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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 19

Present: HON. WILLIAM R. LaMARCA
Justice

MARIA PEREIRA,

Plaintiff,

-against-

CARLOS M. MONTEIRO and JOSE S. MONTEIRO,

Defendants.

Motion Sequence #001
Submitted July 13, 2007
XXX

INDEX NO: 11392/05

The following papers were read on this motion:

Notice of Motion.....1
Affirmation in Opposition.....2
Reply Affirmation.....3

Defendants, CARLOS M. MONTEIRO and JOSE S. MONTEIRO, move for an order, pursuant to CPLR §3212, granting them summary judgment dismissing the complaint on the ground that the injuries alleged by the plaintiff, MARIA PEREIRA, do not satisfy the "serious injury" threshold requirement of Insurance Law §5102(d) and, thus, her claim for non-economic loss is barred by Insurance Law §5104(a) of the statute. Plaintiff opposes the motion, which is determined as follows:

This is an action to recover damages for personal injuries allegedly sustained by plaintiff in a motor vehicle accident on May 31, 2004 at approximately 10:50 A.M. The

accident occurred on Liberty Avenue, approximately 150 feet west of Union Street, Mineola, New York.

In her bill of particulars, plaintiff alleges that she sustained the following injuries:

- Head trauma
- Loss of consciousness
- Headaches
- Bulging of the cervical disc annuli at C2/3
- Bulging of the cervical disc annuli at C5/6
- Bulging of the cervical disc annuli at C6/7
- Neck pain/spasms
- Loss of rotation of cervical spine
- Cervical radiculitis
- Loss of movement of upper left extremity
- Left shoulder rotator cuff tendinitis with impingement
- Bilateral shoulder pain
- Bilateral loss of range of motion of shoulders
- Weakness of left arm
- Paresthesias of left arm
- Left knee pain
- Left knee contusion

Defendants now move to dismiss the complaint on the ground that plaintiff did not sustain a serious injury within the purview of Insurance Law § 5102(d). In order to satisfy the statutory serious injury threshold, a plaintiff must have sustained an injury that is identifiable by objective proof; subjective complaints of pain do not qualify as a serious injury within the meaning of Insurance Law § 5102(d) (*see, Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 746 NYS2d 865, 774 NE2d 1197 [C.A.2002]; *Scheer v Doubek*, 70 NY2d 678, 518 NYS2d 788, 512 NE2d 309 [C.A.1987]; *Tuna v Babendererde*, 32 AD2d 574, 819 NYS2d 613 [3rd Dept. 2006]). On a motion for summary judgment where the issue is whether a plaintiff has sustained a serious injury under the no-fault law, the defendant bears the initial burden of presenting competent evidence that there is no cause of action (*Brodame v Candura*, 25 AD3d 747, 807 NYS2d 658 [2nd Dept. 2006]).

In support of their motion, defendants have submitted, *inter alia*, the following evidence:

(a) the Emergency Room Report from Winthrop University Hospital wherein the attending physician examined the plaintiff, sent her for x-rays of her cervical spine and diagnosed her with a concussion;

(b) an unenhanced CT scan of plaintiff's head and an MRI performed on plaintiff's cervical spine;

(c) electrodiagnostic tests performed at the request of plaintiff's treating physician which reflect normal results;

(d) the affirmed report of Dr. Benjamin Nachamie, a board certified orthopedic surgeon, who examined the plaintiff at the request of the no fault carrier, performed range of motion and other clinical tests and diagnosed the plaintiff with resolved sprains and contusions and concluded that there was no evidence of an orthopedic disability;

(e) the affirmed report of Dr. David Steiner, a board certified neurologist, who examined the plaintiff, performed various clinical and neurological tests and concluded that plaintiff had a normal neurological examination;

(f) the affirmed report of Dr. Carl Austin Weiss, a board certified orthopedist, who examined the plaintiff, performed range of motion tests to her cervical spine, knees, lumbosacral spine and shoulders and diagnosed the plaintiff with a cervical sprain that has healed completely, and concluded that the plaintiff was not disabled; and

(g) the affirmed report of Dr. Melissa Sapan Cohn, a board certified radiologist, who performed a film review of the MRI taken of the plaintiff's cervical spine and found degenerative changes and no trauma-related abnormalities.

It is the judgment of the Court that defendants have established a *prima facie* right to summary judgment and the burden now shifts to plaintiff to establish questions of fact that require a trial. (*Pommells v Perez*, 4 NY3d 566, 797 NYS2d 380, 830 NE2d 278 [C.A. 2005]; *see also, Grossman v Wright*, 268 AD2d 79, 707 NYS2d 233 [2nd Dept. 2000]).

In opposition to the motion, plaintiff submits, *inter alia*, an affirmed report of her treating physician, Dr. Bruce Ross. In his report, dated May 30, 2007, Dr. Ross states, in

pertinent part, as follows:

> This is an updated narrative for Maria Pereira. The last narrative was done for the patient on November 15, 2006. Patient had an MRI of the cervical spine on December 10, 2004, which showed minimal posterior bulging of the disc annuli, C2-3, C5-6, and C6-7.
>
> The patient did return to this office, most recently, on May 16, 2007, for re-evaluation of chronic pain in the cervical and lumbar spines, secondary to her motor vehicle accident of May 31, 2004. (emphasis added)

Medical proof, which indicates limitations in the lumbar or cervical spine is usually sufficient to raise a triable issue of fact (*see e.g. Rosario v Universal Truck & Trailer Service, Inc.*, 7 AD3d 306, 779 NYS2d 1 [1st Dept. 2004]). However, certain factors may override a plaintiff's objective medical proof of limitations and allow dismissal of the complaint (*Pommells v Perez, supra*). Specifically, the Court held in *Pommells v Perez* that additional contributing factors, such as a gap in treatment, an intervening medical problem, or a pre-existing condition, would interrupt the chain of causation between the claimed accident and the claimed injury (*Pommells v Perez, supra,* citing *Franchini v Palmieri*, 1 NY3d 536, 775 NYS2d 232, 807 NE2d 282 [C.A.2003]; *see also Mohamed v Siffrain*, 19 AD3d 561, 797 NYS2d 532 [2nd Dept. 2005]).

Furthermore, "the existence of a herniated or bulging disc is not evidence of serious injury in the absence of objective medical evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration" (*Albano v Onolfo,* 36 AD3d 728, 830 NYS2d 205 [2nd Dept. 2007]; *Yakubov v CG Trans Corp.*, 30 AD3d 509, 817 NYS2d 353 [2nd Dept. 2006]; *Kearse v New York City Tr. Auth.*, 16 AD3d 45, 789 NYS2d 281 [2nd Dept. 2005]). While Dr. Ross purports to find a number of range of motion restrictions at

the time of his recent examination, on May 16, 2007, this documentation of range of motion restrictions is a full three years after the accident. Plaintiff has not presented sufficient medical proof that was contemporaneous with the accident, showing range of motion restrictions in her cervical and lumbar spine (*Bell v Rameau*, 29 AD3d 839, 814 NYS2d 534 [2nd Dept. 2006]; *Li v Yun*, 27 AD3d 624. 812 NYS2d 604, [2nd Dept. 2006]; *Suk Ching Yeung v Rojas*, 18 AD3d 863, 796 NYS2d 661 [2nd Dept. 2005]; *Rodriguez v Cesar*, 40 AD3d 731, 835 NYS2d 438 [2nd Dept. 2007]). Hence, there is an undisputed gap in treatment from the time of the accident until the preparation of the medical report of Dr. Ross (*see, Albano v Onolfo, supra*).

The only other medical proof submitted by plaintiff was the affirmed magnetic resonance report of her treating radiologist, Dr. Richard Silvergleid. His affirmed report noted "previous trauma; left upper extremity weakness and paresthesia" and "minimal posterior bulging of the disc annuli, C2-3, C5-6 and C6-7". Dr. Silvergleid expressed no opinion as to causation (*Collins v Stone*, 8 AD3d 321, 778 NYS2d 79 [2nd Dept. 2004]). Furthermore, plaintiff failed to address the findings of defendants' radiologist, Dr. Sapan Cohen, who found only degenerative changes, and no evidence of causally related injuries. *Gomez v Epstein,* 29 AD3d 950, 818 NYS2d 101 [2nd Dept. 2006]; *Bycinthe v Kombes*, 29 AD3d 845, 815 NYS2d 693 [2nd Dept. 2006]).

Finally, plaintiff failed to submit competent medical evidence that she was unable to perform substantially all of her daily activities for not less than 90 days of the first 180 days subsequent to the subject accident (*Albano v Onolfo, supra*; *Doran v Sequino*, 17 AD3d 626, 795 NYS2d 245 [2nd Dept. 2005]; *Sainte-Aime v Ho*, 274 AD2d 569, 712 NYS2d

133 [2nd Dept. 2000]).

After a careful reading of the submissions herein, it is the judgment of the Court that plaintiff has not met her burden of raising issues of fact to overcome defendants' *prima facie* showing of entitlement to summary judgment. It is therefore

ORDERED, that defendants' motion for summary judgment dismissing the complaint is granted.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: October 2, 2007

WILLIAM R. LaMARCA, J.S.C.

TO: Steven Cohn, PC
Attorney for Plaintiff
One Old Country Road, Suite 420
Carle Place, NY 11514

James P. Nunemaker, Jr. & Associates
Attorneys for Defendants
PO Box 9040
Jericho, NY 11753-9040

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