SHORT FORM ORDER

INDEX NO. 99-14772
CALENDAR NO. 06-01835-MV

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

PRESENT:

Hon. EMILY PINES
Justice of the Supreme Court

MOTION DATE 12-20-06
ADJ. DATE 3-20-06
Mot. Seq. # 008 - MD

BIANCA ODESIA WATLER and JUDITH GRANT,	:	THE COCHRAN FIRM
	:	Attorneys for Plaintiffs
Plaintiffs,	:	233 Broadway, 5th Floor
	:	New York, NY 10279-0003
– against –	:	
	:	LEWIS JOHS AVALLONE AVILES
ROBERT FRANCIS RICCUITI,	:	Attorneys for Defendant
	:	425 Broad Hollow Road, Suite 200
Defendant.	:	Melville, NY 11747

Upon the following papers numbered 1 to 41 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1 - 20 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 21 - 39 ; Replying Affidavits and supporting papers 40 - 41 ; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant for summary judgment dismissing the claim of plaintiff Bianca Watler is denied.

Plaintiff Bianca Watler and her mother, plaintiff Judith Grant, commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred on Prospect Street in Kings County on October 25, 1996. The accident allegedly happened when a vehicle driven by defendant Robert Riccuiti struck the rear of a vehicle operated by plaintiff Watler, which was stopped due to traffic conditions on Prospect Street. The bill of particulars alleges that plaintiff Watler sustained various injuries as a result of the collision, including a bulging disc at level L5-S1 of the lumbosacral spine; lumbar radiculopathy; right knee sprain/strain; cervical and lumbosacral sprains/strains; and "cervical paraspinal myofascitis with discogenic radiculopathy." It further alleges that plaintiff, who sought treatment at the emergency department of Brooklyn Hospital Center immediately after the accident, was confined to home for approximately six months

due to her injuries.

Defendant now moves for summary judgment dismissing the claim of plaintiff Watler on the ground that she is precluded by Insurance Law §5104 from recovering for non-economic loss, as she did not sustained a "serious injury" within the meaning of Insurance Law §5102 (d). Defendant's submissions in support of the motion include copies of the pleadings; hospital records from Brooklyn Hospital Center's emergency department regarding plaintiff Watler's treatment; magnetic resonance imaging (MRI) reports concerning plaintiff Watler's cervical and lumbar regions prepared in November and December 1996; an initial evaluation report, dated February 2, 1997, which was prepared by plaintiff's treating chiropractor, Jason Reznik; and a sworn medical report prepared by Dr. Sanford Ratzan. At defendant's request, Dr. Ratzan, an orthopedic surgeon, conducted an examination of plaintiff Watler on April 21, 2006, and reviewed various medical records related to her alleged injuries.

Dr. Ratzan's report states that plaintiff Watler presented with complaints of left neck pain radiating into the back and shoulder, as well as pain in the right knee pain, left ankle, and left foot. The report states, in relevant part, that an examination of plaintiff Watler's cervical region showed "decreased left lateral tilt without spasm, but good flexion, extension, rotation and bend to the right." It states that examination of the lumbosacral spine revealed "20 degrees decreased flexion with mild complaints with rotation, lateral bend and extension without palpable spasm or loss of these motions." It states that the straight leg raise test was negative, and that a neurologic examination showed that plaintiff Watler had normal and symmetrical reflexes and motor strength in her extremities. Further, the report states that examination of plaintiff Watler's right knee showed full range of motion with no swelling and stable ligaments. It also states that examination of plaintiff Watler's left ankle and foot revealed "tenderness along the posterior distal later border of the fibula without swelling, without loss of motion and neurovascular intact." Dr. Ratzan concludes in the report that plaintiff Watler "has minimal residual cervical sprain without functional deficit and has no evidence of residual lumbosacral sprain." He also asserts that there was no evidence of disability in plaintiff Watler's right knee or left ankle.

Plaintiff Watler opposes the motion for summary judgment, arguing that defendant failed to show prima facie that she did not sustain injuries within the significant limitation of use or the 90/180 categories of Insurance Law §5102 (d). Alternatively, plaintiff Watler asserts that medical evidence submitted in opposition to the motion, namely, medical reports and records prepared by her treating chiropractors, Dr. Reznik and Dr. Gregory Buzzell, and by orthopedic surgeon Dr. Leonard Harrison, together with her deposition testimony, raises triable issues of fact as to whether she sustained a significant limitation in spinal function or a medically-determined injury which prevented her from performing substantially all of her normal activities for more than 90 days of the 180 days immediately following the accident.

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."

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see*, ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, i.e., affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see*, ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2d Dept 2001]; ***Torres v Micheletti***, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]; ***Craft v Brantuk***, 195 AD2d 438, 600 NYS2d 251 [2d Dept 1993]; ***Pagano v Kingsbury***, *supra*). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact, or demonstrate an acceptable excuse for failing to meet the requirement of tender in admissible form (***Gaddy v Eyler***, *supra*; ***Pagano v Kingsbury***, *supra*; *see*, ***Grasso v Angerami***, *supra*; *see generally*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). However, if a defendant does not establish a prima facie case that the plaintiff's injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff's opposition papers (*see*, ***Burns v Stranger***, 31 AD3d 360, 819 NYS2d 60 [2d Dept 2006]; ***Rich-Wing v Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2d Dept 2005]; *see generally*, ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Contrary to the assertions by defense counsel, the sworn medical report by Dr. Ratzan is insufficient to demonstrate prima facie that plaintiff Watler did not suffer a serious injury in the subject accident. Although Dr. Ratzen concludes in his report that his examination revealed that plaintiff Watler only has "minimal residual cervical sprain without functional deficit" and no evidence of residual lumbosacral sprain or other orthopedic disability, his report fails to indicate the objective tests performed to support these finding (*see*, ***Palladino v Antonelli***, __ AD3d __, 2007 WL 1502102 [2d Dept, May 22, 2007]; ***McCrary v Street***, 34 AD3d 768, 825 NYS2d 514 [2d Dept 2006]; ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]; ***Benitez v Mileski***, 31 AD3d 473, 818 NYS2d 555 [2d Dept 2006]; ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]; ***Nembhard v Delatorre***, 16 AD3d 390, 791 NYS2d 144 [2d Dept 2005]). Further, while the report states that plaintiff Watler exhibited "good" cervical movement and "no loss" in rotation, lateral bending and extension in the lumbar region, it does not indicate the range of motion measurements taken during the examination (*cf.*, ***Desulme v Stanya***, 12 AD3d 557, 785 NYS2d 477 [2d Dept 2004]). Moreover, Dr. Ratzan indicates in his report that plaintiff Watler exhibited "20 degrees decreased flexion" in her cervical spine (*see*, ***McNulty v Buglino***, __ AD3d __, 2007 WL 1289924 [2d Dept, May 1, 2007]; ***Sullivan v Johnson***, __ AD3d __, 2007 WL 1289568 [2d Dept, May 1, 2007]; ***D'Onofrio v Arsenault***, 35 AD3d 646, 828 NYS2d 117 [2d Dept 2006]; ***Grady v Jacobs***, 32 AD3d 994, 820 NYS2d 888 [2d Dept 2006]; ***Sano v Gorelik***, 24 AD3d

747, 805 NYS2d 854 [2d Dept 2005]), and did not offer any cause for such limitation other than the accident or show that such a limitation is insignificant. The motion for summary judgment, therefore, is denied, as defendant failed to establish prima facie that plaintiff Watler did not sustain a serious injury within the meaning of Insurance Law §5102 (d) as a result of the subject accident (*see*, ***Palladino v Antonelli***, *supra*; ***McNulty v Buglino***, *supra*; ***Sullivan v Johnson***, *supra*; ***DeLuca v Miceli***, 37 AD3d 643, 830 NYS2d 331 [2d Dept 2007]; ***McCrary v Street***, *supra*).

Dated: 6/6/07

Emily Pines
J.S.C.

____ FINAL DISPOSITION __X__ NONFINAL DISPOSITION