SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. JOSEPH COVELLO

Justice

FRANCILLA THOMAS,

Plaintiff,

-against-

HARRAN TRANSPORTATION CO. INC., CBS LINES, INC., GREGORY A. JORDAN and RUPERTO VELEZ.

Defendants,

TRIAL/IAS, PART 28
NASSAU COUNTY

Index #: 14591/99
Action #: 1

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

RUPERTO VELEZ and MYDALIS VELEZ, Individually and as parent and natural guardians of DAVID VELEZ EMMANUEL VELEZ, and ADRIANA VELEZ,

Plaintiffs,

-against-

CBS LINES, INC., GREGORY A. JORDAN, EVANGELINE REYES and FRANCILLA THOMAS,

Defendants.

Index #: 7677/01
Action #: 2

Motion Seq. No.:1, 2, 3, 4,
Motion Date: 11/21/02

Motion Seq. No.: 5, 6
Motion Date: 01/07/03

The following paper read on this motion:

Notice(s) of Motion	1,5
Notice (s)of Cross Motion	2, 3, 4, 6
Affirmation(s) in Opposition	7, 8, 9, 11
Reply Affirmation(s)	10

The foregoing motions in Action No.2 are determined as follows.

The motion by the Velez plaintiffs, in Action No. 2 for an order pursuant to CPLR §3212 granting them partial summary judgment on the issue of liability against defendants CBS Lines, Inc., Jordan, and Reyes, is granted only to the extent provided herein.

The cross-motions by CBS Lines, Inc., Gregory Jordan and Francilla Thomas, defendants in Action No. 2, for an order pursuant to CPLR §3212 granting them summary judgment dismissing the complaint against them on the ground that the plaintiffs did not suffer a

"serious injury" as defined by Insurance Law §5102(d) and required by Insurance Law §5104(a) is granted to the extent that plaintiffs Mydalis, David, Emmanuel and Adriàna Velez's complaints are dismissed.

The cross-motion by Francilla Thomas, defendant in Action No. 2, for an order pursuant to CPLR §3212 granting him summary judgment dismissing the complaint and all cross-claims against him is granted.

The motion by Evangeline Reyes, defendant in action No. 2, for an order pursuant to CPLR §3212 granting her summary judgment dismissing the complaint and all cross-claims against her is granted.

This is an action to recover damages for personal injuries allegedly sustained in a motor vehicle accident on June 21, 1996, by plaintiffs, Ruperto and Mydalis Velez and their three children David, Emmanuel and Adriana. The plaintiffs were allegedly stopped in their van in the right lane of the Gowanus Expressway behind a jeep driven by defendant Thomas; Defendant Thomas, was stopped behind a Mazda driven by defendant Reyes. Defendant Reyes, had experienced trouble with her car and went to get help. A bus operated by defendant Jordan, and owned by defendant CBS Lines, Inc., rear-ended the Velez's van and caused a chain reaction accident: Defendant Jordan's bus hit Velez's van; Velez's van hit defendant Thomas' jeep; and, Defendant Thomas' jeep hit defendant Reyes' Mazda.

Presently before the court is an application by the Velez plaintiffs, seeking summary judgment with respect to the liability of defendant's CBS Lines, Inc., Jordan and Reyes. Both defendant's Thomas and Reyes, seek to have the complaint against them dismissed. And, defendant CBS Lines, Inc., Gregory A. Jordan and Francilla Thomas, also seek dismissal of the

complaint against them on the grounds that none of the plaintiffs sustained a "serous injury" as required by Insurance Law §5104 (a) and defined by Insurance Law §5102 (d).

Since a "serious injury" is required to maintain this action, that issue will be addressed first. In seeking summary judgment pursuant to Insurance Law §5104 (a), 5102 (d), the movants must establish a ***prima facie*** case that the plaintiffs did not sustain a "serious injury" as defined by Insurance Law §5102 (d). *(Gaddy v Eyler*, 79 NY2d 955, 956 - 957; *Grossman v Wright*, 268 AD2d 79).

Dr. Andrew Dowd, an orthopedic surgeon, conducted independent medical examinations of the five plaintiffs on June 28, 2002.

Regarding plaintiff Ruperto Velez, Dr. Dowd found that he had full range of motion of his lumbosacral spines and his left knee. Dr. Dowd concluded that Mr. Velez had suffered a lumbosacral sprain, left knee contusion and a left knee laceration, but had no current orthopedic disability. He concluded that Mr. Velez, was able to function in his pre-accident capacity and to carry out his day-to-day activities without any restriction.

Regarding Mydalis Velez, Dr. Dowd found that she had full range of motion in her cervical and lumbosacral spines. Dr. Dowd concluded that Mrs. Velez had suffered cervical and lumbosacral sprains, but had no current orthopedic disability. He concluded that she was able to function in her pre-accident capacity and to carry out her day-to-day activities without any restriction.

Regarding plaintiff David Velez, Dr. Dowd found that he had full range of motion in his lumbosacral spine. Although he had suffered a lumbosacral sprain, it was fully resolved and David had no current orthopedic disability.

Regarding plaintiff Emmanuel Velez, Dr. Dowd found that he had full range of motion of his cervical and lumbosacral spines. Although he had suffered cervical and lumbosacral sprains, they were completely resolved and Emmanuel had no current orthopedic disability.

Regarding plaintiff Adrianna Velez, Dr. Dowd found that she had full range of motion of her lumbosacral spine. Although she had suffered a lumbosacral sprain, it had fully resolved and Adrianna had no current orthopedic disability.

The defendants have submitted evidentiary proof in admissible form, which establishes that none of the Velez plaintiffs, sustained a "serious injury." The burden accordingly shifts to plaintiffs to demonstrate the existence of a material issue of fact. *(Gaddy v Eyler, supra).*

In the plaintiffs' Bill of Particulars the injuries alleged on behalf of Mydalis Velez, amount to soft tissue injuries. As to her injuries, Mydalis Velez, last received treatment for her injuries two months after the accident. Indeed, she only saw a doctor again in response to this motion. The six year gap in her treatment is completely unexplained and as such she has failed to raise an issue of fact. *(Crespov Kramer, 295 AD2d 467, 468, citing Borino v Little, 273 AD2d 262; Rum v Pam Transp., 250 AD2d 751; Goldin v Lee, 275 AD2d 341; see also, Ginty v MacNamara 2002WL 31895072).* Accordingly, Mydalis Velez has failed to meet her burden and her complaint must be dismissed.

As for injuries to the three infant plaintiffs, David, Emmanuel and Adriana Velez, the plaintiffs' Bill of Particulars lists the following injuries for: David "Pain, both lower legs" "Pain, lower back"; Emmanuel "Pain, lower back" no injuries are listed for Adriana. Moreover, plaintiffs have not submitted any medical evidence in opposition on behalf of these plaintiffs. Accordingly, they failed to meet their burden and their complaint must be dismissed.

However, although Ruperto Velez's treating chiropractor Dr. Mollins improperly partially relies on unsworn medical records in his attempt to establish objective evidence of a medical injury, Dr. Mollins himself attests to conducting straight leg raise tests, which were positive. Tests of this nature suffice to meet the "objective evidence" requirement. (*Grossman v Wright, supra, at p. 84; Kim v Cohen, 208 AD2d 807; Adetunji v U-Haul Co. Of Wisconsin, Inc., 250 AD2d 483).* In addition, Dr. Mollins set forth the range of motion tests performed by him along with the results which evidence a restricted range of motion in both Mr. Velez's lumbar and cervical spine. As to the gap in treatment, Mr. Velez explained at his examination before trial that the No-fault insurance carrier refused to cover any additional treatment. (*Villalta v Schechter, 273 AD2d 299, 302 [Goldstein, J., Dissenting]).* Accordingly, Ruperto Velez has raised an issue of fact as to whether he sustained a serious injury.

Turning next to the question of liability, plaintiff Velez seeks summary judgment against CBS Lines, Inc., and Jordan for rear-ending his vehicle and against defendant Reyes, for leaving her vehicle unattended on the expressway.

> A rear-end collision with a stopped vehicle creates a prima facie case of liability in favor of the operator of the stationary vehicle unless the operator of the moving vehicle can come forward with an adequate, non negligent explanation for the accident (*see, Lopez v Minot, 258 AD2d 564; Mundo v City of Yonkers, 249 AD2d 522; Miller v Irwin, 243 AD2d 546; Parise v Meltzer, 204 AD2d 295).* The operator of the moving vehicle is required to rebut their inference of negligence created by an unexplained rear-end collision, because he is in the best position to explain whether the collision was due to a reasonable, non negligent cause. If the operator of the moving vehicle cannot come forward with any evidence to rebut the inference of negligence, the operator of the stationary vehicle may properly be awarded summary judgment on the issue of liability (*see, Lopez v Minot, supra*)." (*Leonard v City of New York, 273 AD2d 205).*

The defendants CBS Lines, Inc., and Jordan have failed to come forward with any

explanation whatsoever for the rear-end collision. In light of the undisputed facts, defendant Ruperto Velez, is granted summary judgment against defendants CBS Lines, Inc., and Jordan on the issue of liability. *(Leonard v City of New York, supra).*

Defendant, Thomas was not in any way negligent and there is no question that his conduct contributed to the accident. Accordingly, his motion is granted and complaint against him is dismissed. (*See, Zaslavskay v Twine, 249 AD2d 466; Hoffman v Eastern Long Island Transp., Enterprise, Inc., 266 AD2d 509, lv. to app den., 94 NY2d 762).*

As for defendant Reyes, again, plaintiff argues that she was negligent in abandoning her car on the highway. (*See,* VTL §1201). Defendant, Reyes seeks summary judgment dismissing the complaint against her. Defendant Reyes, testified at her examination-before-trial that when her car broke down, there was no shoulder. She waited for 15-20 minutes but no one stopped to help. Although she was forced to leave her car on the parkway, before going to get help, she put her hazard lights on. While VTL §1201(a) provides that no person shall stop, park or leave a vehicle standing upon the paved or main-traveled part of a highway when it is practicable to stop, park or leave such vehicle off such part of the highway, Section 1201(b) specifically provides that section shall not apply to the driver of any vehicle which is disabled while on the paved or main-traveled portion of the highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such disabled vehicle. (*See, Russo v Sabella Bus Co.*, 275 AD2d 660). Defendant Reyes, has established her entitlement to summary judgment and the plaintiff has failed to come forward with any evidence of any negligent act or omission on Reyes' part, which proximately caused this accident. The complaint against defendant Reyes is accordingly dismissed. (*Rios v Buyant*, 234 AD2d 441; *see also*, *Russo v Sabella Bus Co., supra*).

Therefore, it is hereby

ORDERED, that the complaint of plaintiffs Mydalis Velez; David Velez, Emmanuel Velez and Adriana Velez is dismissed against all defendants on the grounds that they have not sustained a "serous injury" as required by Insurance Law §5104 (a) and defined by Insurance Law §5102 (d). It is further

ORDERED, that the complaint and all cross-claims against defendants, Evangeline Reyes and Francilla Thomas in Action No. 2 are dismissed. It is further

ORDERED, that the plaintiff, Ruperto Velez, is granted partial summary judgment on the issue of liability against defendants, CBS Lines, Inc., and Gregory A. Jordan. Upon the plaintiff's filing of a Note of Issue and Certificate of Readiness this action is to be set down for a trial on the issue of damages. Plaintiff is directed to file his Note of Issue and Certificate of Readiness within 30 days of entry of this Order and to attach a copy of this Order to the Note of Issue and serve a copy upon the Clerk of the Calendar Control Part.

The foregoing constitutes the decision and order of the Court.

Dater: January 28, 2003

Joseph Covello, J.S.C.

ENTERED

FEB 05 2003

NASSAU COUNTY
COUNTY CLERK'S OFFICE