SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

MARC J. LAMANTIA and KATHERINE LAMANTIA,

Plaintiff(s),

- against -

ANGELA TENCZA, T.J. PATTERNOSTER, MARKETSPAN CORP., TOWN OF NORTH HEMPSTEAD and COUNTY OF NASSAU,

Defendant(s).

TRIAL/IAS PART 20

INDEX NO. 23855/99

MOTION SEQUENCE NO. 1 & 2 & 3

MOTION SUBMISSION DATE: February 21, 2002

ACTION NO. 1

PROGRESSIVE INSURANCE COMPANY a/s/o MARC LAMANTIA,

Plaintiff(s),

- against -

TOWN OF NORTH HEMPSTEAD, ANGELA TENCZA, MARKETSPAN CORPORATION AND THEODORE PATERNOSTER,

Defendant(s).

ACTION NO. 2

234/00

KEYSPAN CORPORATION, f/k/a MARKETSPAN CORPORATION,

Plaintiff(s),

- against -

ANGELA TENCZA, KATHERINE L.LAMANTIA and MARC J. LAMANTIA,

Defendant(s).

ACTION NO. 3

KATHERINE J. LAMANTIA and MARC J. LAMANTIA,

Third-Party Plaintiff(s),

- against -

TOWN OF NORTH HEMPSTEAD,

Third-Party Defendant(s).

The following papers read on this motion:

Notice of Motion	**X**
Amended Notice of Motion	**X**
Notice of Cross Motion	**X**
Reply Affirmation	**XX**
Affirmation in Opposition	**XXXXX**
Sur Reply Affirmation	**X**

Upon the foregoing papers, the motion by defendants, County of Nassau ("County") moves and the Town of North Hempstead ("Town") cross-moves for summary judgment. Defendant, Angela Tencza ("Tencza") cross-moves for summary judgment on the issue of serious injury as to plaintiff, Katherine Lamantia ("Lamantia").

The matter involves a three-car collision on November 8, 1998 at the intersection of Park Avenue and County Courthouse Road, Garden City Park, New York. The vehicle of plaintiffs Marc J. Lamantia and Katherine Lamantia (plaintiffs in action #2, index #23855/99) was eastbound on Park Avenue. At the intersection of Park Avenue and County Courthouse Road, their vehicle was struck by Tencza's vehicle and a vehicle owned by defendant, Marketspan Corp. ("Marketspan") and driven by defendant, T.J. Paternoster ("Paternoster"). A stop sign controlling eastbound traffic on Park Avenue at the intersection with County Courthouse Road had been knocked to the ground in a prior accident that had occurred on November 4, 1998. The Lamantias contend the stop sign was missing on November 8, 1998, and they contend the lack of the stop sign was the proximate cause of the collision.

The County states it had no jurisdiction over the intersection (see Exhibit C annexed to Nassau's motion) and the Town was responsible for the maintenance of the stop sign (see Exhibit D, page 31, the deposition of Diane O'Donnell, a Town Traffic Technician, annexed to Nassau's motion).

The Town seeks summary judgment on the grounds it did not create the hazard. The Town contends it had no actual or constructive notice of the downed stop sign until after the accident. The Town contends its employees could not see the damage to the stop sign since a County police officer had, after the November 4, 1998 accident, temporarily repaired the stop sign.

Tencza, Lamantias, Marketspan and Paternoster all oppose the motion by the County.

As to the County, they contend that a County police officer, William Monteiro, on November 4, 1998, responded to an accident at the same intersection. The stop sign in issue was damaged (see Town's Exhibit T, pp. 20-21, deposition of Monteiro annexed to Town's cross-motion). Monteiro tried the best he could to put it back in a functioning up-right position (p. 23). Monteiro completed a damaged sign form (p. 24) and put the form in the clerk's bin at his station house (p. 26). Monteiro did no follow-up.

Thus, it is contended the County, by Monteiro, took affirmative action to fix the sign. First, it is alleged the sign was not repaired correctly by Monteiro since it was down prior to the November 8, 1998 collision (see Exhibit C, pp. 18-19, 23, 41-42, deposition of County police officer Robert Xerri annexed to Paternoster and Marketspan's affirmation in opposition) and Monteiro did not use the good and accepted procedure to report the downed sign. (Exhibit C, p. 20; see also Exhibit 4, the affidavit of Joe Donato, a retired Nassau County police officer, annexed to the Lamantias' affidavit in opposition, dated December 11, 2001.)

Those parties opposing the County's motion contend there are issues of fact as to the County's involvement.

The Lamantias and Tencza oppose the Town's cross-motion for summary judgment.

They argue the Town should, as owner of the stop sign, have been aware of the defective or downed sign by periodic inspection by the Town's employees. They contend there is an issue of fact as to if the stop sign was down for several days before November 8, 1998; whether the Town had actual or constructive notice of the downed stop sign (see Exhibit 4, the affidavit of Paul Krumholz, annexed to Lamantias' affirmation in opposition, dated December 21, 2001).

Liability may be imposed upon a municipality when it has voluntarily assumed a duty, the proper exercise of which was justifiably relied upon by the persons benefitted thereby or where the municipality assumes positive direction and control under circumstances in which a known blatant and dangerous safety violation exists. (Garrett v Holiday Inns, 58 NY2d 253.)

Even though the County did not own the stop sign (the Town did), the conduct of Monteiro clearly raises an issue of fact as to the County's assumption of duty as to the stop sign.

Even when no original duty is owed to undertake affirmative action to help, once such action has been voluntarily undertaken, it must be performed with due care. (See Parvi v City of Kingston, 41 NY2d 553.)

Where the plaintiff submits an expert affidavit stating that the police officer deviated from standard police practice in performing a task, the affidavit established that there was an issue of fact that precluded granting summary judgment. (Persaud v City of New York, 267 AD2d 220.)

Here, the affidavit of Donato presents issues of fact regarding the alleged misfeasance of County employee, Monteiro, (see Ganci v SuffolkCounty Police Department, 285 AD2d 580), i.e., did Monteiro utilize proper procedure to report the downed stop sign?

The Town contends Monteiro replaced the stop sign and its employees would not know if the sign was damaged or about to fall over. The affidavit of Krumholz states the sign was down for a few days before the November 8, 1998 collision.

To make out a prima facie case in the action, plaintiff must be able to demonstrate that a defendant created the condition which caused the accident or that a defendant had actual or constructive notice of the condition. (Raimo v Brown, 249 AD2d 530.)

Here, there are issues of fact as to whether the Town had actual or constructive notice of the downed stop sign (Gordon v American Museum of Natural History, 67 NY2d 836), and whether the Town's failure to repair and replace the stop sign was the proximate cause of the accident. (See: Dalzell v County of Dutchess, 258 AD2d 615.)

In conclusion, there are issues of fact as to whether the County's employee caused the defect or that the Town had notice that the stop sign was down, (see Prager v Motor Vehicle Accident Indemnification Corporation, 74 AD2d 844, affd 53 NY2d 854), so as to preclude a summary determination in favor of the County and the Town.

The Court will now consider Tencza's cross-motion that Lamantia did not sustain a serious injury as defined under Insurance Law §5102(d).

Tencza notes that Lamantia did not require first aid at the scene (see Exhibit I, p. 44, annexed to Tencza's cross-motion, the following page number refers to that Exhibit). Lamantia had pain in her head, neck, hands, hips and left knee (pages 50-51); she received pain killers (p. 51); she was discharged from the hospital and spent 2-3 nights at her parents' house (p. 53); Lamantia saw an orthopedist once (p. 54); she went to a chiropractor (p. 55), but 6-7 months after the accident she stopped seeing him (pp. 55-58); she lost 1-2 weeks from work; she currently travels every day to New York City and travels around the county to see clients (p. 66); Lamantia was expected to give birth in January, 2001 (p. 67).

Tencza has presented medical affidavits (see Exhibit L and M annexed to Tencza's cross-motion) which indicate Lamantia's condition is normal and she can engage in all her usual daily activities.

Clearly, Tencza contends, Lamantia has shown no indiction that she had sustained the 90/180 day period of disability.

Based on the above, Tencza argues Lamantia has not sustained a serious injury as defined in Insurance Law §5102(d).

When the evidence presented by a defendant establishes that a plaintiff's injuries were not serious within the meaning of Insurance Law §5102(d), the burden shifts to the plaintiff to come forward with sufficient evidence to demonstrate the existence of an issue of fact as to whether he or she suffered a serious injury. (Gaddy v Eyler, 79 NY2d 955.)

Upon review of the submission, Lamantia has not met her burden.

Lamantia relies on the medical records and reports of Dr. David Weinstein, a chiropractor, (see Exhibit 2, annexed to the affirmation in opposition). Dr. Weinstein's report is not sworn (CPLR 2106) and it is not in admissible form. (Grossman v Wright, 268 AD2d 79.)

Lamantia also relies on the properly sworn affidavit of Dr. Gareth Brancato. (See annexed to the plaintiffs' affirmation in opposition). First, Dr. Brancato does not offer an explanation for the gap

between the examination of Lamantia on November 11, 1998 and his examination of her in June 2000. (Grossman v Wright, supra.)

Also, Dr. Brancato in his affidavit, cites and relies on unsworn medical reports of Dr. Weinstein. On a summary judgment motion relating to serious injury, a plaintiff's physician in opposing the motion may not rely upon unsworn medical reports prepared by another physician. (Rozenganz v Loh Wing Ha, 280 AD2d 534.)

Dr. Brancato's affidavit failed to demonstrate a permanent consequential limitation of the use of a body organ or member, a significant limitation of the use of a body organ or system, and it failed to demonstrate a medically determined injury that prevented Lamantia from performing substantially all the material acts constituting her usual daily activities for at least 90 days during the 180 days following her injury. (Atkins v Metropolitan Suburban Bus Authority, 222 AD2d 390.)

In the instant case, Lamantia has failed to present viable objective medical evidence that there is an issue of fact as to whether or not Lamantia suffered a "serious injury" from the collision on November 8, 1998.

Also, an affirmation of a plaintiff's treating chiropractor must set forth the objective tests which were performed to support a chiropractor's conclusion that the plaintiff has suffered a restricted range of motion, (Monoco v Davenport, 277 AD2d 209) and where the chiropractor's conclusion appears to be based on a plaintiff's subjective complaint of pain, such conclusions are insufficient to defeat a summary judgment motion (Villalta v Schechter, 273 AD2d 299), for the subjective quality of a plaintiff's pain does not fall within the objective verbal definition of a serious injury as contemplated by the no-fault Insurance Law. (Scheer v Koubek, 70 NY2d 678.)

Dr. Brancato, herein, has not set forth what objective tests were utilized as to the alleged restricted range of motion of Lamantia.

The affidavit of Dr. Brancato clearly represents a tailoring of his assertions to attempt to meet the statutory requirements of serious injury. (See Betheil-Spitz v Linares, 276 AD2d 732.)

As to Lamantia's affidavit (annexed to plaintiffs' affirmation in opposition following Dr. Brancato's affidavit), an affidavit from a personal injury plaintiff claiming an inability to perform substantially all of the material acts constituting plaintiff's usual and customary activities following the underlying accident was insufficient to show the plaintiff suffered a "serious injury" within the meaning of the no-fault law, where the plaintiff did not submit a physician's affidavit substantiating the existence of a medically determined injury producing the medical impairment. (Donisi v Henderson, 279 AD2d 603.)

The plaintiff, Lamantia's affidavit submitted herein, contains nothing more than self-serving, unsubstantiated allegations and subjective complaints.

Accordingly, the County's motion and the Town's cross-motion for summary judgment are denied. Tencza's cross-motion for summary judgment on the issue of serious injury is granted.

SO ORDERED.

ENTERED

DATED: 4/9/2002

APR 15 2002

Roy S. Mahon
J.S.C.

NASSAU COUNTY
COUNTY CLERK'S OFFICE