SHORT FORM ORDER

INDEX NO. 20824/2003

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

SONDRA E. SACCENTE,

Plaintiff,

-against-

LUCY ANN M. SIMON,

Defendant.

LUCY ANN M. SIMON,

Third-Party Plaintiff,

-against-

TOWN OF HUNTINGTON,

Third-Party Defendant.

TOWN OF HUNTINGTON,

Second Third-Party Plaintiff,

-against-

WELSBACH ELECTRIC CORP., L.I.,

Second Third-Party Defendant.

ORIG. RETURN DATE: MARCH 29, 2007
FINAL SUBMISSION DATE: APRIL 19, 2007
MTN. SEQ. #: 007
MOTION: MG CASEDISP

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Upon the following papers numbered 1 to 6 read on this motion _____
FOR SUMMARY JUDGMENT.
Notice of Motion and supporting papers 1-3; Answering Affirmation and supporting papers 4, 5; Reply Affirmation 6; it is,

ORDERED that this motion by defendant, LUCY ANN M. SIMON, for an Order, pursuant to CPLR 3212(b) and Insurance Law § 5102(d), granting summary judgment in favor of defendant dismissing plaintiff SONDRA E. SACCENTE's complaint, on the grounds that plaintiff did not suffer a "serious injury" as that term is defined by Insurance Law § 5102(d), is hereby **GRANTED** for the reasons set forth herein.

This action is for injuries alleged to have occurred as a result of a motor vehicle accident involving vehicles driven by plaintiff, SONDRA E. SACCENTE, and defendant, SIMON, on February 19, 2002, at the intersection of Deepdale Drive and New York Avenue, Town of Huntington, New York. On or about August 20, 2003, plaintiff served a summons and complaint on defendant SIMON. Thereafter, on or about March 8, 2004, defendant SIMON served a third-party summons and complaint on third-party defendant, COUNTY OF SUFFOLK. Within the third-party complaint, defendant SIMON alleged that the traffic light at the subject intersection was malfunctioning and inoperable at the time of the accident.

By Order dated April 1, 2005 (Werner, J.), the COUNTY OF SUFFOLK was granted summary judgment dismissing the third-party complaint and all cross-claims against it. Within the aforementioned Order, the Court noted that during the discovery process, it was revealed that the TOWN, not the COUNTY OF SUFFOLK, "owned operated and controlled" the traffic signal at the subject intersection. As such, third-party plaintiff SIMON was granted leave to serve an amended third-party complaint adding the TOWN as a necessary third-party defendant. On or about November 29, 2005, the TOWN served a second third-party summons and complaint on WELSBACH, the corporation under contract with the TOWN responsible for the maintenance and repair of illuminated traffic control devices within the TOWN.

By Order dated March 23, 2007, this Court granted the summary judgment motions of second third-party defendant, WELSBACH ELECTRIC CORP., L.I., and third-party defendant, TOWN OF HUNTINGTON, on the grounds that there was no issue of material fact regarding the liability of those defendants.

Defendant SIMON now moves for summary judgment, arguing that plaintiff has not met the serious injury threshold as set forth in Insurance Law § 5102(d). In support thereof, defendant has submitted, among other things, the deposition transcript of plaintiff, and reports from two doctors who conducted independent medical examinations of plaintiff.

Plaintiff served a verified bill of particulars, sworn to on December 11, 2003, which alleged that she suffered the following injuries as a result of the accident: sprain and contusion of left hip; pain in left hip; pain in left wrist; and injuries to the cervical spine, including spinal nerve root compression and bulging discs. Each injury, except for superficial ones, was alleged to be permanent and/or long lasting, and caused diminution of use and motion of the neck and back.

Plaintiff appeared for a deposition on July 20, 2006, and was thereafter physically examined, on or about October 25, 2006, by S. FARKAS, M.D., an orthopedist, and on or about November 1, 2006, by C.M. SHARMA, M.D., a neurologist, both of whom were designated by defendant. After conducting objective tests on plaintiff, the doctors found, as indicated by their sworn reports, that plaintiff had no orthopedic impairment and no neurologic injury. Dr. Farkas found that plaintiff may perform the daily activities of living, without restriction, and Dr. Sharma found no permanency or disability as a result of the subject accident. Based upon these findings, defendant argues that plaintiff has not satisfied the "serious injury" threshold, as set forth in Insurance Law § 5102(d). Defendant contends that plaintiff's alleged soft tissue injuries do not constitute a serious injury.

New York's No-Fault Insurance Law precludes recovery for any "non-economic loss, except in the case of serious injury, or for basic economic loss" arising out of the negligent use or operation of a motor vehicle (Insurance Law § 5104[a]). As recognized by the Court of Appeals, the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (*Dufel v Green*, 84 NY2d 795 [1995]; *see also Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Licari v Elliott*, 57 NY2d 230 [1982]). The Legislature also intended that the issue of whether a plaintiff sustained a "serious injury" could be determined by the courts as a matter of law on a motion for summary judgment (*see Licari v Elliott*, 57 NY2d 230, *supra*).

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" (Insurance Law § 5102[d]).

To establish a permanent consequential limitation or a significant limitation of use, the medical evidence submitted by a plaintiff must include objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment, based on objective findings, comparing the plaintiff's present limitations to the normal function, purpose and use of the affected body, organ, member or function (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, *supra*). "Whether a limitation of use or function is 'significant' or 'consequential' ... relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (*Dufel v Green*, 84 NY2d 795, *supra*; *see Toure v Avis Rent A Car Sys.*, 98 NY2d 345, *supra*). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see Licari v Elliott*, 57 NY2d 230, *supra*). Further, subjective claims of pain and limitation of movement must be verified by objective medical findings that are based on a recent examination of the plaintiff (*see Ali v Vasquez*, 19 AD3d 520 [2005]; *Batista v Olivo*, 17 AD3d 494 [2005]; *Grossman v Wright*, 268 AD2d 79 [2000]).

A movant 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, *supra*; *Gaddy v Eyler*, 79 NY2d 955 [1992]; *Pagano v Kingsbury*, 182 AD2d 268 [1992]). Once a movant meets this burden, the plaintiff must present proof in admissible form showing that a serious injury exists or demonstrate an acceptable excuse for failing to meet the requirement of tender in admissible form (*Gaddy v Eyler*, 79 NY2d 955, *supra*; *Pagano v Kingsbury*, 182 AD2d 268, *supra*; *Grasso v Angerami*, 79 NY2d 813 [1991]; *see generally Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Gong v Joni*, 294 AD2d 648 [2002]; *Romano v St. Vincent's*

Med. Ctr., 178 AD2d 467 [1991]; *Commrs. of the State Ins. Fund v Photocircuits Corp.*, 2 Misc 3d 300 [Sup Ct, NY County 2003]).

In the case at bar, the Court finds that defendant's submissions were sufficient to establish that plaintiff did not sustain serious injury to her back, left hip or left wrist as a result of the accident (*see Hernandez v DIVA Cab Corp.*, 22 AD3d 722 [2005]; *Khan v Hamid*, 19 AD3d 460 [2005]; *Luckey v Bauch*, 17 AD3d 411 [2005]. The burden, therefore, shifted to plaintiff to raise a triable issue of fact, and she failed to present competent medical evidence substantiating her claim that her injuries caused a permanent consequential limitation of use of a body organ or member, or a significant limitation of use of a body function or system (*see McConnell v Ouedraogo*, 24 AD3d 423 [2005]; *Gousgoulas v Melendez*, 10 AD3d 674 [2004]; *Sainte-Aime v Ho*, 274 AD2d 569 [2000]). While under certain circumstances a herniated disc may constitute a serious injury within the meaning of Insurance Law § 5102(d) (*see Chaplin v Taylor*, 273 AD2d 188 [2000]; *Flanagan v Hoeg*, 212 AD2d 756 [1995]), plaintiff failed to provide any objective evidence of the extent or degree of the alleged physical limitations resulting from the disc injury and its duration (*see Jackson v New York City Tr. Auth.*, 273 AD2d 200 [2000]; *Greene v Miranda*, 272 AD2d 441 [2000]; *Guzman v Michael Mgt.*, 266 AD2d 508 [1999]). Furthermore, plaintiff did not provide any recent medical evidence in opposition to the instant application; instead, plaintiff merely provided unsworn reports and records from the physicians who examined and treated plaintiff in the months following the accident in February of 2002. Such submissions were insufficient to rebut defendant's *prima facie* showing of no serious injury (*see Elgendy v Nieradko*, 307 AD2d 251 [2003]; *Diers v Valerio*, 276 AD2d 465 [2000]; *Diaz v Wiggins*, 271 AD2d 639 [2000]; *Loiacano v Lawrence*, 214 AD2d 704 [1995]).

Accordingly, this motion by defendant for summary judgment dismissing plaintiff's complaint on the grounds that plaintiff has failed to sustain a "serious injury" as that term is defined by Insurance Law § 5102(d), is granted.

The foregoing constitutes the decision and Order of the Court.

Dated: June 18, 2007

HON. JOSEPH FARNETI
Acting Justice Supreme Court