SHORT FORM ORDER

INDEX No. 04-26875
CAL. No. 06-02915-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 1-31-07
ADJ. DATE 4-3-07
Mot. Seq. # 002 - MD
004 - XMD

KATHLEEN ROBINSON, Plaintiff, - against - DANA L. TIERNEY and CONCETTA PUMA, Defendants.	COSTANTINO & COSTANTINO Attorneys for Plaintiff 632 Merrick Road Copiague, New York 11726 MARTIN, FALLON & MULLE Attorneys for Defendant Puma 100 East Carver Street Huntington, New York 11743 KELLY, RODE & KELLY, LLP Attorneys for Defendant Tierney 218 Griffing Avenue Riverhead, New York 11901

Upon the following papers numbered 1 to 30 read on this motion and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14 ; Notice of Cross Motion and supporting papers 15 - 19 ; Answering Affidavits and supporting papers 20 - 26 ; Replying Affidavits and supporting papers 27 - 28; 29 - 30 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Concetta Puma for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied; and it is further

ORDERED that the cross motion by defendant Dana Tierney for summary judgment dismissing the complaint on the ground 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 personal injuries allegedly sustained by plaintiff, Kathleen Robinson, as a result of a chain-reaction, rear-end motor vehicle collision which occurred in the left-hand turning lane on Merrits Road at its intersection with Motor Avenue in Farmingdale, New

York, on November 29, 2001. The following facts are undisputed. There were three vehicles involved in the accident. The lead vehicle was owned and operated by plaintiff; behind it was the vehicle owned and operated by defendant Dana Tierney; and last in line was the vehicle owned and operated by defendant Concetta Puma.

By her bill of particulars, plaintiff alleges that she sustained serious injuries as a result of the subject accident, including neck pain and tension; thoracic sprain/strain; lumbosacral sprain/strain; lumbar facet syndrome; sacroiliac joint sprain; spinal intersegmental joint dysfunction; and mild facial pain and spasm. In addition, plaintiff claims that she was confined to bed for approximately two weeks and to home for approximately two and a half months.

Defendant Tierney cross-moves for summary judgment in her favor dismissing the complaint on the ground that plaintiff has not sustained a serious injury as defined in Insurance Law § 5102 (d). In support, defendant Tierney submits a verified answer, a bill of particulars and an affirmation of one of her attorneys, which attempts to incorporate by reference the same arguments submitted in the motion by defendant Puma.

Pursuant to CPLR 3212 (b), a motion for summary judgment "shall be supported by *** a copy of the pleadings." Defendant Tierney failed to submit the pleadings, without which it is not possible to determine whether summary judgment is warranted. In any event, even assuming that all of the papers submitted on the motion by defendant Puma were referred and incorporated, the cross motion by defendant Tierney is denied, as discussed below (*infra*).

Defendant Puma now moves for summary judgment in her favor dismissing the complaint against her on the ground that plaintiff has not sustained a serious injury as defined in Insurance Law § 5102 (d). In support, defendant Puma submits, *inter alia*, the pleadings; a bill of particulars; the affirmed report dated August 22, 2006 of her examining neurologist, Dr. Erik Entin; the affirmed report dated July 11, 2006 of her examining orthopedist, Dr. Frank Hudak, based on an examination of plaintiff on July 6, 2006; the radiographic examination dated December, 14, 2002 of plaintiff's lumbosacral spine and pelvis, performed by Dr. Robin Scarlata; the MRI report dated July 1, 2002 of plaintiff's lumbar spine, performed by Dr. Robert Goodman; and the MRI report dated January 4, 2002 of plaintiff's thoracic spine, performed by Dr. Robert Goodman.

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***, 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 Sys.***, 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 [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 [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 [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 [1990]).

Here, defendant Puma failed to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) (*see*, ***Nembhard v Delatorre***, 16 AD3d 390, 791 NYS2d 144 [2005]). On July 6, 2006, approximately four years and seven months after the subject accident, defendant Puma's examining orthopedist, Dr. Hudak, examined plaintiff, using certain orthopedic and neurological tests. Dr. Hudak reported his findings with respect to the various ranges of motion of plaintiff's cervical spine, shoulders, elbows, wrists and hands and compared those findings to the normal ranges of motion. Although Dr. Hudak found that there was no spasm or tenderness in plaintiff's cervical spine and that she had full range of motion in her cervical spine, shoulders, elbows, wrists and hands, he failed to set forth the objective tests that were performed to support his conclusion that plaintiff did not suffer from any limitation of the range of motion in her cervical spine (*see*, ***Vazquez v Basso***, 27 AD3d 728, 815 NYS2d 626 [2006]; ***Kennedy v Brown***, 23 AD3d 625, 805 NYS2d 408 [2005]; ***Nembhard v Delatorre***, *supra*). Dr. Hudak also reported his findings with respect to the various ranges of motion of plaintiff's lumbar spine and compared those findings to the normal ranges of motion. Dr. Hudak found that there was no tenderness or spasm in plaintiff's dorsal and lumbosacral spine; that the straight leg raising test was negative bilaterally; and that plaintiff had full range of motion in her lumbar spine: 100 degrees flexion (90 degrees normal) and 45 degrees lateral flexion (45 degrees normal). Nevertheless, Dr. Hudak failed to specify the degree of range of motion in extension of plaintiff's lumbar spine in support of his conclusion that plaintiff did not sustain a serious injury (*see*, ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2006]). On August 22, 2006, defendant Puma's examining neurologist, Dr. Entin, examined plaintiff, using certain orthopedic and neurological tests and found that there was no spasm in her neck and back area. Dr. Entin concluded that plaintiff had an "entirely normal neurological examination" and that she suffered no "neurological deficit or disability referable to" the subject accident. Nevertheless, Dr. Entin failed to discuss the range of motion of plaintiff's cervical and lumbar spine (*compare*, ***Kerzhner v N.Y. Ubu Taxi Corp.***, 17 AD3d 410, 792 NYS2d 622 [2005]). Dr. Scarlata's radiographic examination dated December, 14, 2002 of plaintiff's lumbosacral spine revealed that there was "minimal degenerative change" at L4.

Thus, defendant Puma failed to establish, prima facie, her entitlement to judgment as a matter of law. Accordingly, her motion for summary judgment dismissing the complaint on the ground that plaintiff has not sustained a serious injury as defined in Insurance Law § 5102 (d) is denied. Under the circumstances, it is unnecessary to consider the sufficiency of plaintiff's opposition papers (*see*, ***Barrett v Jeannot***, 18 AD3d 679, 795 NYS2d 727 [2005]).

Dated: MAY 14 2007

J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**