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SHORT FORM ORDER

INDEX No. 06-23635
CAL. No. 07-01821-MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH F. COSTELLO
Justice of the Supreme Court

MOTION DATE 12-7-07
ADJ. DATE 2-7-08
Mot. Seq. # 001 - MD

KATHLEEN COLLINS,	:	BARBERA & McELHONE, P.C.
	:	Attorneys for Plaintiff
Plaintiff,	:	428 Route 25A, P.O. Box 5595
	:	Miller Place, New York 11764
- against -	:	
	:	RICHARD T. LAU & ASSOCIATES
BRYAN J. METZLER,	:	Attorneys for Defendant
	:	P.O. Box 9040
Defendant.	:	Jericho, New York 11753-9040

Upon the following papers numbered 1 to 33 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 23 ; Notice of Cross Motion and supporting papers__; Answering Affidavits and supporting papers 24 - 31 ; Replying Affidavits and supporting papers 32 - 33 ; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by defendant Bryan J. Metzler pursuant to CPLR 3212 and Insurance Law §5102(d) for summary judgment dismissing the complaint on the issue that plaintiff's injuries do not meet the serious injury threshold, is denied.

This is an action for damages for personal injuries alleged to have been sustained by plaintiff, Kathleen Collins, arising out of a two-vehicle accident which occurred on January 27, 2006, on North Ocean Avenue at or near the intersection with Masonic Avenue, Medford, Town of Brookhaven, County of Suffolk, State of New York, wherein it is claimed that defendant's vehicle came into contact with plaintiff's vehicle, causing plaintiff to suffer personal injury.

Defendant claims entitlement to an order granting summary judgment dismissing the complaint, asserting the plaintiff did not sustain serious injury sufficient to meet the threshold pursuant to Insurance Law of the State of New York §5102(d).

It is set forth in plaintiff's bill of particulars that as a result of the within incident, Kathleen Collins sustained, inter alia, posterior disc herniations at C3-4 through C6-7 with ventral CSF impression; foraminal narrowing on the right greater than the left at C3-4, bilaterally at C4-5, and bilaterally at C5-6

and 6-7; C7-T1 grade I anterolisthesis related to facet hypertrophic change; scoliotic lumbar curvature; T9-10 and T11-12 disc adjacent osseous vertebral adema; T12-L1 posterior disc herniation extending to impress the thecal sac; L1-2 posterior disc herniation seen centrally and to the right with ventral thecal sac impression and narrowing of the right foramen; L2-3 and L3-4 posterior disc herniations with ventral thecal sac impression and foraminal narrowing and L3-4 central canal stenosis; L4-5 grade II anterolisthesis with posterior disc herniation with central canal stenosis, foraminal narrowing and abutment of the exiting L4 roots; L5-S1 posterior disc herniation extending to flatten the ventral thecal sac; 6 cm inferomedial right hepatic rounded mass suggesting a cyst; L1 vertebral lesion compatible with hemangioma; pain and tingling and numbness in both hands; headaches, jaw pain and clicking; pain in the neck, left leg and foot after sitting, standing or lying down; pain in the lower back radiating to the left buttock and posterior left thigh; pain in the left arm; decreased range of motion of the cervical and lumbar spine; urinary incontinence; need of a cane to ambulate at times; urinary incontinence; inability to perform household chores, grocery shopping, gardening, raking leaves, and shoveling snow; inability to work on manuscript as a book writer; inability to be active on reading tours when her book comes out; and difficulty caring for her disabled daughter and domestic partner.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented (Sillman v Twentieth Century-Fox Film Corporation, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (Winegrad v N.Y.U. Medical Center, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v N.Y.U. Medical Center, supra). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (Joseph P. Day Realty Corp. v Aeroxon Prods., 148 AD2d 499 [2nd Dept 1989]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (Castro v Liberty Bus Co., 79 AD2d 1014 [2nd Dept 1981]). Summary judgment shall be granted only when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 [1979]).

Pursuant to Insurance Law §5102(d), " '[s]erious injury' means 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."

The term "significant" as it appears in the statute has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (Licari v Elliot, 57 NY2d 230 [1982]).

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 [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 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 Systems, Inc., 98 NY2d 345 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (Licari v Elliott (supra).

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 [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 [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 [1992]).

In support of this motion defendant Bryan Metzler has submitted, inter alia, an attorney's affirmation; a copy of the summons and verified complaint; defendant's verified answer; a copy of plaintiff's verified bill of particulars; a copy of the transcript of the examination before trial of Kathleen Collins; copies of various medical records, a cervical MRI report of October 16, 2007, a lumbar MRI report of October 16, 2007; a copy of the sworn report dated March 28, 2007 by Joseph Stubel, M.D. concerning his independent orthopedic examination of plaintiff; and a copy of the sworn report dated May 9, 2007 by Beatrice Engstrand, M.D. concerning her independent neurological examination of plaintiff.

In opposing this motion, plaintiff has submitted, inter alia, her affidavit; an attorney's affirmation; the sworn report of Dr. Stacy Braff, M.D. dated December 26, 2007; a copy of the MV 104 Police Accident Report; copies of MRI reports; and a note from Dr. Gatewood indicating she should not shovel snow or rake leaves as she has herniated discs at C3-7 and T12-S1.

Initially, the Court notes that the unsworn MV-104 police accident report constitutes hearsay and is inadmissible (see, Lacagnino v Gonzalez, 306 AD2d 250 [2d Dept 2003]; Hegy v Coller, 262 AD2d 606 [2d Dept 1999]).

At her examination before trial, plaintiff testified that as a result of the accident in which her vehicle was struck by an oncoming vehicle traveling in the wrong direction in her lane of traffic, she was caused to sustain injury to her neck, upper and lower back, jaw, face, and hands, and experienced severe headaches and sciatica and could not walk on her left leg due to pain that radiated down her back into her left leg. She had to walk with a cane initially, but now uses it occasionally. She also experienced urinary incontinence. Prior to this accident, she stated she had never injured her neck or jaw. She testified that

she had minor incidents involving tripping over a tent stake thirty years ago and another involving her car being struck by another car about ten years ago causing a minor incident with her back that did not last very long. She also wore wrist braces for carpal tunnel in both wrists prior to the accident at night and with typing. She stated she has a disabled son and is his only financial support, and a schizophrenic daughter who she does not support solely, but for whom she does a lot of care taking. Plaintiff stated she is a retired teacher since 1992, and is currently a writer and has published a couple novels and a book of short stories. She further testified she has a memoir under contract with Michigan State University concerning being the parent of a schizophrenic daughter. She also testified that she usually worked at writing four to five hours a day and could no longer do that after the accident, and could only write one hour a day because her back hurt, she couldn't sit and would have to lie down on a heating pad. At the date of her deposition, she returned to writing her manuscripts only two to three hours a day. She testified that since the accident she can no longer rake leaves or shovel snow, and even running the vacuum or taking out garbage hurts. She states it is difficult to carry laundry up and down the stairs and to carry groceries as those activities hurt her back. She has difficulty driving. Because her housemate has severe emphysema and is on oxygen, she also has to take care of her. She testified it is harder to take care of her daughter as she is in and out of hospitals and she has to drive hours each week.

Defendant submitted the record of Dr. Martin Domineer who examined Ms. Collins after the accident and diagnosed her with probable post traumatic hemarthrosis of her jaw with some adhesions causing joint noise. He recommended a soft diet and range of motion exercises and treatment of her neck injuries.

Defendant submitted the letter dated October 16, 2007 to counsel for defendant from Dr. Jessica Berkowitz concerning Ms. Collins' cervical MRI performed March 29, 2006 which revealed an exaggeration of the normal cervical lordosis; diffuse disc bulges from C3-4 through C6-7; some spondylosis at C5-6 and C6-7 impinging on the neural foramina. It was Dr. Berkowitz' impression that the spondylosis was greater at the lower of the two levels (C5-6 and C6-7) impinging on the neural foramina. She opined that these findings are chronic and degenerative in origin. She stated that there was no evidence of acute traumatic injury to the cervical spine such as vertebral fracture, asymmetry of the disc spaces, spinal cord contusion or epidural hematoma. She states there is no causal relationship between the claimant's alleged accident and the findings on the MRI examination. However, Dr. Berkowitz has merely set forth a conclusory opinion, unsupported with any evidentiary basis for her conclusory opinion wherein she states that the findings were chronic and degenerative in origin and that there is no causal relationship between the accident and injuries. Dr. Berkowitz does not opine to the duration of the condition, whether it was present prior to the accident, or the etiology of such conditions. Based upon the foregoing, defendant has not demonstrated prima facie entitlement to summary judgment on the issue of serious injury based upon Dr. Berkowitz' conclusory report.

Defendant submitted the letter dated October 16, 2007 to counsel for defendant from Dr. Jessica Berkowitz concerning Ms. Collins' lumbar MRI performed March 29, 2006 which revealed a normal lumbar lordosis, a diffuse disc bulges at T12-L1 and L1-2; minimal retroposiiton of L1 in relation to L2; hypertrophic facet joints changes giving the spinal canal a triangular configuration; a diffuse disc bulge at L2-3 with hypertrophic changes fo the facet joints at this level resulting in minimal central spinal stenosis; a slight diffuse disc bulge and hypertrophic facet joint changes at L3-4 with slight central spinal stenosis;

a diffuse disc bulge, hypertrophic facet joint changes and grad I spondylothesis at L4-5 with at least moderate central spinal stenosis, bilateral lateral recess stenosis and slight bilateral neural foraminal narrowing; a diffuse disc bulge at L5-S1 with an unusual heterogeneous marrow pattern which Dr. Berkowitz states could be related to osteoporosis but unrelated to the alleged accident. She further states there is no evidence of acute traumatic injury to the lumbar spine such as vertebral fracture, asymmetry of the disc spaces, ligamentous tear or epidural hematoma. Dr. Berkowitz opines that there is no causal relationship between the claimant's alleged accident and the findings on the MRI examination. However, Dr. Berkowitz' opinion is conclusory without any basis being set forth for such opinion. She does not opine as to duration or etiology. Accordingly, defendant has not demonstrated entitlement to summary judgment on the issue of serious injury based upon Dr. Berkowitz' report of plaintiff's lumbar spine.

Dr. Joseph Stubel performed an independent orthopedic examination of plaintiff on March 28, 2007. Dr. Stubel states plaintiff's vehicle was struck head on by another vehicle on January 27, 2006, and since then she has been having neck pain with some radiation down the arms and lower back pain with radiation down the left leg, and felt it was very difficult to walk causing her to use a cane for a while. She had physical therapy for over a year, two times a week. Dr. Stubel examined Ms. Collins' cervical spine and quantified his findings, comparing them to the normal ranges of motion for extension, flexion, rotation, lateral flexion bilaterally, and found all to be normal. He performed an examination of Ms. Collins' lumbar spine and quantified his findings, comparing them to the normal ranges of motion for forward bending, flexion, rotation, lateral flexion bilaterally, and lateral rotation and found all to be normal. Straight leg raising was 80 degrees (normal 80 degrees) bilaterally. Reflexes at the Achilles and patella tendons were bilaterally symmetrical and 2+. Motor strength and sensation in the lower extremities were stated to be grossly normal, as was his unspecified vascular exam. It was Dr. Stubel's impression that Ms. Collins has no objective signs of disability and that she can perform her usual activities of daily living and her usual work. However, Dr. Stubel does not comment on plaintiff's multiple bulging discs and findings set forth by Dr. Berkowitz and does not comment on whether the injuries are causally related to the accident, raising factual issues in this regard, precluding summary judgment on the issue of serious injury. Further, his opinion that Ms. Collins can perform her usual activities of daily living and her usual work raises factual issues with plaintiff's testimony in her examination before trial submitted with the moving papers. Accordingly, defendant has not demonstrated entitlement to summary judgment on the issue of serious injury based upon Dr. Stubel's report.

Dr. Beatrice Engstrand performed an independent neurological examination of plaintiff on April 24, 2007. Dr. Engstrand states plaintiff's vehicle was struck head on by another vehicle on January 27, 2006, and that she suffered loss of consciousness, pain in her head, neck, shoulder and low back and urinary incontinence for what she was told was a neurogenic bladder since the accident. Dr. Engstrand stated that Ms. Collins still has back pain going into her left leg and she has trouble with stairs. Cranial neurological examination was stated to be normal as was motor examination which revealed normal tone, bulk and power with no atrophy or fasciculation. Straight leg raising was found to be negative, but was not quantified and Tinel's and Phalen's signs were negative bilaterally. She examined Ms. Collins' cervical spine and quantified her findings, comparing them to the normal ranges of motion for extension, flexion, rotation, and lateral flexion bilaterally, and found all to be normal. She performed an examination of Ms. Collin's lumbar spine and quantified her findings, comparing them to the normal ranges of motion for flexion, extension, rotation, and lateral flexion bilaterally, and found all to be normal. Sensory testing

was stated to be normal but Dr. Engstrand stated Ms. Collins has difficulty moving her back, tiptoeing and heel walking. Deep tendon reflexes were 2 and equal bilaterally in the biceps, bracioradialis, triceps, patellar jerks and Achilles jerks, and plantar responses were down going. Station and gait were normal. It was Dr. Engstrand's assessment that Ms. Collins had a lumbar and cervical sprain. She stated the urinary incontinence is questionably related so there is a partial causal relationship. Based upon the finding of partial causation of the urinary incontinence, and in that Dr. Engstrand does not comment on plaintiff's multiple bulging discs and findings set forth by Dr. Berkowitz, and does not comment on whether those injuries are causally related to the accident, factual issues are raised precluding summary judgment on the issue of serious injury. Accordingly, defendant has not demonstrated entitlement to summary judgment on the issue of serious injury based upon Dr. Engstrand's report.

To prevail on their motion for summary judgment dismissing the complaint, the defendant was required to make a prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law §5102(d) (see, Toure v Avis Rent A Car Sys., 98 NY2d 345; Gaddy v Eyler, 79 NY2d 955). Here, defendants failed to satisfy the burden of establishing, prima facie, that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) (see, Agathe v Tun Chen Wang, ___NYS2d ___, 2006 WL 2965205, 2006 NY Slip Op 07434 [NYAD 2 Dept Oct 17, 2006]; see also, Walters v Papanastassiou, 31 AD3d 439 [2d Dept 2006]).

Since defendant failed to establish entitlement to judgment as a matter of law as set forth above, the burden has not shifted to plaintiff to establish that there are issues of fact to preclude an order granting summary judgment (CPLR 3212[b]; Zuckerman v City of New York, supra), and it is unnecessary to reach the question of whether or not plaintiff has raised a triable issue of fact (Krayn v Torella, 833 NYS2d 406. NY Slip Op 03885 [2nd Dept 2007]).

Accordingly, motion (001) by defendant Bryan Metzler for summary judgment on the issue that plaintiff did not sustain a serious injury pursuant to Insurance Law §5102 is denied.

Dated: March 27 2008

HON. RALPH F. COSTELLO
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION