SHORT FORM ORDER

INDEX No. 04-23529
CAL. No. 06-01506-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 11/16/06
ADJ. DATE 1/19/07
Mot. Seq. # 002 - MD

MARYANN BADARACCO	:	DIGIOVANNA & KHALATBARI
	:	Attorneys for the Plaintiff
Plaintiff,	:	32 Court Street, Suite 205
	:	Brooklyn, New York 11201
- against -	:	
	:	LOCCISANO & LARKIN, ESQS.
	:	Attorneys for the Defendant
ANTHONY A. PRINZO,	:	150 Motor Parkway, Suite 405
Defendant.	:	Hauppauge, New York 11788-5108

Upon the following papers numbered 1 to 18 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 9 - 15; Replying Affidavits and supporting papers 16 - 17; Other 18 (copy of affirmation in opposition); (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant for an order pursuant to CPLR 3212 granting him summary judgment dismissing the complaint on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d), is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff on March 11, 2004 in a motor vehicle accident that occurred at Bayshore Road and Deer Park Avenue, in Deer Park, New York. By her bill of particulars, plaintiff alleges that as a result of the subject accident she sustained serious injuries including, C2-3 posterior prominent left sided disc herniation with impingements; C3-4, C5-6 and C6-7 posterior disc herniations with ventral cord SF impression and impingement; C6-7 posterior left sided herniation with impingement on the ventral cord; pain extending from neck into right arm through right shoulder; cervical intervertebral disc disorder with radiculitis; thoracic sprain; thoracic subluxation with myelopathy; and intervertebral disc disorder of the lumbar spine with myelopathy. In addition, plaintiff alleges that following the

accident she was treated and released from the emergency room at Huntington Hospital and that thereafter she was confined to bed and home for approximately ten days. Plaintiff also alleges that following the accident she was incapacitated from her work as a secretary for about one week.

Defendant now moves for summary judgment dismissing the complaint on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) as a result of the subject accident. In support of the motion, defendant submits, among other things, the summons and complaint; the verified answer; plaintiff's bill of particulars; a portion of plaintiff's deposition transcript; and the affirmed report dated May 15, 2006 of defendant's examining orthopedist, Arthur M. Bernhang, M.D. (Dr. Bernhang), based on an examination of plaintiff on May 5, 2006.

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 (*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 non-moving party, here, the plaintiff (***Cammarere v Villanova,*** 166 AD2d 760, 562 NYS2d 808 [3d Dept 1990]).

At her deposition, plaintiff testified that at the time of the accident she worked for the Town of Babylon's Highway Department as a secretary and on the road for sixteen and a half hours per week and that she also worked as a hairdresser at home. In addition, plaintiff testified that following the accident she missed one week of work for the Town and intermittently thereafter. According to plaintiff, she continues to work the same number of hours for the Town but she no longer goes out on the road and after the accident she completely stopped hairdressing. Plaintiff testified that one month after the accident she attempted hairdressing and lacked mobility in her right arm and could not hold a blow dryer or tease hair.

With respect to her treatment, plaintiff testified that on the day of the accident she went to see her cousin, a chiropractor, Dr. Izzo from whom she had been receiving treatment for a lower back injury from a 1994 car accident. At the time, plaintiff had complaints of pain with respect to her head, neck, shoulders, numbness going down her right arm and numbness going down her left leg. According to plaintiff, prior to the subject accident her injuries to her lower back from the prior accident had resolved. Plaintiff testified that Dr. Izzo's treatment on the first visit consisted of adjustments and he gave her a soft neck collar which she wore only one day and removed due to discomfort. Plaintiff explained that she received treatment from Dr. Izzo in the form of adjustments and heat therapy three times a week for six months after which the treatments stopped for a while. Plaintiff stated that Dr. Izzo recommended acupuncture and massage therapy and that plaintiff received massage therapy from another cousin, a licensed massage therapist, once or twice a week for about two months until her cousin moved. The only diagnostic testing that Dr. Izzo ordered was an MRI of plaintiff's neck and he never referred her to another doctor. Plaintiff also testified that the day after the subject accident she went to the emergency room of Huntington Hospital with complaints of pain in her head and neck and that she underwent a CAT scan and was given instructions to take Advil or something for pain and was released.

In his affirmed report, Dr. Bernhang indicated that plaintiff's active ranges of motion as measured by goniometer with respect to cervical flexion was 20 and cervical extension was 25 as compared to average range of joint motion of 38 and that her lateral flexion was 25/15 as compared to an average range of 43. In addition, Dr. Bernhang noted that plaintiff's cervical rotation was 50/40 in comparison to the average range of 45. Dr. Bernhang also found that plaintiff's active shoulder abduction was 115/85 as compared to an average range of 170; that plaintiff's active shoulder forward flexion was 90/90 compared to the average of 158; and that her internal rotation was 45/45 as compared to an average of 70. Various tests that Dr. Bernhang performed on plaintiff's cervical spine, shoulders and lumbar spine all had negative results. Dr. Bernhang characterized plaintiff's restrictions of the cervical spine as mild and opined that they were consistent with the pre-existing degenerative changes of the cervical spine that appeared in plaintiff's x-rays and MRI of the cervical spine performed in March 2004 and September 2004, respectively. He added that the findings in the x-rays and MRI appeared to be longstanding chronic degenerative changes which were not causally related to the subject motor vehicle accident. Dr. Bernhang noted that at the time of the examination in May 2006 plaintiff was not under any active medical care and concluded that there was no causally related disability or permanency and no reason why plaintiff could not return to her former occupation as a hairdresser.

Here, Dr. Bernhang reported range of motion measurements for plaintiff's cervical spine and shoulder but failed to compare those findings to what is deemed normal ranges of motion for those areas of plaintiff's body (*see*, ***McLaughlin v Rizzo***, ___ NYS2d ___, 2007 WL 926515, 2007 NY Slip Op 02720 [NYAD 2 Dept Mar 27, 2007]; ***Harman v Busch***, 37 AD3d 537, 829 NYS2d 680 [2d Dept 2007]; ***Iles v Jonat***, 35 AD3d 537, 825 NYS2d 540 [2d Dept 2006]). Although Dr. Bernhang opined that plaintiff's cervical restrictions were mild and explained that they were consistent with the pre-existing degenerative changes that appeared on the x-rays and MRI, he did not provide any such opinion on the restrictions that he found as to plaintiff's bilateral shoulder range of motion measurements (*see*, ***McLaughlin v Rizzo***, *supra*). Plaintiff's bilateral shoulder range of motion measurements revealed apparent limitations when compared to one another, particularly active shoulder abduction (*see*, *id.*). Absent a comparison with normal measurements, it cannot be concluded that any limitations were mild, minor or slight so as to be considered insignificant within the meaning of the no-fault statute (*see*, ***McLaughlin v Rizzo***, *supra*; ***Harman v Busch***, *supra*; ***Iles v Jonat***, *supra*). Thus, defendant failed to establish, prima facie, that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see*, ***Cruz v Williams***, 34 AD3d 719, 825 NYS2d 510 [2d Dept 2006]).

Inasmuch as defendant failed to establish his prima facie entitlement to judgment as a matter of law based on whether plaintiff sustained a serious injury, it is unnecessary to consider whether plaintiff's opposition papers were sufficient to raise a triable issue of fact on that matter (*see*, ***Nembhard v Delatorre***, 16 AD3d 390, 791 NYS2d 144 [2d Dept 2005]; ***McDowall v Abreu***, 11 AD3d 590, 782 NYS2d 866 [2d Dept 2004]; ***Coscia v 938 Trading Corp.***, 283 AD2d 538, 725 NYS2d 349 [2d Dept 2001]).

Accordingly, the instant motion is denied.

Dated: APR 10 2007

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**