SHORT FORM ORDER

INDEX No. 03-1808
CAL. No. 06-01701-MV

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 10-4-06
ADJ. DATE 12-22-06
Mot. Seq. # 004-MD
005-XMD
006-XMD

JILLIAN M. MAGER,

Plaintiffs,

- against -

SHEILA COONEY, KELLY A. GRAUER and JESSICA LAVERTY

Defendants.

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Upon the following papers numbered 1 to 70 read on this motion and cross motions for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 20; Notice of Cross Motion and supporting papers 21-25, 26-44; Answering Affidavits and supporting papers 45-62; Replying Affidavits and supporting papers 66-68; 69-70; Other 63-65; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant Jessica Laverty for an order pursuant to CPLR 3212 granting summary judgment in her favor dismissing the complaint as against her on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied; and it is further

ORDERED that this cross motion by defendants Sheila Cooney and Kelley A. Grauer for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the complaint as against them on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied; and it is further

ORDERED that this cross motion by plaintiff for an order pursuant to CPLR 3212 granting summary judgment in her favor on the issue of liability is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff on May 14, 2001 at approximately 2:35 p.m. while she was a front seat passenger of a vehicle owned and operated by defendant Jessica Laverty (Laverty) that was struck on the front passenger side by a vehicle operated by defendant Kelley A. Grauer (Grauer) on the Sunrise Highway North Service Road approximately 50 feet east of the entrance ramp to Route 27 in Brookhaven, New York. Plaintiff alleges that the subject accident occurred as defendant Laverty was attempting to make an illegal U-turn across double yellow lines. In addition, plaintiff seeks to recover economic loss in excess of basic economic loss as defined in Insurance Law § 5102 (a). Plaintiff was involved in a second motor vehicle accident on April 30, 2002.

By her bill of particulars, plaintiff alleges that as a result of the May 14, 2001accident she sustained serious injuries including, left lower cervical radiculopathy; loss of normal cervical lordosis related to muscle spasm and pain; intraosseous disc herniation at T12-L1; lumbar scoliosis related to muscle spasm and pain; teeth grinding; photophobia; difficulty in concentrating; anxiety; and depression. In addition, plaintiff alleges that following said accident she was treated at the emergency room of Brookhaven Memorial Hospital and released and was treated one week later at Good Samaritan Hospital. Plaintiff also claims that following said accident she was confined to bed for approximately two weeks and to her home for about three months after the accident. The Court's computer records indicate that the note of issue in this action was filed on July 17, 2006.

Defendant Laverty now moves for summary judgment in her favor dismissing the complaint as against her on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). In support of her motion, defendant Laverty submits, among other things, the summons and complaint; the answer of defendant Laverty and the answer of defendant Sheila Cooney (Cooney) and Grauer; plaintiff's complete deposition transcript; plaintiff's emergency room records from Brookhaven Memorial Hospital and from Good Samaritan Hospital for admissions after the first accident; plaintiff's cervical spine and brain MRI reports; plaintiff's electrodiagnostic report; plaintiff's emergency room records from Good Samaritan Hospital for an admission after the second accident; plaintiff MRI of the lumbar spine; the affirmation and attached report dated April 21, 2004 of defendant's examining neurologist Richard A. Pearl, M.D. based on an examination of plaintiff one day earlier; the affirmed report dated April 14, 2004 of defendant's examining orthopedic surgeon Craig B. Ordway, M.D. (Dr.

Ordway) based on an examination of plaintiff on the same date; and the unsworn report dated April 19, 2004 of defendant's examining internist David H. Goldstein, M.D. (Dr. Goldstein).

Defendants Cooney and Grauer now cross-move for summary judgment in their favor dismissing the complaint as against them on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). In her affirmation, counsel for defendants Cooney and Grauer refers to and adopts the facts, exhibits and legal arguments set forth by counsel for co-defendant Laverty and incorporates them by reference. In support of their cross motion, defendants Cooney and Grauer submit the affirmed report dated April 13, 2004 of their examining orthopedic specialist, S. Farkas, M.D. (Dr. Farkas) based on an examination of plaintiff on said date and the affirmed report dated April 13, 2004 of their examining neurologist, Edward M. Weiland, M.D. (Dr. Weiland) based on an examination of plaintiff on the same date.

Insurance Law § 5102 (d) defines "serious injury" as "a personal injury which results in 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."

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]).

It is for the court to determine in the first instance whether a prima facie showing of "serious injury" has been made out (*see*, ***Tipping-Cestari v Kilhenny***, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). The initial burden is on the defendant "to present evidence, in competent form, showing that the plaintiff has no cause of action" (***Rodriguez v Goldstein,*** 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once defendant has met the burden, plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). Such proof, in order to be in a competent or

admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the nonmoving party, here, the plaintiff (***Cammarere v Villanova,*** 166 AD2d 760, 562 NYS2d 808 [3d Dept 1990]).

Here, defendant Laverty failed to meet her prima facie burden on the motion of showing that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see*, ***Schacker v County of Orange***, 33 AD3d 903, 822 NYS2d 777 [2d Dept 2006]). The report of defendant Laverty's examining internist, Dr. Golstein, is in inadmissible form inasmuch as it not properly sworn "under the penalties of perjury" pursuant to CPLR 2106 and instead states that it is his work product and is true to the best of his knowledge and information (*see*, CPLR 2106; ***Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]). Even if the Court considered said report, its contents are insufficient to satisfy defendant's burden. In his report, Dr. Goldstein states that examination of the cervical spine, thoracolumbar spine, upper extremities and lower extremities revealed "full range of motion" but he fails to set forth the objective testing he performed in order to reach the conclusion that plaintiff did not sustain any limitations in range of motion in these areas as a result of the subject accident (*see*, ***Larrieut v Gutterman***, ___ NYS2d ___, 2007 WL 416382, 2007 NY Slip Op 01085 [NYAD 2 Dept Feb 06, 2007]). The properly affirmed report of defendant Laverty's examining orthopedic surgeon, Dr. Ordway, has the same deficiency with respect to range of motion testing (*see*, ***Larrieut v Gutterman***, *supra*; ***Schacker v County of Orange***, *supra*). The remaining reports submitted by defendant Laverty are insufficient to show the absence of a serious injury (*see*, ***Walker v Village of Ossining***, *supra*). Therefore, defendant Lavery's motion for summary judgment is denied. Since defendant Laverty failed to establish her prima facie entitlement to judgment as a matter of law, the Court need not address the sufficiency of plaintiff's opposition papers (*see*, ***Iles v Jonat***, 35 AD3d 537, 825 NYS2d 540 [2d Dept 2006]).

Regarding the cross motion by defendants Cooney and Grauer, the Court initially notes that no bill of particulars has been submitted specifically with respect to them, either with the motion or with this cross motion. In any event, the affirmed report of the orthopedic specialist Dr. Farkas is deficient inasmuch as he provides range of motion measurements without comparing those findings to the normal ranges of motion (*see*, ***Kovalenko v General Elec. Capital Auto Lease, Inc.***, ___ NYS2d ___, 2007 WL 534383, 2007 NY Slip Op 01523 [NYAD 2 Dept Feb 20, 2007]). Moreover, Dr. Weiland's findings that "[t]here was full range of motion of the neck, both shoulders, as well as lower torso" were insufficient since he failed to set forth the objective testing he performed in order to reach said conclusion (*see*, ***Larrieut v Gutterman***, *supra*; ***Schacker v County of Orange***, *supra*). It so follows that the cross motion for summary judgment by defendants Cooney and Grauer is denied. Inasmuch as defendants Cooney and Grauer failed to establish their prima facie entitlement to judgment as a matter of law, the Court is not required to address the sufficiency of plaintiff's opposition papers (*see*, ***Iles v Jonat***, *supra*).

Plaintiff now cross-moves for summary judgment in her favor on the issue of liability on the grounds that as a passenger she was not contributorily negligent and that the two defendants, Laverty and Grauer, were negligent. Defendants oppose plaintiff's cross motion for summary judgment as untimely under CPLR 3212 (a).

Here, as defendants correctly point out, plaintiff's cross motion is untimely inasmuch as it was not served within 120 days of the filing of the note of issue, that is, November 14, 2006 (*see*, CPLR 3212 [a]). The affidavit of service of plaintiff's cross motion is dated November 27, 2006, 13 days after the deadline to file the cross motion for summary judgment. Plaintiff's counsel has provided no explanation or "good cause" for serving the cross motion 13 days late, and thus, the Court has no discretion to entertain it on the merits (*see*, ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]; ***Thompson v Leben Home for Adults***, 17 AD3d 347, 792 NYS2d 597 [2d Dept 2005]). Therefore, plaintiff's cross motion for summary judgment on the issue of liability is denied.

Accordingly, the motion and cross motions are denied.

Dated: MAR 14 2007

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION