SHORT FORM ORDER

INDEX No. 03-8855
CAL. No. 06-01070-MV

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

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 10-2-06
ADJ. DATE 1-3-07
Mot. Seq. # 001- MG; CASEDISP

MELISSA WATTS, Plaintiff, - against - NANCY J. KNABL, JAMES KNABL and DIANE R. KNABL, Defendants.	ERIC H. GREEN, ESQ. Attorney for Plaintiff 295 Madison Avenue New York, New York 10017 RUSSO & APOZNANSKI Attorneys for Defendants 875 Merrick Avenue Westbury, New York 11590

Upon the following papers numbered 1 to 22 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 13 - 22; Replying Affidavits and supporting papers ____; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants for an order granting them summary judgment on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d), is granted.

This is an action to recover damages for serious injuries allegedly sustained by plaintiff as a result of a motor vehicle accident that occurred at the intersection of Portion Road and Metzner Road in the Town of Brookhaven, State of New York on August 14, 2000. The accident allegedly happened when the vehicle owned by defendants Nancy J. Knabl and James Knabl, and operated by Diane R. Knabl, impacted the vehicle operated by plaintiff Melissa Watts. Defendants now move for summary judgment in their favor dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d), and plaintiff opposes this motion.

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 a "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 (***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]).

In support of this motion, defendants submit, inter alia, the pleadings; plaintiff's bill of particulars; the affirmed report of defendants' examining neurologist, C. M. Sharma, M.D.; the affirmed report of the defendants' examining orthopedist, Anthony Spatora, M.D.; and the plaintiff's deposition testimony.

Plaintiff claims in her bill of particulars that she sustained sprains and strains of the cervical, thoracic and lumbar spine; cervical and lumbar radiculopathy; brancial neuritis; and cephalgia. Plaintiff also claims that she was confined to her house for approximately sixteen weeks and to her bed for approximately eighteen weeks. Additionally, plaintiff claims that she sustained a serious injury in the categories of a permanent loss of use, a permanent consequential limitation, a significant limitation, a non-permanent injury, and a significant disfigurement. Furthermore, plaintiff claims economic loss in excess of basic economic loss within the meaning of Article 51 of the Insurance Law.

In his report dated September 7, 2005, Dr. Sharma states that he performed an independent neurological examination of the plaintiff on that date, and his findings include a normal cranial nerve examination; normal muscle tone in all limbs with no atrophy or involuntary movements; and a normal gait. He also observed that plaintiff was able to bend forward and touch her knees, as well as place each foot on the opposite knee. Furthermore, he noted that the movements of plaintiff's neck were normal in range even though she reported pain in these areas. Dr. Sharma opined that plaintiff had a normal neurological exam and that she was not neurologically disabled.

In his report dated September 7, 2005, Dr. Spataro states that he performed an independent orthopedic examination of the plaintiff on that date, and his findings include intact pulses in all four extremities; a motor exam that was "5/5"; reflexes that were "2/2"; and a negative straight leg raising test. He observed that there was a full range of motion of the upper and lower extremities as well as no palpable

spasm in the cervical or lumbar spine. Dr. Spataro opined that plaintiff had sustained sprains of the cervical and thoracic spine which had resolved. He also concluded that plaintiff was capable of performing her normal work activities and not disabled.

Plaintiff testified that she was involved in an automobile accident on August 14, 2000. She was driving her step-sister's car at the time. As a result of the impact, her head hit the driver's side window. After the police arrived, a friend's sister drove her home. A few days later, she went to Great South Bay Medical where she received treatment to her head, back and neck for a few months. Thereafter, she treated with a chiropractor several times per week for about one month. She also treated with a neurologist, Dr. Wani, on one occasion, but did not recall the last time she had seen any other health care provider. At the time of the accident, plaintiff was unemployed but she subsequently worked at Home Depot from May 2001 until January 2002. Sometime thereafter, she became self-employed as a part-time hairdresser and is currently engaged in that profession. Contrary to the allegations in her bill of particulars, she testified that she was confined to her home for about two weeks after the accident. Plaintiff further testified that she was unable to perform certain household duties after the accident.

By their submissions, defendants made a prima facie showing that plaintiff did not sustain a serious injury (*see*, ***Wright v Peralta***, 26 AD3d 489, 809 NYS2d 465 [2d Dept 2006]; ***Farozes v Kamran***, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]; ***Teoduro v Conway Transp. Serv.***, 19 AD3d 479, 798 NYS2d 466 [2d Dept 2005]; ***Willis v New York City Trans. Auth.***, 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]; ***Edwards v DeHaven***, 155 AD2d 757, 547 NYS2d 462 [3d Dept 1989]). Defendants' examining orthopedist found that there was a full range of motion of the plaintiff's upper and lower extremities as well as no palpable spasm in the cervical or lumbar spine. Similarly, defendants' examining neurologist found that plaintiff had a normal range of motion of the cervical spine. Furthermore, both of defendants' examining experts concluded that plaintiff was not disabled. As defendants have met their burden as to all categories of serious injury alleged, the Court turns to plaintiffs' proffer (*see*, ***Franchini v Palmieri***, 1 NY3d 536, 775 NYS2d 232 [2003]; ***Dongelewic v Marcus***, 6 AD3d 943, 774 NYS2d 841 [3d Dept 2004]).

