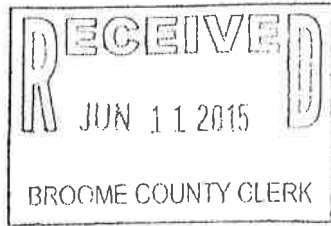


APPENDIX



At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Broome County Courthouse, 92 Court Street, Binghamton, New York on May 15th, 2015.

PRESENT: HON. FERRIS D. LEBOUS
JUSTICE, SUPREME COURT

STATE OF NEW YORK
SUPREME COURT :: BROOME COUNTY

THERESA ODEJIMI,

Plaintiff,

vs.

DECISION & ORDER

Index No. 2011-2394
RJI No. 2015-0073

TOWN OF WINDSOR,

Defendant.

APPEARANCES:

COUNSEL FOR PLAINTIFF:

THERESA ODEJIMI
PLAINTIFF, PRO SE
50 WILLIAMS ROAD
WINDSOR, NY 13865

COUNSEL FOR DEFENDANT:

COUGHLIN & GERHART, LLP
BY: JAMES P. O'BRIEN, ESQ., OF
COUNSEL
P.O. BOX 2039
BINGHAMTON, NY 13902

Copy to:
Ronald R. Benjamin, Esq.
P.O. Box 607
Binghamton, NY 13902

FERRIS D. LEBOUS, J.S.C.

Defendant Town of Windsor moves for dismissal pursuant to CPLR § 3211 (a)(7) for failure to state a cause of action upon which relief can be granted and CPLR § 3212 for an order granting summary judgment dismissing plaintiff's complaint for failure to establish defendant's conduct was reckless under Vehicle & Traffic Law § 1103 and/or for failure to prove a serious injury as defined by Insurance Law § 5102 (d).

BACKGROUND

The Accident

On March 7, 2011, at approximately 6:00 a.m., plaintiff was preparing to go to work and was clearing snow off her car. Plaintiff's car was parked in front of her home pulled off to the side of the road. Plaintiff alleges she heard the defendant's snowplow approaching and looked up and saw the snowplow on the opposite side of the road and made eye contact with the driver and wingman as they made their first pass. Shortly thereafter, plaintiff heard the snowplow again and looked up to see the snowplow making a second pass, this time on her side of the road, with the blades down, traveling "[a]t a high rate of speed not more than 1' away from [her]" (Plaintiff's Letter dated February 17, 2015). Plaintiff states that she had no time to get out of the way so she turned her back to the snowplow and was hit with rock salt and gravel from her neck down to her thighs. Plaintiff admits she did not fall down from the impact, but states she had the wind knocked out of her. Plaintiff was able to continue clearing snow off her car and then got inside her car to warm up and gather herself when she heard the snowplow approaching on the opposite side of the road for a third pass. Plaintiff avers that on this third pass "[t]he 2 men drove by

slowly....They slowly drove by and both men laughed at me as if it was a joke" (Plaintiff's Letter dated February 17, 2015). Plaintiff was able to work her entire shift the day of the accident (March 7) and the next day (March 8), but was only able to work a partial day on March 9, 2011 due to increasing pain. Plaintiff returned to work on March 15, 2011. Plaintiff was out of work again from April 26, 2011 through July 17, 2011. Plaintiff's medical treatment and history will not be set forth at this juncture.¹

The Pleadings

Plaintiff retained the Law Office of Ronald R. Benjamin to represent her in this matter. A summons and complaint were filed on September 20, 2011. The complaint alleges that plaintiff was injured due to defendant's negligence including, among other things, failure to control the snowplow, speeding and reckless endangerment. Further, the complaint alleges that plaintiff suffered personal injuries as the result of the accident.

An answer with various affirmative defenses was interposed on November 30, 2011 including, among others, that plaintiff had failed to state a cause of action, had not sustained a serious injury under Insurance Law Article 51, and failed to allege reckless disregard under Vehicle and Traffic Law §1103.

Plaintiff's verified bill of particulars alleges that defendant's employees were driving the

¹Defendant's Exhibit N contains over 750 pages of plaintiff's medical records without any index, tabs, or other organizational method to facilitate the court's review of specifically cited reports other than a statement by defendant that the records were in chronological order.

snowplow in a "reckless manner" (Bill of Particulars, ¶ 19). With respect to her injuries, plaintiff's bill of particulars does not list verbatim any of the specific categories enumerated in Insurance Law § 5102, but it does list specific injuries that will be outlined in more detail below.

DISCUSSION

I. WITHDRAWAL OF PLAINTIFF'S COUNSEL

Plaintiff was represented at the time of commencement by Ronald Benjamin, Esq. Prior to the return date of this motion, the court started receiving communications from plaintiff directly which indicated that there were difficulties between her and her counsel. The court received a letter dated February 17, 2015 from plaintiff detailing issues that had arisen with her counsel, as well as addressing some substantive issues.²

On the return date, the case was called for oral argument. Appearances were made by plaintiff on her own behalf, Ronald Benjamin, Esq. (technically still plaintiff's counsel of record as of that time), as well as defendant's counsel. It was clear to this court that plaintiff was surprised by Mr. Benjamin's appearance. Mr. Benjamin explained that his appearance was solely to make an oral application to withdraw as counsel. Prior to formal argument, the court held a conference with plaintiff and all counsel on the record. Plaintiff indicated her desire to proceed without representation by Mr. Benjamin. The court warned the plaintiff on the record of the risks inherent in proceeding pro se. Ultimately, the court determined that it would waive formal

²The letter was not initially served on defendant's counsel nor filed in the clerk's office. The court forwarded the original letter to the Broome County Clerk's Office for filing and plaintiff provided a copy of the letter to defendant's counsel at motion term.

application to withdraw by Mr. Benjamin and, with plaintiff's consent on the record, Mr. Benjamin was relieved of further representation of plaintiff pursuant to CPLR § 321.

Thereafter, the court indicated on the record that it would accept plaintiff's letter dated February 17, 2015 as her opposition to the motion and that defendant's counsel would have until May 29, 2015 to respond to plaintiff's letter but that no further appearances were necessary. Additionally, there were some conflicting discussions between the court, plaintiff, and defendant's counsel as to whether what plaintiff described as a "folder of evidence" would be accepted. In any event, on May 20, 2015, plaintiff filed in the Broome County Clerk's Office a letter dated May 20, 2015, an affidavit of service, and Exhibits marked "A-E" (presumably the so-called "folder of evidence"). The court will not consider plaintiff's "folder of evidence" at this juncture as it is not pertinent to a resolution of the limited issues before the court on this motion nor is it submitted in proper evidentiary form.

II. RECKLESSNESS

A. Defendant's Motion to Dismiss

It is well-settled that on a CPLR § 3211 (a) (7) motion to dismiss for failure to state a cause of action, a court must accept the facts alleged in the complaint as true and accord plaintiff the benefit of every possible inference and determine whether the facts as alleged fit within any cognizable legal theory (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

Defendant alleges that the complaint should be dismissed as plaintiff has failed to allege that the snowplow operator acted in reckless disregard for the safety of others as required under Vehicle and Traffic Law § 1103 (b), but rather is stated only in terms of negligence and negligent hiring.

A detailed review of the complaint reveals that although it is framed in negligence; it does contain an express reference to "reckless endangerment" (Complaint, ¶ 9). Additionally, plaintiff's verified bill of particulars alleges that defendant's employees were driving a snowplow in a "reckless manner" (Bill of Particulars, ¶ 19). While neither reference specifically cites to Vehicle and Traffic Law § 1103 (b), the court finds the complaint sufficiently states a cause of action under that provision. Defendant's motion to dismiss is denied.

B. Defendant's Motion for Summary Judgment

The court will now turn to defendant's alternative argument on the issue of recklessness, namely defendant's motion for an order granting summary judgment based upon plaintiff's failure to establish defendant's conduct was in reckless disregard for the safety of others pursuant to Vehicle and Traffic Law § 1103 (b).

Generally, the standard of care applicable in vehicle accidents is ordinary negligence. However, under Vehicle and Traffic Law § 1103 (b), any person operating a "hazard vehicle", including a snowplow, while actually engaged in work on a highway is exempt from the rules of the road which means they cannot be held liable for mere negligence (*Riley v County of Broome*,

95 NY2d 455 [2000]). For accidents involving such vehicles, liability may be imposed only if the employee operated the vehicle in reckless disregard for the safety of others (*Primeau v Town of Amherst*, 5 NY3d 844 [2005]). Case law has determined that reckless disregard must be more than a momentary lapse in judgment (*Rockland Coaches, Inc. v Town of Clarkstown*, 49 AD3d 705 [2d Dept 2008]). The Court of Appeals has described "reckless disregard" as "requir[ing] evidence that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and has done so with conscious indifference to the outcome [citations omitted]" (*Saarinen v Kerr*, 84 NY2d 494, 501 [1994]).

On defendant's motion for summary judgment, the defendant Town has the initial burden of establishing the snowplow was actually engaged in work on the highway and that they did not act with reckless disregard. The court finds that the defendant Town has met its initial burden that they did not act with reckless disregard via the affidavits of the snowplow operator (Mr. Brink) and snowplow wingman (Mr. Story) both of whom state that the snowplow was only traveling 15-20 mph, acknowledge that they saw plaintiff on the side of the road, and pulled in the wing of the snowplow when passing plaintiff on the side of the road. Since the defendant Town has met its burden, the burden shifts to plaintiff to come forward to raise a triable issue of fact with respect to the issue of reckless disregard (*Catanzaro v Town of Lewiston*, 73 AD3d 1449 [4th Dept 2010]).

In opposition, the court has considered plaintiff's letter, as well as the various exhibits attached to defendant's papers including the 50-h hearing transcript and plaintiff's deposition transcript. Plaintiff's version of events states that the snowplow was going 45-50 mph when the snow/gravel hit her, that the operator and wingman were laughing at her, and they were too close to her and never reduced speed or tried to avoid her.

In reply, defendant argues that due to the tire chains on the snowplow and road type it would have been impossible for the snowplow to travel at 45-50 mph and that neither the snowplow operator or wingman ever saw any snow/gravel hit plaintiff.

As stated above, it is well-settled that reckless disregard means more than a momentary lapse in judgment (*Saarinen*, 84 NY2d 494; *Lorber v Town of Hamburg*, 225 AD2d 1062 [4th Dept 1996] [speeding alone insufficient since expressly privileged under Vehicle and Traffic Law § 1104]); *Kabir v County of Monroe*, 16 NY3d 217 [2011] [glancing down at data terminal]; (*Gawelko v State of New York*, 184 Misc2d 581 [Ct Cl 2000] [snowplow in opposite lane in whiteout]; (*Dodds v Town of Hamburg*, 117 AD3d 1428 [4th Dept 2014] [car believed to be sufficiently far enough away to execute U-turn]). A review of the case law reveals that two factors are most crucial in determining whether an act or omission was a momentary lapse in judgment or rises to the level of reckless disregard, namely: (1) the operator was under the mistaken belief of something (e.g., that another car was far enough away; the other car had stopped, etc.); and (2) there was evidence of precautions (checked for traffic; put on emergency lights; slowed down, etc.).

Here, even assuming the snowplow operator believed he was far enough away so as not to cause any harm to plaintiff, the court finds that evidence of precautions by either the snowplow operator and/or wingman to be missing. For instance, neither the operator or wingman state that they ever decreased the snowplow's speed upon passing plaintiff or that they veered away from plaintiff. Further, although the wingman, Mr. Story, states he pulled in the wing, with respect to the front plow he avers that due to the dangers of snow in the road for unsuspecting drivers, "[a] snowplow cannot raise its plow and not remove snow from an area of the road because a pedestrian may be in the vicinity" (Affidavit of Gregg Story, ¶ 12). In this court's view, Mr. Story's concession that the plow remained down as it passed plaintiff raises a question of fact of reckless disregard for the safety of the pedestrian.

Moreover, the conduct as alleged and detailed by plaintiff in her pleadings and submissions clearly establishes sufficient conduct by defendants' employees to create a question of fact as to reckless disregard which cannot be resolved on this motion.

Based upon the foregoing, defendant's motion for summary judgment on the issue of recklessness is denied without prejudice to renewal at trial.

II. SERIOUS INJURY

According to Insurance Law § 5104 (a), "[i]n any action by or on behalf of a covered person against another covered person for personal injuries arising out of negligence in the use or operation of a motor vehicle in this state, there shall be no right of recovery for non-economic

loss [pain and suffering], except in the case of a serious injury." The term "serious injury" is a legal term is defined as one of the following categories under Insurance Law § 5102 (d):

- 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;
- 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.

Defendant's motion to dismiss is based upon plaintiff's failure to plead in her complaint that she sustained a "serious injury" as defined in Insurance Law § 5102 (d). More particularly, defendant alleges that CPLR § 3016 (g) requires that "the complaint shall state that the plaintiff has sustained a serious injury, as defined in [Insurance Law § 5102 (d)], or economic loss greater than basic economic loss, as defined in [Insurance Law § 5102 (a)]."

A review of the complaint confirms that the phrase "serious injury" is not contained therein. That said, however, the complaint does contain the following allegations:

- "That as a result of the aforesaid incident plaintiff was injured all about her body including severe injuries to the head, neck and cervical spine which, upon information and belief, have resulted in permanent damage to the plaintiff" (Complaint, ¶ 6);
- "That as a result of the aforesaid incident plaintiff has had limitations and pain in the area of the neck, head and back, and has experienced other limitations which continue to the present time" (Complaint, ¶ 7);

- "That as a proximate cause of the aforesaid conduct, plaintiff sustained permanent injuries including but not limited to suffering nerve damage to the neck and cervical spine, which injuries upon information and belief, are permanent in nature" (Complaint, ¶ 12).

A review of plaintiff's bill of particulars is also warranted. While plaintiff's bill of particulars does not specifically identify any of the serious injury categories under Insurance Law § 5102 it does describe the following injuries:

- "Plaintiff's injuries are to her cervical spine: small posterior disc bulge to the C6-C7 vertebrae, large central and left paracentral spondylotic ridge with moderate left-sided spinal cord compression to the C5-C6 vertebra and compression upon the left C6 nerve root, C4-C5 moderate left paracentral disk protrusion and minimal left-sided spinal cord compression, moderate right paracentral disk protrusion with mild right-sided spinal cord compression to the C3-C4 vertebrae. To the lumbar spine the plaintiff sustained small posterior disk bulge at the T12-L1 and moderate central disk protrusion at the L4-L5 " (Bill of Particulars, ¶ 7).

- "Plaintiff was confined to her bed and home...for approximately three months from the date of the accident until July 17, 2011" (Bill of Particulars, ¶ 8).

- "Plaintiff sustained significant limitations of the cervical spine including but not limited to the aggravation of pre-existing limitations which are permanent in nature" (Bill of Particulars, ¶14);

- Plaintiff "was unable to pursue employment from March 9, 2011 to March 15, 2011, as well as April 26, 2011 to July 17, 2011" (Bill of Particulars, ¶ 16).

- Plaintiff claims lost wages while she was out of work for 13 weeks following the accident...." (Bill of Particulars, ¶ 21).

- "Plaintiff is claiming damages for disability, pain and suffering and permanent loss of use of the cervical spine" (Bill of Particulars, ¶ 25).

In this court's view, there can be no mistake from the complaint and bill of particulars, taken together, that plaintiff was alleging a serious injury under Insurance Law § 5102 (d). While defendant is correct that CPLR § 3016 (g) requires specificity in pleading, the statute should not

be read in overly strict terms. The court finds that the complaint satisfies the pleading requirements of CPLR § 3016 (g) to the extent of giving defendant ample notice of the occurrences and plaintiff's alleged losses (*Secore v Allen*, 27 AD3d 825 [3rd Dept 2006]). Further, it is proper for a court to deny a motion to dismiss and, sua sponte, allow a plaintiff to amend the complaint so that it complies with the CPLR's particularity requirements which the court finds is the proper remedy in this case (*Leitner v Jasa Hous. Mgt. Servs. for Aged*, 6 AD3d 667 [2d Dept 2004]; CPLR § 3025[b]).

The next issue is plaintiff's failure to identify the exact serious injury categories under Insurance Law § 5102 (d) on which she is relying. Defendant's alternative summary judgment motion speculated on which serious injury categories were at issue including: (1) permanent loss of use of a body organ, member, function or system; (2) permanent consequential limitation of use of a body organ or member; and (3) significant limitation of use of a body function or system. However, defendant's moving papers do not address the so-called 90-180 day category. While the court could also speculate as to the serious injury categories at issue and attempt to deal with those issues on the merits, the court finds the best option is to permit plaintiff an opportunity to supplement her bill of particulars so as to permit these issues to be fully briefed at a later time on subsequent motion practice.

Leave to supplement a bill of particulars should be freely granted upon the showing of a satisfactory excuse for the delay and a lack of prejudice to the opposing party (CPLR §3042 [b]; *Sadler v Hurley*, 304 AD2d 930 [3d Dept 2003]). However, if the note of issue has already been

filed, then permission to supplement a bill of particulars should be sparingly granted (*Monk v Dupuis*, 287 AD2d 187 [3d Dept 2001]). Here, no note of issue has been filed. With respect to excuse, this court is mindful of the unique circumstances of this case, namely a scenario involving a deteriorating attorney-client relationship that resulted in a litigant who is now proceeding pro se. If plaintiff were still represented by counsel, it is likely that there would have been a cross-motion to amend the complaint and/or supplement the bill of particulars once the aforementioned deficiencies were raised by defendant. The court is unclear how the lack of communication between plaintiff and her former counsel, if at all, impacted the preparation of the pleadings, discovery, response to this motion, etc. With respect to lack of prejudice, the court has examined the record including plaintiff's transcripts at the 50-h hearing and her deposition and finds that defendant has clearly tracked the issue of serious injury from its initial answer with affirmative defenses through discovery. Thus, the court finds the best option is to permit plaintiff an opportunity to supplement her bill of particulars.

In view of the foregoing, defendant's motion to dismiss is denied. The court, sua sponte, grants plaintiff permission to amend her complaint to allege a serious injury (CPLR § 3025) and permission to supplement her bill of particulars to particularize the categories of serious injury under Insurance Law § 5102 (d) (CPLR § 3042).

To the extent that defendant moved for summary judgment on the issue of serious injury, that portion of the motion is denied without prejudice to renewal after plaintiff's filing and

service of the amended complaint and supplemental bill of particulars, the filing and service of an amended answer by defendant, and whatever additional discovery the parties deem proper.

Plaintiff is forewarned that her pro se status entitles her to no greater rights than a represented litigant (*Brown v Midrox Ins. Co.*, 108 AD3d 921 [3d Dept 2013]). Plaintiff is expected to adhere to all filing and service requirements, as well as all evidentiary rules. By way of example, plaintiff has already demonstrated a lack of understanding of the evidentiary requirements by submitting a "folder of evidence" that is not in evidentiary form. If the serious injury issues had been addressed on the merits, plaintiff's "folder of evidence" could have been deemed insufficient to meet her burden. Plaintiff's submission on May 29, 2015 of "Exhibit F" is another example of inadequate papers. Plaintiff submitted photocopies of the Town's affidavits with her own handwritten notes in the margins in an attempt to respond to those allegations. Suffice it to say, this is simply an unacceptable method of presenting arguments to the court. In the likely event of future summary judgment motion practice, it will be plaintiff's responsibility to submit proof in admissible evidentiary form.

CONCLUSION

In view of the foregoing, the court finds as follows:

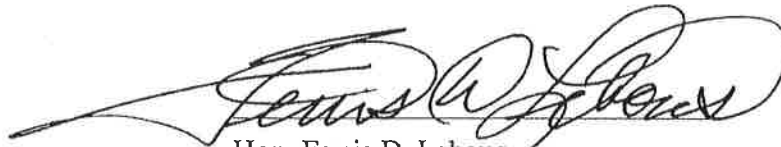
- (1) Defendant's motion to dismiss on the issues of reckless disregard and serious injury is denied;
- (2) The court, sua sponte, grants plaintiff leave to amend her complaint within sixty

(60) days from the date hereof to properly plead she sustained a serious injury under Insurance Law § 5102 (d). Defendant shall serve its amended answer upon receipt of the amended complaint within the time frame set forth in the CPLR depending upon the method of service; and

- (3) The court, sua sponte, further grants plaintiff leave to supplement her bill of particulars within sixty (60) days from receipt of defendant's amended answer to properly plead the specific categories of serious injury under Insurance Law § 5102 (d);
- (4) Defendant's motion for summary judgment on the issue reckless disregard is denied without prejudice; and
- (5) Defendant's motion for summary judgment on the issue of serious injury is denied without prejudice.

This constitutes the decision and order of the court.

Dated: June 11, 2015
Binghamton, New York

A handwritten signature in black ink, appearing to read "Ferris D. Lebous", with a long, sweeping horizontal line extending to the left.

Hon. Ferris D. Lebous
Justice, Supreme Court