SHORT FORM ORDER

INDEX No. 05-27366
CAL. No. 07-01233-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 8-29-07
ADJ. DATE 10-10-07
Mot. Seq. # 001 - MD
002 - XMD

SANDRA HYMAN and HOWARD HYMAN, Plaintiffs, - against - CHARLES W. JOHNSON and ALPAY AKKAYA. Defendants.	NICHOLAS PANZINI, ESQ. Attorney for Plaintiffs 8 Dixon Avenue Amityville, New York 11701 ERIC N. WOLPIN, ESQ. Attorney for Defendant Johnson 60 East 42nd Street, Suite 601 New York, New York 10165 PICCIANO & SCAHILL, P.C. Attorney for Defendant Akkaya 900 Merchants Concourse, Suite 310 Westbury, New York 11590

Upon the following papers numbered 1 to 28 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 6; Notice of Cross Motion and supporting papers 7 - 13; Answering Affidavits and supporting papers 14 - 25; Replying Affidavits and supporting papers 26 - 28; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant Charles W. Johnson for an order pursuant to CPLR 3212 granting summary judgment in his favor dismissing the complaint as against him on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied; and it is further

ORDERED that this cross motion by defendant Alpay Akkaya for an order pursuant to CPLR 3212 granting summary judgment in his favor dismissing the complaint as against him on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is denied.

This is an action to recover damages, personally and derivatively, for injuries allegedly sustained by the then 35 year old plaintiff Sandra Hyman on June 1, 2005 at about 7:30 p.m. when her vehicle was struck by a vehicle owned and operated by defendant Charles W. Johnson (Johnson) which had struck a vehicle owned and operated by defendant Alpay Akkaya (Akkaya) on Horseblock Road (County Road

161, twenty feet east of Maine Avenue in Medford, New York. By their complaint, plaintiffs allege a first cause of action on behalf of plaintiff Sandra Hyman to recover damages for serious injuries that she sustained as defined by Insurance Law § 5102 (d) as well as economic loss in excess of basic economic loss as defined in Insurance Law § 5102 (a) and a second cause of action on behalf of plaintiff's husband, plaintiff Howard Hyman, for loss of services.

By their verified bill of particulars, plaintiffs allege that as a result of the subject accident plaintiff Sandra Hyman sustained injuries including, disc bulge at C4-C5; posterior annular tear at C6-C7; shallow central disc herniation at C6-C7; disc bulge at L1-L2 and L5-S1; cervical, thoracic and lumbar radiculopathy; cervicalgia; and herniated nucleus pulposis C6-7. In addition, plaintiffs allege that following the accident, plaintiff was treated and released from the Brookhaven Memorial Hospital emergency room and was confined to her home thereafter. Plaintiffs also state that at the time of this accident, plaintiff was employed as a registered nurse at Stony Brook Hospital.

Defendants Johnson and Akkaya now move and cross-move, respectively, for summary judgment dismissing the complaint as against him on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). In support of the motion, defendant Johnson submits, among other things, the summons and verified complaint; his answer; and the affirmed report dated March 6, 2007 of defendant Akkaya's expert orthopedist Richard S. Goodman, M.D. (Dr. Goodman), who performed an orthopedic examination of plaintiff on said date. In support of the cross motion, defendant Akkaya submits, among other things, the summons and verified complaint; his answer; plaintiffs' verified bill of particulars; Dr. Goodman's affirmed report; and plaintiff's deposition transcript dated November 21, 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]).

Both defendants rely on the affirmed report dated March 6, 2007 of examining orthopedist, Dr. Goodman, the only physician for the defendants who physically examined plaintiff. Said affirmed report indicated that Dr. Goodman examined plaintiff on said date, reviewed various records and reports including plaintiffs' verified bill of particulars[1], and noted that plaintiff's complaints continued to be related to her neck, right and left shoulder, and low back and included headaches and loss of sleep. With respect to the results of his physical examination, Dr. Goodman reported that plaintiff walked with a normal gait, could heel and toe walk normally, and restricted cervical motion to 5/30 degrees of flexion, 5/30 degrees of extension, 30/90 degrees of right rotation and 20/90 degrees of left rotation. He noted that plaintiff had full range of motion of the lumbar spine in flexion but "limited lumbar extension to 15/30 degrees of right rotation and 45/90 degrees of left rotation." In addition, Dr. Goodman indicated that plaintiff's triceps reflexes were 3+ on the left and 1+ on the right; biceps reflexes were 3+ on the left and 2+ on the right; and forearms reflexes were 3+ on the left and 1+ on the right. Also, plaintiff's ankle reflexes were symmetrical but absent. Dr. Goodman noted that plaintiff's motor power on testing flexion and extension of the toes, ankles, knees, hips, fingers, wrists, elbows and shoulders were symmetrical and within normal limits and that plaintiff's straight leg raising test results were normal to 180 degrees in the sitting position. In conclusion, Dr. Goodman indicated that plaintiff continued to have multiple subjective complaints; that the electrodiagnostic studies were reported as normal and that the MRI studies should be considered within normal limits; and that there was no evidence of a true herniated disc with nerve compression. He opined that there were no objective signs of any organic disease causing a disability, impairment or handicap in plaintiff and stated that plaintiff had not missed any work as a part-time nurse, that she could return to work full time and that there was no indication for further orthopedic care.

Here, defendants' examining orthopedist's report contains deficiencies inasmuch as the report appears to be missing numerical findings for right rotation of the lumbar spine and provides differing bilateral reflex testing results for the biceps, triceps and forearm without providing any explanation for the asymmetrical findings. In addition, the report contains findings of 25 degree restrictions of cervical flexion and extension, 60 and 70 degree restrictions of cervical rotation, as well as a 15 degree restriction of lumbar extension and a 45 degree restriction of left lumbar rotation which findings are insufficient to satisfy defendants' burden of demonstrating that plaintiff had full range of motion and

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[1]Dr. Goodman indicates in his affirmed report that he reviewed a "supplemental verified bill of particulars," said document was not submitted by defendants for the Court's review.

from no disabilities (*see*, ***Meely v 4 G's Truck Renting Co., Inc.***, 16 AD3d 26, 789 NYS2d 277 [2d Dept 2005]). Notably, no mention is made of whether or not plaintiff had any spasms during the range of motion testing.

Plaintiff testified at her deposition on November 21, 2006 that at the time of the subject accident she was employed at Stony Brook University Hospital as a part-time registered nurse on a cardiac post-op floor and that her work week alternated between three days a week and two days a week. She described her duties as involving patient care, patient assessment, administering medication, frequent monitoring of patients and getting patients out of bed. In addition, plaintiff testified that she was out from work for one year following said accident and returned to work full duty on May 31, 2006 although she does not perform the full duties that she used to perform. When asked what she could no longer perform, plaintiff responded that she could not lift patients and that looking at the monitors on the wall or chest tubes and drainage bags on the floor gave her neck pain. Plaintiff added that bending her head down to look at a patient's chart caused her great pain. According to plaintiff, she could no longer do certain housework such as lifting laundry and the laundry basket, vacuuming, putting dishes away in the cabinet; anything that required her to lift her arms up and yard work such as weeding and sweeping; and playing with her young children and camping.

Plaintiff recalled that at the scene of the accident, she made complaints to ambulance personnel that her neck, her head, her left arm and her knees hurt. Plaintiff testified that at the Hospital she was told to follow up with her own doctor, no x-rays were taken and she was given a prescription for anti-inflammatory medication and released. The day after the accident, plaintiff went to see Dr. Nussbaum, whom plaintiff only saw once, with complaints of severe neck pain, bilateral shoulder pain, bilateral knee pain and left arm pain. He performed neck x-rays and diagnosed whiplash and prescribed an anti-inflammatory medication. Plaintiff next saw an orthopedic doctor, Dr. Rho, who prescribed physical therapy three times a week for four to six weeks. According to plaintiff, she underwent physical therapy three times a week for about three to four months and then stopped after re-evaluation by the insurance company. Plaintiff stated that she was given a home TENS unit which she continued to use every day and that the last time that she was at Dr. Rho's office for treatment was at the end of 2005 and beginning of 2006. Plaintiff also stated that Dr. Rho referred her to a spine specialist, Dr. Shapiro, whom she saw in August or September of 2005 with her original complaints and he prescribed physical therapy, which plaintiff underwent for seven visits until November 2006. Plaintiff added that she also went to a pain management specialist, Dr. Littman, in 2005 who recommended nerve block injections and plaintiff underwent three epidural injections in December 2005 in the left side of her neck. Plaintiff testified that the injections did not help; Dr. Littman referred her to Dr. Mango whom she saw once and that he recommended spinal surgery; and that she last saw Dr. Littman in April 2006 and he told her to follow up with her orthopedic doctor, Dr. Shapiro. Plaintiff further testified that she last saw Dr. Shapiro the previous week with complaints of neck pain, bilateral shoulder pain and headaches and that Dr. Shapiro told her to continue conservative treatment and to use the TENS unit and the neck traction that plaintiff had at home. She stated that she was considering surgery. Said deposition testimony together with the report of defendants' examining orthopedist failed to make out a prima facie case that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) (*see*, ***DeSimone v Mejia***, 283 AD2d 454, 724 NYS2d 630 [2d Dept 2001]).

Inasmuch as defendants failed to establish their prima facie entitlement to judgment as a matter of law based on whether plaintiff sustained a serious injury, it is unnecessary to consider whether plaintiffs' opposition papers were sufficient to raise a triable issue of fact on that matter (*see*, ***Nembhard v Delatorre***, 16 AD3d 390, 791 NYS2d 144 [2d Dept 2005]; ***McDowall v Abreu***, 11 AD3d 590, 782 NYS2d 866 [2d Dept 2004]; ***Coscia v 938 Trading Corp.***, 283 AD2d 538, 725 NYS2d 349 [2d Dept 2001]). Therefore, the motion and cross motion for summary judgment dismissing the complaint on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) are denied.

Dated: DEC 06 2007

J.S.C.

____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION