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SHORT FORM ORDER

INDEX No. 05-10470
CAL. No. 07-00202-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 6-6-07
ADJ. DATE 8-6-07
Mot. Seq. # 001 - MG; CASEDISP

KAREN A. TRAENKLE, Plaintiff, - against - MICHAEL A. GREENSPAN and GALIT GREENSPAN, Defendants.	SIBEN & SIBEN, LLP Attorneys for Plaintiff 90 East Main Street Bay Shore, New York 11706 CORIGLIANO, GEIGER, VERRILL, et al. Attorneys for Defendants Two Robbins Lane, Suite 200 Jericho, New York 11753

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 - 11 ; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 12 - 19 ; Replying Affidavits and supporting papers ___; Other__; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants for an order pursuant to CPLR 3212 granting summary judgment in their favor on the grounds 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 injuries allegedly sustained by plaintiff in a rear-end motor vehicle accident that occurred on November 7, 2004 at 2:05 p.m. on the South Service Road of the Long Island Expressway at its intersection with Bagatelle Road in Huntington, New York. By her complaint, plaintiff seeks to recover damages for serious injuries that she allegedly sustained as defined in Insurance Law § 5102 (d) as well as economic loss in excess of basic economic loss as defined in Insurance Law § 5102 (a). By her bill of particulars, plaintiff alleges that as a result of the subject accident she sustained a thoraco-lumbar sprain requiring selective nerve root blocks and facet blocks at T10-11 and T11-12 and a cervical spine sprain. In her supplemental bill of particulars, plaintiff claims that she also sustained degenerative disc disease of the thoracic spine. In addition, plaintiff alleges that following the subject accident she was confined to bed and to home from November 7, 2004 to February 9, 2005.

Defendants now move for summary judgment on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). In support of the motion, defendants submit, among other things, the summons and complaint; defendants' answer; plaintiff's bill of particulars and supplemental bill of particulars; plaintiff's deposition transcript; an unaffirmed report dated November 7, 2006 by defendants' examining orthopedic surgeon, Yan Q. Sun, M.D.; the affirmed report dated November 7, 2006 of defendants' examining neurologist, Edward M. Weiland, M.D. (Dr. Weiland), based on an examination of plaintiff on said date; and the affirmed report dated October 5, 2006 of defendants' examining radiologist, Audrey Eisenstadt, M.D. (Dr. Eisenstadt) based on a review of a thoracic spine MRI performed on April 19, 2006.

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 "significant limitation of use of a body function or system" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of the plaintiff must be provided 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 (*see*, ***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 722 [2d Dept 2006]).

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]). 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]).

Initially, the Court notes that the report of defendants' examining orthopedic surgeon Yan Q. Sun, M.D. was not affirmed to be true under the penalties of perjury pursuant to the requirements of CPLR 2106 nor was it notarized so as to be in affidavit form and thus the report is in inadmissible form and cannot be considered (*see*, CPLR 2106; ***Borgella v D & L Taxi Corp.***, 38 AD3d 701, 834NYS2d 199 [2d Dept 2007]; ***Sully v Kings Luxury, Inc.***, 38 AD3d 529, 833 NYS2d 111 [2d Dept 2007]; ***Parente v Kang***, 37 AD3d 687, 831 NYS2d 430 [2d Dept 2007]; *see also*, ***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d

178 [1991]).

Nevertheless, defendants established, prima facie, that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the subject motor vehicle accident through the affirmed medical reports of defendants' examining neurologist and radiologist which demonstrated that plaintiff's spinal injuries were not causally related to the subject motor vehicle accident, were degenerative and osteoarthritic in nature, and existed prior to the subject accident (*see*, ***Passaretti v Ping Kwok Yung***, 39 AD3d 517, 835 NYS2d 224 [2d Dept 2007]). Defendants' examining neurologist, Dr. Weiland, performed a neurological examination of plaintiff two years after the subject accident. In his report he recorded that plaintiff's current complaints consisted of periodic mid-thoracic paravertebral muscle pain and spasm without any radicular component and that the symptoms appeared to manifest themselves with daily living activities. Based on his neurological examination of plaintiff, Dr. Weiland reported his findings that, among other things, plaintiff's cognitive functions were intact; there was no scalp or sinus percussion tenderness; and there was full range of motion of the neck, shoulders, extremities and lower torso. Specifically, Dr. Weiland recorded cervical spine range of motion measurements as flexion and extension to 45 degrees (normal 45 degrees), right and left lateral flexion to 70 degrees (normal 70 degrees), and right and left lateral flexion to 40 degrees (normal 40 degrees). Lumbar spine range of motion measurements for plaintiff were flexion to 80 degrees (normal 80 degrees), extension to 30 degrees (normal 30 degrees), and right and left lateral flexion to 40 degrees (normal 40 degrees). With respect to plaintiff's shoulders, plaintiff found that abduction was unlimited to 170 degrees (normal 170 degrees), adduction was unlimited to 50 degrees (normal 50 degrees), and internal and external rotation showed no restriction to 90 degrees (normal 90 degrees). Dr. Weiland indicated that no vertebral body percussion tenderness or paraspinal muscle spasm was appreciated; plaintiff had no sciatic notch tenderness; and he noted no clinical signs of any compressive neuropathy in either the upper or lower extremities. In addition, he indicated that the Fabere-Patrick sign and Adson's Maneuver were negative; the Soto-Hall Sign and Kemp's Test were negative; and Lhermitte's Test was absent. Dr. Weiland did note subjective complaints of pain with light palpation over the mid-thoracic area but that no associated muscle spasm or soft tissue swelling was observed in said area. He added that the segmental motor evaluation revealed full power in the proximal and distal muscle groups of the upper and lower extremities; deep tendon reflexes were 2+ and symmetric throughout with plantar flexor responses bilaterally; and Romberg's test was negative.

In conclusion, Dr. Weiland diagnosed resolved cervical sprain and strain, thoracic sprain and strain and lumbosacral sprain and strain. He stated that he found no evidence of any lateralizing neurological deficits nor any neurological residual or permanency and opined that he saw no reason why plaintiff should not be able perform activities of daily living and continue gainful employment without restrictions from a neurological perspective.

Defendants' examining radiologist, Dr. Eisenstadt, indicated in her affirmed report that upon reviewing plaintiff's thoracic spine MRI that was performed one and a half years after the subject accident she found bone hemangiomas[1] at the T3, T7 and T11 levels; early osteophyte formation at the T7-8 and T8-9 intervetebral disc levels; and widespread disc degeneration. However, no bulging or disc

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[1] Hemangioma is defined as a congenital anomaly in which a proliferation of blood vessels leads to a mass that resembles a neoplasm (Stedman's Medical Dictionary 795 [27th ed 2000]).

herniations were noted. Dr. Eisenstadt explained that the incidental bone hemangiomas had no clinical significance and were not traumatic but were instead a developmental abnormality with no causal relationship or association with the accident. In addition, Dr. Eisenstadt pointed out that degenerative disc disease was seen throughout plaintiff's thoracic spine; that osteophyte formation was seen at the T7-8 and T8-9 levels which are common levels for degenerative disc disease to occur; and that osteophyte formation is a chronic abnormality. She added that there was no focal abnormality to suggest a traumatic etiology and no osseous, ligamentous or intervertebral disc changes attributable to the subject accident. Thus, defendants' admissible evidence consisting of the affirmed medical reports of their examining orthopedist and radiologist, plaintiff's bill of particulars and supplemental bill of particulars, and plaintiff's deposition transcripts was sufficient to establish, prima facie, that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) (*see*, ***Porto v Blum***, 39 AD3d 614, 833 NYS2d 245 [2d Dept 2007]).

Defendants also demonstrated that although plaintiff did not go to work for three months, plaintiff's deposition testimony failed to show that she was unable to perform substantially all of her daily activities for not less than 90 out of the first 180 days as a result of the subject accident (*see generally*, ***Hernandez v DIVA Cab Corp.***, 22 AD3d 722, 804 NYS2d 396 [2d Dept 2005]). At her deposition on August 23, 2006, plaintiff testified that she had been employed by the United States Postal Service for 12 years as a letter carrier and that at the time of the accident she was driving her vehicle with a passenger and was stopped at a red light when she was rear-ended. Plaintiff described the impact as "hard"; stated that no portion of her body made contact with the inside of her vehicle and her airbags did not deploy; and stated that plaintiff did not have any pain at the accident scene and drove home. According to plaintiff, two or three days after the accident she began to feel stiffness in her mid-back and neck and had trouble getting up in the morning and she went to see her primary care physician. Plaintiff testified that her primary care physician referred her to an orthopedist who told her that her back pain was probably muscular and prescribed pain medication, Celebrex, which prescription plaintiff filled two to three times. In addition, plaintiff testified that she went to the orthopedist a few times; plaintiff started physical therapy; and the orthopedist referred her to a spine specialist. Plaintiff also testified that she had physical therapy three times a week for a period then twice a week and then she had massage therapy and later she received chiropractic treatment. Eventually plaintiff's no-fault ran out. According to plaintiff, at the time of the deposition she was still receiving chiropractic treatment once a month and she would take prescription pain medication when her back bothered her sporadically in the form of a throbbing pain in the middle of her back. Plaintiff explained that there were no normal daily activities that she was unable to do but that there were activities that she could perform but with limitations such as, swinging a golf club, lifting groceries and getting into her vehicle. Plaintiff clarified that following the accident she was not confined to her bed but was at home for three months and during those three months she was able to walk outside and drive to the store and to therapy. When plaintiff returned to work, she worked part-time based on the orders of her orthopedist and spine specialist and began to work full-time in June 2005 without restrictions.

In opposition to the motion, plaintiff contends that she did sustain a "serious injury" as defined in Insurance Law § 5102 (d). In support of her opposition to the motion, plaintiff submits her affidavit; her bill of particulars and supplemental bill of particulars; her deposition transcript; the affirmed report dated May 12, 2005 of an examining orthopedic surgeon, Alan J. Zimmerman, M.D. (Dr. Zimmerman); Dr. Weiland's November 7, 2006 affirmed report; and plaintiff's medical and billing records from The

Central Orthopedic Group certified by the office's bookkeeper.

Here, plaintiff's evidence failed to raise a triable issue of fact (*see*, ***Lee v Troia***, 41 AD3d 469, 837 NYS2d 299 [2d Dept 2007]; ***Passaretti v Ping Kwok Yung***, *supra*). Initially, the Court notes that the records from plaintiff's treating orthopedist's office, The Central Orthopedic Group, consist of billing records, unsworn reports and notes of plaintiff's treating orthopedist, Ralph Parisi, M.D. (Dr. Parisi), and the unsworn MRI reports of Jeffrey Kaufman, M.D., PhD. Inasmuch as said records were certified by the office's bookkeeper, they are admissible as business records of the physical examinations and MRI's having been performed but inadmissible for the purpose of verifying of the contents of the physical examination and MRI reports (*see*, CPLR 2106; CPLR 4518; ***Hefte v Bellin***, 137 AD2d 406, 524 NYS2d 42 [1st Dept 1988]). Nevertheless, the unsworn reports dated November 16, 2004, December 28, 2004 and January 12, 2005 of Dr. Parisi are admissible inasmuch as they were referred to by Dr. Weiland in his affirmed report in support of defendants' motion (*see*, ***Silkowski v Alvarez***, 19 AD3d 476, 798 NYS2d 468 [2d Dept 2005]; ***Kearse v New York City Trans. Auth.***, 16 AD3d 45, 789 NYS2d 281[2d Dept 2005]; ***Ayzen v Melendez***, 299 AD2d 381, 749 NYS2d 445 [2d Dept 2002]). Said reports are speculative and inconclusive as to the causation of plaintiff's mid-thoracic spine pain (*see*, ***Albano v Onolfo***, 36 AD3d 728, 830 NYS2d 205 [2d Dept 2007]; ***Vishnevsky v Glassberg***, 29 AD3d 680, 815 NYS2d 152 [2d Dept 2006]). Notably, in his most recent admissible report of January 12, 2005, Dr. Parisi indicated that plaintiff had tenderness in the mid-thoracic spine, related plaintiff's history that she saw Dr. Finkelstein who gave her injections and surmised that plaintiff's pain may be coming from a thoracic disc, and stated that he advised plaintiff to obtain an MRI of the thoracic spine and return to him with it.

Dr. Zimmerman's affirmed report indicated that he re-examined plaintiff on May 12, 2005 and performed cervical spine range of motion testing with the following results, flexion 80 degrees (normal 45 degrees); extension 45 degrees (normal 45 degrees); lateral flexion to the right 45 degrees (normal 30 - 45 degrees); lateral flexion to the left 45 degrees (normal 30 - 45 degrees); rotation to the right 60 degrees (normal 60 degrees); and rotation to the left 60 degrees (normal 60 degrees). Contrary to plaintiff's counsel's assertions in his affirmation, plaintiff's cervical flexion measurements were not less than normal. Among Dr. Zimmerman's other findings were those based on an examination of the thoracic spine indicating tenderness at about the T6 level and negative spasm. In conclusion, Dr. Zimmerman diagnosed cervical sprain and strain resolved and thoracic sprain and strain resolved and opined that plaintiff was not in need of any further orthopedic treatment or physical therapy and is capable of working full time at full capacity. Dr. Zimmerman added that plaintiff informed him that she had a past history of a thoracic cyst or tumor and Dr. Zimmerman stated that "this injury was superimposed in the pre-existing thoracic cyst/tumor."

Notably, plaintiff's alleged injuries, thoraco-lumbar sprain and cervical strain, constitute injuries which do not rise to the level of "serious injury" pursuant to the statutory definition (*see*, ***Harrison v City of New York***, 2 AD3d 682, 770 NYS2d 90 [2d Dept 2003]; ***Keena v Trappen***, 294 AD2d 405, 742 NYS2d 344 [2d Dept 2002]; ***Maenza v Letkajornsook***, 172 AD2d 500, 567 NYS2d 850 [2d Dept 1991]). In addition, plaintiff submitted no medical proof based on a recent examination (*see*, ***Marziotto v Striano***, 38 AD3d 623, 831 NYS2d 551 [2d Dept 2007]). In her affidavit, plaintiff related her treatment with various physicians, adding that she currently takes Aleve four days out of the week, continues to have lumbar pain on the left side and follows up with a chiropractor once a month. However, with insufficient objective medical evidence to show that she sustained a serious injury specifically as a result of this

accident, plaintiff's affidavit and her deposition testimony were insufficient to show that she sustained a serious injury from the accident (*see*, ***Duke v Saurelis***, 41 AD3d 770, 840 NYS2d 88 [2d Dept 2007]). Also, plaintiff submitted no competent medical evidence to corroborate her claims that she was unable to perform substantially all of her daily activities for not less than 90 of the 180 days immediately following the subject accident as a result of the accident (*see*, ***Franco v Akram***, 26 AD3d 461, 809 NYS2d 465 [2d Dept 2006]).

Finally, plaintiff submitted no evidence that her alleged economic loss exceeded the statutory amount of basic economic loss (*see*, ***Rulison v Zanella***, 119 AD2d 957, 501 NYS2d 487 [3d Dept 1986]). Therefore, the motion by defendants for summary judgment in their favor dismissing the complaint against them on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is granted.

Accordingly, the instant motion is granted and the complaint is dismissed in its entirety.

Dated: SEP 25 2007

J.S.C.

_X_ FINAL DISPOSITION _____ NON-FINAL DISPOSITION