SHORT FORM ORDER

INDEX NO. 05-10797
CALENDAR NO. 07-00533-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 4-10-07
ADJ. DATE 6-11-07
Mot. Seq. # 001 MG; CASEDISP

----------X

ALICE JAMES,

Plaintiff,

– against –

RENEL WHEELER,

Defendant.

----------X

DONALD LEO & ASSOCS.
Attorneys for Plaintiff
625 Middle Country Road, Suite 100
Coram, NY 11727

ZAKLUKIEWICZ, PUZO & MORRISSEY
Attorneys for Defendant
2701 Sunrise Highway, Suite 2
Islip Terrace, NY 11752

Upon the following papers numbered 1 to 24 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 - 22; Replying Affidavits and supporting papers 23 - 24; 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 is granted.

This action was commenced by plaintiff Alice James to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred at the intersection of Main Street and Bay Avenue in the Town of Islip on May 11, 2004. The collision allegedly occurred when a vehicle driven by defendant Renel Wheeler struck the front of plaintiff's vehicle as it was proceeding through the intersection. By her bill of particulars, plaintiff alleges that she suffered numerous injuries as a result of the accident, including herniated discs at levels C4-5 and C5-6; bulging discs at levels C3-4, C6-7, L2-3, L3-4, L4-5 and L5-S1; cervical and lumbar radiculopathy; cervical and lumbar myofascial pain syndrome; and post traumatic stress

syndrome.

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 accident. Defendant's submissions in support of the motion include copies of the pleadings, a transcript of plaintiff's deposition testimony, and a sworn medical report prepared by Dr. Arthur Bernhang. At defendant's request, Dr. Bernhang, an orthopaedic surgeon, examined plaintiff in February 2007 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 significant injuries due to the collision. Alternatively, plaintiff asserts that the medical evidence presented in opposition, namely affirmed reports prepared by her treating physiatrist, Dr. Harold Avella, and radiologist, Dr. Robert Diamond, raises a triable issue of fact as to whether she suffered spinal injuries causing significant limitations in spinal function.

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]).

Defendant's 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, the deposition testimony reveals that plaintiff, who was employed full time as a physical therapist at the time of the accident, missed a four or five days of work due to her injuries. According to her pretrial testimony, plaintiff began receiving physical therapy treatments for her injuries two weeks after the accident and continued to receive such treatments three times a week for approximately four months. Plaintiff testified that while her neck pain resolved approximately two months after the accident, she continues to experience intermittent pain in her lower back when she performs certain activities, such as gardening or washing her hair, and when she stands for prolonged periods of time. In addition, plaintiff testified that she stopped physical therapy in September or October 2004, because she moved out of state with her family, and that she has not received any medical care for her injuries since that time.

Further, Dr. Bernhang's report states that plaintiff presented with complaints of chronic pain in her lower back. It states, in relevant part, that plaintiff exhibited normal range of motion in her cervical and lumbosacral regions, with no evidence of fibromyalgia, trigger points or spasm on palpation of spine. The report also states that plaintiff walked with a normal gait, that the straight leg raise test was negative, and that objective tests for lumbrosacral and sacroiliac joint disorder were negative. Dr. Bernhang concludes that the examination revealed no objective evidence of any unresolved orthopaedic injuries to plaintiff's cervical or lumbar regions, and that plaintiff is capable of performing her occupation and the usual activities of daily living. 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***, 41 AD3d 441, 837 NYS2d 311 [2d Dept 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*).

Here, plaintiff, who continues to work full time as a physical therapist, failed to provide a reasonable explanation for the cessation of medical treatment for her alleged injuries just months after the subject accident (*see*, ***Pommells v Perez***, *supra*; ***Bestman v Seymour***, 41 AD3d 629, 838 NYS2d 645 [2d Dept 2007]; ***Berktas v McMillian***, 40 AD3d 563, 835 NYS2d 388 [2d Dept 2007]; ***D'Alba v Yong-Ae Choi***, 33 AD3d 650, 823 NYS2d 423 [2d Dept 2006]). The Court notes that while Dr. Avella's report states that he performed follow-up evaluations on three occasions in 2005, it also does not offer any reason for the termination of treatment (*see*, ***D'Alba v Yong-Ae Choi***, *supra*). In any event, Dr. Avella's report is insufficient to raise a triable issue, as it merely states that plaintiff "is suffering from multiple cervical herniated discs, cervical sprain with bulging discs, lumbar sprain with bulging discs, grade I retrolisthesis and sever [sic] range of motion deficits in her lumbar and cervical spine region," and that such injuries are permanent and were caused by the subject accident. It does not indicate that range of motion or other objective tests were performed during any of the examinations of plaintiff, nor does it provide an assessment of the functional ability of plaintiff's spine (*see*, ***Bennett v Genas***, 27 AD3d 601, 813 NYS2d 446 [2d Dept 2006]; ***Sainte-Aime v Ho***, 274 AD2d 569, 712 NYS2d 133 [2d Dept 2000]; *cf.*, ***Mazo v Wolofsky***, 9 AD3d 452, 779 NYS2d 921 [2d Dept 2004]). Further, it appears that Dr. Avella improperly relied on unsworn reports by other physicians in reaching his conclusion regarding plaintiff's spinal conditions (*see*, ***Cossentino v Kelly***, 41 AD3d 632, 839 NYS2d 777 [2d Dept 2007]; ***Phillips v Zilinsky***, 39 AD2d 728, 834 NYS2d 299 [2d Dept 2007]; ***Earl v Chapple***, 37 AD3d 520, 830 NYS2d 275 [2d Dept 2007]; ***Elder v Stokes***, 35 AD3d 799, 828 NYS2d 138 [2d Dept 2006]; ***Felix v New York Tr. Auth.***, 32 AD3d 527, 819 NYS2d 835 [2d Dept 2006]), and has not conducted an examination of plaintiff for more than two years (*see*, ***Ali v Mirshah***, 41 AD3d 748, ___ NYS2d ___ [2d Dept 2007]; ***Ranzie v Abdul-Massih***, 28 AD3d 447, 813 NYS2d 473 [2d Dept 2006]; ***Murray v Hartford***, *supra*; ***Kauderer v Penta***, *supra*).

Lastly, the affirmed report by Dr. Diamond, which sets forth the findings of magnetic resonance imaging scans of plaintiff's cervical and lumbar regions performed in July 2004, is insufficient to defeat summary judgment. It is well established that the existence of a herniated or bulging disc, in and of itself, is not evidence of a serious injury within the scope of Insurance

Law § 5102 (d) (*see*, ***Cossentino v Kelly***, *supra*; ***Young Soo Lee v Troia*** 41 AD3d 469, 837 NYS2d 299 [2d Dept 2007]; ***Umanzor v Pineda***, 39 AD3d 539, 834 NYS2d 218 [2d Dept 2007]; ***Yakubov v CG Trans Corp.***, 30 AD3d 509, 817 NYS2d 353 [2d Dept 2006]; ***Kearse v New York City Tr. Auth.***, *supra*). "[T]he mere existence of a bulging or herniated disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration" (***Kearse v New York City Tr. Auth.***, *supra*, at 50, 789 NYS2d 281). Dr. Diamond's report also does not establish a causal link between plaintiff's alleged spinal conditions and the subject accident (*see*, ***Nociforo v Penna***, __ AD3d __, 2007 WL 2127347 [2d Dept, July 24, 2007]; ***Itskovich v Lichenstadter***, 2 AD3d 406, 767 NYS2d 859 [2d Dept 2003]). Moreover, there is no indication in the report that Dr. Diamond reviewed the actual MRI films from the 2004 scans of plaintiff's spine (*see*, ***Umanzor v Pineda***, *supra*; ***Friedman v U-Haul Truck Rental***, 216 AD2d 266, 627 NYS2d 765 [2d Dept 1995]).

Accordingly, summary judgment dismissing the complaint based on plaintiff's failure to meet the serious injury threshold is granted.

Dated: SEP 04 2007

J.S.C.

__X__ **FINAL DISPOSITION** ____ **NON-FINAL DISPOSITION**