SHORT FORM ORDER

INDEX No. 05-11721
CAL. No. 06-02310-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 2-26-07
ADJ. DATE 4-9-07
Mot. Seq. # 001 - MD
002 - XMD

MARIA D. MAURY, Plaintiff, - against - COUNTY OF SUFFOLK, SUFFOLK COUNTY DEPARTMENT OF PUBLIC WORKS and SUFFOLK COUNTY DEPARTMENT OF TRANSPORTATION, Defendants.	KUJAWSKI & DELLICARPINI Attorneys for Plaintiff 1637 Deer Park Avenue, P.O. Box 661 Deer Park, New York 11729-0661 KRAL, CLERKIN, REDMOND, et al. Attorneys for Defendants 496 Smithtown Bypass Smithtown, New York 11787

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 - 21 ; Notice of Cross Motion and supporting papers 22 - 28 ; Answering Affidavits and supporting papers ____; Replying Affidavits and supporting papers 29 - 30 ; Other _____; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that this motion by defendants for summary judgment dismissing the complaint against them 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 plaintiff for summary judgment in her favor on the issue of liability is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, Maria Maury, when her vehicle was rear-ended by a bus owned by defendant County of Suffolk and operated by non-party Ronald Rodriguez, defendants' employee, on Route 27A in Islip, New York, on the afternoon of June 30, 2004. Plaintiff was involved in another unrelated accident in January 2003.

By her bill of particulars, plaintiff alleges that she sustained serious injuries as a result of the subject accident, including a C5-C6 central disc herniation with bulging; cervical radiculopathy; abrasion/burn to forehead; and burns to bilateral arms. In addition, plaintiff claims that she was confined to bed for seven days and to her home for three weeks.

Defendants now move for summary judgment in their favor dismissing the complaint against them on the ground that plaintiff has not sustained a serious injury as defined in Insurance Law § 5102 (d). In support, defendants submit, *inter alia*, the pleadings; a bill of particulars; the affirmed report dated June 9, 2006 of their examining orthopedist, Dr. Noah Finkel; the affirmed report dated July 7, 2006 of their examining neurologist, Dr. Howard Reiser; the report dated February 26, 2003 of plaintiff's treating physician, Dr. Eric Shapiro; the medical record dated June 30, 2004 of Good Samaritan Hospital; the CT scan of plaintiff's brain and cervical spine, taken on July 7, 2004 by Dr. Alexander Belman; the MRI report of plaintiff's cervical spine, taken on July 13, 2004 by Drs. Conellia Ha and Steven Mendelsohn; the report dated July 14, 2004 of plaintiff's treating physician, Dr. Gerard D'Ariano; and the CT scan of plaintiff's cervical spine, taken on July 7, 2004 by Dr. Alexander Belman.

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, defendants 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]). The MRI report of plaintiff's cervical spine, taken on July 13, 2004 , revealed that plaintiff had bulging discs at C4-C5 and C5-C6 and straightening of the normal cervical lordosis. For a herniated or bulging disc to constitute a serious injury, there must be objective evidence of the extent or degree of the alleged limitation resulting from the injury and its duration (*see*, ***Guzman v Paul Michael Mgt.***, 266 AD2d 508, 698 NYS2d 719 [1999]). On February 26, 2003, approximately one year and four months prior to the subject accident, plaintiff's treating physician, Dr. Shapiro, administered certain orthopedic and neurological tests and found that plaintiff had a full range of motion in her neck and upper extremities. Dr. Shapiro also found that the distraction test was positive and that plaintiff had bilateral neck pain associated with neck flexion and extension and left and right neck pain associated with right and left lateral neck flexion respectively. On July 14, 2004, two weeks after the subject accident, plaintiff's treating physician, Dr. D'Ariano, administered certain orthopedic and neurological tests and found that "there is tenderness over the facet joints to palpation and in the interscapular area on palpation." Dr. D'Ariano reported his findings with respect to the various ranges of motion of plaintiff's cervical spine and compared those findings to the normal ranges of motion. Dr. D'Ariano found that plaintiff had full range of motion in her cervical spine. Nevertheless, he failed to set forth any objective tests (*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*). On June 9, 2006, approximately two years after the subject accident, defendants' examining orthopedist, Dr. Finkel, examined plaintiff, using certain orthopedic and neurological tests and found that there is "some tenderness at the base of the neck on the left to local palpation in the levator scap and trapezius areas." Dr. Finkel reported his findings with respect to the various ranges of motion of plaintiff's cervical and lumbar spine and compared those findings to the normal ranges of motion. Dr. Finkel found that plaintiff had full range of motion in her cervical spine: 80 degrees rotation (80 degrees normal), 40 degrees forward flexion (40 degrees normal) and 25 degrees extension (25 degrees normal). Nevertheless, Dr. Finkel failed to specify the degree of range of motion in lateral bending of plaintiff's cervical 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]). Moreover, Dr. Finkel failed to set forth any objective tests. Dr. Finkel also found that the straight leg raising test was negative and that plaintiff had full range of motion in her lumbar spine: 50 degrees forward flexion, 30 degrees extension (30 degrees normal) and 30 degrees lateral bending (30 degrees normal). Nevertheless, Dr. Finkel failed to compare plaintiff's forward flexion to what is considered normal range of motion (*see*, ***LaCagnina v Bernard***, 34 AD3d 534, 824 NYS2d 161 [2006]). On July 7, 2006, defendants' examining neurologist, Dr. Reiser, examined plaintiff and found that her "neck is supple and nontender" and that "[l]umbosacral regions are nontender and straight leg raising signs are negative bilaterally." Nevertheless, Dr. Reiser failed to specify the degree of ranges of motion in plaintiff's cervical 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]).

Thus, defendants failed to establish, prima facie, their entitlement to judgment as a matter of law. Accordingly, their motion 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. 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]).

Plaintiff now cross-moves for summary judgment in her favor on the complaint on the issue of liability and opposes defendants' motion for summary judgment on the ground that plaintiff did sustain a serious injury within the meaning of Insurance Law § 5102 (d). Defendants oppose the cross motion as being untimely under CPLR 3212 (a).

Here, as defendants correctly point out, plaintiff's cross motion for summary judgment is untimely inasmuch as it was not served within 120 days of the filing of the note of issue, that is, October 3, 2006 (*see*, CPLR 3212 [a]). Instead, the affidavit of service of plaintiff's cross motion is dated March 9, 2007, 37 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 37 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 [2005]). Therefore, plaintiff's motion for summary judgment on the issue of liability is denied.

Accordingly, the motion and cross motion are denied.

Dated: MAY 2 1 2007

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION