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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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LORI ALEXANDER,

Plaintiff,

-against-

MARIA L. GUEVARA, C.S. CANTWELL and VERIZON NEW YORK, INC.,

Defendants.

----------x

MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 16
Index No.:15314/06
Motion Seq. No.: 01+02

DECISION AND ORDER

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Defendants C.S. Cantwell ("Cantwell") and Verizon New York, Inc. ("Verizon") move for summary judgment on Plaintiff's complaint and any cross claims on grounds that the Plaintiff did not sustain a serious injury as well as on the issue of liability. Defendant Maria L. Guevara ("Guevara") cross moves for summary judgment on the grounds that the Plaintiff did not sustain a serious injury as defined under Insurance Law § 5102(d).

Plaintiff commenced this action for injuries allegedly sustained in an automobile collision that occurred on December 28, 2005 on Long Beach Road at or near the intersection with Windsor Parkway, Hempstead, N.Y.

Ms. Guevara was traveling westbound on Windsor Parkway. She was faced with a stop sign at

the intersection with Long Beach Road. Cantwell, operating a truck/vehicle owned by Verizon was traveling southbound on Long Beach Road. Cantwell had no traffic control devices at the intersection of Long Beach Road and Windsor Parkway. Plaintiff had been traveling eastbound on Windsor Parkway at the intersection of Windsor Parkway and Long Beach Road, Plaintiff had a stop sign and she stopped. Cantwell and Plaintiff allege Ms. Guevara failed to stop at the stop sign (see Exhibit D, pg. 24; Exhibit E, pg. 21 both annexed to Cantwell/Verizon 's motion) and her vehicle struck Cantwell's vehicle as his southbound vehicle entered the intersection of Long Beach Road and Windsor Parkway. Cantwell's vehicle was pushed across Long Beach Road into Plaintiff's stopped vehicle. Defendants note Plaintiff in her deposition is not claiming monies for lost wages, and she missed no days from work right after the collision (see Exhibit E, pgs. 61-62 annexed to Cantwell-Verizon's motion).

Cantwell/Verizon have offered the sworn affidavit of Dr. Leo Varriale, an orthopedist (the affidavit is dated March 17, 2008 and is annexed as Exhibit J to Cantwell/Verizon's motion). Dr. Varriale alleged Plaintiff displayed "overt malingering" and he found it made it difficult to assess her condition. Dr. Varriale did find Plaintiff had no disability in her lower back or knee. Cantwell/Verizon has also offered the affidavit of Dr. Charles H. Bagley, a neurologist (the affidavit is dated June 6, 2008 and annexed as Exhibit K to Cantwell/Verizon's motion). Dr. Bagley found the Plaintiff had no neurological disability.

Cantwell/Verizon has also offered the sworn MRI review by Dr. Stanley Sprecher, a radiologist (the affidavit is dated July 1, 2007, annexed as Exhibit K to Cantwell/Verizon's motion). The MRI in issue was done on January 27, 2006, one month after the collision of December 28, 2005. Dr. Sprecher found a disc space narrowing that represented a longstanding, chronic degenerative process that predated and was unrelated to the December 28, 2005 collision.

The deposition testimony alone of a Plaintiff may make a *prima facie* showing that the Plaintiff did not sustain a serious injury under Insurance Law § 5102(d) (*see Sanchez v Williamsburg Volunteer of Hatzolah, Inc.*, 48 AD3d 664). Here, Plaintiff 's deposition testimony demonstrated that Plaintiff's alleged injuries did not prevent her from performing substantially all of the material acts constituting her customary daily activities at least 90 out of 180 days following the collision.

Here, Defendants established *prima facie* that Plaintiff did not sustain a serious injury under the no-fault statute by submitting the affirmed reports of a radiologist, an orthopedist and a neurologist who each conducted independent medical examinations of Plaintiff during which they viewed various ranges of motion and performed objective tests (*see Tarhan v Kabashi*, 44 AD3d 847). The deposition testimony of the Plaintiff indicates she missed no days from work and stopped all medical treatment approximately five (5) months after the collision (*see Charley v Goss*, 54 AD3d 569).

A Defendant in an automobile negligence serious injury case can establish his or her entitlement to judgment by a physician' s report, form the qualitative assessment therein, that the Plaintiff has not sustained a serious injury (*Toure v Avis Rent A Car System, Inc.*, 98 NY2d 345, 350; *Gonzales v Fiallo*, 47 AD3d 760).

Examining the respective reports of Drs. Varriale and Bagley, there are enough tests set forth therein to provide an objective basis so that their respective qualitative assessments of Plaintiff could readily be challenged by any of Plaintiff's expert(s) during cross examination at trial as well as to provide enough to be evaluated by the trier of fact (*Toure v Avis Rent A Car Systems, Inc., supra*).

Restrictions in a motion noted by Defendants' medical expert were adequately explained as self imposed and unrelated to the collision as part of Defendants' experts' qualitative assessment (*Gonzales v Fiallo, supra*).

Thus, as noted, Defendants' submission of relevant portions of Plaintiff's deposition (*Jackson v Colvert*, 24 AD3d 420; *Batista v Olivo*, 17 AD3d 494) and affirmations of Defendants' physicians are sufficient to make a *prima facie* showing that the Plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (*Paul v Trerotola*, 11 AD3d 441). The Plaintiff is now required to come forward with viable, valid objective evidence to verify her complaints of pain and limitation of motion (*Farozes v Kamran*, 22 AD3d 458).

Plaintiff has offered the affirmation of Dr. Joseph Gregorace, dated October 14, 2008 (see Exhibit A annexed to Plaintiff's affirmation in opposition) and the sworn report of Dr. Donald I. Goldman dated August 16, 2008 (see Exhibit B annexed to Plaintiff' s affirmation in opposition). According to Dr. Gregorace, Plaintiff was under the care of his office until March 28, 2006 (¶ 35 of Exhibit A) and returned September 15, 2008 for an "up to date examination" (¶ 36 of Exhibit A). The court notes this was after the motion and cross motion were made. While Dr. Goldman does not state the last day Plaintiff was treated by his office, Dr. Gregorace does state that the last day of treatment by Plaintiff with Dr. Goldman was May, 2006 (see Exhibit A, ¶ 37). This is confirmed by Plaintiff's affidavit. Dr. Goldman's report does not memorialize the last visit by Plaintiff or any of his recommendations. In her post summary judgment affidavit, Plaintiff states she discontinued physical therapy since she, the Plaintiff, determined she was "not improving to a great extent from the physical therapy" (see the affidavit, ¶ 26 annexed to Plaintiff's affirmation in opposition). Plaintiff states her treatment regimen ended in April, 2006. Yet Dr. Nizarali Visram in his evaluation dated March 8, 2006 (see Exhibit G annexed to Plaintiff's affirmation in opposition) Dr. Gregorace recommended continued physical therapy as of March 7, 2006 (see Exhibit A, ¶ 31 annexed to Plaintiff's affirmation in opposition).

Here, the Plaintiff does not offer a medical reason for the two plus year gap in treatment for purportedly painful conditions. Thus, these medical affirmations/reports present a "gap in treatment" issue.

In *Pommells v Perez*, 4 NY3d 566, 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 v Siffrain*, 19 AD3d 561).

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.

Plaintiff had H.I.P. insurance from 2004 until at least February 26, 2008 (the day of the deposition, see Exhibit E, pg. 95 annexed to Cantwell/Verizon's motion). Plaintiff did state that neither Dr. Goldman nor Baldwin Medical Services would accept her private health coverage when the no-fault payments ended (see Plaintiff's affidavit, ¶ 24, 25 annexed to Plaintiff's affidavit in opposition dated October 14, 2008 or post the Cantwell/Verizon motion for summary judgment). Plaintiff did not state that she had no insurance or could not afford any further treatment (*see Francovig v Senekis Cab Corp.*, 41 AD3d 643). Plaintiff indicated no effort on her part was made to find a physical therapy/physician that accepted her (H.I.P.) insurance.

Clearly, no physician adequately explained the lengthy gap in treatment (*see Hackett v AAA Expedited Freight Systems, Inc.*, 54 AD3d 721).

The Plaintiff's record seems tailored to avoid the "gap in treatment" consequences (*see Sougstad v Meyer*, 40 AD3d 839; *Barnes v Cisneros*, 15 AD3d 514).

There is no concrete reason for the gap that is substantiated by the record.

Plaintiff has offered the affirmation of Dr. Richard J. Rizzuti, a radiologist (see Exhibit C annexed to Plaintiff's affirmation in opposition) as to an MRI of Plaintiff's lumbar spine (dated January 14, 2006), right knee (dated March 22, 2006) and left shoulder (dated March 10, 2008). Plaintiff has also offered the affirmation of Dr. Harvey Lefkowitz, a radiologist (see Exhibit D annexed to Plaintiff's affirmation in opposition) as well as Dr. Allen Keil's unsworn report on the x-ray of Plaintiff's right knee (see Exhibit F annexed to Plaintiff's affirmation in opposition). Dr. Keil's report is not in proper admissible form since it is neither affirmed to be true nor sworn (*see Shamsoodeen v Kibong*, 41 AD3d 577).

Also, Plaintiff's experts do not properly address the degenerative condition set forth by Defendants' expert Dr. Sprecher (see Exhibit K annexed to the Cantwell/Verizon motion) (*see Pommells v Perez*, *supra* at p. 579; *see Young Soo Lee v Troia*, 41 AD3d 469).

While Dr. Rizzuti and Dr. Goldman note Plaintiff has a disc herniation, the mere existence of a herniated or bulging disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting from the injury and its duration (*Patterson v N.Y. Alarm Response Corp.*, 45 AD3d 656; *Tobias v Chupenko*, 41 AD3d 583). Nor does Dr. Rizzuti nor Lefkowitz relate the findings of the MRI causally to the collision of December 28, 2005 (*Basmajian v Wang*, 12 AD3d 471).

Plaintiff's bulges alone are also refuted by Defendants' orthopedic report of Dr. Varriale that Plaintiff had no orthopedic disability in her lower back and knee (*see Siegel v Sumaliyev*, 46 AD3d

666).

A self-serving affidavit of the Plaintiff (referred to *supra*) and her deposition testimony were insufficient to show that she suffered a serious injury caused by the December 28, 2005 collision since there was no objective medical evidence to show that she suffered a serious injury (*Marrache v Arkan Taxi Corp.*, 50 AD3d 993; *Garcia v Solbes*, 41 AD3d 426).

The claim by Plaintiff that she was unable to perform substantially all of her daily activities for not less than 90 out of 180 days as a result of the subject accident was unsupported by competent medical evidence (*Wang v Harget Cab Corp.*, 47 AD3d 777; *Abreau v Bushwick Building Products & Supplies, LLC*, 43 AD3d 1091; *Cotto v JND Concrete & Brick, Inc.*, 41 AD3d 415; *Albano v Onolfo*, 36 AD3d 728).

Thus, the Plaintiff has failed to come forward with sufficient admissible evidence to rebut the Defendants' *prima facie* showing that the Plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d).

The court is not concluding that Plaintiff did not sustain an injury. Here, the record is clear that the Plaintiff did not sustain a "serious injury" as defined by Insurance Law § 5102(d) and as interpreted by the Appellate Division, Second Department.

Finally, as to the issues of liability raised by the various Defendants the issue of "liability" is moot or academic based on the lack of serious injury found herein (*see Rabolt v Park*, 50 AD3d 995).

This constitutes the Decision and Order of the Court.

DATED: December 18, 2008
Mineola, N.Y. 11501

ENTER:

HON. [illegible]
J.S.C.

ENTERED

DEC 23 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE

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