SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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ANNA M. JONES,

Plaintiff,

-against-

TANYA THOMPSON,

Defendant.

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MICHELE M. WOODARD, J.S.C.
TRIAL/IAS Part 16
Index No.: 17027/06
Motion Seq. No.: 01

DECISION AND ORDER

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Defendant Tanya Thompson moves for an order granting Summary Judgment on the grounds that the Plaintiff has not sustained a "serious injury" as defined under Insurance Law § 5102(d).

Plaintiff commenced this action for personal injuries allegedly sustained in an automobile collision that occurred on August 11, 2004 at or near the intersection of Peninsula Boulevard and West Graham Avenue, Hempstead, New York.

Defendant has offered the sworn report of Dr. Scott S. Coyne, a radiologist (the report is dated September 5, 2007 and it is annexed to Defendant's motion as Exhibit D). Dr. Coyne found no evidence of a fracture, dislocation or other trauma to Plaintiff's cervical and lumbar spines. Dr. Coyne noted Plaintiff had disc bulges that were degenerative in nature and were normal for a person of Plaintiff's age (41 years old). Dr. Coyne stated the disc bulging preexisted and was unrelated to the collision of August 11, 2004.

Defendant has offered the sworn report of Dr. Mathew M. Chacko, a neurologist (the report is dated November 28, 2007 and is annexed as Exhibit E to Defendant's motion). Dr. Chacko found Plaintiff's cervical and lumbar strains resolved. He found Plaintiff had no need for further neurological care. He opined that the Plaintiff was not disabled, he noted she was working and he felt Plaintiff was capable of performing her normal activities of daily living. Also, Defendant has offered the sworn report of Dr. Leon Sultan, an orthopedist (the report is dated

December 4, 2007 and annexed as Exhibit F to Defendant's motion). Dr. Sultan found Plaintiff had no orthopedic impairment. Defendant has also offered the Plaintiff's deposition (see Exhibit G annexed to Defendant's motion; the following page numbers refer to that exhibit): Plaintiff refused an ambulance; she walked home from the collision site (p. 47); she lost three days from work right after the collision (p. 84); Plaintiff states she lost 56 days in total from work after the collision over an unspecified period of time (p. 84); the Plaintiff's hours nor responsibilities were reduced when she returned to work (pgs. 85, 86); Plaintiff took physical therapy two to three times a week for a year (p. 59); Plaintiff stopped her physical therapy when the No Fault Insurance stopped paying (p. 60); Plaintiff has GHI insurance through her job (p. 90); the last time Plaintiff saw a doctor or a medical care provider was two years ago (or October 2005) (p. 92).

The court, having examined the Defendant's medical affidavit, is satisfied that Drs. Coyne, Chacko and Sultan, as part of their respective qualitative assessments, found that Plaintiff did not sustain a serious injury. S*ee Gonzales v Fiallo*, 47 AD3d 760 (2d Dept 2008).

In a serious injury matter, when a Defendant seeks summary judgment on the issue that the Plaintiff did not sustain a serious injury, the burden is placed on the Defendant to prove through admissible evidence that the Plaintiff failed to meet the statutory threshold of "serious injury" (*Gaddy v Eyler*, 79 NY2d 955 [1992]; *Lagois v Public Administrator of Suffolk County*, 303 AD2d 644 [2d Dept 2003]).

The affirmed medical reports of Defendant's physicians (here a neurologist, an orthopedist and a radiologist) as well as the Plaintiff's deposition testimony are sufficient to establish *prima facie* that the Plaintiff did not sustain a serious injury in a motor vehicle collision within the meaning of Insurance Law § 5102(d)(*see Park v Orellana*, 49 AD3d 721 [2d Dept 2008]; *Tarhen v Kabashi*, 44 AD3d 847 [2d Dept 2007]).

A Defendant moving for summary judgment on the grounds that the Plaintiff did not sustain a "serious injury" under Insurance Law § 5102(d) must meet the initial burden of establishing *prima facie* entitlement to judgment (*Matthew v Cupie Transportation Corp.*, 302 AD2d 566 [2d Dept 2003]). In an automobile negligence case, it is only after a Defendant has made a *prima facie* showing of entitlement to summary judgment that it becomes incumbent on the Plaintiff to present competent medical evidence to support Plaintiff's claim of serious injury

(*Franchini v Palmieri*, 307 AD2d 1056 [3d Dept 2003]). Here, Defendant has met her burden. Plaintiff has not met hers.

The post-sworn records of Phillip Tassey (see Exhibit C annexed to Plaintiff's affirmation in opposition) offered by Plaintiff are mostly illegible. The post-sworn records/statement of Dr. Daniel Brietstein/Pro Health Care Associates (see Exhibit C annexed to Plaintiff's affirmation in opposition) do not explain away the degenerative nature of Plaintiff's disc bulges noted by Defendant's Dr. Coyne. Also the last date of service by Dr. Brietstein is December, 2005. Dr. Gregorace states he last evaluated Plaintiff on August 30, 2005. In his August 30, 2005 report, Dr. Gregorace notes improved range of motion of the Plaintiff's neck and spine.

Plaintiff has offered the MRI reports of Dr. Robert Diamond, a radiologist (see Exhibit B annexed to the Plaintiff's affirmation in opposition; see also Exhibit E annexed to Plaintiff's affidavit in opposition). The MRI reports indicate Plaintiff has bulging or herniated discs. The mere existence of bulging or herniated discs is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the disc injury and its duration (*see Siegel v Sumaliyev*, 46 AD3d 666 [2d Dept 2007]).

Also, the Plaintiff's reports failed to address the findings in the report of Defendant's radiologist, Dr. Coyne, as to the degenerative condition of Plaintiff's spine (*see Passaretti v Ping Kwok Yung*, 39 AD3d 517 [2d Dept 2007]; *see also Pommells v Perez*, 4 NY3d 566, 579 [2005]). Thus, an opinion that the Plaintiff's injuries were causally related to the subject collision was speculative (*Passaretti v Ping Kwok Yung, supra*).

Further, MRI reports of Dr. Diamond did not causally relate the issue of Plaintiff's spine to the August 11, 2004 collision (*see Basmajian v Wang*, 12 AD3d 471 [2d Dept 2004]).

The hospital records offered by Plaintiff (see Exhibit E annexed to her affidavit in opposition) are unsworn and cannot be used by Plaintiff to raise a triable issue of fact (*see Shamsoodeen v Kibong*, 41 AD3d 577 [2d Dept 2007]).

Plaintiff also has a "gap in treatment" issue.

In *Pommells v Perez*, supra, the Court of Appeals held that a gap in treatment would interrupt the chain of causation between the collision and the alleged injury.

While a cessation of treatment is not totally dispositive since it is not required that the

Plaintiff continue needless treatment in order to survive a summary judgment motion, the Court of Appeals has recently stated 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, supra; see also Mohamed Siffrain*, 19 AD3d 561 [2d Dept 2005]).

Courts that have applied *Pommells v Perez, supra*, have consistently held that to be reasonable, the explanation must be concrete and substantiated by the record. The same exacting scrutiny should be applied to the Plaintiff's explanation that the gap or cessation of treatment occurred when the no-fault benefits stopped.

What about Plaintiff's G.H.I. coverage offered by her job (see Exhibit G, pg. 90, annexed to Defendant's motion)? The Plaintiff does not state she could not afford additional therapy/treatment. Yet when Defendant made her summary judgment motion, Plaintiff sought further medical consultation.

Plaintiff's last visit with Dr. Gregorace was August 30, 2005 (see Exhibit B annexed to Plaintiff's affirmation in opposition; see Exhibit G, pg. 92 annexed to Defendant's motion). Plaintiff states in her deposition (see Exhibit G, pg. 10, annexed to Defendant's motion) that " . . . the insurance [no-fault] stopped paying . . ."

Dr. Gregorace states he was advised by Plaintiff that she discontinued her treatment because the treatment was only providing temporary relief and Plaintiff was advised by her doctor (Dr. Tassay) that she, the Plaintiff, had reached her maximum medical improvement from the chiropractic treatment (see Exhibit G, pg. 83 annexed to Defendant's motion). Dr. Gregorace notes also the Plaintiff's no-fault insurance benefits had been discontinued (see Dr. Gregorace's affidavit, ¶ 5). Clearly, Dr. Gregorace does not cite sworn reports from other physicians that present medical evidence to indicate Plaintiff should cease therapy. Dr. Tassay does not state Plaintiff should stop physical therapy (see Exhibit C annexed to Plaintiff's affirmation in opposition). Dr. Gregorace does not provide a valid excuse for the gap in treatment. His affidavit is tailored to avoid the "gap in treatment" of *Pommells v Perez, supra.* Clearly, Dr. Gregorace's reports contain conclusory allegations tailored to hurdle "the gap" issue (*see Cornelius v Cintas Corp.*, 50 AD3d 1085 [2d Dept 2008]; *Barnes v Cisneros*, 15 AD3d 514 [2d Dept 2005]).

The Plaintiff is required to proffer competent medical evidence that she was unable to

perform substantially all of her daily activities for not less than 90 of the first 180 days subsequent to the collision (*Robalt v Park*, 50 AD3d 995 [2d Dept 2008]; *Nina Wang v Harget Cab Corp.*, 47 AD3d 773 [2d Dept 2008]; *Albano v Onolfo*, 36 AD3d 728 [2d Dept 2007]).

Here, the Plaintiff states in her deposition (Exhibit G, pg. 84, annexed to Defendant's motion) she missed a total of 56 days from work after the collision. As noted earlier, she went back to work three days after the collision (Exhibit G, pg. 84). She offers absolutely no viable medical evidence for her days off nor does she supply a time frame for the 56-day period.

The Plaintiff's affidavit (see Exhibit D annexed to the Plaintiff's affirmation in opposition) is also insufficient to raise a triable issue of fact as to whether she sustained a serious injury (*Marrache v Akron Taxi Corp.*, 50 AD3d 973 [2d Dept 2008}; *Shvartzman v Vildman*, 47 AD3d 700 [2d Dept 2008]).

The Plaintiff has not sustained a "serious injury" as defined under Insurance Law § 5102(d) and as interpreted by the Appellate Division, Second Department.

As such, the Defendant's application is **granted** in its entirety.

DATED: June 27, 2008
Mineola, N.Y.

ENTER:

HON. MICHELE M. WOODARD,
J.S.C.
XXX

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