SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:

HON. DANIEL PALMIERI
Acting Justice Supreme Court

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ISHMAEL NWAOGBE and OKEOMA NWAOGBE,

Plaintiff,

-against-

DAWANA JOHNSON,

Defendant.

----------x

TRIAL TERM PART: 45

INDEX NO.:21164/07

MOTION DATE:7-24-09
SUBMIT DATE:12-23-09
SEQ. NUMBER - 001

MOTION DATE: 7-28-09
SUBMIT DATE: 12-23-09
SEQ. NUMBER - 002

The following papers have been read on this motion:

Notice of Motion, dated 6-29-09.....1
Notice of Motion, dated 7-7-09.....2
Affirmation in Opposition, undated.....3
Affirmation in Opposition, dated 11-24-09.....4
Reply Affirmation, dated 7-17-09.....5
Reply Affirmation, dated 12-18-09.....6

The motion (Seq. 1) by plaintiff Ishmael Nwaogbe (Ishmael) for summary judgment on the issue of liability or fault, but not as to serious injury, is granted. CPLR §3212 *Zecca v. Riccardelli*, 293 AD2d 31 (2d Dept. 2002). Pursuant to CPLR § 3212(b), a court may search the record and award summary judgment to a party other than the moving party,

without necessity of a cross motion, provided that the grant of such summary judgment is with respect to a cause of action or issue that is the subject of the motion before the court. *Dunham v. Hilco Construction Company, Inc.*, 89 NY2d 425 (1996), *Geoffrey S. Matherson & Associates, Ltd. v. Siegler*, 305 AD2d 457 (2d Dept. 2003). Based on the foregoing authority, the court has searched the record and grants summary judgment to plaintiff Okeoma Nwaogbe, (Okeoma) against the defendant on the issue of liability only.

This is an action arising out of a hit in the rear accident that occurred at 6:30-7:00 a.m. on July 7, 2007, on an exit ramp off the Cross Bronx Expressway, in Bronx County. Plaintiffs' vehicle was struck in the rear by defendant's vehicle as plaintiffs' vehicle slowed for a red light at the end of the ramp. Defendant testified that while traveling at a speed of 30 mph, she first observed the plaintiffs' vehicle when it was two car lengths away from it. When she was one car length away, she saw the plaintiffs' vehicle stopped at the red light, tried to brake but was unable to stop before striking the vehicle. Defendant also testified that she could not see the light at first due to a wall and that plaintiffs' vehicle "suddenly stopped". It is this testimony about the sudden stop which defendant claims raises an issue of fact as to whether plaintiff Ishmael was at fault in causing the accident.

Based on the above, there is no support for the contention that the stop by the lead vehicle was sudden or abrupt, since there is a lack of any evidence as to the degrees of speed from which and to which it stopped. The only evidence of the speed of the lead vehicle is from plaintiff who states that he was moving at 5 mph when struck.

On a motion for summary judgement the movant must establish his or her cause of action or defense sufficient to warrant a court directing judgement in its favor as a matter of

law. See *Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 (1988); *Alvarez v. Prospect Hosp.*, 68 NY2d 320 (1986); *Rebecchi v. Whitmore,* 172 AD2d 600, (2d Dept. 1991). "The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material question of fact" *Frank Corp. v. Federal Ins. Co.*, supra at 967; *GTF Mktg. v. Colonial Aluminum Sales*, 66 NY2d 965 (1985), *Rebecchi v. Whitmore*, supra at 601. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *Frank Corp. v. Federal Ins. Co., supra.*

Further, to grant summary judgement, it must clearly appear that no material triable issue of fact is presented. The burden on the Court deciding this type of motion is not to resolve issues of fact or determine matters of credibility but merely to determine whether such issues exist *Barr v. County of Albany*, 50 NY2d 247 (1980); *Daliendo v. Johnson*, 147 AD2d 312, 317 (2d Dept, 1989).

There is no competent evidence to dispute plaintiffs' sworn testimony that defendant's vehicle struck the plaintiff's vehicle in the rear. The submission in support of the motion by plaintiffs has established entitlement to judgement thus shifting the burden to defendant to rebut the motion by submitting proof in evidentiary form showing the existence of triable issues of fact. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Friends of Animals v. Associated Fur Manufacturers, Inc.*, 46 NY2d 1065 (1979). Here the defendant has failed to establish the existence of triable issues of fact on the issue of liability or fault and the Court finds no material fact issues requiring a trial with respect to the issue of fault.