In opposition to this motion, plaintiff submits, among other things, the personal affidavit of plaintiff's treating neurologist, Shafi Wani, M.D., and the plaintiff's personal affidavit. At the outset, the Court notes that Dr. Wani's findings and diagnosis with respect to plaintiff's right wrist and fingers have been disregarded as injuries to these body parts are not alleged in the bill of particulars (*see*, ***Robinson v Schiavoni***, 249 AD2d 991, 672 NYS2d 560 [4th Dept 1998]).

Dr. Wani states that he performed an initial neurological examination of the plaintiff on August 22, 2000, and his findings include stiffness and tenderness of the cervical and shoulder muscles, as well as limitations of motion of the cervical and lumbar spine. More specifically, he observed that plaintiff's right/left rotation and extension were 45/60 and 45 degrees, with the normal ranges being 70/70 and 90 degrees. He also noted that plaintiff's flexion, extension and right/left lateral flexion were 45, 15 and 15/15 degrees, with the normal ranges being 90, 45 and 45/45 degrees. Plaintiff returned to his office on October 24, 2006, with complaints of, inter alia, discomfort in the right side of her neck. His findings on that date include weakness in the abductor muscle on the right side, and reflexes that were "2+" bilaterally.

Plaintiff states that she stopped treating with Dr. Wani after six months. Immediately after the accident, she was unable to take care of her daughter. She was also unable to clean her house for about three

months. As a result of her injuries, she has limited her work and personal activities and she no longer plays softball. Plaintiff further alleges that she is unable to walk up stairs, and that she has difficulty standing or sitting for long periods of time.

Plaintiff has provided insufficient medical proof to raise an issue of fact that she sustained a serious injury under the no-fault law (*see*, ***Burke v Galli***, 242 AD2d 595, 664 NYS2d 742 [2d Dept 1997], *lv denied* 91 NY2d 806, 669 NYS2d 1 [1998]; ***Picott v Lewis***, 26 AD3d 319, 809 NYS2d 541 [2d Dept 2006]; ***Sirmans v Mannah***, 300 AD2d 465, 752 NYS2d 359 [2d Dept 2002]). Dr. Wani's finding of muscle weakness is not explained, defined or specifically connected to plaintiff's alleged limitations, and its significance is not specifically delineated (*see*, ***Davis v Evan***, 304 AD2d 1023, 758 NYS2d 203 [3d Dept 2003]). Also, Dr. Wani's affidavit does not include any recent findings of any significant limitation or restriction of a body part, member or function (*see*, ***Hernandez v DIVA***, 22 AD3d 722, 804 NYS2d 396 [2d Dept 2005]; ***Frier v Teague***, 288 AD2d 177, 732 NYS2d 428 [2d Dept 2001]). Instead, the affidavit of Dr. Wani demonstrates that plaintiff's injuries were mild, minor or slight (*see*, ***Gonzalez v Green***, 24 AD3d 939, 805 NYS2d 450 [3d Dept 2005]; ***Moore v County of Suffolk***, 6 AD3d 408, 774 NYS2d 375 [2d Dept 2004]; ***Maenza v Letkajornsook***, 172 AD2d 500, 567 NYS2d 850 [2d Dept 1991]). Additionally, Dr. Wani's affidavit is not probative for the purposes of demonstrating a serious injury in connection with any of her alleged injuries because it contains no opinion as to causation (*see generally*, ***Vishnevsky v Glassberg***, 29 AD3d 680, 815 NYS2d 152 [2d Dept 2006]). In any event, Dr. Wani has not provided any explanation for plaintiff's last medical exam in 2000, and his re-examination of her shortly after the filing of this motion (*see*, ***Karabchievsky v Crowder***, 24 AD3d 614, 808 NYS2d 338 [2d Dept 2005]; ***Puerto v Omholt***, 17 AD3d 650, 795 NYS2d 117 [2d Dept 2005]). Plaintiff's six year gap in treatment was, in essence, a cessation of treatment which is not satisfactorily explained by her other submissions (*see*, ***Bycinthe v Kombos***, 29 AD3d 845, 815 NYS2d 693 [2d Dept 2006]; ***Pimentel v Mesa***, 28 AD3d 629, 813 NYS2d 517 [2d Dept 2006]).

Additionally, the proof submitted by the plaintiff is insufficient to raise a triable issue of fact that she sustained a medically-determined injury or impairment rendering her unable to substantially perform all of her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident (*see*, ***Magarin v Kropf***, 24 AD3d 733, 807 NYS2d 398 [2d Dept 2005]; ***Mercado v Garbacz***, 16 AD3d 631, 792 NYS2d 519 [2d Dept 2005]). Although plaintiff alleges, among other things, that she has difficulties performing household chores, the record lacks objective proof of any substantial curtailment of her activities within the relevant time period after the accident (*see*, ***Nelson v Distant***, 308 AD2d 338, 764 NYS2d 258 [1st Dept 2003]; ***Keena v Trappen***, 294 AD2d 405, 742 NYS2d 344 [2d Dept 2002]).

Moreover, since there is no evidence in the record demonstrating that plaintiff's alleged economic loss exceeded the statutory amount of basic economic loss, her claim in this regard must be dismissed (*see*, CPLR 3212 [b]; *see*, ***Watford v Boolukos***, 5 AD3d 475, 772 NYS2d 566 [2d Dept 2004]; ***Rulison v Zanella***, 119 AD2d 957, 501 NYS2d 487 [3d Dept 1986]). Accordingly, this motion for summary judgment is granted and the complaint is dismissed.

Dated: APR 10 2007

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION