SHORT FORM ORDER

INDEX No. 06-23473
CAL. No. 07-01801-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 9-28-07
Mot. Seq. # 001 - MG; CASEDISP

BEVERLY J. SNOWDEN,	:	CHARLES G. EICHINGER & ASSOCS.
	:	Attorneys for Plaintiff
Plaintiff,	:	1601 Veterans Memorial Hwy, Suite 510
	:	Islandia, New York 11749
- against -	:	
	:	RUSSO & APOZNANSKI
RALPH REYNOLDS,	:	Attorneys for Defendant
	:	875 Merrick Avenue
Defendant.	:	Westbury, New York 11590

Upon the following papers numbered 1 to 20 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 - 18 ; Replying Affidavits and supporting papers 19 - 20 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant for an order pursuant to CPLR 3212 granting summary judgment in his favor dismissing the complaint 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 the then 57 year old plaintiff on June 24, 2005 as a result of an accident that occurred on Straight Path at or near its intersection with Parkway Boulevard, in Babylon, New York. By her bill of particulars, plaintiff alleges that as a result of the subject accident she sustained injuries including, discomfort in the left side of her chest; contusion to the right knee; injury to her left foot; recurrent post-traumatic headaches and anxiety; neck pain radiating to shoulders; lower back pain; shooting pains in buttocks, back side of right leg and thigh; posterior disc herniations at C2-3 through C6-7 with impression on thecal sac; aggravation of spinal stenosis at C4-5, C5-6 and C6-7 with impression on cervical spinal cord at C4-5 with right foraminal narrowing; posterior disc herniations at L4-5 and L5-S1; foraminal narrowing at L4-5, right greater than left, with impression on exiting nerve root; posterior disc bulge at L3-4; C5-6 radiculopathy on left; and limitation of movement of cervical and lumbar spines. In addition, plaintiff alleges that following said accident she was confined to bed and home for approximately one week but she was not incapacitated from employment.

Plaintiff also alleges in her bill of particulars that her injuries constitute serious injuries under the following categories of Insurance Law § 5102 (d), "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."

Defendant now moves for summary judgment in his favor dismissing the complaint on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). In support of his motion, defendant submits, among other things, the summons and verified complaint; defendant's answer; plaintiff's bill of particulars; the deposition transcripts of plaintiff and defendant; the affirmed report dated May 30, 2007 of defendant's examining orthopedic surgeon, Anthony Spataro, M.D., based on an orthopedic examination on said date; the affirmed report dated May 30, 2007 of defendant's examining neurologist, C.M. Sharma, M.D., based on a neurological examination on that date; and the affirmed reports dated June 16, 2007 of defendant's examining radiologist, Sondra J. Pfeffer, M.D., who reviewed plaintiff's lumbar spine MRI films performed on September 26, 2005 and plaintiff's cervical spine MRI films performed on August 30, 2005, respectively.

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]).

Here, defendant satisfied his prima facie burden by showing that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see*, ***Cossentino v Kelly***, 41 AD3d 632, 839 NYS2d 777 [2d Dept 2007]). Defendant's examining orthopedic surgeon examined plaintiff almost two years after the subject accident and indicated in his affirmed report that plaintiff stated that she still had discomfort in her neck and back but was working regular duty as a teacher's aide at the present time. Defendant's examining orthopedic surgeon provided observed range of motion testing findings in comparison with normal results for plaintiff's cervical spine as follows, flexion 60 degrees (normal 60 degrees); extension 30 degrees (normal 30 degrees); lateral flexion right 40 degrees (normal 40 degrees); lateral flexion left 40 degrees (normal 40 degrees); rotation right 70 degrees (normal 70 degrees); and rotation left 70 degrees (normal 70 degrees). In addition, defendant's examining orthopedic surgeon provided observed range of motion testing findings in comparison with normal results for plaintiff's lumbar spine as follows, flexion 90 degrees (normal 90 degrees); extension 25 degrees (normal 25 degrees); lateral flexion right 25 degrees (normal 25 degrees); lateral flexion left 25 degrees (normal 25 degrees); rotation right 30 degrees (normal 30 degrees); and rotation left 30 degrees (normal 30 degrees). Defendant's examining orthopedic surgeon added that there was no palpable spasm or tenderness in the entire spine. His other findings included 5/5 normal motor function on all extremities with no objective abnormal findings present in plaintiff's arms or legs; reflexes of 2/2 bilaterally for biceps, brachioradialis, triceps, patella and Achilles; and negative straight leg raising testing for both lower extremities. Defendant's examining orthopedic surgeon also reported negative testing results for LaSague sign to evaluate radiculopathy, Controlateral straight leg raise to evaluate sciatica, Kemp's test to evaluate increased pain on lateral bending, Eli's test to evaluate whether hip extension causes pain, and Sperling maneuver to evaluate nerve root irritation. In conclusion, defendant's examining orthopedic surgeon diagnosed status post sprain, cervical and lumbar spine. He opined that there was no orthopedic disability, that plaintiff could carry out her normal activities without restrictions; and that no further treatment was indicated, including physical therapy.

Defendant's examining neurologist examined plaintiff on the same day as the examining orthopedic surgeon and also noted by affirmed report that plaintiff's neck still bothered her at times and that plaintiff was able to perform her daily activities with occasional difficulty in performing sustained activity. Defendant's examining neurologist's findings included, normal speech, awareness, memory and recall with no evidence of thought disorder or psychomotor abnormality; normal cranial nerves; and normal muscle tone in all limbs with muscle strength appropriate to age and build. In addition, defendant's examining neurologist found symmetrical deep tendon reflexes and no abnormal reflexes; a sensory system with no areas of numbness and negative Tinel sign and Phalen sign; and a normal gait. Defendant's examining neurologist also noted that plaintiff was unable to perform tandem maneuver but was able to stand on toes and heels and was able to stand on one foot unsupported for a few seconds. Defendant's examining neurologist diagnosed subjective cervical pain with normal neurological examination and opined that there were no causally related neurological lesions, no further need for neurological testing or treatment, and no neurological disability. Defendant's examining neurologist

further opined that there were no neurological limitations to usual work and activities and that there would be no permanent neurological problems of a causally related nature.

Seventeen days after defendant's examining orthopedic surgeon and neurologist conducted their examinations of plaintiff, defendant's examining radiologist prepared affirmed reports based on a review of plaintiff's lumbar MRI performed on September 26, 2005 and cervical MRI performed on August 30, 2005, respectively. Defendant's examining radiologist reported that the lumbar MRI revealed degenerative disc disease, manifested by disc desiccation and circumferential disc bulging, at L4-5 and L5-S1with endplate spurring, discogenic marrow endplate signal change and facet joint osteoarthropathy at the L4-5 level. She opined that there was no evidence of acute, trauma-related, discal or vertebral injury at any level. With respect to plaintiff's cervical MRI, defendant's examining radiologist indicated that the film revealed multi-level disc desiccation; disc space narrowing at C4-5; minimal posterior disc bulging with osseous ridging at C2-3; mild posterior disc bulging with endplate spurring at C3-4; chronic reactive discogenic marrow (Modic) endplate signal change at C4-5; and mild circumferential disc bulging with endplate spurring at C4-5, C5-6 and C6-7. She opined that said findings were pathognomonic[1] of long-standing spondylitic disease processes pre-dating the subject accident and that there was no evidence of acute, trauma-related, discal or vertebral injury at any level.

At her deposition on March 2, 2007, plaintiff testified that she was a Teacher's Aide for the third and fourth grades at the Wyandanch School District and that the subject accident occurred on the last day of school before summer vacation so she did not miss any time from work as a result of the accident. In addition, plaintiff testified that following the accident, she was taken by ambulance to Good Samaritan Hospital where she received medication and was told to see her doctor the next day and was released the same day. Plaintiff stated that right after the weekend she went to see her primary care physician who prescribed medication for pain and nerves and then she went to see a neurologist, Dr. Hausknecht, with neck and lower back complaints. According to plaintiff, Dr. Hausknecht conducted various tests and referred her for therapy which she initially received two or three days a week for about two months and then plaintiff decreased it to once a month for about two or three months. Plaintiff testified that she last saw Dr. Hausknecht about four or five months ago. Plaintiff stated that she did not feel that the treatment helped her pain. When asked what activities she could no longer do as a result of the subject accident, plaintiff replied that she could no longer lift heavy items. As for activities that she could perform but with difficulty, plaintiff responded lifting or carrying and at times, turning her neck. Plaintiff also stated that she still felt neck pain almost every day and that she often felt pain in her back too. Defendant adequately demonstrated that plaintiff's alleged injuries did not prevent her from performing substantially all of the material acts constituting her customary daily activities during at least 90 out of the first 180 days following the accident (*see*, ***Omar v Goodman***, 295 AD2d 413, 743 NYS2d 568 [2d Dept 2002]; *see also*, ***Gray v Steger***, 150 AD2d 962, 541 NYS2d 645 [3d Dept 1989]).

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 the affirmed reports dated August 26, 2005, September 23, 2005, October 21, 2005, and October 28, 2005 with attached electrodiagnostic evaluation of plaintiff's treating neurologist, Kerin B. Hausknecht, M.D. (Dr.

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[1]Pathognomonic is defined as characteristic or indicative of a disease (Stedman's Medical Dictionary 1332 [27th ed 2000]).

Hausknecht), and the unsworn cervical spine MRI report dated September 1, 2005 of plaintiff's radiologist, Robert Diamond, M.D., based on an examination on August 30, 2005.

In reply, defendant requests that the Court not consider the unsworn MRI report since it is not in admissible form and contends that plaintiff's proof failed to establish any causal connection between plaintiff's alleged injuries and the subject accident and that plaintiff's deposition testimony revealed that she did not miss any time from work such that she cannot satisfy the last serious injury threshold category of Insurance Law § 5102 (d).

Initially, the Court notes that the unsworn cervical spine MRI report of September 1, 2005 is admissible inasmuch as defendant's examining orthopedic surgeon and neurologist referred to said report in their affirmed reports in support of defendant's 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 MRI report indicated upper cervical kyphotic curvature; C2/3 through C6/7 posterior disc herniations, with ventral CSF impression; C3/4 ventral cord abutment; C4/5 Schmorl's invagination, ventral cord impression, and right foraminal narrowing; C4/5 through C6/7 central canal stenosis; and T1/2 grade I anterolisthesis, related to facet hypertrophic change.

However, all of plaintiff's submissions failed to raise a triable issue of fact as to whether plaintiff's injuries were causally related to the subject accident or whether plaintiff was unable to perform substantially all of her daily activities for not less than 90 of the first 180 days immediately following the accident (*see*, ***Ruddock v Boland Rentals, Inc.***, 31 AD3d 627, 819 NYS2d 81 [2d Dept 2006]). The initial affirmed report of plaintiff's treating neurologist, based on his initial evaluation of plaintiff two months after the subject accident, revealed that plaintiff's coordination was normal; her gait was steady; pain limited weakness of shoulder abduction and elevation, more pronounced on the left side; there was some weakness in the grip of both hands; and there was mild weakness of dorsiflexion of the left foot when compared with the right. In addition, plaintiff's treating neurologist noted localized tenderness over the medial aspect of the right knee joint and patella. Plaintiff's treating neurologist also recorded that in the cervical region, plaintiff had 1+ muscular spasm at around C5-6 and C6-7; restricted mobility on right cervical rotation by 35 to 40 percent and left cervical rotation by 30 to 35 percent; a 45 to 50 percent loss of mobility on cervical flexion; and pain in the extremes of movement. Plaintiff's treating neurologist's findings with respect to plaintiff's thoraco-lumbar region included mild spasm at around L3-4 and L4-5; positive straight leg raise testing on the left side at 35-40 degrees and on the right side weakly positive around 45 to 50 degrees; and range of motion testing results of a 20 to 25 percent painful limitation of mobility on lumbar flexion and extension. Plaintiff's treating neurologist diagnosed cervical whiplash injury with musculoligamentous strain/sprain; thoraco-lumbar spine whiplash injury with musculoligamentous strain/sprain; right knee and chest contusions; and post traumatic headaches and anxiety. He also planned further testing to rule out traumatic cervical disc herniation and radiculopathy and thoracic disc herniation and radiculopathy.

Upon his neurological re-evaluation of plaintiff on September 23, 2005, plaintiff's treating neurologist noted in his report that plaintiff had returned to work as a teacher's aide; plaintiff had less tingling in the arms; her knee pains had improved; and plaintiff was taking Tylenol #3 for pain. In addition, plaintiff's treating neurologist found during the physical examination that plaintiff continued to

be in a mild degree of discomfort; had mild weakness of both shoulders without obvious atrophy; and had less tenderness over the right knee. He also found that plaintiff had diffuse tenderness in the cervical paraspinal areas with a slight spasm at C4-5 and C5-6 and a moderate loss of mobility on cervical rotation in both directions and some painful limitation of mobility on cervical flexion. With respect to plaintiff's lower thoracic and lumbar region, plaintiff's treating neurologist indicated that plaintiff was diffusely tender with areas of spasm at L3-4 and L4-5 and tenderness in the sciatic notch region. He added that plaintiff continued to have weakness of dorsiflexion of the left foot and difficulty with deep knee bends. Plaintiff's treating neurologist pointed out that x-rays of the cervical, thoracic and lumbar spine showed no evidence of fracture but did indicate some degenerative changes and demineralization in the bones. He indicated that he concurred with the interpretation of the cervical MRI performed on August 30, 2005. Plaintiff's treating neurologist concluded that plaintiff continued to suffer from cervical whiplash injury and lumbar spine derangement with associated radicular symptoms and that he was concerned about radiculopathy.

By his October 21, 2005 report, plaintiff's treating neurologist reported a 25 to 30 percent loss of mobility on cervical rotation in both directions and a 20 percent loss on cervical flexion. In addition, he found restricted mobility on lumbar flexion and extension by 30 to 35 percent and a 25 percent loss on lumbar extension and positive straight leg raise testing results. His assessment was that there had been some mild improvement over the past few weeks and he recommended that plaintiff undergo EMG/Nerve conduction testing to evaluate nerve damage.

The last report dated October 28, 2005 of plaintiff's treating neurologist, four months after the subject accident, indicated that plaintiff still had range of motion restrictions: restricted mobility on cervical rotation in both directions by 25 to 30 percent; a 20 percent loss of cervical flexion; and 25 to 30 percent loss of mobility on lumbar flexion and 20 percent loss of extension. His assessment at the time was that plaintiff continued to suffer from cervical and lumbar musculoligamentous strain/sprain with disc herniations. The attached results of plaintiff's EMG/NCV study indicated evidence of moderate C5-6 radiculopathy on the left.

Notably, nowhere in any of his submitted reports did plaintiff's treating neurologist expressly indicate that plaintiff's diagnosed injuries were causally related to the subject accident. In addition, the diagnosis of plaintiff's treating neurologist in the most recent of the four reports, cervical and lumbar musculoligamentous strain/sprain, 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]). As for the added diagnosis of disc herniations and radiculopathy, the mere existence of a herniated or bulging disc, or even of radiculopathy, 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 (*see*, ***Furrs v Griffith***, 43 AD3d 389, 841 NYS2d 594 [2d Dept 2007]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 722 [2d Dept 2006]). Plaintiff submitted no medical proof based on a recent examination (*see*, ***Marziotto v Striano***, 38 AD3d 623, 831 NYS2d 551 [2d Dept 2007]).

Moreover, plaintiff's treating physicians failed to address the finding of defendant's expert radiologist attributing the condition of plaintiff's cervical and lumbar spine to degenerative changes

which would render speculative any opinion of plaintiff's treating neurologist that plaintiff's cervical and lumbar conditions were caused by the subject motor vehicle accident (*see*, ***Abreu v Bushwick Bldg. Products & Supplies, LLC***,43 AD3d 1091, 841 NYS2d 788 [2d Dept 2007]).

Furthermore, 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]; *see also*, ***Irizarry v Bin Chen***, 40 AD3d 925, 834 NYS2d 672 [2d Dept 2007]).

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

Dated: DEC 06 2007

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION