SUM

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

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RICHARD COSTLEIGH and LISA SAUNDERS, as Co-Executors of the Estates of RICHARD K. COSTLEIGH and DOROTHY M. COSTLEIGH, deceased, RICHARD COSTLEIGH and LISA SAUNDERS, individually,

Plaintiffs,

-against-

JOSEPH C. LUCAS, BRENDA R. LUCAS and JOSEPH ERRICO,

Defendants

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TRIAL TERM
PART 48

Action No. 1

INDEX NO.: 15668/06

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DANIELLE MONTEFUSCO,

Plaintiff,

-against-

JOSEPH ERRICO, BRENDA R. LUCAS and JOSEPH C. LUCAS,

Defendants.

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Action No. 2
INDEX NO. 011278/07
MOTION DATE:6-30-08
SUBMIT DATE: 8-25-08
SEQ. NUMBER - 002 & 003

The following papers have been read on this motion:

Notice of Motion, dated 5-23-08.....1
Notice of Cross Motion, dated 6-18-08.....2
Affirmation in Opposition, dated 7-28-08.....3
Reply Affirmation, dated 8-19-08.....4
Affirmation in Support of Cross Motion, dated 8-22-08.....5

The motion by defendants Brenda R. Lucas and Joseph C. Lucas (Action no. 2), and motion (erroneously denominated a "cross motion") by defendant Joseph Errico (Action no. 2), both pursuant to CPLR 3212 for summary judgment dismissing the complaint on the ground that plaintiff Danielle Montefusco (Action no. 2) did not suffer a "serious injury," as that term is defined by the Insurance Law, are granted and the complaint in Action no. 2 is dismissed in its entirety.

As indicated in the prior order of this Court joining these actions for trial, this suit stems from an accident on June 6, 2006 in which the plaintiff alleges that she was a passenger in the Lucas vehicle at the time it collided with the Errico vehicle. The Errico vehicle thereafter allegedly struck and caused the death of the decedents named in Action no. 1. The defendants in Action no. 2 now move for summary judgment on the ground that the Danielle Montefusco did not sustain a serious injury.

"Serious injury" is defined by § 5102(d) of the New York Insurance Law as follows:

> "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 sue 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 persons' usual and customary daily activities for not less than ninety days during one hundred and eighty days immediately following the occurrence of the injury or impairment." (Ins. Law § 5102(d)).

In her bill of particulars the plaintiff in effect alleges that she sustained either 1) a "permanent consequential limitation of use of a body function or system" or 2) "significant limitation of use of a body organ or member," 3) a non-permanent injury that satisfied the

"90/180" category and 4) significant disfigurement. The foregoing is based on her claim that the following resulted from the accident:

"Anterolateral impingement with thickening and synovitis involving the distal (fibular) attachment of the anterior talofibular ligament of the left ankle, with surrounding synovitis requiring injections."

"Severe laceration to left arm requiring sutures to close, resulting in permanent scarring, and requiring future plastic surgical intervention."

"Post concussion syndrome, cerebral headaches, lightheadedness, shock, mental anguish, loss of normal pusuits and pleasures of life, etc."

With regard to the period following the accident, the plaintiff alleges that she "was confined to bed and home, but not necessarily to bed, intermittently since the date of the accident until the present time, except for visits to her treating physicians."

The Court finds that the defendants have presented *prima facie* proof demonstrating that the plaintiff does not suffer from any injury fitting the Insurance Law definitions as asserted in the pleadings.

With regard to the "90/180" category, the motions are based on the plaintiff's deposition testimony regarding her activities following the accident, demonstrating that she was not prevented from performing "substantially all" of her normal activities during this period, including attending her high school where she was a senior.

The plaintiff testified as to an injury to her left ankle and right elbow as a result of the accident, and wore a cast on her ankle for six weeks and used crutches for four of them. She also testified that she missed the last three days of school and two of her final examinations, but was able to attend graduation exercises and later to go on vacation with her family. She stated that she was restricted in her activities in her family's home for the first four weeks after the accident. This is sufficient to demonstrate that the "90/180" category cannot be

satisfied. *See, Duran v Sequino*, 17 AD3d 626 (2nd Dept. 2005); *Sainte-Aime v Ho,* 274 AD2d 569 (2nd Dept. 2000).

The records presented by the defendants regarding the elbow injury on these motions indicate a 1 cm laceration. Given its size and location, the Court finds that the defendants have demonstrated, *prima facie,* that this does not constitute a "significant disfigurement" as set forth in the Insurance Law. *Loiseau v Maxwell,* 256 AD2d 450 (2d Dept. 1998); *Spevak v Spevak,* 213 AD2d 622 (2d Dept. 1995).

As to the remaining categories, the plaintiff was examined by Dr. Paul Miller, an orthopedist, on March 21, 2008. Initially, the Court rejects the plaintiff's argument that his report was not properly affirmed and thus should be rejected as proof on this motion. However, the report concluding paragraph contains the following statement:

> "I, Paul Miller, M.D., being an orthopedist, duly licensed to practice medicine in the State of NY, pursuant to the applicable provisions of the Civil Practice Law and Rules section 2106, hereby affirm that the claimant was examined according to the restricted rules concerning independent medical examination."

Given the reference to CPLR 2106, this is sufficient despite the absence of the phrase, "affirmed... to be true under the penalties of perjury." *John H. Dair Bldg. Constr. Co. v Mayer,* 31 AD2d 835 (2d Dept. 1969); *Jones v Schmitt,* 7 Misc 3d 47 (App Term. 2d and 11th Jud Dist. 2005).

As to the merits, Dr. Miller's affirmation is sufficient to shift the burden to the plaintiff to come forward with evidence of a serious injury regarding the other potential categories of injuries claimed. *See generally, Taylor v Jerusalem Air, Inc.,* 280 AD2d 466 (2001), *lv den* 96 NY2d 716 (2001); *Harney v Tombstone Pizza Corp.,* 279 AD2d 609

(2001). Specifically, upon a review of medical records and his own evaluation, which included range of motion testing comparing normal values to the test results, he diagnosed left ankle sprain/strain with no orthopedic disability. This constitutes *prima facie* proof that she has suffered no more than a strain or sprain, which cannot satisfy either of the categories identified as "1" or "2" above. *See, e.g., Rabolt v Park,* 50 AD3d 995 (2d Dept. 2008); *Washington v Cross,* 48 AD3d 457 (2d Dept. 2008).

Finally, the proof submitted establishes that the treatment the plaintiff received ended approximately six months after the accident, or not later than January of 2007. There is no explanation for why treatment ceased some eighteen months before this motion was made, which is fatal to a claim of serious injury. *See Pommells v. Perez*, 4 NY3d 566, 574 (2005).

In response, the plaintiff submits only the affirmation of her attorney and certain color photographs of her elbow and ankles, identified as having been taken in October of 2006. No medical proof or affidavit is submitted. Indeed, the elbow photographs indicate a barely visible small scar, which supports rather than undermines the defendants' showing that this did not constitute a significant disfigurement. In sum, the plaintiff's response is patently insufficient as proof sufficient to rebut the defendants' proof.

Accordingly, these motions are granted and the complaint in Action no. 2 is dismissed.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: September 4, 2008

HON. DANIEL PALMIERI
Acting Supreme Court Justice

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