SHORT FORM ORDER

INDEX No. 04-13341
CAL. No. 06-02618-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 3-26-07
ADJ. DATE 5-11-07
Mot. Seq. # 005 - MG; CASEDISP

PATRICIA BENNETT and ROBERT BENNETT, Plaintiffs, - against - DIANE M. WEISS, Defendant.	JOHANNESEN & JOHANNESEN, L.L.P. Attorneys for Plaintiffs 44 Business Route 25A Rocky Point, New York 11778 SOBEL & KELLY, P.C. Attorneys for Defendant 464 New York Avenue, Suite 100 Huntington, New York 11743

Upon the following papers numbered 1 to 23 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 14 - 20; Replying Affidavits and supporting papers 21 - 23; 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 Mrs. Moskowitz did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is granted.

This is an action to recover damages, individually and derivatively, for serious injuries allegedly sustained by plaintiff Patricia Bennett ("Mrs. Bennett") as a result of a motor vehicle accident that occurred on the westbound side of Route 25 approximately one mile west of Route 25A, Calverton, Town of Riverhead, New York on September 21, 2003. The accident allegedly occurred when the vehicle owned and operated by defendant Diane M. Weiss rear-ended the vehicle operated by Mr. Bennett, and in which Mrs. Bennett was riding as a passenger. Defendant now moves for an order granting her summary judgment granting 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, and defendant has filed a reply.

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; plaintiffs' bill of particulars; the affirmed report and addendum report of defendant's examining orthopedist, Arthur M. Bernhang, M.D.; the affirmed report of defendant's examining neurologist, Howard B. Reiser, M.D.; and Mrs. Bennett's deposition testimony. Plaintiffs claim, in their bill of particulars, that Mrs. Bennett sustained neck and back sprains; straightening of the cervical spine; lumbar disc herniations; spinal nerve root encroachment with stenosis; peripheral nerve root entrapment/neuropathy; and a right rotator cuff syndrome. Plaintiffs also claim that Mrs. Bennett was confined to her bed for approximately four days and to her home for approximately two weeks and intermittently thereafter. The Court construes these allegations to mean that plaintiffs claim that Mrs. Bennett sustained an injury in the serious injury categories of a permanent consequential limitation and a significant limitation.

In his affirmed report dated December 27, 2005, Dr. Bernhang states that he performed an independent orthopedic examination of Mrs. Bennett on December 16, 2005, and his findings include intact reflexes at the elbows; symmetrical reflexes at the knees; no tenderness to palpation at the AC joint; no winging of the scapula; and negative test results for cervical radiculopathy, median carpal tunnel, and ulnar nerve neuropathy. He also observed that Mrs. Bennett's cervical flexion, extension, lateral flexion and cervical rotation were 55, 35, 40/30 and 55/45 degrees, with the normal ranges being 38, 38, 43/43 and 45/45 degrees. He further also noted that there were inconsistent results with respect to testing for pelvic roll with Mrs. Bennett reporting lower back mechanical problems without evidence of sciatica or radiculopathy. Dr. Bernhang opined that there was no objective evidence of any residual of any claimed

injuries to the cervical or thoracic spine, or the right shoulder. In his addendum report dated July 11, 2006, Dr. Bernhang states that he performed an independent radiological study of Mrs. Bennett's MRI scans of the lumbar spine/pelvis dated February 26, 2004, and his findings include some narrowing of the L4-5 disc space; slight lumbar scoliosis to the right; mild dessication of L4-5 with a slight bulge; and no herniations or annular tears. Dr. Bernhang opined that these studies showed some mild degenerative changes at L4-5, but not a lumbar discogenic disorder.

In his report dated July 19, 2006, Dr. Reiser states that he performed an independent neurological examination of Mrs. Bennett on that date, and his findings include a supple neck; a nontender thoracic region; normal motor exam with no atrophy or fasciculations; a normal sensory exam; a negative straight leg raising test bilaterally; and a normal gait. While he observed a positive Tinel's sign at both wrists, he also noted that there was no swelling or discoloration of the extremities. Dr. Reiser opined that, while there were some positive findings of bilateral median nerve involvement at the wrists, this was causally unrelated to the accident. He also concluded that there were no objective causally related findings to substantiate Mrs. Bennett's complaints of ongoing low and mid back pain, and that there was no evidence of an ongoing neurological disorder.

Mrs. Bennett testified to the effect that she declined an ambulance at the scene of the accident, and was driven home by her husband. Later that day, her husband drove her to the emergency room at St. Charles Hospital, where she was treated and released. A few weeks later, she went to Choice Spine, Joint and Neurology where she continued to treat two or threes times per week for about six months for a total of about 20 visits. She eventually stopped her visits there because she was no longer covered and because treatment was no longer working. She continued treating, however, with her primary care provider. Plaintiff also testified that she worked 4 hour daily shifts at Kohl's during the 2004 Christmas season for approximately twenty hours per week. In 2005, she went by car with her family to Disney World in Florida, driving a portion of the way. While her mother helps care for her daughter, she has not had to hire any household help or incur any childcare expenses. Plaintiff further testified that she is no longer able to ride a bicycle.

By their submissions, defendants made a prima facie showing that Mrs. Bennett did not sustain a serious injury (*see*, ***Wright v Peralta***, 26 AD3d 489, 809 NYS2d 465 [2d Dept 2006]; ***Teodoru v Conway Transp. Svc.***, 19 AD3d 479, 798 NYS2d 466 [2d Dept 2005]; ***Willis v New York City Trans. Auth.***, 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]; ***Grant v Heli Trucker, Inc.***, 294 AD2d 538, 742 NYS2d 874 [2d Dept 2002]). Defendant's examining orthopedist found, upon a recent examination, that there were negative test results for cervical radiculopathy and carpal tunnel syndrome. He also found that plaintiff's cervical spine motion was essentially normal. His independent radiological review of plaintiff's lumbar spine MRI studies showed some dessication and mild bulging, but no disc herniations. Defendant's examining neurologist found that there was no evidence of an ongoing neurological disorder. He also opined that his findings of bilateral median nerve involvement at the wrists was causally unrelated to the accident. The defendants' remaining evidence, including plaintiff's deposition testimony, also supports a finding that she did not sustain a serious injury. As defendants met their burden as to all categories of serious injury alleged by the 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, plaintiffs submit, among other things, the affirmed report of Mrs. Bennett's treating radiologist, Stephen Hershowitz, M.D., and the personal affirmation of Mrs. Bennett's treating osteopath, James T. Kelly, D.O. In his report dated February 27, 2004, Dr. Hershowitz states that he performed MRI studies of Mrs. Bennett's lumbar spine on February 25, 2004, and his findings include a left posterolateral disc herniation at the L4-5 level and minimal dessication of all the intervertebral discs. He also observed that the vertebral body heights were within normal limits and that there were no paravertebral soft tissue abnormalities. Dr. Hershowitz opined that these studies primarily showed a left posterolateral disc herniation that impinges upon the left L4 nerve root within the left L4-5 neural foramen.

In his personal affirmation, Dr. Kelly avers that he first saw Mrs. Bennett on October 22, 2004, in connection with her accident related complaints of pain and insomnia. He has treated Mrs. Bennett once every six months since her initial visit, and he most recently saw her on April 9, 2007. His treatment plan has included anti-inflammatories and other medications to address her complaints. Dr. Kelly opines that Mrs. Bennett's symptoms and complaints are related to the disc herniation and other injuries which she sustained in the accident.

Plaintiffs have provided insufficient medical proof to raise an issue of fact that Mrs. Bennett sustained a serious injury under the no-fault law (*see*, ***Burke v Galli***, 242 AD2d 595, 664 NYS2d 742 [2d Dept 1997], *lv denied* 91 NY2d 806, 669 NYS2d 1 [1998]; ***Picott v Lewis***, 26 AD3d 319, 809 NYS2d 541 [2d Dept 2006]; ***Grant v Fofana***, 10 AD3d 446, 781 NYS2d 160 [2d Dept 2004]). While a disc herniation may constitute a serious injury, the MRI report of Mrs. Bennett's treating radiologist is not probative for the purposes of demonstrating a serious injury because it contains no opinion as to causation (*see*, ***Collins v Stone***, 8 AD3d 321, 778 NYS2d 79 [2d Dept 2004]), and, in any event, this report does not establish the duration of her alleged injuries (*see*, ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]; ***Nelson v Amicizia***, 21 AD3d 1015, 803 NYS2d 87 [2d Dept 2005]). In this regard, plaintiffs have failed to present any medical proof that was contemporaneous with the accident showing any initial range of motion restrictions for Mrs. Bennett's affected body parts (*see*, ***Ramirez v Parache***, 31 AD3d 415, 818 NYS2d 238 [2d Dept 2006]; ***Yeung v Rojas***, 18 AD3d 863, 796 NYS2d 661 [2d Dept 2005]), or proof by way of a recent medical examination showing any physical limitations resulting from her alleged injuries report (*see*, ***Porto v Blum***, __AD3d__, 833 NYS2d 245 [2d Dept 2007]; ***Springer v Arthurs***, 22 AD3d 829, 803 NYS2d 170 [2d Dept 2005]). Instead, the report of Dr. Kelly largely consists of unsubstantiated speculation concerning the causal relationship between the subject accident and Mrs. Bennett's condition several years after the accident (*see*, ***Damstetter v Martin***, 247 AD2d 893, 668 NYS2d 863 [4th Dept 1998]), as well as conclusory assertions tailored to meet the statutory requirements (*see*, ***Khan v Hamid***, 19 AD3d 460, 798 NYS2d 444 [2d Dept 2005]; ***Gousgoulas v Melendez***, 10 AD3d 674, 782 NYS2d 103 [2d Dept 2004]). Moreover, Mrs. Bennett's subjective complaints of pain to her health care providers do not constitute a significant injury within the meaning of the statute (*see*, ***Ali v Vasquez***, 19 AD3d 520, 797 NYS2d 528 [2d Dept 2005]).

Accordingly, this motion for summary judgment is granted and the complaint is dismissed.

Dated: JUN 25 2007

J.S.C

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION