Short Form Order

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

COPY

**PRESENT:**
**HON. PAUL J. BAISLEY, JR., J.S.C.**

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ROBERTA GUSSACK,

Plaintiff,

-against-

KELLY L. McCOY,

Defendant.

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INDEX NO.: 8336/2007
CALENDAR NO.: 2008 00867MV
MOTION DATE: 10/30/2008
MOTION NO.: 001 MG CASEDISP

**PLAINTIFF'S ATTORNEY:**
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Copaigue, New York 11726

**DEFENDANT'S ATTORNEY:**
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330 Old Country Road, Suite 211
Mineola, New York 11501

Upon the following papers numbered 1 to 16 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1-8 ; ~~Notice of Cross Motion and supporting papers~~ ___ ; Answering Affidavits and supporting papers 9-12 ; Replying Affidavits and supporting papers 13-14 ; Other 15-16 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

***ORDERED*** that the motion (motion sequence no. 001) of defendant for an order pursuant to CPLR R. 3212 granting summary judgment in her favor dismissing the complaint on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law §5102(d) is granted.

This is an action to recover damages for injuries allegedly sustained by the then-49-year-old plaintiff on August 29, 2005 at approximately 9:15 a.m. when defendant's vehicle collided with plaintiff's vehicle on Oceanside Road at its intersection with Merrick Road, in Rockville Centre, New York. By her bill of particulars, plaintiff alleges that as a result of the accident, she sustained serious injuries which included cervical strain sprain; cervicobrachial syndrome; cervical subluxation; cervical myalgia; cervical disc bulging; thoracic subluxation; thoracic myalgia; lumbar spine subluxation; cervical radiculitis at C5/6 on the right; lumbar radiculitis at L5 and S1; disc bulging at C5 and C6; disc bulging at C2/3, C3/4 and C7/T1; headaches; wrist pain; and difficulty sleeping. In addition, plaintiff alleges that following the accident she received emergency room treatment at South Nassau Community Hospital and was released and that thereafter she was confined to bed and home for one day and intermittently thereafter. Plaintiff indicates in her bill of particulars that at the time of the accident she was a merchandiser and sales representative for Cassametta Provisions, a distributor of Boar's Head products. Plaintiff also seeks to recover economic loss in excess of basic economic loss as defined in Insurance Law §5102(a).

Plaintiff claims in her bill of particulars that she has sustained injuries that satisfy the categories of Insurance Law §5102(d) relating to 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 90 days during the 180 days immediately following the occurrence of the injury or impairment.

Defendant now moves for summary judgment in her favor dismissing the complaint on the grounds that plaintiff did not sustain a "serious injury" as defined in Insurance Law §5102(d) as a result of the accident. In support of her motion for summary judgment, defendant submits, among other things, the summons and complaint; her answer; plaintiff's bill of particulars; plaintiff's deposition transcript; and the affirmed reports of defendant's examining orthopedic surgeon and neurologist.

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."

In order 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 (*Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either objective evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration based on a recent examination of plaintiff must be provided or there must be a sufficient description of the "qualitative nature" of plaintiff's limitations, with an objective basis, correlating plaintiff's limitations to the normal function, purpose and use of the body part (*see*, *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]; *Mejia v DeRose*, 35 AD3d 407, 825 NYS2d 722 [2d Dept 2006]).

It is for the court to determine in the first instance whether a *prima facie* showing of "serious injury" has been made out (*see*, *Tipping-Cestari v Kilhenny*, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). The initial burden is on defendant "to present evidence, in competent form, showing that the plaintiff has no cause of action" (*Rodriguez v Goldstein,* 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once defendant has met the burden, plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (*Gaddy v Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]). Such proof, in order to be in a competent or admissible form, shall consist of affidavits or affirmations (*Pagano v Kingsbury,* 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the nonmoving party, here, the plaintiff (*Cammarere v Villanova,* 166 AD2d 760, 562 NYS2d 808 [3d Dept 1990]).

Here, defendant established her *prima facie* entitlement to judgment as a matter of law by demonstrating that plaintiff did not sustain a "serious injury" as a result of the subject accident (*see*, *Kurin v Zyuz*, 54 AD3d 902, 864 NYS2d 151 [2d Dept 2008]; *Sforza v Big Guy Leasing Corp.*, 51 AD3d 659, 858 NYS2d 233 [2d Dept 2008]). By his affirmed report dated March 21, 2008, defendant's examining orthopedic surgeon, Isaac Cohen, M.D. (Dr. Cohen), indicated that his examination of plaintiff one day before revealed that plaintiff's range of motion testing results for her cervical spine, lumbosacral spine and both shoulders, elbows and wrists when compared to normal measurements were all normal. In addition, Dr. Cohen reported that plaintiff's

compression test, Spurling test and percussion test results were all normal. Dr. Cohen added that with respect to the upper extremities, range of motion was full bilaterally with normal hand grip, pinch and grasp present. He also indicated that there was no tenderness, muscle spasms or trigger points on palpation of the paravertebral muscles. Dr. Cohen diagnosed status post motor vehicle accident with resolved cervical and lumbosacral strain. He noted that the cervical spine MRI's performed on October 6, 2005 indicated some degenerative changes with no disc bulges or herniations. In conclusion, Dr. Cohen opined that there was no evidence of sequelae or permanency related to the subject accident and pointed out that plaintiff had resumed her normal work activities in an unrestricted manner.

Plaintiff's examining neurologist, Mathew M. Chacko, M.D. (Dr. Chacko), indicated in his affirmed report dated December 18, 2007 that he evaluated plaintiff on that date and found that her active range of motion testing results for her cervical spine and lumbar spine when compared to normal measurements were all normal. Among his other findings were straight leg raising up to 90 degrees bilaterally (90 degrees normal); Tinel sign negative bilaterally at the wrists; and no muscle spasm sensed in plaintiff's cervical, thoracic and lumbar areas. In conclusion, Dr. Chacko opined that plaintiff's cervical and lumbar strain had resolved and that there were no findings consistent with cervical or lumbar radiculopathy or myelopathy. He added that there was no objective evidence of any neurological sequelae attributable to the subject accident, noting that plaintiff was working and was capable of performing her normal activities of daily living.

Plaintiff testified at her deposition on November 7, 2007 that as a result of the accident's impact, her neck, right foot and left shoulder came into contact with the interior of her vehicle; that following the accident she got out of her vehicle and sat on the sidewalk; and that she was taken to the hospital by ambulance. According to plaintiff, she complained of pain in her neck, right foot, left shoulder and lower back and was prescribed a muscle relaxer while at the emergency room, no x-rays or diagnostic testing was performed, and she was told to apply ice and then discharged. In addition, plaintiff testified that on the same day she went to see her chiropractor, Dr. Muench, who had treated her previously for migraine headaches, and that her chiropractor x-rayed her neck and adjusted her and she continued to be treated by him three times a week for at least one year. According to plaintiff, her chiropractor also sent her for MRI testing and told her that the results indicated bulging discs in her neck. Plaintiff added that about one month after the accident she went to see a neurologist, Dr. Shetty, who had been recommended by her chiropractor, with complaints concerning pain in her neck and back and that six weeks later her left shoulder pain completely disappeared. She stated that she saw the neurologist five or six times and that the neurologist told her that she had a pinched nerve in her neck and recommended muscle relaxers, which she declined, and that he further recommended the application of ice and to continue her chiropractic treatment. Plaintiff also testified that a few months after said accident she went to see an orthopedist, Dr. Payakapan, who had also been recommended by her chiropractor, with complaints of neck and lower back pain and that the orthopedist examined her and told her to continue treating with her chiropractor. Plaintiff further testified that she missed less than five days of work following the subject accident but was placed on light duty for at least the first six months. According to plaintiff, she has weekly neck and lower back pain that occurs while performing her job activities, which involve moving merchandise and cleaning and setting up showcases, and that she continues to see her chiropractor once a week. She also stated that she is limited in what used to be her routine activities such as gardening, golfing and exercising.

In opposition to defendant's motion, plaintiff contends that she did sustain a "serious injury" as defined in Insurance Law §5102(d). In support of her opposition to the motion, plaintiff submits, among other things, the affidavit dated October 6, 2008 of her treating chiropractor, Philip F. Muench, D.C.; the unsworn electroencephalogram reports, electrodiagnostic examination reports, and various other reports of K. R. Shetty, M.D.; and the unsworn report dated October 6, 2005 of plaintiff's cervical spine MRI.

Inasmuch as the MRI report dated October 6, 2005, electrodiagnostic examination reports dated November 15, 2005 and November 29, 2005 and the electroencephalogram report dated November 8, 2005 as well as other submissions from Dr. Shetty's office were unaffirmed, they were without any probative value in opposing defendant's motion (*see*, *Casas v Montero*, 48 AD3d 728, 853 NYS2d 358 [2d Dept 2008]). Although the abovementioned unsworn reports were listed in the affirmed reports of defendant's examining orthopedic surgeon and neurologist, they could not be properly relied upon by plaintiff inasmuch as the specific results of these reports were not set forth in the affirmed reports of defendant's examining orthopedic surgeon and neurologist (*compare*, *Gastaldi v Chen*, ___ AD3d ___,866 NYS2d 750 [2d Dept 2008]; *Casas v Montero*, *supra*). Even though defendant's examining orthopedic surgeon noted in his report that "[t]he EMG and nerve conduction studies performed were also unremarkable except for a diagnosis of "evidence of radiculitis"as documented in the report ...," the electrodiagnostic examination reports could not be properly relied upon by plaintiff because defendant's examining orthopedic surgeon did not set forth in detail the specific results of the reports in his own report which was submitted in support of defendant's motion (*compare*, *Williams v Clark*, 54 AD3d 942, 864 NYS2d 493 [2d Dept 2008]; *Smeja v Fuentes*, 54 AD3d 326, 863 NYS2d 689 [2d Dept 2008]; *Casas v Montero*, *supra*).

In addition, plaintiff was required to submit objective medical evidence based upon a recent examination and failed to do so (*see*, *Ali v Mirshah*, 41 AD3d 748, 840 NYS2d 83 [2d Dept 2007). Plaintiff's treating chiropractor provided range of motion testing results, as evaluated by Computerized Digital Ink Clinometer, for plaintiff's cervical spine as well as other test results contemporaneous to the subject accident and from his examination on June 19, 2006 but conclusorily stated that during his last examination of plaintiff in February 2008, without providing a specific date, plaintiff's range of motion and test results had remained essentially unchanged since June 19, 2006 (*see*, *Sharma v Diaz*, 48 AD3d 442, 850 NYS2d 634 [2d Dept 2008]). 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 disc injury and its duration (*see*, *Byam v Waltuch*, 50 AD3d 939, 857 NYS2d 605 [2d Dept 2008]). Strains and sprains are not considered serious injuries under Insurance Law §5102(d) (*see*, *id.*). Also, plaintiff's treating chiropractor's conclusions improperly relied on the abovementioned unsworn reports (*see*, *Ali v Mirshah*, *supra*; *Cotto v JND Concrete & Brick, Inc.*, 41 AD3d 415, 837 NYS2d 728 [2d Dept 2007]).

Moreover, plaintiff failed to submit 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 accident (*see*, *Gastaldi v Chen*, *supra*; *Ronda v Friendly Baptist Church*, 52 AD3d 440, 861 NYS2d 622 [1st Dept 2008]; *Furrs v Griffith*, 43 AD3d 389, 841 NYS2d 594 [2d Dept 2007]).

Finally, plaintiff submitted no evidence that her alleged economic loss exceeded the statutory amount of basic economic loss (*see*, *Moran v Palmer*, 234 AD2d 526, 651 NYS2d 195 [2d Dept 1996]; *Rulison v Zanella*, 119 AD2d 957, 501 NYS2d 487 [3d Dept 1986]).

Accordingly, the instant motion is granted and the complaint is dismissed in its entirety.

Dated: Feb. 18, 2009

PAUL J. BAISLEY, JR.

J.S.C.

**__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION**