SHORT FORM ORDER

INDEX No. 05-4731
CAL. No. 07-01826-MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER MAYER
Justice of the Supreme Court

MOTION DATE 12-7-07
ADJ. DATE 2-4-08
Mot. Seq. # 001 - MG

DONNA M. PEGUILLAN and WILLIAM PEGUILLAN,	:	SIBEN & SIBEN, LLP
	:	Attorneys for Plaintiffs
	:	90 East Main Street
Plaintiffs,	:	Bay Shore, New York 11706
	:	
- against -	:	RICHARD T. LAU & ASSOCIATES
	:	Attorneys for Defendant
RAUL B. BERRIOS,	:	P.O. Box 9040
Defendant.	:	Jericho, New York 11753-9040

Upon the reading and filing of the following papers in this matter: (1) notice of Motion by the defendant , dated November 5, 2007, and supporting papers; (2) Affirmation in Opposition by the plaintiff, dated January 24, 2008, and supporting papers; and (3) Reply Affirmation by the defendant, dated January 31, 2008; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by defendant for an order awarding summary judgment in his favor on the ground that plaintiff Donna Peguillan did not sustain "serious injury" within the meaning of Insurance Law §5102 (d) is granted.

Plaintiff Donna Peguillan commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred on January 20, 2004, when the vehicle she was riding in was struck in the rear by a vehicle operated by defendant Raul Berrios. Her husband, plaintiff William Peguillan, sued derivatively for loss of services. By her supplemental bill of particulars, plaintiff alleges that as a result of the subject accident she sustained serious injuries including C2-3 and C6-7 disc bulges with ventral CSF impression; disc herniation at C3-4 which effaces the ventral aspect of the thecal sac; aggravation and/or exacerbation of disc bulge at C3-4; and C4-5; aggravation and/or exacerbation of herniated disc at C5-6; cervical radiculopathy; and headaches.

Defendant now moves for summary judgment on the ground that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d). Defendant's submissions in support of the motion include copies of the pleadings, the transcript of plaintiff's deposition testimony, emergency room

records related to plaintiff's treatment after the accident, and reports prepared by plaintiff's radiologists, Dr. Phillip Beuchert and Dr. Melissa Sapan. The reports indicate that plaintiff had injured her neck in a prior motor vehicle accident in 1990 and that a MRI study conducted in 1999 revealed a small central disc herniation at level C5-C6 and mild disc bulge at level C3-C4 and C4-C5. In her report dated April 27, 2004, Dr. Sapan states that a comparison of plaintiff's MRI study conducted in 2004 revealed no interval change with the prior study dated July 16, 1999.

During her deposition, plaintiff testified that she injured her neck and back in a prior car accident in 1990, and that she received intermittent chiropractic treatment from Dr. Anthony Rizzo for those injuries since 1995. Plaintiff also testified that she only missed one day from work after the subject accident, and that she had a subsequent car accident in March 2004.

Defendant also submits sworn medical reports prepared by physicians who, at defendant's request, conducted physical examinations of plaintiff in February 2007 and reviewed plaintiff's medical records. Dr. Richard Pearl, a neurologist, states in his report that he observed 75 degrees of extension, 60 degrees of flexion, and 80 degrees of lateral rotation in plaintiff's cervical spine and that these degrees of movement were within the normal range of motion. The report states that passive range of motion of the lumbar spine was observed to be 80 degrees flexion, 25 degrees of extension and 30 degrees of lateral flexion and that the straight leg raise test was negative. Dr. Pearl concludes that there were no objective findings during plaintiff's examination indicating a neurological injury or disability. Dr. Pearl also states that plaintiff suffered from a significant preexisting condition in her cervical spine at the time of the subject accident.

Similarly, Dr. Joseph P. Stubel, an orthopedic surgeon, found that plaintiff had normal range of motion in her cervical spine and lower back, and displayed no muscle spasm or tenderness in either region. Dr. Stubel report also states that plaintiff had normal reflexes, muscle strength and sensation in the upper and lower extremities. It states that examination of plaintiff's spine revealed no muscle spasm, tenderness or trigger points, and that probing of the cervical roots produced no symptoms down the arms. Dr. Stubel concluded that plaintiff suffered from pre-existing degenerative changes to her cervical spine at the time of the subject accident and that she could perform her usual activities of daily living and work.

Plaintiffs oppose the motion for summary judgment, arguing that defendant's submissions are insufficient to meet his burden on the motion. Specifically, plaintiff asserts that Dr. Stubel's report was conclusory, because his findings were not adequately supported by his examination of the plaintiff and bears little evidence that he reviewed plaintiff's prior medical reports. Plaintiffs further argue that Dr. Pearl's conclusions are flawed, because he examined plaintiff more than three years after her accident. Plaintiff also notes that Dr. Pearl failed to discuss how plaintiff's pre-existing injuries were impacted by the accident, or if the previous injuries were impacted at all. Alternatively, plaintiffs argue that their submissions in opposition to the motion are sufficient to raise triable issues of fact as to whether plaintiff suffered serious injuries. Plaintiffs' submissions include a copy of her deposition testimony and affirmed reports from her treating physician, Dr. Anthony Rizzo.

In his report dated May 21, 2007, Dr. Rizzo states that following an examination conducted on January 21, 2004, he diagnosed plaintiff as suffering from post-concussion syndrome, cervical and lumbar sprains and myospasm. DR. Rizzo states that the examination showed plaintiff had "severely limited" range of motion in her cervical spine with bilateral cervical and upper trapezium spasms, and mild range of motion limitations in her lumbar spine. Plaintiff's straight leg raise test was positive for lower back pain at 60 degrees bilaterally, and her deep tendon reflexes and sensation were normal. Dr. Rizzo further indicates that an MRI performed on March 24, 2004, showed a C3-C4 left parasagittal disc herniation, a C5-C6 central disc herniation, and C4-C5 disc bulge with right neural foraminal stenosis. Dr. Rizzo mentions however that plaintiff did have an MRI from a prior motor vehicle accident in 1999 which showed a small central disc herniation at C5-C6 and a mild disc bulge at C3-C4 and C4-C5 without neural foraminal stenosis. As for cervical range of motion tests conducted on May 21, 2007, Dr. Rizzo states that plaintiff exhibited 30 degrees of flexion, 20-25 degrees extension, 30 degrees bilaterally and 90 degrees lumbar flexion. In his December 16, 2007, report, Dr. Rizzo opines that plaintiff only has "mild intermittent lower back pain" and "permanent mild-to-moderate disability." Dr. Rizzo also concludes that plaintiff is "significantly worse since the accident and the likelihood of recovery is not likely."

New York's No-Fault Insurance Law precludes recovery for any "non-economic loss, except in the case of serious injury, or for basic economic loss" arising out of the negligent use or operation of a motor vehicle (Insurance Law §5104[a]). As long recognized by the Court of Appeals, the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries" (*see*, ***Dufel v Green***, 84 NY2d 795, 798, 622 NYS2d 900 [1995]; ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570 [1982]). To help achieve this goal, the Legislature vested trial courts with the authority to determine the issue of whether a plaintiff has established prima facie that he or she sustained a "serious injury" in a motor vehicle accident (*see*, ***Licari v Elliot***, *supra*).

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."

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 (*see*, ***Oberly v Bangs Ambulance***, 96 NY2d 295, 727 NYS2d 378 [2001]). To establish a permanent consequential limitation or a significant limitation of use, the medical evidence submitted by a plaintiff must include objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment, based on objective findings, comparing the plaintiff's present limitations to the normal function, purpose and use of the affected body, organ, member or function (*see*, ***Toure v Avis Rent A Car Sys.***, *supra*). "Whether a limitation of use or function is 'significant' or 'consequential' * * * relates to medical significance and 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" (*see*, ***Dufel v Green***, *supra*, at 798, 622 NYS2d 900; *see*, ***Toure v Avis Rent A Car Sys.***, *supra*). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see*, ***Licari v Elliott***, *supra*). Further, subjective claims of pain and limitation of movement must be verified by objective medical findings that are based on a recent examination of the plaintiff (*see*, ***Ali v Vasquez***, 19 AD3d 520, 797 NYS2d 528 [2005]; ***Batista v Olivo***, 17 AD3d 494, 795 NYS2d 54 [2005]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2000]).

A defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see*, ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, i.e., affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, *supra*, at 270, 587 NYS2d 692). A defendant also may establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see*, ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2001]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [1997]; ***Torres v Micheletti***, 208 AD2d 519, 616 NYS2d 1006 [1994]; ***Pagano v Kingsbury***, *supra*). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact or demonstrate an acceptable excuse for failing to meet the requirement of tender in admissible form (***Gaddy v Eyler***, *supra*; ***Pagano v Kingsbury***, *supra*; ***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]; *see generally*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

The evidence submitted by defendant establishes prima facie that plaintiff did not sustain a serious injury as a result of the January 20, 2004 accident, and that the restricted movement in her spine is attributable to pre-existing condition in her cervical spine (*see*, ***Cruz v Calderone***, 2008 NY App. Div. LEXIS 2735; ***Rashid v Estevez***, 47 AD3d 786, 850 NYS2d 181 [2008]; ***Siegel v Sumalyev***, 46 AD3d 666, 846 NYS2d 583 [2007]). The reports submitted by defendant's physicians were consistent with the findings of plaintiff's own radiologist, Dr. Melissa Sapan, who concluded that a comparison of plaintiff's MRI conducted in 2004 revealed no interval change with the prior study dated July 16, 1999. In their respective reports, both Dr. Stubel and Dr. Pearl also relate plaintiff's symptoms to pre-existing degenerative changes in her cervical spine. Despite the existence of MRI reports showing that plaintiff has a herniated or bulging disc, defendant has established that plaintiff did not sustain a serious injury within the meaning of the No-Fault Law by submitting evidence that she has a normal range of motion in her cervical and lower spine and displayed no disabilities (*see*, ***Rashid v Estevez***, *supra*; ***Siegel v Sumalyev***, *supra*; ***Deutsch v Tenempaguay***, 48 AD3d 614, 852 NYS2d 369 [2008]; ***Morris v Edmond***, 48 AD3d 432, 850 NYS2d 641 [2008]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 291 [2005]). Further, evidence of a herniated disc or bulge, without objective medical evidence that the accident caused plaintiff to suffer significant physical limitations, is insufficient to establish a serious injury (*see*, ***Pommells v Perez***, 4 NY3d 566, 574, 797 NYS2d 380 [2005]; ***Rashid v Estevez***, *supra*; ***Siegel v Sumalyev***, *supra*; ***Kearse v New York City Tr. Auth.***, *supra*). The burden of proof, therefore, shifted to plaintiffs. Plaintiffs failed to meet this burden.

When a defendant presents evidence that plaintiff's alleged pain and injuries are related to a pre-existing condition, a plaintiff alleging serious injury must come forward with evidence that addresses the defense of lack of causation (***Pommells v Perez***, *supra*, at 580, 797 NYS2d 380; ***Franchini v Palmieri***, 1 NY3d 536, 775 NYS2d 232 [2003]). To this end, plaintiff submits sworn medical reports from plaintiff's treating physician dated May 21, 2007 and December 16, 2007. Despite alluding to plaintiff's prior treatment for plaintiff's 1990 accident and concluding that plaintiff's grew "significantly worse" since the subject accident, neither medical report presented in opposition sufficiently addresses the findings by defendant's physicians that plaintiff suffered from a pre-existing degenerative condition in her cervical region (*see*, ***Franchini v Palmieri***, *supra*; ***Scott v Aponte***, 2008 NY App. Div. LEXIS 2716; ***Cadena v Espinal***, 2008 NY App. Div. LEXIS 2151; ***Luciano v Luchsinger***, 46 AD3d 634, 847 NYS2d 622 [2007]; ***Kaplan v Vanderhans***, 26 AD3d 468, 809 NYS2d 582 [2006]). Indeed, Dr. Rizzo's reports fails to discuss the injuries and complaints related to plaintiff's 1990 car accident, or her subsequent car accident in March 2004. Dr. Rizzo's conclusion that plaintiff suffers from permanent mild-to-moderate disability as a result of the subject accident, therefore is speculative (*see*, ***Pommells v Perez***, *supra*; ***Cadena v Espinal***, *supra*; ***Luciano v Luchsinger***, *supra*).

Dr. Rizzo's reports are also insufficient to raise a triable issue of fact as to whether plaintiff suffered injury within the significant limitation of use category. While Dr. Rizzo found range of motion restrictions in plaintiff's cervical spine based upon tests performed in preparation for his May 21, 2007, report, Dr. Rizzo did not proffer any evidence that plaintiff was subject to range-of-motion testing following her initial car accident in 1995, or at any other time contemporaneous to the subject accident (*see*, ***Yaroslav Shvartsman v Vildman***, 47 AD3d 700, 849 NYS2d 600 [2008]; ***Deutsch v Tenempaguay***, *supra*; ***Thomason v Thomason***, 40 AD3d 627, 836 NYS2d 196 [2007]; ***Borgella v D & L Taxi Corp.***, 38 AD3d 701, 834 NYS2d 199 [2007]). In addition, there is no objective medical evidence in the record showing that the subject accident exacerbated plaintiff's pre-existing injuries (*see*, ***Suarez v Abe***, 4 AD3d 288, 772 NYS2d 317 [2004]; ***Phillips v Tissotvanpatot***, 280 AD2d 735, 720 NYS2d 274 [2001]). Instead, plaintiff's claim that the accident aggravated a preexisting spinal condition is based solely on her subjective complaints of pain. Finally, there is no objective evidence showing that plaintiff was unable to perform substantially all of her normal activities for at least 90 of the 180 days immediately after the accident as a result of the injuries she sustained therein (*see*, ***Hernandez v DIVA Cab Corp.***, 22 AD3d 722, 804 NYS2d 396 [2005]; ***Davis v New York City Tr. Auth.***, 294 AD2d 531, 742 NYS2d 658, *lv denied* 98 NY2d 612, 749 NYS2d 475 [2002]; ***Sainte-Aime v Ho***, 274 AD2d 569, 712 NYS2d 133 [2000]). Indeed, plaintiff testified that at the time of the subject accident she was working as an accountant and only missed one day from work.

Thus, the cause of action seeking damages on behalf of plaintiff must be dismissed, as must the derivative claim brought by her husband. Accordingly, defendants' application for summary judgment dismissing the action based on plaintiff's failure to meet the serious injury threshold is granted.

Dated: 5/16/08

Peter H. Mayer
PETER H. MAYER, J.S.C.