SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - PART 17

Present: HON. WILLIAM R. LaMARCA
Justice

LORRAINE MUELLER and STEPHAN L. MUELLER,

Plaintiffs,

-against-

INCORPORATED VILLAGE OF OYSTER BAY COVE, OYSTER BAY COVE POLICE DEPARTMENT and JOHN J. SWEENEY,

Defendants.

Motion Sequence #1, #2
Submitted May 8, 2008

INDEX NO: 14389/06

The following papers were read on these motions:

Notice of Motion.....1
Notice of Motion.....2
Affirmation in Opposition.....3
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Defendants, INCORPORATED VILLAGE OF OYSTER BAY COVE, OYSTER BAY COVE POLICE DEPARTMENT and JOHN J. SWEENEY (hereinafter collectively referred to as the "VILLAGE"), move for an order, pursuant to CPLR §3212, granting them summary judgment dismissing the complaint on the grounds that the plaintiff LORRAINE MUELLER (hereinafter referred to as "plaintiff"), did not sustain a "serious injury" as required by Insurance Law §5104(a) and defined by Insurance Law §5102(d). In a motion of even

date, the plaintiffs, LORRAINE MUELLER and STEPHAN L. MUELLER, who has made a derivative claim, move for an order, pursuant to CPLR §3212, granting them partial summary judgment against defendants with respect to the issue of liability. The motions are determined as follows:

In this action, the plaintiffs seek to recover, *inter alia*, damages for personal injuries that plaintiff, LORRAINE MUELLER, sustained in a motor vehicle accident, on March 20, 2006, when she was allegedly rear-ended at a red light by a motor vehicle owned by the VILLAGE and operated by the defendant, JOHN J. SWEENY, in the course of his employment with the OYSTER BAY COVE POLICE DEPARTMENT. Plaintiff alleges to have sustained cervical disc herniations at C3-C4 and C4-C5 and cervical disc herniations at C5-C6 and C6-C7 with ventral CSF impression; lumbar disc herniation at L5-S1 flattening the thecal sac and impressing upon the existing right L4 nerve root; lumbar disc bulges at L3-L4 and L4-L5 flattening the thecal sac; lumbosacral radiculopathy; cervical radiculopathy at C7 with cervical sprain/strain derangement; and, lumbar sprain/strain derangement post-traumatic myofascial pain syndrome. Plaintiff characterizes these injuries as a significant disfigurement; a 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 body function or system; and, a medically determined injury or impairment of a non-permanent nature which prevents the plaintiff from performing substantially all material acts which constitute her usual and customary daily activities not less than 90 days during the 180 days immediately following the accident.

As to the Threshold Issues

Defendants seek summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as required by Insurance Law § 5102(a) and defined by Insurance Law § 5104(d).

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Sheppard-Mobley v King*, 10 AD3d 70, 778 NYS2d 98 (2d Dept. 2004), *aff'd. as mod.*, 4 NY3d 627 (C.A.2005), citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923, 501 NE2d 572 (C.A. 1986); *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316m 476 NE2d 851 (C.A. 1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Sheppard-Mobley v King, supra*, at p. 74; *Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra*. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. *Alvarez v Prospect Hosp., supra*, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. *See, Demshick v Community Housing Management Corp.*, 34 AD3d 518, 824 NYS2d 166 (2d Dept. 2006), citing *Secof v Greens Condominium*, 158 AD2d 591, 551 NYS2d 563 (2d Dept. 1990).

In support of their motion, the defendants have submitted the affirmed report of Frederick S. Mortani, M.D., F.A.A.N, a Diplomate in Neurology, and the report of Carl

Austin Weiss, M.D. a Diplomate of the American Board of Orthopedic Surgeons.

Dr. Mortani examined plaintiff on or about July 10, 2007. Mrs. MUELLER reported that she continued to suffer chronic headaches and low back and neck pain which radiated down her legs to her toes and down her arms to her fingers. Upon examination, Dr. Mortani found Mrs. MUELLER's mental status and cranial nerves within normal limits. Her motor system was also found to be normal. While Dr. Mortani summarized Mrs. MUELLER's neurological examination as normal, he advised that an independent orthopedic evaluation should be obtained and that a neuroradiologist should review Mrs. MUELLER's MRI's.

The report of Dr. Weiss is not in admissible form and cannot be considered. In any event, even he concluded after examining Mrs. MUELLER that, not only has she suffered cervical and lumbar sprains from the accident, "her condition obviously is not resolved. . ." Thus, even if his report was considered, Dr. Weiss has failed to establish that Mrs. MUELLER did not sustain a serious injury.

Assuming, *arguendo*, that defendants had met their burden, the plaintiffs, in opposition, have clearly met their burden of establishing the existence of a material issue of fact concerning the issue of serious injury through, *inter alia*, the reports of Mrs. MUELLER's attending doctor, Daniel Brietstein, M.D., Associate Director of the Division of Integrative Pain Medicine of ProHealth Care Association, dated April 8, 2008, and the report of Paul Lerner, M.D., an Assistant Clinical Professor of Neurology at Albert Einstein College of Medicine dated April 4, 2008.

Following his April 8, 2008 examination of Mrs. MUELLER, Dr. Brietstein opined that she had ongoing pain in her cervical and lumbar spines, left arm and lower

extremities and that she will not improve significantly. He noted that she will require ongoing care, including chiropractic and physiotherapy on an ongoing basis. After his April 4, 2008 physical examination of Mrs. MUELLER, Dr. Lerner opined that she had a specific marked degree of loss of range of motion in her cervical and lumbar spines, which resulted in a total disability from employment, and he noted that she will likely require spinal surgery and injections in the future.

As to Liability Issues

The court next turns to the plaintiffs' motion for partial summary judgment with respect to liability. This application can be decided without a determination regarding "serious injury," which must be determined during the damages phase of this action. *See, Zecca v Riccardelli*, 293 AD3d 31, 742 NYS2d 76 (2nd Dept. 2002); *Perez v State of New York*, 215 AD2d 740, 627 NYS2d 421 (2nd Dept. 1995); *see also, Van Nostrand v Froelich*, 44 AD3d 54, 844 NYS2d 293 (2nd Dept. 2007).

"'A rear end collision with a stopped vehicle creates a *prima facie* case of negligence against the operator of the moving vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision.'" *Allstate Insurance Co. v Liberty Lines Transit, Inc.*, 50 AD3d 712, 855 NYS2d 599 (2nd Dept. 2008) quoting *Kimyagarov v Nixon Taxi Corp.*, 45 AD3d 736, 846 NYS2d 309 (2nd Dept. 2007); *see, Klopchin v Masri,* 45 AD3d 737, 846 NYS2d 311 (2nd Dept. 2007); *Nieves v JHH Transp., LLC,* 40 AD3d 1060, 836 NYS2d 6972nd Dept. 2007).

Mrs. MUELLER testified at her examination-before-trial (EBT) that she was stopped at a red light for about one minute when she was rear-ended by a police car

being operated by defendant SWEENEY. At SWEENEY's EBT, he testified that he saw Mrs. MUELLER's car stopped at the traffic light before he hit it and that, prior to hitting her automobile in the rear, he had looked down at his computer and when he looked up again, he saw Mrs. MUELLER's car and could not stop.

The Court concludes that plaintiffs have established their entitlement to partial summary judgment with respect to liability. In fact, the defendants have not opposed the plaintiffs' application. It is therefore

ORDERED, that defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff has not sustained a "serious injury" is denied; and it is further

ORDERED, that plaintiffs' motion for partial summary judgment on the issue of liability is granted, as no question of fact has been raised to require a trial on said issue. However, as questions of fact remain on the issue of "serious injury", the Court grants judgment as to fault only, which does not include any finding that the plaintiff has satisfied the "threshold" serious injury requirements. *Shafareko v Fu Cheng*, 5 AD3d 585, 772 NYS2d 862 (2nd Dept. 2004); *Reid v Brown*, 308 AD2d 331, 764 NYS2d 260 (1st Dept. 2003); and it is further

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: July 28, 2008

WILLIAM R. LaMARCA, J.S.C.

ENTERED

AUG 01 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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