A rear-end collision creates a *prima facie* case of negligence with respect to the operator of the rearmost vehicle, and the party who was struck from behind may thus establish entitlement to judgment as a matter of law that he was not responsible for the accident. *Smith v Seskin,* 49 AD3d 628 (2d Dept. 2008); *Francisco v Schoepfer,* 30 AD3d 275 (1st Dept. 2006); *Velazquez v Denton Limo Inc.,* 7 AD3d 787 (2d Dept. 2004). Accordingly, plaintiffs have made out a *prima facie* showing of entitlement to summary judgment as to defendant.

Once a *prima facie* showing has been made the burden is on the operator of the moving vehicle to rebut the inference of negligence by providing a non-negligent explanation for the collision. *Katz v. Masada II Car & Limo Service, Inc.*, 43 AD3d 876, 877 (2d Dept. 2007).

A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe rate of speed and control over his or her vehicle and to exercise reasonable care to avoid colliding with the other vehicle. *Vavoulis v. Adler*, 43 AD3d 1154 (2d Dept. 2007); *Velasquez v. Denton Limo, Inc.*, 7 AD3d 787 (2d Dept. 2004). The following vehicle was under a duty to maintain a safe distance between his vehicle and the vehicle ahead. Vehicle and Traffic Law § 1129 [a]. *Leal v. Wolff*, 224 AD2d 392 (2d Dept. 2005).

A sudden stop by a lead vehicle in the middle of a roadway, may constitute a non-negligent explanation for a rear-end collision. *Foti v. Fleetwood Ride, Inc.*, 57 AD3d 724 (2d Dept. 2008). Defendant fails to state the speed at which plaintiff was traveling or the distance traveled at such speed before he made the sudden stop, hence, there is no evidence

from defendant to contradict the testimony of the plaintiff Ishmael that he had started to slow for the light and moving at five miles per hour when struck. Moreover, even if plaintiff had made sudden stop, that fact, standing alone, is insufficient to rebut the presumption of negligence, *Emil Norsic & Son, Inc., v L.P. Transp. Inc.,* 30 AD3d 368 (2d Dept. 2006), especially in view of the deposition testimony of defendant that indicates that she was following too closely. *Arias v. Rosario,* 52 AD3d 551 (2d Dept. 2008).

Plaintiffs are granted summary judgment on the issue of liability and fault, except for the issue of serious injury.

The motion (Seq. 2) of defendant for summary judgment pursuant to CPLR§ 3212, on the ground that plaintiffs failed to sustain serious injuries within the parameters of Insurance Law § 5102(d) is granted as to plaintiff Ishmael and his complaint is dismissed. The motion is denied as to plaintiff Okeoma.

The movant seeks summary judgment dismissing the complaints in this action predicated on the contention that plaintiffs did not sustain serious injury as a result of the underlying accident. Okeoma was a passenger in Ishmael's vehicle which was involved in an accident in Bronx County, New York, with a vehicle owned and operated by defendant.

Insurance Law § 5102(d) defines "serious injury" as a personal injury which results in, among other things,

> "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."

In his Bill of Particulars plaintiff Ishmael alleges injuries which include reversal of normal lordosis, disc herniation at C5-6, lumbar disc bulges and related sequalae.

Plaintiff Okeoma alleges straightening of the normal cervical lordosis, cervical disc herniation, lumbar disc bulges, radiculopothy, radiculitis, cervical and lumbar subluxations, derangement, and pain.

It is well settled that in order to satisfy the statutory serious injury threshold, a plaintiff must have sustained an injury that is identifiable by objective proof; subjective complaints of pain do not qualify as a serious injury within the meaning of Insurance Law § 5102(d). *See Toure v Avis Rent A Car Sys.*, 98 NY2d 345,350 (2002); *Scheer v Koubek*, 70 NY2d 678, 679 (1987); *Tuna v Babendererde*, 32 AD3d 574, 575 (3rd Dept. 2006). On a motion for summary judgment where the issue is whether a plaintiff has sustained a serious injury under the no-fault law, the movant bears the initial burden of presenting competent evidence that there is no cause of action. *Browdame v Candura*, 25 AD3d 747, 748 (2nd Dept. 2006).

By submitting deposition transcripts, and the Bills of Particulars, movants have satisfied their initial burden of establishing that plaintiffs have not sustained a serious injury under the 90/180 category of the Insurance Law. Plaintiffs lost minimal or no time from work and neither plaintiff has submitted any competent medical evidence that he or she was

unable to perform substantially all of his or her daily activities for not less than 90 days of the first 180 days subsequent to the subject accident. *Albano v Onolfo,* 36 AD3d 778 (2d Dept. 2007); *Duran v Sequino*, 17 AD3d 626 (2d Dept. 2005); *Sainte-Aime v Ho,* 274 AD2d 569 (2d Dept. 2000).

With respect to the other categories claimed, the movants have submitted affirmed medical reports of physicians who conducted independent medical examinations of the plaintiffs.

As to plaintiff Ishmael, Dr. Katz, an orthopedist, reviewed plaintiff's records, conducted specific, tests with quantified results and found no active or objective disability or permanency related to the accident. His final impression was that Ishmael sustained resolved cervical and lumbar strains.

Dr. Feit, a radiologist, reviewed plaintiff's lumbar and cervical MRIs taken shortly after the accident. The lumbar MRI disclosed disc bulges at L3-4, L4-5, L5-S1, degenerative spondylosis and no evidence of focal herniation. He further opines that none of the results are caused by the accident or causally related to any injury from the accident. The cervical MRI found defects at multiple levels and no evidence of spondylolisthesis. The conclusion is that the disc bulges and herniation are degenerative and not post traumatic.

Dr. Weiland, a neurologist, examined plaintiff Ishmael, conducted specified tests, gave quantitative results and concluded that Ishmael sustained cervical and lumbosacral sprains and strains which had resolved and that the examination was normal

Based on the foregoing, the Court finds that the movant has made out a *prima facie* showing that the plaintiff Ishmael has not sustained a "serious injury" that would satisfy any

of the other categories alleged in his Bill of Particulars or deposition, thus shifting the burden to the plaintiff to come forward with admissible evidence demonstrating the existence of triable issues of fact. *Toure v. Avis Rent a Car Systems Inc., Supra*; *Junco v. Ranzi*, 288 AD2d 440 (2d Dept. 2001) .

In opposition to this motion, plaintiff Ishmael submits an affirmation of his attorney, his own affidavit and the affidavit of chiropractor Dr. Bachenheimer.

Dr. Bachenheimer treated plaintiff for four months and does not indicate having seen him between the fall of 2007 and July 2009.

Significantly, Dr. Bachenheimer, other than a brief reference to application of ice, adjustment and traction, fails to state what treatment was rendered, why there was nearly a two year gap in treatment or why plaintiff discontinued his initial treatment.

Medical proof which indicates limitations in the lumbar or cervical spine is sometimes sufficient to raise a triable issue of fact. *See, e.g., Rosario v Universal Truck & Trailer Service, Inc.*, 7 AD3d 306 (1st Dept. 2004). However, certain factors may override a plaintiff's objective medical proof of limitations and allow dismissal of the complaint. *Pommells v Perez*, 4 NY3d 566 (2005). Specifically, the Court held in *Pommells* that additional contributing factors, such as a gap in treatment, which would interrupt the chain of causation between the claimed accident and the claimed injury would render plaintiff's case subject to dismissal. *Id* at 566, citing *Franchini v Palmieri*, 1 NY3d 536 (2003); *see also Mohamed v Siffrain*, 19 AD3d 56 (2d Dept. 2005). Where, as here, there is a gap in treatment, a plaintiff is required to demonstrate a basis for the gap. *Guzman v. New York City Transit Authority*, 15 AD3d 541 (2d Dept. 2005). A plaintiff may explain a gap in treatment

based on a discontinuance of no fault benefits and a court may not speculate on the availability of other insurance. *Wadford v. Gruz*, 35 AD3d 258 (1st Dept. 2006). However, here, the claim of lack of no fault benefits is inconsistent with Ishmael's deposition testimony that other insurance was available and seems to have been raised for the first time on this motion. *Gonzalez v. A.V. Managing, Inc.*, 37 AD3d 175 (1st Dept. 2007); *cf Francovig v. Senekis Cab Corp*, 41 AD3d 643 (2d Dept. 2007); *See also DeLeon v. Ross*, 44 AD3d 545 (1st Dept. 2007). Given the inconsistent testimony from Ishmael, more than the undocumented statement of lack of no fault coverage should be required in order to explain his gap in treatment and this plaintiff has failed to do.

As to plaintiff Okeoma, defendant has submitted the report of an independent medical examination performed by Dr. Katz, an orthopedist.

Dr. Katz conducted objective tests and compared the quantified results with what is normal and concluded with a diagnosis of resolved cervical and lumbosacral strains and contusions with no evidence of any injuries related to the accident.

Dr. Weiland, a neurologist, also examined Okeoma, performed specific tests, obtained quantified results compared to what is normal and concluded that her history of muscoloskeletal trauma was resolved.

Dr. Feit, radiologist, performed a review of MRIs of Okeoma's lumbar and cervical spines, noted bulging discs, degenerative spondylosis and no herniation, which he concludes are degenerative, unrelated to the accident and preexisting. A review of the cervical MRI, upon which he notes disc bulges and herniations, yields the same conclusion that these are preexisting degenerative conditions.

In opposition, plaintiff Okeoma has submitted an affirmation of her attorney, her own affidavit and an affidavit from Dr. Bachenheimer who treated her with ice, adjustment and traction for three or four months and who reexamined her again in July 2009, after this motion was made.

In her affidavit, Dr. Bachenheimer relies upon an examination and report by a Dr. Liguori who saw Okeoma one time in October 2007, however, since his report has not been submitted, the opinions based thereon are without probative value, *Besso v. DeMaggio*, 56 AD3d 596 (2d Dept. 2008); *Casas v. Montero*, 48 AD3d 728 (2d Dept. 2008), and have not been considered.

Dr. Bachenheimer does not state the duration of her treatment, when it ceased or why it ceased and does not comment upon or refute the conclusion of the doctors who examined plaintiff Okeoma on behalf of the defendant.

It is known from her deposition that plaintiff Okeoma ceased treatment after "five or six months" "because the insurance company stopped it," and in her affidavit, Okeoma states that she was cut off from no fault coverage, did not have health insurance that would continue to pay for her treatment and could not afford to pay for it. There is no testimony from any source that contradicts Okeoma's claim that her insurance benefits ceased. Her husband's deposition testimony on this issue relates solely to his insurance coverage and not to his spouse's. Hence, there is no inconsistency in her testimony.

It has been held that cessation of no fault benefits constitutes an acceptable explanation for a gap in treatment. *Francovig v. Senekis Cab Corp., supra*; *Wadford v. Gruz, supra.*

Contrary to the defendant's contention, plaintiff Okeoma has raised issues of fact sufficient to defeat defendant's motion for summary judgment. Okeoma has explained why she ceased treatment with her chiropractor after 5-6 months, she has submitted evidence of significant range of motion limitations that are contemporaneous with the accident, the affidavit of her chiropractor is based in part on a recent examination, which also reflected significant limitations in range of motion, her chiropractor personally reviewed MRI studies that were taken shortly after the accident and found injuries, while disputing the claim of degeneration and attributes causation to the subject accident. *See Pearson v. Guapisaca*, 61 AD3d 833 (2d Dept. 2009) ; *Azor v. Torado*, 59 AD3d 367 (2d Dept. 2009); *Altreche v. Gilmar Masonry Corp.*, 49 AD3d 479 (2d Dept. 2008). Thus, by way of submitting evidence of objective testing, both contemporaneous with the accident and recent, showing significant limitations of motion, review of the MRI films and explaining gap in treatment, plaintiff Okeoma has raised issues of fact necessitating denial of this motion as to her. *Seecoomar v. Ly*, 43 AD3d 900 (2d Dept. 2007).

Based on the foregoing, summary judgment is granted to the plaintiffs on the issue of liability or fault, summary judgment is granted to defendant on the issue of lack of serious injury as to plaintiff Ishmael Nwaogbe and summary judgment is denied as to plaintiff Okeoma Nwaogbe.

This shall constitute the Decision and Order of this Court.

ENTERED

JAN 07 2010

NASSAU COUNTY

COUNTY CLERK'S OFFICE

ENTER

DATED: January 4, 2010

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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