SHORT FORM ORDER

INDEX No. 04-21355

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 7-19-06
ADJ. DATE 9-15-06
Mot. Seq. #001 – SJ – MG
#002X – SJ – MG
#003X – SJ – MG

YVETTE ALLEN,

Plaintiff,

- against -

LOUIS J. WILLIAMS, III, EVELYN WILLIAMS, CARLOS MELENDEZ, GMAC d/b/a VAUL TRUST, being and intended to be the owner of a certain 2001 Chevrolet motor vehicle bearing vehicle identification number 1G1NE52J616175967, and New York State registration number AGR6717 for the year 2001,

Defendants.

PLAINTIFF'S ATTORNEYS:
SWEENY & SWEENY, ESQS.
Two Hillside Avenue, Suite C
Williston Park, New York 11596

DEFENDANTS' ATTORNEYS:
ROBERT P. TUSA, ESQ.
898 Veterans Memorial Highway
Hauppauge, New York 11788

SHAYNE, DACHS, STANISCI, CORKER & SAUER
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Mineola, New York 11501

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88 Pine Street
New York, New York 10005-1886

Upon the following papers numbered 1 to 5 read on this motion for summary judgment; Notice of Motion/ ~~Order to Show Cause~~ and supporting papers 1; Notice of Cross Motion and supporting papers 2 - 3; Answering Affidavits and supporting papers 4; Replying Affidavits and supporting papers 5; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant Carlos Melendez for an order granting him summary judgment dismissing plaintiff's complaint upon the ground that plaintiff has not suffered a serious injury as that term is defined in the Insurance Law and these cross motions by defendants GMAC d/b/a Vaul Trust and Louis J. Williams, III and Evelyn Williams for the same relief are considered by the Court and are determined as follows:

This is an action commenced by plaintiff seeking to recover for injuries sustained by her in a motor vehicle accident in which she was a passenger in one of the vehicles which occurred on October 1, 2001 on Route 454 (Veterans Memorial Highway) at its intersection with Express Drive South in the Town of Islip, New York. In her bill of particulars, plaintiff alleges, *inter alia*, that as a result of this accident, she suffered lacerations and abrasions and a herniated disc at L5-S1.

In support of his motion, defendant Carlos Melendez submits to the Court the affirmed report of Dr. C.M. Sharma, a neurologist, who examined plaintiff at defendants' request. In his report, Dr. Sharma concludes that there was no evidence of any neurological disability. After an examination of plaintiff wherein he evaluated plaintiff's cranial nerves, motor systems, reflexes, sensory (including negative findings for Tinel's sign and Phalen's sign), gait and coordination, and skull and spine, he found no neurological limitations to continuation of work and pre-accident daily activities. During these evaluations, he made findings with respect to the various ranges of motion of plaintiff's cervico-dorsal and lumbar spine and compared them to the normal ranges of motion. All were within normal limits.

Defendant also submits the affirmed report of Dr. Harvey Fishman, an orthopedic surgeon. In his report, Dr. Fishman sets forth the extent of the examination he conducted including a physical examination, Spurling compression test and range of motion tests. During his examination, he found no evidence of muscle spasm and no evidence of trigger point tenderness on palpation. He concludes after his examination that plaintiff suffers no disability from a orthopedic perspective including nothing which would preclude her from all of her usual daily activities. He found no evidence of any disfiguring scar to claimant's forehead resulting from the lacerations she sustained. According to Dr. Fishman, any sprain or strain to her cervical and lumbosacral spine has been fully resolved.

Finally, defendant submits an affirmed report from Dr. Craig Warshall, a radiologist. In his report, he opines that based upon his review of the MRI conducted on plaintiff's lumbar spine on November 6, 2001, there are preexisting chronic degenerative changes in plaintiff's lumbar spine which are not related to her accident of October 1, 2001.

In order to prevail on this type of motion, defendant has the initial burden of establishing that plaintiff did not sustain the type of "serious injury" necessary to satisfy the threshold requirement of Insurance Law § 5102(d) (*see*, Gaddy v. Eyler, 79 NY2d 955, 956-957, 582 NYS2d 990; Boehm v. Estate of Mack, 255 AD2d 749, 749-750, 680 NYS2d 732). As with all summary judgment motions, defendant was required to come forward with proof, in admissible form, sufficient to justify the Court granting him judgment as a matter of law (*see*, Winegrad v. New York University Medical Center, 64 NY2d 851, 487 NYS2d 316; Zuckerman v. City of New York, 49 NY2d 557, 427 NYS2d 595). In order to sustain this initial burden, defendant produced plaintiffs' bill of particulars, a portion of plaintiff's deposition testimony along with the affirmed independent medical examination reports of a neurologist, a radiologist and an orthopedic surgeon. This evidence was clearly sufficient to meet defendant's initial burden on the threshold issue of serious injury and required plaintiff to come forward with evidence in admissible form creating a genuine triable issue of fact as to whether plaintiff sustained a serious injury as a result of the accident (*see*, Gaddy v. Eyler, *supra*; Morgan v. Beh, 256 AD2d 752, 681 NYS2d 394; Weaver v. Derr, 242 AD2d 823, 661 NYS2d 684; Rennell v. Horan, 225 AD2d 939, 639 NYS2d 171).

Plaintiff has not met that burden. Much of the evidence submitted by plaintiff is neither sworn to nor affirmed and therefore, may not be considered by the Court. It is insufficient to meet plaintiff's burden of proof (*see*, Hernandez v. Taub, 19 AD3d 368, 796 NYS2d 169; Sammut v. Davis, 16 AD3d 658, 792 NYS2d 192). While plaintiff does submit to the Court an affirmed medical report from Dr. Scott Roteman, that report fails to raise a triable issue of fact on the issue of serious injury for several reasons.

Initially, it must be noted that the examinations that are set forth in Dr. Roteman's report occurred on October 4, 2001 and July 30, 2002. The last examination was over four years ago and there has been no explanation by plaintiff for this cessation of apparent treatment (*see*, Pommels v. Perez, 4 NY3d 566, 797 NYS2d 380). As the Court of Appeals noted in Pommels, "a plaintiff who terminates therapeutic measure following the accident, while claiming 'serious injury', must offer some reasonable explanation for having done so." Here, plaintiff's explanation that her insurance company would no longer pay for any treatment is not supported by any evidence in the record.

Dr. Roteman's report is deficient in other respects. Although he notes in his report that plaintiff was examined at Eastern Island Medical Care, P.C., an office where he practices medicine, it does not state in his report that he performed the examinations of plaintiff. It appears from the report that the statements made by Dr. Roteman are based upon examinations performed by others. In this regard it must be noted that a doctor may not rely on unsworn records and reports prepared by other medical providers (*see*, Springer v. Arthurs, 22 AD3d 829, 803 NYS2d 170).

For these reasons, the Court finds that the affirmed report of Dr. Roteman does not raise a triable issue of fact on the question of whether plaintiff sustained a serious physical injury. It must also be noted that although plaintiff alleges that she sustained an injury that prevented her from performing substantially all of her usual and customary activities for 90 out of the 180 days following the accident, there is no evidence to support that claim. Neither the affidavit by plaintiff herself or the affirmed report of Dr. Roteman substantiates plaintiff's claim that she was disabled for that period of time.

Finally, it must also be noted that although plaintiff attempts to raise a claim for the first time that she has suffered a significant disfigurement by virtue of a scar on her forehead, she has not included such a claim in her bill of particulars. While the Court is always empowered to allow amendment of a plaintiff's bill at any time prior to trial (*see*, Fick v. LaGuardia Medical Group, P.C., 208 AD2d 800, 618 NYS2d 72), here, there is no merit to plaintiff's claim. Where a plaintiff seeks to supplement a bill of particulars to assert a new injury, there must be some evidence to establish the merits of the proposed supplemental claim (*see*, Varan v. TriCity Rentals, Inc., 90 AD2d 501, 454 NYS2d 740). Here, from the picture submitted by plaintiff, there can be no basis upon which she could claim that any scar on her forehead was "unattractive, objectionable or the object of pity or scorn" (*see*, Loiseau v. Maxwell, 256 AD 2d 450).

Accordingly, upon the plaintiff's failure to offer sufficient proof to raise a triable issue of fact on the question of whether the plaintiff sustained a serious injury, defendants are entitled to summary judgment dismissing plaintiff's complaint. The motion and cross motions are granted and the complaint dismissed.

Dated: MARCH 29, 2007

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION