was totally incapacitated. In response, moving defendants failed to show, prima facie, that Cabrera-Verduzo did not sustain an injury within the 90/180 category. At her deposition, Cabrera-Verduzo indicated that following the accident, she missed approximately 4½ to 5 months of work (*see* ***Aujour v Singh***, 90 AD3d 686, 934 NYS2d 240 [2d Dept 2011]; ***Takaroff v A.M. USA, Inc.***, 63 AD3d 1142, 882 NYS2d 265 [2d Dept 2009]; ***Shaw v Jalloh***, 57 AD3d 647, 869 NYS2d 189 [2d Dept 2008]). The Derle defendants' examining orthopedist, Dr. David Weissberg, examined Cabrera-Verduzo approximately five years after the subject accident. Dr.

Weissberg did not relate any of his findings to the period of time immediately following the accident. Dr. Weissberg's report is insufficient to sustain defendants' burden of proof to establish prima facie that Cabrera-Verduzo had not sustained serious injury by reason of having been incapacitated from performing substantially all of her customary and daily activities for 90 of the first 180 days following the accident (*see* ***Cabey v Leon***, 84 AD3d 1295, 923 NYS2d 713 [2d Dept 2011]; ***Mugno v Juran***, 81 AD3d 908, 917 NYS2d 892 [2d Dept 2011]; ***Ali v Rivera***, 52 AD3d 445, 859 NYS2d 713 [2d Dept 2008]). Thus, Dr. Weissberg's report is insufficient to establish a prima facie case that Cabrera-Verduzo did not sustain a serious injury within the meaning of Insurance Law § 5102 (d). The Derle defendants failed to negate the existence of a factual issue as to whether Cabrera-Verduzo's injury prevented her from performing substantially all of her usual and customary daily activities for at least 90 of the first 180 days following the accident.

Inasmuch as the Derle defendants failed to meet their prima facie burden, it is unnecessary to consider whether the papers submitted by Cabrera-Verduzo in opposition to the cross-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]). Accordingly, the branch of the Derle defendants' cross-motion for summary judgment dismissing the claim of Cabrera-Verduzo on the issue of serious injury is denied.

Likewise, the Derle defendants failed to make a prima facie showing that Montenegro 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 March 24, 2017, the Derle defendants' examining orthopedist, Dr. Raymond Shebairo, examined Montenegro and performed certain orthopedic and neurological tests, including the Lachman test and the McMurray's test. Dr. Shebairo found that all the test results were negative or normal. Dr. Shebairo also performed range of motion testing on Montenegro's cervical and lumbar regions, shoulders, and knees, using a goniometer to measure his joint movement. Dr. Shebairo found that Montenegro exhibited normal joint function in those regions. However, Dr. Shebairo's report failed to adequately address Montenegro's claim, clearly set forth in the bill of particulars, that he sustained appendicitis as a result of the subject accident (*see* ***Cohn v Khan***, 89 AD3d 1052, 933 NYS2d 403 [2d Dept 2011]; ***Smith v Quicci***, 62 AD3d 858, 880 NYS2d 652 [2d Dept 2009]; ***Volpetti v Kap***, 28 AD3d 750, 814 NYS2d 236 [2d Dept 2006]). In his report dated September 29, 2017, moving defendants' gastroenterologist, Dr. Ilan Weisberg, states that upon reviewing the medical records, he opines that Montenegro's appendicitis was "more likely" to be coincidental to, rather than caused by the subject accident. Dr. Weisberg's conclusions regarding the cause of Montenegro's alleged appendicitis are speculative and his report is without probative value (*see* ***Irizarry v Lindor***, 110 AD3d 846, 973 NYS2d 296; ***Vasquez v John Doe #1***, 73 AD3d 1033, 905 NYS2d 188; ***Casimir v Bailey***, 70 AD3d 994, 896 NYS2d 122; ***Matra v Raza***, 53 AD3d 570, 863 NYS2d 445 [2d Dept 2008]). In view of the foregoing, the report of Dr. Shebairo and Dr. Weisberg are insufficient to establish a prima facie case that Montenegro did not sustain a serious injury within the meaning of Insurance Law § 5102 (d).

Inasmuch as the Derle defendants failed to meet their prima facie burden, it is unnecessary to consider whether the papers submitted by Montenegro in opposition to the cross motion were sufficient to raise a triable issue of fact (*see* ***McMillian v Naparano***, *supra*; ***Yong Deok Lee v Singh***, *supra*).

Thus, the branch of the Derle defendants' cross-motion for summary judgment dismissing the claim of Montenegro on the issue of serious injury is denied. Accordingly, the Shortis defendants' cross-motion for summary judgment dismissing the complaint on the issue of serious injury is denied.

Dated: August 3, 2018

J.S.C.
HON. DAVID T. REILLY

____ **FINAL DISPOSITION** ___X__ **NON-FINAL DISPOSITION**