SHORT FORM ORDER

INDEX NO. 05-30534

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

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 11/16/07
ADJ. DATE 2/15/08
Mot. Seq. #001 - MG

MONICA E. LETIZIA, Plaintiff, - against - KISMET DOMI, Defendant.	RICONDA & GARNETT, LLP Attorneys for Plaintiff 753 West Merrick Road Valley Stream, New York 11580 RICHARD T. LAU & ASSOCIATES Attorneys for Defendant P.O. Box 9040 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 October 15, 2007, and supporting papers; (2) Affirmation in Opposition by the plaintiff, dated February 15, 2008, and supporting papers; and (3) Reply Affirmation by the defendant, dated February 21, 2008; and

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

ORDERED that the defendant's motion for summary judgment dismissing the complaint is granted.

The plaintiff, Monica Letizia, commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred at the intersection of Mastic Beach Road and Mastic Road in the Town of Brookhaven on August 9, 2004. The collision allegedly happened when a vehicle driven by the defendant, Kismet Domi, struck the passenger side of the plaintiff's vehicle as it was traveling through the intersection. By her bill of particulars, the plaintiff alleges that she sustained various injuries as a result of the collision, including a disc herniation at level C5/6; lumbar radiculitis; cervical and lumbar sprains and strains; neck and back pain; and headaches. She further alleges in a supplemental bill of particulars that she has been unable to work since the date of the accident due to such injuries.

The defendant now moves for summary judgment dismissing the complaint on the ground that the plaintiff is precluded under Insurance Law § 5104 from recovering for non-economic loss, as she did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d). The defendant's submissions in support of the motion include copies of the pleadings, a transcript of the plaintiff's deposition testimony, and hospital records relating to the plaintiff's emergency room treatment immediately after the subject accident. The defendant also submits affirmed medical reports prepared by Dr. Jay Nathan and

Dr. S. Farkas. At the defendant's request, Dr. Nathan, an orthopedic surgeon, examined the plaintiff in February 2007 and reviewed various medical records related to the injuries alleged in this action. Dr. S. Farkas, also an orthopedic surgeon, conducted an examination of the plaintiff on behalf of the no-fault insurance carrier in October 2004.

The plaintiff opposes the motion, arguing that triable issues of fact exist as to whether she suffered injury within the "limitation of use" categories or the 90/180 category. In opposition, the plaintiff submits, among other things, a sworn report, dated October 21, 2005, by her treating chiropractor, Jeffrey Scaccio; an unsworn statement, dated February 12, 2008, by Dr. Scaccio; an unsworn magnetic resonance imaging (MRI) report concerning the plaintiff's cervical spine dated October 2004; and a photocopy of a note written on a prescription pad bearing the names of H.M. Thippeswamy and Alemka Babich, which states that the plaintiff "has been disabled since her car accident on 8/9/04." Plaintiff also submits a copy of a "pay out sheet" purportedly showing payments made by the insurance carrier on her no-fault claim, and an affidavit describing her limitations after the accident and her current complaints of pain and restricted movement. The Court notes that the unsworn statement of Dr. Saccio and the copies of the insurance company's "pay sheet" and the physician's note were not in admissible form and, therefore, were not considered in its determination (*see* ***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [2d Dept 1992]; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

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."

A plaintiff claiming injury within the "limitation of use" categories must substantiate his or her complaints of pain with objective medical evidence showing the extent or degree of the limitation of movement and its duration (*see* ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]; ***Meyers v Bobower Yeshiva Bnei Zion***, 20 AD3d 456, 797 NYS2d 773 [2d Dept 2005]). He or she must present medical proof contemporaneous with the accident showing the initial restrictions in movement or an explanation for its omission (*see* ***Bell v Rameau***, 29 AD3d 839, 814 NYS2d 534 [2d Dept 2006]; ***Suk Ching Yeung v Rojas***, 18 AD3d 863, 796 NYS2d 661 [2d Dept 2005]; ***Ifrach v Neiman***, 306 AD2d 380, 760 NYS2d 866 [2d Dept 2003]), as well as objective medical findings of restricted movement that are based on a recent examination of the plaintiff (*see* ***Laruffa v Yui Ming Lau***, *supra*; ***Murray v Hartford***, 23 AD3d 629, 804 NYS2d 416 [2d Dept 2005], *lv denied* 6 NY3d 713, 816 NYS2d 748 [2006]; ***Batista v Olivo***, 17 AD3d 494, 795 NYS2d 54 [2d Dept 2005]; ***Kauderer v Penta***, 261 AD2d 365, 689 NYS2d 190 [2d Dept 1999]). "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" (***Dufel v Green***, 84 NY2d 795, 798, 622 NYS2d 900 [1995]; *see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]).

Further, to qualify as a serious injury within the 90/180 category, there must be objective medical evidence of a medically-determined injury or impairment of a non-permanent nature, as well as evidence that plaintiff's activities were significantly curtailed due to such injury (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Hamilton v Rouse***, 46 AD3d 514, 846 NYS2d 650 [2d Dept 2007]; ***Ocasio v Henry***, 276 AD2d 611, 714 NYS2d 139 [2d Dept 2000]). In addition to demonstrating an inability to perform "substantially all" usual activities for at least 90 days of the 180 days following the accident, a plaintiff asserting a 90/180 claim must show through competent medical evidence that his or her inability to perform such activities was medically indicated and causally related to the subject accident (*see* ***Penaloza v Chavez***, 48 AD3d 654, 852 NYS2d 315 [2d Dept 2008]; ***Hamilton v Rouse***, *supra*; ***Roman v Fast Lane Car Serv., Inc.***, 46 AD3d 535, 846 NYS2d 613 [2d Dept 2007]; ***Sainte-Aime v Ho***, 274 AD2d 569, 712 NYS2d 133 [2d Dept 2000]). Moreover, a plaintiff claiming serious injury who terminates medical treatment for such injury after the accident must offer a reasonable explanation for having done so (***Pommells v Perez***, 4 NY3d 566, 574, 797 NYS2d 380 [2005]; *see* ***Joseph v Layne***, 24 AD3d 516, 808 NYS2d 253 [2d Dept 2005]; ***Ali v Vasquez***, 19 AD3d 520, 797 NYS2d 528 [2d Dept 2005]).

The defendant's submissions established prima facie that the plaintiff did not suffer a serious injury as a result of the subject accident (*see* ***Morris v Edmond***, 48 AD3d 432, 850 NYS2d 641 [2d Dept 2008]; ***Washington v Cross***, 48 AD3d 457, 849 NYS2d 784 [2d Dept 2008]; ***Baez v Rahamatali***, 24 AD3d 256, 808 NYS2d 171 [1st Dept 2005], *affd* 6 NY3d 868, 817 NYS2d 204 [2006]; ***Nelson v Distant***, 308 AD2d 338, 764 NYS2d 258 [1st Dept 2003]). The records of Brookhaven Hospital indicate that the emergency room physician treating the plaintiff immediately after the subject accident determined there was no evidence of trauma to the musculoskeletal system, no vertebral tenderness, and no restrictions in range of motion. The hospital reports also show that x-rays of the plaintiff's cervical spine, chest and pelvis were normal, and that the plaintiff was discharged the same day with a diagnosis of chest contusion and neck strain. Dr. Nathan's medical report states, in relevant part, that the plaintiff exhibited normal range of motion in her cervical and thoracolumbar regions, as well as in her extremities, during the February 2007 examination. It states that there was no evidence of vertebral tenderness or paravertebral spasm, that the straight leg raising test was negative, and that clinical tests for nerve root irritation and impingement were negative. Dr. Nathan concludes that the plaintiff is not disabled and may perform the activities of daily living without restriction.

Further, at a deposition conducted on December 8, 2006, the plaintiff testified that she suffered neck, back and hand injuries as a result of the subject accident. She testified that her medical treatment for these injuries consisted of one appointment with her family physician, Dr. Mehta, one appointment with a neurologist, Dr. Matthews, and chiropractic treatments twice a week for three months with Dr. Scaccio. The plaintiff, who was employed by a construction company at the time of the accident, testified that she has not worked since the accident. When questioned about her employment situation, the plaintiff testified that she "just felt that [she] couldn't work," and that no physician or other healthcare provider told her not to work. The plaintiff further testified that she stopped seeking treatment for her injuries three months after the accident when the no-fault benefits were discontinued by the insurance carrier.

The burden, therefore, shifted to the plaintiff to raise a triable issue of fact (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). Contrary to the assertions by the plaintiff's counsel, the evidence

submitted in opposition is insufficient to defeat summary judgment. The sworn medical report by Dr. Scaccio is insufficient to raise a triable issue as to whether the plaintiff suffered injury within the significant limitation of use category, as his opinion that she suffered permanent impairment of cervical and lumbar joint function is not based on a recent examination of the plaintiff (*see* ***Park v Orellana***, __ AD3d __, 2008 WL 731957 [2d Dept, March 18, 2008]; ***Deutsch v Tenempaguay***, 48 AD3d 614, 852 NYS2d 369 [2d Dept 2008]; ***Amato v Fast Repair Inc.***, 42 AD3d 477, 840 NYS2d 394 [2d Dept 2007]). Also absent from the report are findings of range of motion limitations in the plaintiff's cervical or lumbar regions made shortly after the accident (*see* ***Ferraro v Ridge Car Serv.***, __ AD3d __, 2008 WL 607469 [2d Dept 2008]; ***Deutsch v Tenempaguay***, *supra*; ***Morales v Daves***, 43 AD3d 1118, 841 NYS2d 793 [2d Dept 2007]). In addition, Dr. Scaccio's report states that range of motion testing performed in October 2005 showed minor limitations in the plaintiff's spine, with only 3% "combined cervical range of motion impairment" and only 4% "combined lumbar range of motion impairment" (*see* ***Gaddy v Eyler***, *supra*; ***Licari v Elliott***, *supra*; ***Duncan v New York City Tr. Auth.***, 273 AD2d 437, 710 NYS2d 255 [2d Dept 2000]). The Court notes that the mere existence of a herniated or bulging disc is not proof of serious injury absent objective evidence of the extent of the physical limitation resulting from such disc injury and its duration (*see* ***Wright v Rodriguez***, __ AD3d __, 2008 WL 596276 [2d Dept, March 4, 2008]; ***Patterson v NY Alarm Response Corp.***, 45 AD3d 656, 850 NYS2d 114 [2d Dept 2007]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]).

Moreover, the plaintiff failed to adequately explain her cessation of medical treatment just three months after the subject accident (*see* ***Pommells v Perez***, *supra*; ***Ning Wang v Harget Cab Corp.***, 47 AD3d 777, 850 NYS2d 537 [2d Dept 2008]; ***Siegel v Sumaliyev***, 46 AD3d 666, 846 NYS2d 583 [2d Dept 2007]; ***Verette v Zia***, 44 AD3d 747, 844 NYS2d 71 [2d Dept 2007]; ***Baez v Rahamatali***, *supra*). Further, the admissible medical evidence presented in opposition is insufficient to establish that the plaintiff suffered a nonpermanent injury within the 90/180 category (*see* ***Casas v Montero***, 48 AD3d 728, 853 NYS2d 358 [2d Dept 2008]; ***Roman v Fast Lane Car Serv. Inc.***, 46 AD3d 535, 846 NYS2d 613 [2d Dept 2007]). Significantly, no medical proof was submitted supporting the plaintiff's allegation that she was disabled for the required period of time as a result of a medically-determined injury causally related to the subject accident (*see* ***Kaminski v Kawamoto***, __ AD3d __, 853 NYS2d 588 [2d Dept 2008]; ***Sainte-Aime v Ho***, *supra*). The Court notes that even if the unsworn statement by Dr. Scaccio was considered, his conclusion that "the injuries and limitations sustained by [the plaintiff] are consistent with being unable to work for at least" six months is speculative and appears tailored to meet the statutory requirement (*see* ***Sainte-Aime v Ho***, *supra*). Finally, absent medical evidence of serious injury, the plaintiff's self-serving affidavit is insufficient to raise a triable issue of fact (*see* ***Deutsch v Tenempaguay***, *supra*; ***Shvartsman v Vildman***, 47 AD3d 700, 849 NYS2d 600 [2d Dept 2008]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 722 [2d Dept 2006]).

Accordingly, summary judgment dismissing the complaint based on the plaintiff's failure to meet the serious injury threshold is granted.

Dated: 5/20/08

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