SHORT FORM ORDER

INDEX No. 05-16670
CAL. No. 06-02760-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 4-9-07
ADJ. DATE 6-21-07
Mot. Seq. # 001 - MD

CHRISTINA M. CLAUDIO and LEONARDO CLAUDIO, Plaintiffs,	SIBEN & SIBEN, LLP Attorneys for Plaintiffs 90 East Main Street Bay Shore, New York 11706
- against -	JAMES P. NUNEMAKER, JR. & ASSOCS. Attorneys for Defendants P.O. Box 9040 Jericho, New York 11753-9040
DENISE A. CAMPASANO and VINCENT CAMPASANO, JR., Defendants.	

Upon the following papers numbered 1 to 19 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 14-19; Replying Affidavits and supporting papers 20-21; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by defendants Denise A. Campasano and Vincent Campasano, Jr. pursuant to CPLR 3212 and Insurance Law §5102(d) for an order granting summary judgment dismissing the complaint on the issue that plaintiff's injuries do not meet the serious injury threshold, opposed by plaintiffs Christina M. Claudio and Leonardo Claudio, is denied.

This is an action sounding in negligence arising out of a two-vehicle accident which occurred on January 26, 2005 Route 231 at or near the intersection with Winnecomac Avenue, Town of Babylon, County of Suffolk, State of New York, when plaintiffs' vehicle was struck in the rear by defendant's vehicle. The complaint of this action sets forth a first cause of action sounding in negligence and a second cause of action premised upon plaintiff's spouse's derivative claim.

Defendants claim entitlement to an order granting summary judgment dismissing the complaint, asserting plaintiff did not sustain serious injury sufficient to meet the threshold pursuant to Insurance Law of the State of New York §5102(d).

Plaintiff, Christina Claudio, has set forth in her bill of particulars that she sustained injury to her cervical and lumbar spines consisting of the following injuries, *inter alia*: herniated disc at L5-S1; disc bulge at L4-L5; lumbar myofascial pain syndrome; lumbar spine sprain; cervical spine subluxation; cervical spine sprain; cervical spine derangement; aggravation and/or exacerbation of degenerative disc disease of the cervical spine with disc bulges from C3 to C7; thoracic spine sprain; thoracic spine derangement; and thoracic subluxation.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented ***(Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment ***(Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers ***(Winegrad v N.Y.U. Medical Center***, supra). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form ***(Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1989]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall be granted only when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]).

Pursuant to Insurance Law §5102(d), " '[s]erious injury' means a personal injury which results in 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."

The term "significant" as it appears in the statute has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570 [1982]).

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 "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*** (supra).

It is for the court to determine in the first instance whether a prima facie showing of "serious injury" has been made out (*see*, ***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]).

In support of motion (001) defendants have submitted, *inter alia*, a copy of the summons and complaint; defendant's verified answer; a copy of the bill of particulars; uncertified copy of Good Samaritan Hospital emergency department record; copy of the examination before trial of Christina Claudio; uncertified copy of BAB Radiology report; copies of letters/reports of Dr. Jay Nathan, M.D., Richard Pearl, M.D. and Stephen Lastig, M.D.; and an uncertified letter from Vytra Health Plans.

The BAB Radiology report dated March 14, 2005 sets forth that the MRI of Christina Claudio reveals small disc bulges associated with small osteophytes from C3 to C7 compatible with degenerative changes, with no evidence of focal disc herniation. There was also straightening of the cervical spine noted, for which Dr. Moriarty suggested clinical correlation.

Dr. Jay Nathan has set forth in his letter/report dated September 18, 2006 to counsel for defendant that plaintiff is a twenty nine year old female involved as a driver in a motor vehicle accident on January 26, 2005 who states she sustained injuries to her neck, back, and both shoulders. She was initially treated at Good Samaritan Hospital emergency room and released with medication. She subsequently treated with medication, physical therapy, chiropractic care, heat and acupuncture, and trigger point injections. Dr. Nathan does not set forth the duration of such treatment. Plaintiff reported to him that she occasionally uses a back brace. At Dr. Nathan's independent orthopedic medical examination of plaintiff, he states plaintiff reported pain in her neck back and both shoulders and has difficulty walking, bending, sleeping and lifting.

Dr. Nathan set forth quantified ranges of motions upon examination of plaintiff's cervical, lumbar and thoracolumbar spine. It was his clinical impression there were no objective findings, that plaintiff sustained a cervical sprain and lumbar sprain, has no disability and is able to work and perform activities of daily living without restrictions. He did not comment on causation of the injuries or the MRI results.

Dr. Richard Pearl performed an independent neurological examination of plaintiff on August 21, 2006 who presented to him claiming pain in her neck radiating to the shoulders, mid-back and lower back as a result of a rear-end collision on January 26, 2005. At the time of this examination, she was still receiving chiropractic care from Dr. Salzer. Dr. Pearl indicates he reviewed various medical records of Good Samaritan Hospital, Dr. Sica, Dr. Priolo, Dr. Coladner, and the MRI reports of her cervical and lumbosacral spine.

Dr. Pearl examined plaintiff and set forth his quantified findings in his report, indicating there were no objective findings to indicate neurological injury, need for neurological healthcare, testing or neurological disability. It was his impression that Ms. Claudio sustained cervical, dorsal and lumbosacral sprains. He suggested board certified neuroradiological review as he states claimant had a pre-existing history of a degenerative condition of the spine as documented on image study.

Dr. Stephen Lasting, by way of a report dated July 31, 2006, reviewed plaintiff's MRI studies of the lumbar spine dated March 11, 2005 and indicated there is evidence of degenerative disc disease with disc space narrowing and desiccation at L5-S1 and disc desiccation at the L4-L5 level. He noted minimal smooth annular bulging at the L4-L5 level. He also noted a shallow broad-based midline disc protrusion at L5-S1 which displaces epidural fat. It was Dr. Lasting's opinion that the disc pathology at both the L4-L5 and L5-S1 levels is most likely degenerative and unrelated to the accident of January 26, 2005.

The letter from the Human Resources Department at Vytra indicates Christina Claudio was out of work from January 26, 2005 through January 28, 2005 and February 2, 2005 to April 21, 2005.

Plaintiff testified at her examination before trial on July 20, 2006, that she was employed by Vytra as a products specialist/clerical assistant where she works on the phone and on the computer. Due to the accident, she missed approximately three months from work, having been advised by Dr. Colaner to stay home during that period of time. She produced a letter from Dr. Colaner with her bill of particulars to that effect. When she returned to work on April 17, 2005, she did not have any job restrictions.

Plaintiff testified she was stopped when defendant's vehicle struck her vehicle in the rear, causing her body to go forward hitting the steering wheel, then moving backwards. She felt pain in all of her back and was taken by ambulance to Good Samaritan Hospital emergency room where x-rays were taken of her neck, back and shoulders. She was given an injection of some sort of medication, and a prescription for pain pills and was discharged. She followed up the next day for medical care and treatment with her primary care physician, Dr. Savino, who advised her to have an MRI taken and referred her for physical therapy. She attended physical therapy three times a week for about two months at South Shore Medical with Dr. Colaner, beginning the first week of February. She stated the physical therapy did not really help except maybe slightly. Thereafter she was prescribed acupuncture therapy which she received two times a week for six weeks, but stated it did not help much. Thereafter, she commenced chiropractic treatment two to three times a week for over six weeks, but did not feel he was "doing all that good for me." Plaintiff then started seeing the chiropractor, Dr. Selzer, who was recommended by her primary care physician. She initially went two to three times a week and was still receiving treatment at the time of her deposition on July 20, 2006.

Plaintiff testified as a result of the injuries sustained in this accident, she has had to stop doing everyday activities such as cleaning, bending, and exercising at the gym at work three or four times a week for about an hour where she used the treadmill, bike, stair master, leg presser, and rowboat. She could no longer do laundry and lift the basket and the injuries also affected "romantic things" with her husband. She stated she still has pain everyday, on and off, in her neck, shoulders and all of the back.

Based upon the foregoing, it is determined that defendants have not demonstrated entitlement to summary judgment on the issue of serious injury. Defendants' examining physicians did not examine

plaintiff during the statutory period of 180 days following the accident, thus rendering defendant physicians' affidavits insufficient to demonstrate entitlement to summary judgment on the issue of whether plaintiff was unable to substantially perform all of the material acts which constituted her usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3rd Dept 2001]). Plaintiff was out of work for almost three months and testified she still cannot perform her usual activities of daily life. She was still undergoing chiropractic care with electrical stimulation at the time of her deposition. Defendants have thus raised a factual issue in their moving papers as to whether plaintiff was able to substantially perform all of the material acts which constituted her usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident.

Defendants have also submitted evidence via the report of Dr. Lastig setting forth that plaintiff's lumbar MRI showed annular bulging at the L4-5 level and a shallow broad-based midline disc protrusion at L5-S-1, but does not indicate whether this is a bulge or a herniation. Additionally, Dr. Lastig's report indicates the described disc pathology at both the L4-L5 and L5-S1 levels is most likely degenerative in origin and therefore unrelated to the accident. This, however, is conclusory and unsupported by an articulated basis for that opinion. In that a disc bulge may constitute a serious injury within the meaning of Insurance Law §5102 (***Hussein, et al. v Harry Littman, et al.,*** 287 AD2d 543, 731 NYS 2d 477 [2nd Dept 2001]), and it has not been set forth by defendant's expert whether the protrusion at L5-S1 is a bulge or herniation, this Court concludes defendants have not demonstrated prima facie entitlement to summary judgment on the issue of whether plaintiff has sustained a serious injury within the meaning of Insurance Law §5102(c) as there are factual issues outstanding which have been raised in defendants' moving papers.

To prevail on their motion for summary judgment dismissing the complaint, the defendant was required to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d) (*see,* ***Toure v Avis Renta A Car Sys.,*** 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197; ***Gaddy v Eyler,*** 79 NY2d 955, 582 NYS2d 99-0, 591 NE 1176). Here, defendant failed to satisfy his burden of establishing, prima facie, that plaintiffs did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) (*see*, ***Agathe v Tun Chen Wang***, ___NYS2d ___, 2006 WL 2965205, 2006 NY Slip Op 07434 [NYAD 2 Dept Oct 17, 2006]; *see also*, ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]).

Since defendants failed to establish their entitlement to judgment as a matter of law as set forth above, the burden has not shifted to plaintiff to establish that there are issues of fact to preclude an order granting summary judgment (CPLR 3212[b]; ***Zuckerman v City of New York***, supra), and it is unnecessary to reach the question of whether or not plaintiff has raised a triable issue of fact (***Krayn v Torella,*** 833 NYS2d 406, NY Slip Op 03885 [2nd Dept 2007]). However, in reviewing plaintiffs' opposing papers, it is determined plaintiff has raised triable issues of fact to preclude summary judgment.

In opposing this motion, plaintiff has submitted, *inter alia*, the affirmations of Dr. Andrea Coladner, D.O., Dr. Barbara Moriarty; and copies of various medical records including certified copies of the records maintained by South Shore Medical Care and All Island Chiropractic.

Dr. Moriarty has affirmed her report of March 14, 2005 relative to the MRI of the lumbar spine of

Christina Claudio, which results were previously set forth above diagnosing lumbar disc desiccation with mild disc space narrowing and a small central disc herniation at L5-S1.

Dr. Colader's report of April 11, 2007 indicates plaintiff was reevaluated on that date and that she reviewed the MRI of the lumbar spine which revealed an HNP (herniated nucleus pulposis) at L5-S1. Dr. Coladner examined plaintiff and quantified the limitations in range of motion found upon examination of plaintiff's lumbar spine with regard to flexion and cervical spine with regard to right rotation. Dr. Coladner indicates plaintiff's condition is guarded, her cervical and lumbar conditions are permanent, and there is a causal relationship between her cervical and lumbar conditions and the motor vehicle accident of January 26, 2005.

Based upon the foregoing, plaintiff has demonstrated quantified limitations in movement of her cervical and lumbar spine, ongoing treatment and a disc herniation at L5-S1. Disc herniation and limited range of motion based on objective findings may constitute evidence of serious injury (***Jankowsky v Smith,*** 294 AD2d 540; 742 NYS2d 876 [2d Dept 2000]). Plaintiff has given testimony as to the activities in her daily living which are affected by these claimed injuries which Dr. Coladner states are permanent. Based upon the factual issues raised in the report of Dr. Coladner , the MRI reports affirmed by Dr. Moriarty, and plaintiff's deposition testimony, it is determined that plaintiff has met her burden by clearly demonstrating that there are factual issues concerning whether or not plaintiff has sustained a serious injury within the meaning of Insurance Law §5102(d), and whether these injuries are permanent in nature, thus precluding summary judgment.

Accordingly, defendants' motion (001) for an order granting summary judgment on the issue of serious injury is denied.

Dated: JUL 2 4 2007

J.S.C.

____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**