SHORT FORM ORDER

INDEX No. 06-4249
CAL. No. 07-00969-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 7-18-07
ADJ. DATE 8-15-07
Mot. Seq. # 001 - MG; CASEDISP

RACHAEL CESTARO,
Plaintiff,

- against -

JANIS DOYLE-FARONE and THOMAS FARONE,
Defendants.

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Upon the following papers numbered 1 to 21 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 - 18 ; Replying Affidavits and supporting papers 19 - 21 ; Other___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants for summary judgment dismissing the complaint on the basis that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d), is granted.

This is an action to recover damages for serious injuries allegedly sustained by plaintiff as a result of a motor vehicle accident that occurred on Route 27A at or near its intersection with Higbie Lane, West Islip, New York on November 29, 2003. The accident allegedly happened when the vehicle owned by Mr. Farone and operated by Mrs. Farone rear-ended plaintiff's vehicle that had been stopped at a red light. Defendants previously stipulated that they bear full liability for the accident, but now move for summary judgment dismissing plaintiff's complaint on the grounds that plaintiff did not sustain a serious injury under the no-fault law.

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, defendants submit, inter alia, the pleadings; plaintiff's bill of particulars; plaintiff's bill of particulars in a previous action pertaining to a prior motor vehicle accident; plaintiff's University Hospital at Stony Brook emergency department, CT scan and x-ray records pertaining to a subsequent car accident; the affirmed report of defendants' examining orthopedist, Jay Nathan, M.D.; the affirmed report of defendants' examining neurologist, Richard A. Pearl, M.D.; and plaintiff's deposition testimony.

Plaintiff claims in her bill of particulars that she sustained, among other things, cervicalgia; sprains/strains of the cervical and lumbar spine with radiculopathy; cervical brachial syndrome; lumbar segmental dysarthria; and a permanent restriction of motion of the cervical and lumbar spine. Plaintiff also claims that she was confined to her home from November 29, 2003 through to December 6, 2003, and intermittently to date. Plaintiff further claims that she was totally disabled and confined to her home from November 29, 2003 through to December 6, 2003, and that she remains partially disabled to date. Moreover, plaintiff claims that she sustained a serious injury in the categories of a permanent loss of use, a permanent consequential limitation, a significant limitation and a non-permanent injury.

In her bill of particulars dated April 15, 1999, plaintiff claimed that she sustained various injuries as a result of her motor vehicle accident on March 9, 1995. These injuries include a sprain of the lumbosacral spine; a traumatic cervical brachial whiplash; cephalalgia; a permanent restriction/limitation of movement; and a permanent injury to the structure/alignment of plaintiff's cervical and lumbar spine. Plaintiff also claimed that she sustained a serious injury in the category of a permanent loss of use and function of the injured parts of her body.

Plaintiff's University Hospital at Stony Brook emergency department records dated May 10, 2004, show that she lost consciousness as a result of a motor vehicle accident on that day. After an initial exam, the emergency department physician noted that plaintiff made complaints of pain to her head, hip, and neck. While CT studies of plaintiff's head showed normal ventricles and an intact calvarium with no intracarnial hemorrhage, they also showed muscosal thickening in the ethmoid sinuses. X-rays of plaintiff's cervical spine showed "good" alignment with no evidence of subluxation/abnormal disc space narrowing or any significant degenerative changes. X-rays of plaintiff's pelvis showed normal sacroiliac/hip joints with normal bone density. Additionally, X-rays of plaintiff's left hip showed preserved joint spaces with no significant soft tissue abnormalities. After testing, the attending physician diagnosed plaintiff with a concussion, a left hip contusion and spinal pain.

In his report dated February 12, 2007, Dr. Nathan states that he performed an independent orthopedic examination of plaintiff on that date, and his findings include a normal range of motion of the hips with no tenderness, swelling, erythema or effusion; a normal range of motion of the cervical and thoracolumbar spine with no vertebral tenderness/spasm; a negative foraminal compression test; and a negative straight leg raising test in the sitting/supine position. He noted that plaintiff's history included a subsequent motor vehicle accident on May 10, 2004 in which she had injured her head, neck, back, left hip, leg, knee and shoulder. Dr. Nathan opined that plaintiff had sustained sprains of the cervical and lumbar spine which were causally related to this accident, but which were exacerbated by the subsequent accident. He also concluded that plaintiff had no disability and that she was able to work and perform the activities of her daily living without restrictions.

In his report dated February 19, 2007, Dr. Pearl states that he performed an independent orthopedic examination of plaintiff on February 12, 2007, and his findings include intact cranial nerve functions; a motor examination that was "5/5" in all extremities with normal tone; DTR's that were "2+" and symmetrical; an intact sensory examination; no atrophy or fasciculations; and a normal gait. He also observed that plaintiff had a normal range of motion of the cervical and lumbar spine as well as a negative straight leg raising test. Dr. Pearl opined that plaintiff sustained sprains of the cervical and lumbar spine but that there were no objective findings to indicate a neurological injury or disability.

Plaintiff testified at her deposition to the effect that she refused an ambulance at the scene and did not go to the hospital. Two days later, however, she went to seek Dr. Frederick Tinari, a chiropractor, with respect to her neck, back and right knee pain. At Dr. Tinari's office, she received massages, electrical stimulation and heat therapy once or twice per week for about five and one-half months. She stopped treatments because she had other engagements, including school, and because she felt that her condition had improved "a little bit." At the time of the accident, plaintiff was enrolled in college classes and working at a part-time job. She missed only two or three days of school and took all of her scheduled final exams. She also missed about a week and one-half from work, however, all of her prior duties remained the same after her return. Plaintiff was injured in another motor vehicle accident on May 10, 2004, and she treated with Dr. Tinari from May 2004 through to September 2006 in connection with her injuries from that accident. She occasionally returns to Dr. Tinari approximately once per month for adjustments. Plaintiff also injured her neck in a prior motor vehicle accident in 1995 for which she was treated by Dr. Tinari. In June 2004, she started working at a local Home Depot store where still continues to work thirty-five to forty hours per week. Plaintiff further testified that she continues to attend college

on a full-time basis at college.

By their submissions, defendants made a prima facie showing that plaintiff did not sustain a serious injury (*see*, ***Wright v Peralta***, 26 AD3d 489, 809 NYS2d 465 [2d Dept 2006]; ***Farozes v Kamran***, 22 AD3d 458, 802 NYS2d 706 [2d Dept 2005]; ***Teoduro v Conway Transp. Serv.***, 19 AD3d 479, 798 NYS2d 466 [2d Dept 2005]; ***Khan v Hamid***, 19 AD3d 460, 798 NYS2d 444 [2d Dept 2005]). Defendant's examining orthopedist found that plaintiff had a normal range of motion of the cervical and lumbar spine with no vertebral tenderness/spasm, and a negative straight leg raising test. Similarly, defendants' examining neurologist found that plaintiff had a normal range of motion of the cervical and lumbar spine as well as a negative straight leg raising test. Additionally, while defendants' experts opined that plaintiff had sustained causally related sprains of the cervical and lumbar spine, they also determined that she was not disabled (*see*, ***Willis v New York City Trans. Auth.***, 14 AD3d 696, 789 NYS2d 223 [2d Dept 2005]). Defendants' remaining evidence, including plaintiff's bill of particulars and deposition testimony, also supports a finding that she did not sustain a serious injury. As defendants have met their burden as to all categories of serious injury alleged, 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, plaintiff submits, inter alia, the affidavit of her treating chiropractor, Frederick Tinari, D.C. and her personal affidavit. In his affidavit, Dr. Tinari avers that he first treated plaintiff on December 1, 2003 in connection with the subject accident and his findings include a 20-30% loss in the range of cervical spine motion; a 10-35% loss in the range of lumbar spine motion; spasms of the bilateral upper trapezius, rhomboids and paraspinal erector spinae muscles; tightness of the bilateral suboccipital muscles; a positive cervical compression test; and a positive straight leg raising test. His initial diagnosis was that plaintiff sustained cervicalgia; sprains/strains of the cervical and lumbar spine; cervical brachial syndrome; and lumbar segmental dysarthia. Dr. Tinari treated plaintiff approximately eighteen times from December 1, 2003 through to May 3, 2004 with a variety of chiropractic modalities which included ultrasound, sine wave impulse, a transcutaneous muscle stimulator, intersegmental traction and a course of spinal manuipulation. On May 3, 2004, Dr. Tinari discharged plaintiff from his care after determining that she had reached maximum medical improvement. Dr. Tinari next treated plaintiff on September 1, 2006 and most recently on June 29, 2007, in connection with her complaints of stiffness/restriction of motion of the spine and discomfort of the brachial and lumbosacral areas. The findings of Dr. Tinari's June 2007 exam include a loss in the range of cervical motion of approximately 10-20 degrees; a loss in the range of lumbar flexion of approximately 30-40 degrees; a positive straight leg raising test; paraspinal tightness at L1-S1; and mild swelling over the sacral area. Dr. Tinari opined that plaintiff continues to suffer, among other things, cervicalgia, sprains/strains of the cervical and lumbar spine, chronic cervical brachial syndrome, and lumbar segmental dysarthia. He also opined that plaintiff sustained a permanent partial impairment to the connective tissues of the cervical and lumbar regions of the spine, resulting in a permanent decrease in the range of motion of the cervical spine as a result of the November 2003 accident. Dr. Tinari further concluded that he last treated plaintiff in 1996 in connection with her prior accident, that she had recovered from those injuries. Lastly, Dr. Tinari avers that he treated plaintiff in connection with her injuries sustained on May 10, 2004, but that her limitations are related to the November 2003 accident.

In her personal affidavit, plaintiff avers that she was unable to work for approximately one week following the accident and that she now has difficulty performing strenuous activities. She also has difficulty sleeping or standing for extended periods of time. Plaintiff further avers that, while she treated with Dr. Tinari after the 1995 accident, she had recovered from those prior injuries long before November 2003. Lastly, plaintiff avers that her subsequent accident aggravated the injuries which she sustained in the November 2003 accident.

Plaintiff has provided insufficient medical proof to raise an issue of fact that she 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]; ***Dugan v Sprung***, 280 AD2d 736, 720 NYS2d 276 [3d Dept 2001]). Initially, plaintiff failed to submit sufficient medical proof addressing her prior and subsequent accidents or her condition relative to these accidents (*see*, ***Vidor v Davila***, 37 AD3d 826, 830 NYS2d 772 [2d Dept 2007]; ***Luckey v Bauch***, 17 AD3d 411, 792 NYS2d 624 [2d Dept 2005]). While Dr. Tinari opined that plaintiff had recovered from her injuries as a result of the 1995 accident, his conclusion in this regard is speculative as he fails to state whether he had treated her during the period immediately proceeding November 23, 2003, and if so, the extent of same. Similarly, while Dr. Tinari opined that plaintiff's injuries are unrelated to the May 10, 2004 accident, his statements in this regard are conclusory in light of his other representations that he treated plaintiff in connection with her injuries sustained in the subsequent accident, as well as his statements that he did not treat plaintiff during the period of May 3, 2004 through to September 1, 2006 (*see*, ***Earle v Chapple***, 37 AD3d 520, 830 NYS2d 275 [2d Dept 2007]; ***Powell v Williams***, 214 AD2d 720, 625 NYS2d 634 [2d Dept 1995]). Further, although Dr. Tinari opined that plaintiff had reached "maximum medical improvement," when he discharged her on May 3, 2004, he did not adequately delineate her condition on that date (*see*, ***Mullings v Huntwork***, 26 AD3d 214, 810 NYS2d 443 [1st Dept 2006]). Additionally, while the report of Dr. Tinari references a recent exam, his diagnosis of chronic cervical brachial syndrome and lumbar segmental dysarthia is not sufficiently explained, defined, or in any manner connected to plaintiff's limitations, symptoms or loss of functions, and its significance is not adequately delineated (*see*, ***Pianka v Pereira***, 24 AD3d 1084, 806 NYS2d 286 [3d Dept 2005]; ***Davis v Evan***, 304 AD2d 1023, 758 NYS2d 203 [3d Dept 2003]). Further, while Dr. Tinari identified range of motion limitations in plaintiff's cervical and lumbar spine, he did not adequately identify any diagnostic tests upon which he used to determine these limitations (see, ***Grant v Fofana***, 10 AD3d 446, 781 NYS2d 160 [2d Dept 2004]; *compare*, ***Sclafani v City of New York***, 22 AD3d 827, 803 NYS2d 182 [2d Dept 2005]), nor did he set forth a sufficient basis for his findings that these limitations were significant, or how they were related to plaintiff's symptoms and the accident (*see*, ***Burford v Fabrizio***, 8 AD3d 784, 777 NYS2d 810 [3d Dept 2004]; ***Ersop v Variano***, 307 AD2d 951, 763 NYS2d 482 [2d Dept 2003]). Also, the findings of muscle spasms by Dr. Tinari, which were not objectively measured or compared with normal function, are insufficient to raise a triable issue of fact (*see*, ***Granger v Keeter***, 23 AD3d 886, 803 NYS2d 814 [3d Dept 2005]; ***Clements v Lasher***, 15 AD3d 712, 788 NYS2d 707 [3d Dept 2005]). Even though Dr. Tinari's most recent diagnosis includes lumbalgia and sciatica, plaintiff did not claim in her bill of particulars that she sustained these injuries (*see*, ***Robinson v Schiavoni***, 249 AD2d 991, 672 NYS2d 560 [4th Dept 1998]). In any event, Dr. Tinari's diagnosis of cervicalgia and sprains/strains of the cervical and lumbar spine, as well as plaintiff's deposition testimony, tends to show that her injuries as a result of the November 2003 accident were merely mild, minor or slight (*see*, ***Kivlan v Acevedo***, 17 AD3d 321, 792 NYS2d 573 [2d Dept 2005]; ***Gonzalez v Green***, 24 AD3d 939, 805 NYS2d 450 [3d Dept 2005];

Harrison v City of New York, 2 AD3d 682, 770 NYS2d 90 [2d Dept 2003]).

Plaintiff also failed to proffer any competent medical evidence that she was unable to perform substantially all of her daily activities for not less than 90 of the first 180 days subsequent to the accident (*see*, ***Mercado v Garbacz***, 16 AD3d 631, 792 NYS2d 519 [2d Dept 2005]; ***Omar v Goodman***, 295 AD2d 413, 743 NYS2d 568 [2d Dept 2002]; ***Barbarulo v Allery***, 271 AD2d 897, 707 NYS2d 268 [3d Dept 2000]). While plaintiff avers that she has difficulty sleeping or standing for extended periods of time, the record lacks objective proof of any substantial curtailment of her activities within the relevant time period after the accident (*see*, ***McNeil v Dixon***, 9 AD3d 481, 780 NYS2d 635 [2d Dept 2004]). In any event, plaintiff admitted that she only missed about a week and one-half from her employment due to her injuries, and that her duties remained the same upon her return (*see*, ***Lalli v Tamasi***, 266 AD2d 266, 698 NYS2d 276 [2d Dept 1999]). Moreover, since there is no evidence in the record demonstrating that plaintiff's alleged economic loss exceeded the statutory amount of basic economic loss, her claim in this regard must be dismissed (*see*, CPLR 3212 [b]; *see*, ***Watford v Boolukos***, 5 AD3d 475, 772 NYS2d 566 [2d Dept 2004]; ***Rulison v Zanella***, 119 AD2d 957, 501 NYS2d 487 [3d Dept 1986]). Accordingly, defendants' motion for summary judgment is granted and the complaint is dismissed.

Dated: SEP 13 2007

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION