SHORT FORM ORDER

INDEX No. 05-2326
CAL. No. 07-01269-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 8-30-07
ADJ. DATE 11-15-07
Mot. Seq. # 001 - MG CASEDISP

OLINFA ROMANI and JORGE ROMANI, Plaintiffs, - against - MICHAEL W. HOLMES, SR. and MICHAEL HOLMES, JR., Defendants	SIBEN & SIBEN, LLP Attorneys for Plaintiffs 90 East Main Street Bay Shore, New York 11706 BRYAN M. ROTHENBERG, ESQ. Attorneys for Defendants 100 Duffy Avenue, Suite 500 Hicksville, New York 11801

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 - 9; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 10 - 19; Replying Affidavits and supporting papers 20 - 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 against them on the ground that plaintiff Olinfa Romani did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Olinfa Romani ("plaintiff") when her mini van collided with a vehicle operated and owned by defendants Michael Holmes, Sr. and Michael Holmes, Jr. at the intersection of Freeman Avenue and Cornell Street in the Town of Islip, Suffolk County, New York, on March 8, 2004. At the time of the accident, plaintiff was a passenger in the van operated by non-party Richie Cousin.

By their bill of particulars, plaintiffs allege that, as a result of the subject accident, plaintiff sustained serious injuries including bulging discs at C3-C4, C4-C5 and C5-C6; cervical radiculitis and spine sprain; concussion; headaches; bilateral shoulder contusion/sprain; and lumbosacral spine sprain. In addition, plaintiff claims that, following the subject accident, she was confined to bed and home for approximately three months.

Defendants now move for summary judgment in their favor dismissing the complaint against them on the ground that plaintiff has not sustained a serious injury as defined in Insurance Law § 5102 (d). In support, defendants submit, *inter alia*, the pleadings; a bill of particulars; the medical record of Southside Hospital; plaintiff's deposition testimony; and the affirmed report dated February 20, 2007 of their examining neurologist, Dr. Warren Cohen.

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***, 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 Sys.***, 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 [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 [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 [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 [1990]).

Here, defendants made a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) through the affirmed report of their examining physician and plaintiffs' bill of particulars (*see*, ***Thompson v Abbasi***, 15 AD3d 95, 788 NYS2d 48 [2005]). On February 20, 2007, approximately two years and eleven months after the subject accident, their examining neurologist, Dr. Cohen, examined plaintiff, using certain orthopedic and neurological tests including Foraminal Compression test, Spurling test, Jackson's Compression test, Soto-Hall test, Cervical Distraction test, Shoulder Depression test, Straight Leg Raising test, Bechterew/Sitting Boot test and Kernig test. Dr. Cohen found that all the test results were negative and that there was no trigger points, tenderness or spasm in plaintiff's cervical and lumbar spine. He reported his findings with

respect to the various ranges of motion of plaintiff's cervical and lumbar spine and compared those findings to the normal ranges of motion. Dr. Cohen found that plaintiff had normal range of motion in her cervical and lumbar spine. Dr. Cohen opined, based on his examination, that plaintiff had no disability or restrictions related to the subject accident and that there was no need for further treatment (*see*, ***Willis v New York City Tr. Auth.***, 14 AD3d 696, 789 NYS2d 223 [2005]). Thus, defendants have sustained their burden of demonstrating that there is no objective evidence of physical limitations resulting from plaintiff's alleged injuries (*see*, ***Santos v Marcellino***, 297 AD2d 440, 746 NYS2d 111 [2002]; ***O'Neal v Cancilla***, 294 AD2d 921, 741 NYS2d 815 [2002]; ***Hutchinson v Beth Cab Corp.***, 204 AD2d 151, 207 AD2d 283, 612 NYS2d 10 [1994]).

At her examination before trial, plaintiff testified to the effect that she is an employee of Suffolk Transportation; that she missed approximately three months of work as a result of the accident; and that she had received physical therapy for over two years at several different facilities. Plaintiff also testified that, while there is no activity that she is unable to perform except playing basketball, she cannot "carry heavy stuff." She is also having difficulties driving, doing laundry and cleaning the yard. Her deposition testimony thus reveals that her 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*, ***Curry v Velez***, 243 AD2d 442, 663 NYS2d 63 [1997]). Thus, defendants have therefore met their initial burden of establishing that plaintiff did not sustain a permanent consequential limitation of use of a body organ or member or significant limitation of use of a body function or system and that she was not prevented from performing substantially all of her usual and customary daily activities for 90 of the first 180 days following the accident within the meaning of Insurance Law § 5102 (d) (*see*, ***Gonzalez v Green***, 24 AD3d 939, 805 NYS2d 450 [2005]).

In opposition, plaintiffs contend that plaintiff did sustain a serious injury within the meaning of Insurance Law § 5102 (d). In support, plaintiffs submit, *inter alia*, the medical record of Southside Hospital; the medical record of ARCE Medical & Diagnostic Services, P.C.; the affirmed MRI report of plaintiff's cervical spine, taken on October 1, 2004 by Dr. Robert Diamond; the affirmed EMG report of plaintiff's upper extremities, taken August 29, 2004 by Dr. Rajpaul Singh; the affirmed report dated April 16, 2007 of his treating chiropractor, Dr. William Mitrus, based on an examination of plaintiff on September 11, 2006; the medical record of JR Medical & Diagnostics; and the medical record of Panetta Physical Therapy PC.

Here, plaintiffs failed to raise a triable issue of fact that plaintiff had sustained a "serious injury" under Insurance Law § 5102 (d) as a result of the subject accident (*see*, ***Sims v Megaris***, 15 AD3d 468, 790 NYS2d 487 [2005], *lv denied* 5 NY3d 703, 800 NYS2d 374 [2005]). The MRI report of plaintiff's cervical spine, performed by Dr. Diamond on October 1, 2004, revealed that plaintiff had bulging discs at C3-C4 through C5-C6, straightening of the cervical lordosis and central canal stenosis at C3-C4. The mere fact that a plaintiff suffers from bulging discs is insufficient to establish "serious injury" for purposes of Insurance Law § 5102 (d) (*see*, ***Howell v Reupke***, 16 AD3d 377, 790 NYS2d 703 [2005]; ***Foley v Karvelis***, 276 AD2d 666, 714 NYS2d 337 [2000]). Instead, for such injuries to constitute a "serious injury" within the contemplation of the Insurance Law, it is incumbent upon a plaintiff to provide objective medical evidence of the degree of the alleged physical limitation resulting from the injuries and their duration (***Toure v Avis Rent A Car Sys.***, *supra*; ***Foley v Karvelis***, *supra*). On September 11, 2006, approximately two years and six months after the subject accident, plaintiff's

treating chiropractor, Dr. Mitrus, administered certain orthopedic and neurological tests including Cervical Compression test and Kemps' test. All the test results were positive. Dr. Mitrus reported findings with respect to the various ranges of motion of plaintiff's cervical and lumbar spine and compared his findings to the normal ranges of motion. Dr. Mitrus concluded that plaintiff had range of motion restrictions in her cervical and lumbar spine and that there were spasm, tenderness and trigger points in her cervical and lumbar spine. To demonstrate the causation of plaintiff's alleged injuries, plaintiff was also required to submit medical evidence based on an initial examination close to the date of the accident (*see generally*, ***Ponce v Magliulo***, 10 AD3d 644, 781 NYS2d 703 [2004]). Nevertheless, plaintiffs failed to submit any medical evidence based on an initial examination in admissible form. Moreover, plaintiffs also failed to submit any competent medical evidence to support a claim that plaintiff was unable to perform substantially all of her daily activities for not less than 90 of the first 180 days as a result of the subject accident (*see*, ***Vita v Enterprise Rent-A-Car***, 8 AD3d 558, 779 NYS2d 128 [2004]).

Under the circumstances, this Court notes that plaintiffs failed to raise a triable issue of fact that plaintiff had sustained a "serious injury" under Insurance Law § 5102 (d) as a result of the subject accident. Thus, defendants' motion for summary judgment is granted.

Dated: DEC 26 2007

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION