SHORT FORM ORDER

INDEX No. 06-9713
CAL. No. 07-00287-MV

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 3-26-07
ADJ. DATE 5-15-07
Mot. Seq. # 001 - MotD

SENIA NIETO,	:	EWALL & EWALL
	:	Attorneys for Plaintiff
Plaintiff,	:	946 Park Avenue
	:	Huntington, New York 11743-4548
- against -	:	
	:	RUSSO & APOZNANSKI
WALTER A. PERLA,	:	Attorneys for Defendant
Defendant.	:	875 Merrick Avenue
	:	Westbury, New York 11590

Upon the following papers numbered 1 to 27 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 12 - 27 ; Replying Affidavits and supporting papers 28 - 29 ; Other ; ~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendant's 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 granted solely to the extent indicated below, otherwise denied.

This is an action to recover damages for serious injuries allegedly sustained by plaintiff as a result of a motor vehicle accident which occurred in front of 39 Patton Street and approximately 200 feet east of Nimitz Street, Brentwood, Town of Islip, New York on December 17, 2004. At the time of the accident, plaintiff was standing on one of the two running boards of defendant's parked SUV talking with a passenger who was inside the vehicle. The accident allegedly occurred when the defendant driver suddenly accelerated throwing plaintiff off the sideboard of his vehicle and onto the pavement. Defendant now moves 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). Plaintiff opposes this motion.

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

In support of this motion, defendant submits, inter alia, the pleadings; plaintiff's bill and supplemental bill of particulars; the affirmed report of defendant's examining orthopedist, Anthony Spataro, M.D.; and plaintiff's deposition testimony. Plaintiff claims in her bill of particulars that she sustained cervical and lumbar disc bulges/herniations; a cervical and lumbar radiculopathy; a thoracic sprain/strain syndrome; a cervicolumbar intervetebral disc syndrome; a cerebral concussion with intracranial brain damage; a restriction and limitation of motion of the head, neck, shoulders, upper extremities, lower back, and lower extremities; traumatic arthritis of all injured joints; and post-traumatic anxiety/depression. Plaintiff also claims that she sustained economic loss greater than basic economic loss as defined in Insurance Law Section 5102 (a). Plaintiff claims in her supplemental bill of particulars that she was totally incapacitated from her employment for three days. Additionally, plaintiff claims that she has been partially incapacitated from her employment from December 24, 2004 to date and continuing with a total estimated partial incapacitation of 45.5 years. The Court construes these allegations to mean that plaintiff claims a serious injury in the categories of a permanent consequential limitation, a significant limitation and a non-permanent injury.

In his report dated January 17, 2004, Dr. Spataro states that he performed an independent orthopedic examination of plaintiff on that date, and his findings include reflexes that were "2/2"

bilaterally; motor power that was "5/5" in all extremities; a normal sensory system; and negative seated and supine straight leg raise tests. He also found that there was a full range of motion of the cervical and lumbar spine with no palpable spasm or tenderness. Additionally, he observed that plaintiff ambulated with a normal heel/toe gait and that she could touch her toes without bending the knees. Dr. Spataro opined that plaintiff had sustained a contusion of the right hand and sprains of the cervical and lumbar spine which had resolved.

Plaintiff testified at her deposition to the effect that she was taken to Southside Hospital emergency room after the accident where she was treated and released the same day. At the time of the accident, she worked for VIP in Hauppauge. At VIP, she regularly lifted heavy items for packaging that sometimes weighed as much as 50 pounds. As a result of her injuries, her employer placed her on light duty for about six to eight months. She subsequently left VIP for a lower paying job at another company, but she eventually left that job. Plaintiff also makes less money at her current job. Her present limitations consist of her inability to lift heavy items, such as laundry bags, or bend to perform gardening or other tasks. Plaintiff further testified that she is unable to wear high heeled shoes or dance.

By their submissions, defendant made a prima facie showing that plaintiff did not sustain a serious injury (*see*, ***Wright v Peralta***, 26 AD3d 489, 809 NYS2d 465 [2d Dept 2006]; ***Farozes v Kamran***, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]; ***Teoduro v Conway Transp. Serv.***, 19 AD3d 479, 798 NYS2d 466 [2d Dept 2005]; ***Gousgoulas v Melendez***, 10 AD3d 674, 782 NYS2d 103 [2d Dept 2004]). Defendant's examining orthopedist found that plaintiff had a full range of motion of the cervical and lumbar spine with no detectable spasm. Defendant's remaining evidence, including plaintiff's deposition testimony, also supports a finding that she did not sustain a serious injury. As defendant has met his burden as to all categories of serious injury alleged by plaintiff, the Court turns to plaintiff's proffer (*see*, ***Franchini v Palmieri***, 1 NY3d 536, 775 NYS2d 232 [2003]; ***Dongelewic v Marcus***, 6 AD3d 943, 774 NYS2d 841 [3d Dept 2004]).

In opposition to this motion, plaintiff submits, among other things, the two affirmed reports of plaintiff's treating radiologist, Allen Rothpearl, M.D.; the affirmed report and personal affirmation of plaintiff's treating physiatrist, Irage Yehudian, M.D.; the personal affidavit of plaintiff's treating chiropractor, Steven Klein, D.C.; the personal affidavit of plaintiff's treating acupuncturist, Giovanni Lopez, L.Ac.; the personal affidavit of plaintiff's treating physical therapist, Pepito Ong Santos, P.T.; the personal affidavit of James. J. Clark, Director of Human Resources at VIP Advertising, plaintiff's prior employer; the personal affidavit of Anthony Sangenito, Assistant Controller at A & Z Pharmaceutical, Inc., plaintiff's second former employer; the personal affidavit of Jennifer Plate, Human Resources Dept., Interpharm, Inc., plaintiff's third former employer; and the plaintiff's personal affidavit.

In his report dated January 20, 2005, Dr. Rothpearl states that he performed MRI studies of plaintiff's cervical spine on that date, and his findings include a reversed lordosis with marked straightening; a disc bulge at the C4-5 level; and a contour abnormality of the thecal sac due to encroachment by the annulus fibrosis of the disc. In his report dated January 31, 2005, Dr. Rothpearl states that he performed MRI studies of plaintiff's lumbar spine on that date, and his findings include reversal and straightening of the lordosis; a disc bulge at the L5-S1 level; and no evidence of central canal stenosis.

In his report dated March 9, 2007, Dr. Yehudian states that he performed an initial physiatric examination of plaintiff on December 21, 2004, and his findings include bruises, discoloration and tenderness at the base of the nose and zygoma; tenderness upon palpation of the metacarpal areas of the right hand; bruises on the left foot; bruises on the back; and a reduced range of motion of the spine by 40-50%. Dr. Yehudian opined that plaintiff had sustained an internal cervicothoracumbar derangement, a cervicolumbar intervertebral disc syndrome, a post-concussion syndrome and posttraumatic anxiety which were causally related to the motor vehicle accident. He also concluded that plaintiff's injuries, which are partial and permanent, limit her ability to utilize her cervical and lumbar spine.

In his affirmation, Dr. Yehudian avers that he saw plaintiff during follow-up visits on January 31, February 25 and March 24, 2005 as well as on March 9, 2007. After his initial evaluation, he treated plaintiff with paraspinal injections and nerve blocks to her cervical and lumbar spine, but noted that she did not fully respond. The findings of his March 9, 2007 examination include a 25 percent loss of cervical range of motion; restricted trunk flexion to 50-60 degrees/90 degrees; restricted lumbar extension to 10/15 degrees; and a positive straight leg raise at 50-60 degrees. He opined that plaintiff continues to demonstrate symptoms of residual inflammatory pathology to the cervical and cervicolumbar spine and that she has not fully recovered from her injuries. Dr. Yehudian also concluded that the cervical and lumbar spine disc bulges and straightening are consistent with the trauma which plaintiff sustained in the accident. Additionally, he concludes that additional treatment would only provide plaintiff with temporary relief as it would neither cure her injury, nor eliminate the cause of her pain. Lastly, Dr. Yahudian avers that plaintiff discontinued treatment with his office after her benefits had been terminated by the no-fault carrier, and that she could not afford additional more costly treatment as she has no health insurance.

In his affidavit, Dr. Klein avers that plaintiff was first examined/treated at his office on December 21, 2004 in connection with her injuries sustained in the accident, and the findings of that exam include an antalgic neck position; muscle spasm and tenderness to digital palpation of the cervical and lumbar spine; an inability to perform a toe walk; and a straight leg raise at 15/60 degrees, with normal being 90/90 degrees. He also noted that plaintiff had positive test results indicating, inter alia, nerve root compression/irritation, sciatic nerve irritation and intervertebral disc disorder. He opined that plaintiff sustained cervical and lumbar radiculopathy, cervical and lumbar spine sprains/strains, as well as cervical and lumbar segmental dysfunction. Dr. Klein also avers that he treated plaintiff with a range of chiropractic modalities, including spinal manipulation, from the date of her initial visit through to March 24, 2005. Plaintiff was treated on approximately 26 occasions during this period, at an initial frequency of about three times per week for the first seven weeks. Plaintiff treatment stopped in March 2005 when her no-fault benefits were terminated by the no-fault carrier as she had no private health insurance coverage. Dr. Klein opined that plaintiff's restrictions and limitations are a natural and expected consequence of her accident related injuries.

In his affidavit, Mr. Lopez states that he is a licensed acupuncturist and that plaintiff was first examined/treated at his office on December 21, 2004 in connection with her injuries sustained in the accident. Plaintiff returned for acupuncture treatment the following day, and she continued treatment through March 24, 2005. Treatment consisted of 15-20 minute intervals and the introduction of 10-15 needles in the affected areas, combined with Tui Ma manipulation in connection with plaintiff's

complaints of shoulder, neck and back stiffness. Plaintiff discontinued treatment after his office received a notice of denial of benefits from the no-fault carrier.

In his affidavit, Mr. Santos states that he is a licensed physical therapist and that plaintiff was first examined/treated at his office on December 21, 2004, and the findings of that exam include a limited range of motion of the cervical spine in all planes; limited lumbar flexion; and muscle spasm in the neck and back. Plaintiff reported difficulty lying down, bending, squatting, and lifting carrying heavy objects. Plaintiff was treated on approximately 25 occasions, at an initial frequency of three times per week until March 24, 2005. She discontinued treatment on that date after her no-fault benefits had been terminated as she did not have health insurance coverage.

In his affidavit, Mr. Clark avers that he is a director of human resources at VIP Advertising, and that the records maintained at his office show that plaintiff was employed by VIP on a full-time basis as a jogger/newspaper production eight hours per day, five days per week, and some Saturdays. She was paid approximately $9.50 per hour and her job responsibilities included packaging, wrapping, heavy lifting, and moving skids. VIP did not provide health insurance benefits to plaintiff. Plaintiff was out of work for several days. When she returned, she worked light duty and sometimes had to leave early. She also stopped working Saturdays. After about 6-8 months, her duties were increased to her pre-accident level, since no low impact jobs were available, and her pay was increased to $10 per hour. Shortly thereafter, plaintiff advised personnel that she could no longer continue working at VIP.

In his affidavit, Mr. Sangenito avers that he is the assistant controller of A & Z Pharmaceutical, Inc., and that the records maintained at his office show that plaintiff was employed by A & Z as heavy equipment operator on a full-time basis from March 27, 2006 until September 21, 2006. Plaintiff's duties included moving heavy drums and boxes, and she was paid approximately $8.50 per hour without health insurance benefits.

In her affidavit, Ms. Late avers that she currently holds a position in the Human Resources Department at Interpharm, and that the records maintained by her office show that plaintiff was employed at Interpharm from September 29, 2006 through April 6, 2007 at the rate of approximately $8.50 per hour. Plaintiff's job duties included checking the quality of manufactured tablets and making sure the machines were functioning properly. Although Interpharm offers health insurance to employees at their own cost, plaintiff was not eligible for coverage until January 1, 2007.

In her affidavit, plaintiff avers that she was standing on the running board of defendant's SUV and talking to a passenger inside when the defendant/driver suddenly accelerated. She was thrown from the side of the vehicle unto the street surface and rendered unconscious. Plaintiff awoke during her transport via ambulance to the emergency room at Southside Hospital. Prior to the accident, she worked as a jogger/newspaper production person for VIP Advertizing 40 hours per week and some Saturdays. Her duties included a lot of bending, lifting, carrying, pushing and pulling. Some of the packages which she was required to handle weighed up to 50 pounds. As a result of her injuries, plaintiff downgraded to a lower paying position and stopped working Saturdays. She eventually changed jobs several times to lower paying positions which did not require heavy lifting. Plaintiff represents that she decided to forgo employment at this time because she is unable to perform her household/familial duties and also care for

her two minor children/present companion. As a result of her injuries, she is also no longer able to garden, run, jog, play with her children, lift heavy laundry bags, and stand or sit for long periods of time. She also has recurrent headaches and vision problems. Plaintiff's two children have been assisting her with household duties such as laundry tasks, garbage removal, carrying groceries, dusting, and making their own beds, all of which she is no longer capable of handling. Plaintiff underwent a course of chiropractic treatment for her neck and back, acupuncture, and physical therapy, but had to stop all treatment when GEICO, the no-fault carrier, terminated her benefits. She had no health insurance and could not afford to purchase the same even when it subsequently became available to her. Plaintiff also could not afford to take off time from work in order to pursue treatment because she was not paid when she was absent. Furthermore, she was supporting her two minor children without the benefit of child support. Plaintiff further testified that she now has a new companion who helps to support her household.

By her submissions, plaintiff has raised a triable issue of fact that she sustained a "serious injury" in the categories of a permanent consequential limitation or a significant limitation of her spine (*see*, ***Lim v Tiburzi***, 36 AD3d 671, 829 NYS2d 145 [2d Dept 2007]; ***Iacovazzo v Ahmad***, 27 AD3d 421, 810 NYS2d 519 [2d Dept 2006]; ***Galati v Brice***, 290 AD2d 530, 736 NYS2d 626 [2d Dept 2002]; ***Rosado v Martinez***, 289 AD2d 386, 734 NYS2d 622 [2d Dept 2001]). The affirmation and report of Dr. Yehudian, specified, among other things, upon a recent clinical range of motion examination, the degrees to which plaintiff's movements were restricted in her spine and these limitations are supported by additional medical proof in the record. Dr. Yehudian also noted the permanency of said restrictions based upon test results from December 21, 2004 and from a recent examination on March 9, 2007. Dr. Yehudian concluded that plaintiff's cervical and lumbar spine disc bulges as well as her related soft tissue injuries are consistent with the trauma which plaintiff sustained in the accident, and that they have resulted in partial, permanent restrictions/limitations of movement (*see*, ***Shpakovskaya v Etienne***, 23 AD3d 368, 804 NYS2d 767 [2d Dept 2005]). Furthermore, plaintiff's experts sufficiently explained the nature of plaintiff's treatment and the gap in treatment, pointing out that plaintiff was still symptomatic at the time of her last treatments. Specifically, plaintiff's experts explained that their treatment would be expensive since plaintiff had no private health insurance (*see*, ***Black v Robinson***, 305 AD2d 438, 759 NYS2d 741 [2d Dept 2003]). Moreover, they explained that continual care would only provide partial relief and not cure plaintiff's condition (*see*, ***Pommels v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]). Plaintiff's submissions, which include the affidavits of employees/officers of several former employers, are also sufficient to raise a triable issue of fact that she sustained economic loss greater than basic economic loss as defined in Insurance Law Section 5102 (a).

The Court reaches a different conclusion, however, with respect to plaintiff's claim that she sustained a "serious injury" in the category of a non-permanent injury. Plaintiff's submissions, considered in the light most favorable to her, are insufficient to raise a triable issue of fact that she sustained a medically-determined injury or impairment rendering her unable to substantially perform all of her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident (*see*, ***Magarin v Kropf***, 24 AD3d 733, 807 NYS2d 398 [2d Dept 2005]; ***Hernandez v DIVA Cab Corp.***, 22 AD3d 722, 804 NYS2d 396 [2d Dept 2005]; ***Mercado v Garbacz***, 16 AD3d 631, 792 NYS2d 519 [2d Dept 2005]). Although plaintiff claims, among other things, that she has difficulties lifting heavy objects and performing household chores, the record lacks

objective proof of any substantial curtailment of her activities within the relevant time period after the accident (*see*, ***Nelson v Distant***, 308 AD2d 338, 764 NYS2d 258 [1st Dept 2003]; ***Keena v Trappen***, 294 AD2d 405, 742 NYS2d 344 [2d Dept 2002]).

Accordingly, defendant's 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 determined as indicated above.

Dated: JUN 14 2007

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION