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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon Deborah Kaplan Justice
DEBORAH A. KAPLAN J.S.C.

PART 22

Samantha Smith-Carter and Rose Carter

-v-

Francisco H. Valdez and Moustapha Diouf

INDEX NO. 117350-05

MOTION DATE 11-28-07

MOTION SEQ. NO. 001

MOTION CAL. NO. 130

The following papers, numbered 1 to _____ were read on this motion to/for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion for summary judgment dismissing the complaint on the ground that the plaintiff did not sustain any "serious injury" (Insurance Law §5102(d)) is decided in accordance with the attached Memorandum Opinion.

This constitutes the Decision and Order of the Court.

FILED
APR 29 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4-21-08

Deborah Kaplan
DEBORAH A. KAPLAN J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 28

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SAMANTHA SMITH-CARTER and ROSE CARTER,

Plaintiffs,

Index No.: 117350/05

-against-

FRANCISCO H. VALDEZ and MOUSTAPHA DIOUF,

Defendants.

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KAPLAN, J.

Defendant Moustapha Diouf (Defendant), moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint on the ground that the plaintiffs, Samantha Smith-Carter (Samantha) and Rose Carter (Rose), have not met the serious injury threshold as defined by New York's Insurance Law § 5102 (d).

FACTUAL ALLEGATIONS

This is a personal injury action arising from a motor vehicle accident which occurred on August 26, 2003, at the intersection of Seventh Avenue and West 111th Street in Manhattan, wherein Defendant vehicle struck the front of defendant Francisco H. Valdez's vehicle. Both plaintiffs, as well as Samantha's newborn child who was not injured, were rear seat passengers in Defendant's vehicle.

As a result of the impact, Samantha's left hand came in contact with the seat in front of her, and her back, neck and head were thrown back against her seat. Samantha complained of lower back pain and was taken by ambulance to Lenox Hill Hospital. At the hospital, Samantha received x-rays of the lumbar spine which revealed no fractures and she was discharged home.

As a result of the impact, Rose's right foot was pressed down and became stuck under the seat in front of her. Rose was also taken to the emergency room at Lenox Hill Hospital and reported pain in her back, neck, and right foot. No x-rays were taken at that time and Rose was discharged home.

Samantha alleges that, as a result of the accident, she sustained a C7/T1 posterior left-sided disc herniation extending to narrow the foramina, posterior disc bulges at C3/4 through C6/7 with ventral CSF impression at these levels, left C8 radiculopathy, carpal tunnel syndrome, a cervical strain/sprain, cervical derangement, a T11/12 posterior left sided disc herniation extending to narrow the left foramina, a lumbar disc herniation, a lumbar strain/sprain, and lumbar derangement.

Following the accident, Samantha sought treatment at Superior Medical Services in Bronx, New York, where she came under the care of Dr. Albert Villafuerte (Dr. Villafuerte). According to Dr. Villafuerte, on Samantha's initial visit on September 10, 2003, she complained of constant numbness of her left hand which went up her arm, neck pain with stiffness which was more pronounced on the left side as well as lower back pain.

Dr. Villafuerte conducted range of motion tests on Samantha which revealed that lumbar range of motion was restricted in extension to about 5 degrees (normal 30 degrees) and bilateral flexion to about 35 degrees (normal 50 degrees). The examination also revealed reduced range of motion of the cervical spine. Cervical rotation was 45-50 degrees bilaterally (normal 80 degrees), cervical extension was to about 35 degrees (normal 50 degrees), and cervical flexion was to about 35 degrees (normal 50 degrees).

Dr. Villafuerte's initial clinical impression was that there was a cervical and lumbar

sprain/strain and instructed Samantha to hold off on physical therapy as she complained of occasional vaginal bleeding. An MRI of the neck and back were ordered, and Dr. Villafuerte recommended an OB/GYN evaluation, x-rays of the cervical spine, and a reevaluation in two to three weeks or sooner if her symptoms worsened.

An MRI of the cervical spine was conducted on October 2, 2003 and read by Dr. Robert Diamond, M.D. (Dr. Diamond). The MRI revealed a C7/T1 posterior left sided disc herniation extending to narrow the foramina as well as C3/4, C4/5, C5/6 and C6/7 posterior disc bulges with ventral CSF impression at these levels. An MRI of the lumbar spine taken September 22, 2003 which was also read by Dr. Diamond revealed a T11/12 posterior left sided disc herniation extending to the left foramina, findings compatible with uterine leiomyomas, a possible nabothian cyst, and a left paravertebral retroperitoneal 2.5 CM ovoid T1 weighted hypointense mass.

Samantha was subsequently examined at follow-up evaluations at Superior Medical Services on September 23, 2003, October 15, 2003, November 19, 2003, and February 4, 2004. She underwent a course of treatment, including physical therapy, at Dr. Villafuerte's office.

After the February 4, 2004 appointment, Samantha's next and most recent visit with Dr. Villafuerte was on August 20, 2007. At the August 20, 2007 examination, flexion of the cervical spine was 40 degrees (50 degrees normal), extension was 50 degrees (60 degrees normal), left rotation was 65 degrees (80 degrees normal), and right rotation was 65 degrees (80 degrees normal). The range of motion tests of Samantha's lumbar spine revealed flexion at 75 degrees (90 degrees normal), extension at 20 degrees (25 degrees normal), left lateral flexion at 18 degrees (25 degrees normal), and right lateral flexion at 21 degrees (25 degrees normal). Dr.

Villafuerte states that Samantha stopped treatment because her insurance benefits terminated.

Dr. Villafuerte concludes that as a result of the August 26, 2003 accident, Samantha has cervical disc herniations at C7/T1 and thoracolumbar disc herniations at T11/12, as well as cervical bulging discs at C3/4, C4/5, C5/6 and C6/7, foraminal narrowing at the C7/T1 herniation, and ventral CSF impression at C3/4 through C6/7. Dr. Villafuerte also concludes that at T11/12 there is a foraminal narrowing on the left side and that the range of motion testing revealed significant limitations in cervical and lumbar range of motion. Dr. Villafuerte states that Samantha should continue with a home exercise program, see an orthopedist for an evaluation, and may be a candidate for epidural steroid and/or trigger point injection therapy.

At the request of Defendant, on October 26, 2006, Samantha had a neurological examination conducted by Dr. Edward M. Weiland, M.D. (Dr. Weiland), a board-certified neurologist. Dr. Weiland's examination of the cervical spine revealed normal flexion, extension, adduction and rotation. After conducting several other tests, Dr. Weiland concludes that Samantha exhibited a normal neurological examination with no objective findings of any continuing or permanent injury, and that Samantha is fully capable of performing all of her normal activities without any restrictions.

At Defendant's request, on October 26, 2006, Dr. Andrew N. Bazos (Dr. Bazos), a board-certified orthopedist, performed an examination of Samantha. Dr. Bazos states that no muscle spasms, tenderness or loss of lordosis were noted in the cervical spine and that active and passive ranges of motion were normal. Straight leg raising was 90 degrees bilaterally (90 normal) and range of motion including forward elevation, internal rotation, external rotation, and abduction were all normal. Based on his physical examination and the medical history of Samantha, Dr.

Bazos concludes that the cervical, thoracic, and the lumbar sprain/strains were all resolved. Dr. Bazos also concludes that Samantha is able to resume pre-accident status level of living activities with no restrictions.

The MRI examinations performed on Samantha on October 2, 2003 and September 22, 2003 were reviewed by Dr. Audrey Eisenstadt (Dr. Eisenstadt). Dr. Eisenstadt states that the MRI's of the cervical and lumbar spine were normal. Dr. Eisenstadt also states that the lumbar spine MRI reveals evidence of degenerative disc disease which may predate the accident.

Rose alleges that, as a result of the accident, she suffered from L3/4 through L5/S1 posterior right and left peripheral disc bulges, a lumbar sprain/strain, lumbar myofascial derangement, C5/6 and C6/7 posterior left sided bulges, C4/5 posterior disc herniation with central canal stenosis and ventral cord impression, C2/3 and C3/4 posterior disc herniations with ventral CSF impression at these levels, C3/4 ventral cord abutment, a cervical sprain/strain, cervical myofascial derangement, and a plantar calcaneal spur.

Following the August 26, 2003 accident, Rose also sought treatment at Superior Medical Services where she came under the care of Dr. Villafuerte. At her initial visit on September 10, 2003, Rose complained of lower back pain, neck pain which was more pronounced on the right side and numbness of the right hand, right arm, and right leg.[1] Dr. Villafuerte's physical examination of the cervical spine revealed tenderness on the paraspinal muscle and tenderness on bilateral lumbar paraspinals, the right more than the left. An exam of the right foot revealed tenderness on the fourth toe of the right foot with some swelling. Range of motion of the

[1] Dr. Villafuerte states that Rose was in a motor vehicle accident six years ago and experienced neck and back pains, has a history of hypertension, has a history of renal disease, was on hemodialysis three days a week, and has been on disability since 1998.

cervical spine revealed bilateral rotation to 45-50 degrees (normal 80 degrees) and extension to about 40 degrees (normal 50 degrees). Lumbar range of motion was restricted in extension 10 degrees (normal 30 degrees) and bilateral lateral flexion to about 15-20 degrees (normal 30 degrees). Rose was to begin physical therapy and was to hold off on exercise for the right foot, was recommended to have x-rays of the cervical and lumbar spine, was recommended to have MRI's of the neck and back and a re-evaluation was advised within three to four weeks.

X-rays were performed on September 11, 2003 by Dr. Allan Keil, M.D. The x-rays revealed that Rose's cervical spine and the lumbar spine were within normal limits and the right foot had a plantar calcaneal spur. A MRI of the lumbar spine was performed on September 22, 2003 by Dr. Diamond and was abnormal revealing L3/4, L4/5 and L5/S1 posterior right and left peripheral disc bulges, straightening of the lumbar curvature compatible with reflex muscle spasms, free fluid seen in the inferior pelvis, and 3.8 CM left pelvic mass suggesting an ovarian cyst. The MRI of the cervical spine performed on November 11, 2003 and read by Dr. Diamond was also abnormal revealing a C4/5 posterior disc herniation with central canal stenosis and ventral cord impression, a C2/3 and C3/4 posterior disc herniations with ventral CSF impression at these levels and C3/4 ventral cord abutment, C5/6 and C6/7 posterior left sided disc bulges and right and left thyroid lesions.

Rose had follow up evaluations on October 15, 2003, November 19, 2003, February 9, 2004, and on March 25, 2004. At the March 25, 2004 visit, Rose was found to have reached maximum benefit from conservative management and was advised to continue therapy via a

home exercise program.[2] Rose did not return for another visit until August 20, 2007.

At the August 20, 2007 examination, several tests were performed. Range of motion tests of the cervical spine revealed flexion at 42 degrees (50 normal), extension at 50 degrees (60 normal), left rotation at 60 degrees (80 degrees) and right rotation at 65 degrees (80 degrees normal). An exam of the lumbar spine revealed flexion was at 75 degrees (90 degrees normal), extension was at 18 degrees (25 degrees), left lateral flexion at 20 degrees (25 degrees normal) and right flexion at 18 degrees (25 degrees normal). On September 23, 2003, Rose underwent objective computerized range of motion testing of the cervical and lumbar spine utilizing digital inclinometry which revealed deficits in flexion, extension, rotation, and bending.

Dr. Villafuerte concludes that Rose suffered traumatic cervical disc herniations at C2/3 and C3/4 with ventral CSF impression at these levels and C3/4 ventral cord abutment, a cervical disc herniation at C4/5 with central canal stenosis and ventral cord impression, cervical disc bulges at C5/6 and C6/7, lumbar disc bulges at L3/4, L4/5 and L5/S1, a cervical and lumbar sprain/strain with myofascial derangement and a contusion and pain of the right fourth toe. Dr. Villafuerte concludes that Rose's disability is partial and permanent and that she may be a candidate for epidural steroid and/or trigger point injection therapy or surgical intervention to remove the herniated cervical disc material.

At Defendant's request, Dr. Bazos conducted an orthopedic examination of Rose on October 26, 2006. Range of motion tests revealed flexion, extension, and rotation to be normal.

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[2] Although Dr. Villafuerte states that Rose had reached maximum benefit from conservative management, according to Dr. Villafuerte's affirmation, Rose's physical therapy "had stopped secondary to insurance issues." (Dr. Villafuerte's Affirm., at 6).

An upper extremity examination was also conducted which revealed no tenderness or muscle spasms, no muscle wasting or atrophy noted in the upper extremities and the range of motion was within normal limits in all planes bilaterally. Dr. Bazos concludes that the cervical sprain/strain and the lumbar sprain/strain were resolved, and that Rose is able to resume pre-accident status level of living activities with no restrictions.

At Defendant's request, Rose was examined by a neurologist, Dr. Weiland, on October 26, 2006. Dr. Weiland notes that Rose continues to complain of lower back pain without any radicular component and no longer complains of any pain in the region of her neck, thoracic region or region of her calves. Examination of the cervical spine revealed flexion and extension to 60 degrees (60 degrees normal), right and left lateral rotation to 70 degrees (70 degrees normal), and right and left lateral flexion to 40 degrees (40 degrees normal). Examination of the lumbar spine revealed flexion was to 80 degrees (80 degrees normal), extension to 30 degrees (30 degrees normal), and right and left lateral flexion to 40 degrees (40 degrees normal). Examination of the shoulders revealed abduction is unlimited at 170 degrees (170 degrees normal). Abduction of the shoulders was unlimited to 50 degrees (50 degrees normal). Internal and external rotation showed no restriction to 90 degrees (90 degrees normal). Straight leg raising was unrestricted to 90 degrees.

Dr. Weiland concludes that the cervical thoracic and lumbosacral sprains/strains were resolved, the neurological examination was normal, and there was no evidence of any lateralizing neurological deficits. Dr. Weiland found no neurologic residual or permanency based upon his physical examination of Rose.

DISCUSSION

I. SAMANTHA SMITH-CARTER

It is beyond dispute that five of the nine categories of serious physical injuries discussed by Insurance Law §5102 (d)[3] are not applicable herein as there is no allegation of death, dismemberment, significant disfigurement, fracture, or loss of a fetus. Therefore, the court must determine if the injuries asserted by Samantha constitute a permanent loss of use of a body organ, member, function, or system; or, a permanent consequential limitation of use of a body function or system; and/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 90 days during the 180 days immediately following the occurrence of the injury or impairment.

Defendant argues that upon viewing the facts most favorable to Samantha, it is clear that her injuries are not within the statutory definition because Samantha does not have a significant limitation of the use of a body function or system. Defendant contends that the physicians that examined Samantha have offered their qualitative assessment of Samantha stating that she has a normal range of motion and full function with no limitations or other indications of any residual loss of function. As Defendant has met his burden by producing the affirmations of both Dr.

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[3]Section 5102 (d) of New York State's Insurance Law defines the term "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.

Weiland and Dr. Bazos, the burden shifts to Samantha to come forward with evidence to prove that she sustained a serious injury within the meaning of the Insurance Law. *Gaddy v Eyler*, 79 NY2d 955, 957 (1992); *Shinn v Catanzaro*, 1 AD3d 195, 197 (1st Dept 2003).

The Court of Appeals has held that whether a limitation of use or function is significant or consequential "'involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part.'" *Toure v Avis Rent A Car Sys., Inc.*, 98 NY2d 345, 353 (2002), quoting *Dufel v Green*, 84 NY2d 795, 798 (1995). "In order to prove the extent or degree of physical limitation, an expert may designate a numeric percentage of a plaintiff's loss of range of motion or may make a qualitative assessment of plaintiff's condition, provided that the latter evaluation has an objective basis and compare the plaintiff's limitations to the normal use of the affected body system or function." *Shinn v Catanzaro*, 1 AD3d at 198. In addition, the Court of Appeals has held that a significant limitation must be something more than a "'minor, mild or slight limitation of use.'" *Gaddy v Eyler*, 79 NY2d at 957, quoting *Licari v Elliott,* 57 NY2d 230, 236 (1982).

Here, Dr. Weiland's and Dr. Bazos's conclusions regarding Samantha's range of motion differ from the conclusions of Dr. Villafuerte, thereby presenting an issue of fact as to the "significant limitation of use of a body function or system" category of Insurance Law § 5102(d). Specifically, while Dr. Weiland and Dr. Bazos state that Samantha demonstrates a full range of motion and that there are no objective findings of any continuing permanent injury, Dr. Villafuerte's range of motion test revealed a reduced range of motion. He found that the cervical spine's flexion was 40 degrees (50 degrees normal), extension was 50 degrees (60 degrees normal), left rotation was 65 degrees (80 degrees normal), and right rotation was 65 degrees (80

degrees normal), the lumbar spine revealed flexion at 75 degrees (90 degrees normal), extension at 20 degrees (25 degrees normal), left lateral flexion at 18 degrees (25 degrees normal), and right lateral flexion at 21 degrees (25 degrees normal). Dr. Villafuerte further concluded that Samantha sustained a permanent partial disability in the lumbar spine and cervical spine and that the prognosis for a complete recovery is poor.

The Court of Appeals has held that "a plaintiff who terminates therapeutic measures following the accident, while claiming serious injury, must offer some reasonable explanation for having done so." *Pommells v Perez*, 4 NY3d at 574 (quotations omitted). Here, Defendant contends that Samantha last received no treatment since February 4, 2004, and that the examination report of that date by Dr. Gautum Khakhar (Dr. Khakhar's), who treated Samantha at Superior Medical Services, states that Samantha should continue physical therapy and return to follow up in four to six weeks. Defendant argues that this cessation in treatment was not sufficiently explained by Samantha. However, this plaintiff's proffered explanation is that her treatment with Dr. Villafuerte was stopped because her no-fault insurance benefits were terminated. Contrary to Defendant's contention, this explanation is a reasonable one, sufficient to explain the cessation in treatment. *Wadford v Gruz*, 35 AD3d 258 (1st Dept. 2006); *Francovig v Senekis Cab Corp.*, 41 AD3d 643 (2nd Dept. 2007).

Samantha also contends in her bill of particulars that she has suffered an injury under the "90/180" category of the Insurance Law. "When construing the statutory definition of a "90/180" claim, the words 'substantially all' should be construed to mean that the person has been prevented from performing his usual activities to a great extent, rather than some slight curtailment." *Thompson v Abbasi*, 15 AD3d 95, 100-101 (1st Dept 2005). Samantha testified at

her deposition that as a result of the accident, she missed a week or two from work, needs some help with household chores, and experiences difficulty typing on the computer. Although some of Samantha's activities have been affected as a result of the accident, there is no evidence that Samantha has sustained injuries which have prevented her from performing substantially all of the material acts that constitute her usual and customary daily activities for at least 90 days during the 180 days immediately following the accident.

Inasmuch as Samantha's injuries do not fall under the "90/180" category of serious injury as defined by Insurance Law §5102(d), Defendant's motion for summary judgment must be granted as to any claim premised upon that category. Nonetheless, as set forth above, the motion must otherwise be denied as to this plaintiff since she has met her burden of raising a triable issue of fact as to the "significant limitation of use of a body function or system" category of Insurance Law § 5102(d).

II. ROSE CARTER

Defendant argues that based upon viewing the facts most favorable to Rose, it is clear that her injuries are not serious as defined by section 5102 (d) of the Insurance Law as Rose does not have a significant limitation of use of a body function or system. Defendant contends that based upon Dr. Weiland and Dr. Bazos's qualitative assessment of Rose, she is capable of working full duty at her usual occupation and is able to resume pre-accident status level of living activities with no restrictions. As Defendant has met his burden by producing the affirmations of both Dr. Weiland and Dr. Bazos, the burden shifts to the Rose to come forward with evidence to prove that she sustained a serious injury within the meaning of the Insurance Law. *Shinn v Catanzaro*,

1 AD3d at 197.

Rose submits the affirmation of Dr. Villafuerte who states that, as of the March 25, 2004 examination, Rose had reached maximum benefit from conservative management and that she was advised to continue therapy via a home exercise program. Dr. Villafuerte concludes that Rose's final diagnosis was post traumatic cervical disc herniations at C2/3 and C3/4 with ventral CSF impression at these levels and C3/4 ventral cord abutment, cervical disc herniation at C4/5 with central canal stenosis and ventral cord impression, cervical disc bulges at C5/6 and C6/7, lumbar disc bulges at L3/4, L4/5 and L5/S1, cervical and lumbar sprain/strain with myofascial derangement and a contusion and pain of the right fourth toe.

The First Department has held that "[a] bulging or herniated disc may very well be a serious injury within the meaning of the statute, and a CT scan or MRI constitutes objective medical evidence to support subjective complaints of such a painful condition. But a plaintiff must still offer some objective evidence of the extent or degree of his alleged physical limitations and their duration, resulting from the disc injury . . . a minor, mild, or slight limitation of use is insufficient to constitute a serious injury within the definition of the no-fault statute." *Arjona v Calcano*, 7 AD3d 279, 280 (1st Dept 2004) (citations omitted). Furthermore, sprain/strain type injuries with minimal limitation are not significant limitations of a body function or system. *See Booker v Miller*, 258 AD2d 783, 784 (3d Dept 1999); *Partlow v Meehan*, 155 AD2d 647 (2d Dept 1989).

Rose states that she had to take off of work for only one or two weeks, and states that she has difficulty bending, lifting and cleaning. However, the First Department has held that difficulty with standing, sitting, bending and lifting can be considered a minor, mild or slight

limitation which is insufficient to constitute a serious injury. *See Arjona v Calcano*, 7 AD3d at 280. Here, Rose fails to prove that the accident caused an injury beyond one that created a minor limitation to her daily activities and fails to show that she was "prevented from performing . . . usual activities to a great extent, rather than some slight curtailment." *Thompson v Abbasi*, 15 AD3d at 100-101.

Since Rose Carter failed to raise any issues requiring a trial, Defendant's motion must be granted and the complaint dismissed to the extent that it asserts claims on behalf of that plaintiff.

CONCLUSION and ORDER

Accordingly, it is hereby

ORDERED that the motion of defendant Moustapha Diouf for summary judgment dismissing the complaint is granted to the extent that the complaint is dismissed as to all claims asserted on behalf of plaintiff Samantha Smith-Carter which are premised upon the "90/180" category of serious injury as defined by Insurance Law § 5102(d), and as to all claims asserted on behalf of plaintiff Rose Carter, and it is further,

ORDERED that the remainder of the action shall continue.

Dated: April 21, 2008

ENTER:

Deborah Kaplan

DEBORAH A. KAPLAN
J.S.C.