SHORT FORM ORDER

INDEX NO. 04-25585
CALENDAR NO. 06-02021-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 1-30-07
ADJ. DATE 4-20-07
Mot. Seq. # 001 MG: CASEDISP

DIANNE L. BESSO,

Plaintiff,

– against –

VINCENT J. DEMAGGIO,

Defendant.

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Upon the following papers numbered 1 to 16 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 10; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 11 - 14; Replying Affidavits and supporting papers 15 - 16; 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 complaint is granted.

This action was commenced by plaintiff Dianne Besso to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred on the Long Island Expressway on November 13, 2002. The collision allegedly occurred when a vehicle driven by defendant Vincent DeMaggio struck the rear of plaintiff's vehicle, which had stopped in the left lane due to heavy traffic conditions. By her bill of particulars, plaintiff alleges that she sustained various injuries as a result of the accident, including bulging discs at L3-4 and L4-5; spinal cord compression at C4-5; cervical myelopathy; aggravation of spondylolisthesis and recess stenosis; "acute exacerbation of herniated discs at C3-4, C4-5, C5-6 and C6-7, with cervical

radiculopathy;" and "acute exacerbation of spinal cord compression at C5-6 and C6-7." She further alleges that she was totally disabled for two to three days after the accident, and that she remains partially disabled to date. Plaintiff, who was 53 years old and employed full time as the comptroller for a country club at the time of the accident, testified at a deposition conducted in October 2005 that she missed approximately eight days of work due to her injuries.

Defendant now moves for summary judgment dismissing the complaint on the ground that plaintiff is precluded by Insurance Law §5104 from recovering for non-economic loss, as she did not sustain a "serious injury" within the meaning of Insurance Law §5102 (d) as a result of the collision. Defendant's submissions in support of the motion consist of copies of the pleadings, a transcript of plaintiff's deposition testimony, and sworn medical reports prepared by Dr. Michael Katz and Dr. C.M. Sharma. At defendant's request. Dr. Katz, an orthopedist, and Dr. Sharma, a neurologist, examined plaintiff in November 2005 and reviewed various medical records related to plaintiff's alleged injuries.

Plaintiff opposes the motion for summary judgment, arguing that the medical proof submitted by defendant fails to demonstrate prima facie that she did not suffer a significant limitations in the cervical and lumbar regions of her spine as a consequence of the November 2002 motor vehicle accident. Alternatively, plaintiff asserts that medical evidence presented in opposition, namely an affirmed report prepared by her treating orthopedist, Dr. Paul Brisson, raises a triable issue as to whether the accident caused a significant exacerbation of preexisting conditions in the cervical and lumbar regions.

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]).

Defendants' submission in support of the motion establish prima facie that plaintiff did not sustain a serious injury as a result of the subject accident (*see*, ***Yu v C & A Seneca Constr.***, 40 AD3d 630, 833 NYS2d 407 [2d Dept 2007]; ***Mullings v Huntwork***, 26 AD3d 214, 810 NYS2d 443 [1st Dept 2006]; ***Giraldo v Mandanici***, 24 AD3d 419, 805 NYS2d 124 [2d Dept 2005]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]; ***Meeley v 4 G's Truck Renting Co.***, 16 AD3d 26, 789 NYS2d 277 [2d Dept 2005]). More specifically, plaintiff's deposition testimony reveals that she was receiving medical treatment for Sjögren's syndrome, an autoimmune disease, and for various pathologies of the spine, including multilevel disc herniations and cord compression, at the time of the accident. It shows that plaintiff's symptoms prior to the collision included pain radiating into the upper and lower extremities; paresthesia in the legs, feet, arm and hand; and a deterioration of fine motor skills. Defendant's medical evidence, namely the affirmed reports by Dr. Katz and Dr. Sharma, further shows prima facie that plaintiff does not suffer any significant restriction in spinal movement or any neurological abnormalities as a result of the accident. The Court notes that Dr. Sharma's finding that plaintiff voluntarily limited her movements during active range of motion testing does not, as plaintiff argues, create a triable issue as to whether plaintiff suffers from a significant limitation of use of spinal function. The burden, therefore, shifted to plaintiff to raise a triable issue of fact (*see*, ***Gaddy v Eyler***, *supra*).

A plaintiff claiming injury within the "limitation of use" categories must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitations of movement and their duration (*see*, ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]; ***Meyers v Bobower Yeshiva Bnei Zion***, 20 AD3d 456, 797 NYS2d 773 [2d Dept 2005]). He or she must present objective medical findings of limitations in movement that are based on a recent examination (*see*, ***Espinosa v Melendez***, 40 AD3d 912, ___ NYS2d ___ [2d Dept 2007]; ***Laruffa v Yui Ming Lau***, *supra*; ***Murray v Hartford***, 23 AD3d 629, 804 NYS2d 416 [2d Dept 2005], *lv denied* 6 NY3d 713, 816 NYS2d 748 [2006]; ***Batista v Olivo***, 17 AD3d 494, 795 NYS2d 54 [2d Dept 2005]; ***Kauderer v Penta***, 261 AD2d 365, 689 NYS2d 190 [2d Dept 1999]),

as well as medical proof contemporaneous with the accident showing the initial restrictions in movement (*see*, ***Nannarone v Ott***, __ AD3d __, 2007 WL 1631406 [2d Dept, June 5, 2007]; ***Bell v Rameau***, 29 AD3d 839, 814 NYS2d 534 [2d Dept 2006]; ***Suk Ching Yeung v Rojas***, 18 AD3d 863, 796 NYS2d 661 [2d Dept 2005]; ***Ifrach v Neiman***, 306 AD2d 380, 760 NYS2d 866 [2d Dept 2003]). In addition, a plaintiff claiming serious injury who ceases treatment after the accident must provide a reasonable explanation for having done so (***Pommells v Perez***, 4 NY3d 566, 574, 797 NYS2d 380 [2005]; *see*, ***Joseph v Layne***, 24 AD3d 516, 808 NYS2d 253 [2d Dept 2005]; ***Ali v Vasquez***, 19 AD3d 520, 797 NYS2d 528 [2d Dept 2005]; ***Batista v Olivo***, *supra*).

Moreover, when a defendant presents evidence that a plaintiff's alleged pain and injuries are related to a preexisting condition, the plaintiff must come forward with medical evidence addressing the defense of lack of causation (***Pommells v Perez***, 4 NY3d 566, 580, 797 NYS2d 380 [2005]; *see*, ***Franchini v Palmieri***, 1 NY3d 536, 775 NYS2d 232 [2003]; ***Phillips v Zilinsky***, 39 AD3d 728, 834 NYS2d 299 [2d Dept 2007]; ***Giraldo v Mandanici***, *supra*). If a plaintiff had a preexisting medical condition, he or she must demonstrate that the subject accident aggravated the condition to such an extent that it produced a serious injury within the meaning of Insurance Law §5102 (d) (*see*, ***Knoll v Seafood Express***, 5 NY3d 817, 803 NYS2d 25, *affg* 17 AD3d 233, 793 NYS2d 391 [1st Dept 2005]; ***McNeil v Dixon***, 9 AD3d 481, 780 NYS2d 635 [2d Dept 2004]; ***Suarez v Abe***, 4 AD3d 288, 772 NYS2d 317 [1st Dept 2004]; *see also*, ***Flores v Leslie***, 27 AD3d 220, 810 NYS2d 464 [1st Dept 2006]; ***Matthews v Cupie Transp. Corp.***, 302 AD2d 566, 758 NYS2d 66 [2d Dept 2003]).

Dr. Brisson's report sets forth the findings of numerous physical examination of plaintiff conducted during the period from February 25, 2002 through March 5, 2007. It states that plaintiff initially presented with complaints of right arm pain and deteriorating writing and grasping ability. It states that at office visits in December 2002 and March 2003, plaintiff complained of increased cervical pain, paresthesia, and difficulty grasping, and that physical examinations conducted during these visits revealed weakness in plaintiff's left upper extremity. It states that an x-ray taken in December 2002 revealed spondylosis, a degenerative condition, at levels C5-6 and C6-7 of the cervical spine, and that an MRI scan of plaintiff's cervical area performed in February 2003 revealed multilevel disc herniations and spinal cord compression.

Dr. Brisson's report further indicates that plaintiff presented at his office on July 14, 2003 with complaints of lumbar pain radiating into her right leg and knee, and paresthesia in both feet. It states that an examination of plaintiff's lumbar spine conducted during such office visit did not reveal any abnormalities. It also states that an MRI scan of plaintiff's lumbar spine, which was ordered by a different physician and performed on July 7, 2003, showed, among other things, multilevel degenerative disease and facet disease; significant central stenosis from a disc bulge at level L4-5l; facet osteoarthritis; and a disc bulge at level L3-4 with a superimposed foraminal disc herniation that mildly compresses the left L3 nerve root. Dr. Brisson's report states that he next examined plaintiff in September 2003 "for a follow-up to her low-grade cervical myelopathy with cervical spondylosis and stenosis." It states that although plaintiff complained

of low back pain with right sciatica "that existed since the accident in November 2002," his examination focused only on plaintiff's upper extremities and produced no evidence of radiculopathy or cervical myelopathy.

According to the report, plaintiff presented at Dr. Brisson's office again on July 14, 2004 with complaints of restricted cervical movement, numbness in her extremities, a burning sensation in right lower extremity, and weakness in her big toe. The report states that an examination showed that plaintiff's "neurological status was maintained and stable in her upper extremity," but that she had weakness in the extensor hallucis longus (EHL) tendon of the right leg with numbness over that area. It states that plaintiff demonstrated evidence of central and recess stenosis at level L4-5 with irritative radiculopathy at level L4-5. The report states that plaintiff was examined by Dr. Brisson in January 2005 for complaints of neck pain and stiffness, and that she was seen in April, May and July 2005 for symptoms that included back pain radiating down the left leg, and difficulty sitting and walking. It states that an MRI scan of plaintiff's lumbar spine performed in March 2005 showed narrowing of the L5-S1 disc space, spondylolisthesis at level L4-5, and recess entrapment at level L4-5. The Court notes that neither of defendants' medical experts list the July 2003 or the March 2005 MRI reports concerning plaintiff's lumbar spine among the medical records reviewed in connection with their examination of plaintiff.

Finally, Dr. Brisson's report states that he performed an examination of plaintiff on March 5, 2007. It states that plaintiff complained of difficulty sleeping and lying on her back, "more frequent episodes of lower back pain and pain into the right lumbosacral area," and big toe numbness in both feet. It states that plaintiff demonstrated 60 degrees of flexion, 15 degrees of extension, and 15 degrees of right and left lateral flexion during range of motion testing. It states that plaintiff exhibited full muscle power in her right extremity; that the EHL tendon in her left extremity was weak; that there was pressure numbness over the right and left L5 dermatomes; and that there were no reflexes in her right ankle. It states that x-rays of the lumbar spine taken that day show spondylolisthesis at L4-5 with narrowing of the disc space. Dr. Brisson concludes that plaintiff suffers from multiple herniations in her cervical spine "with cervical radiculopathy, with evidence of bilateral C5-6 radiculopathy," and from spondylolisthesis at level L4-5 and recess stenosis, and that such injuries are causally related to the accident and have rendered plaintiff permanently disabled.

Dr. Brisson's affirmed report is insufficient to raise a triable issue of fact. Although Dr. Brisson's report discusses that fact that plaintiff was examined in January and May 2002 for right arm pain and deteriorating fine motor skills, and that she had been diagnosed at that time as suffering from multilevel cervical disc herniations and cervical stenosis, it fails to address the testimonial evidence that, in addition to treatment for symptoms related to Sjögren's disease, plaintiff was receiving medical care from other physicians prior to the accident for spinal pathologies that were causing symptoms such as cervical and lumbar pain, shooting pain in the legs, and numbness and tingling in the feet and toes. Conspicuously absent from Dr. Brisson's

report is an explanation of how such preexisting spinal conditions may have affected his conclusion that plaintiff suffers from cervical herniations causing radiculopathy and spondylolisthesis at level L4-5 due to injuries sustained in the accident (*see*, ***Franchini v Palmieri***, *supra*; ***Kupka v Emmerich***, 2 AD3d 595, 769 NYS2d 583 [2d Dept 2003]; ***Pajda v Pedone***, 303 AD2d 729, 757 NYS2d 452 [2d Dept 2003]; ***Narducci v McRae***, 298 AD3d 443, 748 NYS2d 764 [2d Dept 2002]; ***Kallicharan v Sooknanan***, 282 AD2d 573, 723 NYS2d 376 [2d Dept 2001]). Rather, Dr. Brisson simply asserts in conclusory terms that plaintiff had "no objective clinical findings" of cervical pathology and no symptoms of lower back pain radiating into the left lower extremity until after the subject accident.

Further, Dr. Brisson's report includes the alleged medical findings of other treating physicians, like Dr. Richard Pearl, and of MRI scans of plaintiff's cervical and lumbar regions performed in 2002, 2003 and 2005. Such references, of course, constitute impermissible hearsay (*see*, ***Randio v Thomas***, 270 AD3d 767, 704 NYS2d 379 [3d Dept 2000]). Moreover, it is clear that Dr. Brisson improperly relied on unsworn reports of other physicians in reaching his conclusions regarding plaintiff's spinal conditions (*see*, ***Phillips v Zilinsky***, *supra*; ***Porto v Blum***, 39 AD3d 614, 833 NYS2d 245 [2d Dept 2007]; ***Earl v Chapple***, 37 AD3d 520, 830 NYS2d 275 [2d Dept 2007]; ***Felix v New York City Tr. Auth.***, 32 AD3d 527, 819 NYS2d 835 [2d Dept 2006]; ***Friedman v U-Haul Truck Rental***, 216 AD2d 266, 627 NYS2d 765 [2d Dept 1995]).

In addition, while Dr. Brisson's report provides the degrees of movement measured in plaintiff's lumbar region at the re-examination conducted in March 2007, it does not include any findings of limitations in plaintiff's lumbar region contemporaneous with the accident (*see*, ***Bestman v Seymour***, __ AD3d __, 2007 WL 1776070 [2d Dept, June 19, 2007]; ***Berktas v McMillan***, 40 AD3d 563, 835 NYS2d 388 [2d Dept 2007]; ***Ramirez v Parache***, 31 AD3d 415, 818 NYS2d 238 [2d Dept 2006]; ***Li v Woo Sung Yun***, 27 AD3d 624, 812 NYS2d 604 [2d Dept 2006]). It also fails to indicate that plaintiff suffers any restrictions in her cervical spine (*see*, ***Porto v Blum***, *supra*). Thus, there is no medical evidence substantiating the claim that the accident substantially aggravated the preexisting pathologies in plaintiff's cervical region (*see*, ***McNeil v Dixon***, *supra*; ***Pinkowski v All-States Sawing & Trenching***, 1 AD3d 874, 767 NYS2d 502 [3d Dept 2003]). Further, neither the report nor plaintiff's affidavit provide an explanation for the nearly two-year gap between the apparent cessation of medical treatment in May 2005 and the re-examination conducted in March 2007 (*see*, ***Phillips v Zilinsky***, *supra*; ***Hasner v Budnik***, 35 AD3d 366, 826 NYS2d 387 [2d Dept 2006]; ***Bycinthe v Kombos***, 29 AD3d 845, 815 NYS2d 693 [2d Dept 2006]). Dr. Brisson's conclusions regarding causation, duration and significance of plaintiff's injuries, therefore, are rejected as speculative and tailored to meet the statutory requirements (*see*, ***Zinger v Zylberberg***, 35 AD3d 851, 828 NYS2d 128 [2d Dept 2006]; ***Hasner v Budnik***, *supra*; ***Bennett v Genas***, 27 AD3d 601, 813 NYS2d 446 [2d Dept 2006]; ***Vaughan v Baez***, *supra*; ***Medina v Zalmen Reis & Assocs.***, 239 AD2d 394, 658 NYS2d 36 [2d Dept 1997]).

Finally, absent objective medical proof as to the cause, duration and significance of plaintiff's alleged spinal injuries, plaintiff's self-serving affidavit, which contains allegations of continued neck and back pain, paresthesia, and loss of fine motor skills, is insufficient to defeat summary judgment (*see*, ***Tobias v Chupenko***, __ AD3d __, 2007 WL 1703676 [2d Dept, June 12, 2007]; ***Kauderer v Penta***, 261 AD2d 365, 689 NYS2d 190 [2d Dept 1999]; ***Rum v Pam Transp.***, 250 AD2d 751, 673 NYS2d 178 [2d Dept 1998]). Accordingly, summary judgment dismissing the complaint based on plaintiff's failure to meet the serious injury threshold is granted.

Dated: JUL 17 2007

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION