SHORT FORM ORDER

INDEX NO. 07-9008
CAL. NO. 08-01194MV

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 10-28-08
ADJ. DATE 1-27-09
Mot. Seq. # 002 - MD

KARLA L. GARCIA,	:	JOHN F. KUHN, ESQ.
	:	Attorney for Plaintiff
Plaintiff,	:	22 Oakwood Road
	:	Huntington, New York 11743
- against -	:	
	:	DESENA & SWEENEY, LLP
	:	Attorneys for Defendants
JEANINE O'REILLY and DANIEL O'REILLY,	:	1383 Veterans Memorial Highway
	:	Suite 32
Defendants.	:	Hauppauge, New York 11788

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendants, dated September 25, 2008, and supporting papers (including Memorandum of Law) dated September 25, 2008; (2) Affirmation in Opposition by the plaintiff, dated January 16, 2009, and supporting papers; (3) Reply Affirmation by the defendants, dated January 20, 2009, and supporting papers;

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

ORDERED that this motion by defendants Jeanine O'Reilly and Daniel O'Reilly seeking summary judgment dismissing plaintiff's complaint is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff Karla Garcia as a result of a motor vehicle accident that occurred on Sunrise Highway at Exit 50A ("Johnson Avenue Exit") in the Town of Islip on January 8, 2007. Plaintiff, by her bill of particulars alleges that she sustained various personal injuries as a result of the subject accident, including thoracic level spinal fractures, reflex sympathetic dystrophy ("RSD"), and decreased sensation in both of both of her feet.

Defendants now move for summary judgment on the basis that plaintiff does not meet the "serious injury" threshold requirement of Insurance Law §5102 (d). Defendants, in support of the motion, submit the pleadings, a copy of plaintiff's deposition transcript, copies of plaintiff's medical records from December 1997, and the sworn medical reports of Dr. Michael Katz, Dr. Richard Pearl, and an unsworn medical report of Dr. Melissa Sapan Cohn. Dr. Katz conducted an independent physical

examination of plaintiff at defendants' request on April 18, 2008. Dr. Pearl also conducted an independent physical examination of plaintiff at defendants' request on April 9, 2008. Dr. Sapan Cohn conducted an independent radiological review of the magnetic resonance imaging ("MRI") film of plaintiff's thoracic spine on June 2, 2008. Plaintiff opposes the instant motion on the ground that defendants have failed to meet their prima facie burden to show that she did not sustain a "serious injury" as required by Insurance Law §5102 (d) in the subject accident. Plaintiff, in opposition to the motion, submits the pleadings, an unsworn copy of her discharge summary from Brookhaven Memorial Hospital, her affidavit, and excerpts of her deposition testimony. Plaintiff also submits unsworn copies of medical reports prepared by Dr. S. Farkas, Dr. Eli Anker and Dr. Bruce Zitkus.

The purpose of New York State's No-Fault Insurance Law is to "assure prompt and full compensation for economic loss by curtailing costly and time-consuming court trial[s]" (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]), and requiring every case, even those with minor injuries, to be decided by a jury would defeat the statute's effectiveness (*see* ***Licari v Elliott***, *supra*). Therefore, the No-Fault Insurance law precludes the right of recovery for any "non-economic loss, except in the case of serious injury, or for basic economic loss" (*see* Insurance Law § 5104 [a]; ***Martin v Schwartz***, 308 AD2d 318, 766 NYS2d 13 [2003]). Any injury not falling within the definition of "serious injury" is classified as an insignificant injury, and a trial is not allowed under the No-Fault statute (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]; ***Martin v Schwartz***, *supra*).

Insurance Law § 5102 (d) defines a "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 defendant seeking summary judgment on the ground that a plaintiff's negligence claim is barred under the No-Fault Insurance Law bears the initial burden of establishing a prima facie case that the plaintiff did not sustain a "serious injury" (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeking summary judgment based on the lack of serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, such as, affidavits and affirmations, and not unsworn reports" to demonstrate entitlement to judgment as a matter of law (***Pagano v Kingsbury***, 182 AD2d 268, 270, 587 NYS2d 692 [1992]). A defendant may also establish entitlement to summary judgment using the plaintiff's deposition testimony and medical reports and records prepared by the plaintiff's own physicians (*see* ***Fragale v Geiger***, 288 AD2d 431, 733 NYS2d 901 [2001]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [1997]; ***Torres v Micheletti***, 208 AD2d 519,616 NYS2d 1006 [1994]). Once defendant has met this burden, plaintiff must then submit objective and admissible proof of the nature and degree of the alleged injury in order to meet the

threshold of the statutory standard for "serious injury" under New York's No-Fault Insurance Law (*see* ***Dufel v Green***, 84 NY2d 795, 622 NYS2d 900 [1995]; ***Tornabene v Pawlewski***, 305 AD2d 1025, 758 NYS2d 593 [2003]; ***Pagano v Kingsbury***,182 AD2d 268, 587 NYS2d 692 [1992]). However, if a defendant does not establish a prima facie case that the plaintiff's injuries do not meet the serious injury threshold, the court need not consider the sufficiency of the plaintiff's opposition papers (*see* ***Burns v Stranger***, 31 AD3d 360, 819 NYS2d 60 [2006]; ***Rich-Wing v Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2005]; *see generally*, ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Further, to recover under the "permanent loss of use" category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance***, 96 NY2d 295, 299, 727 NYS2d 378 [2001]). 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 caused by the injury and its duration (*see* ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2006]; ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2006]; ***Meyers v Bobower Yeshiva Bnei Zion***, 20 AD3d 456, 797 NYS2d 773 [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 [2006]; ***Suk Ching Yeung v Rojas***, 18 AD3d 863, 796 NYS2d 661 [2005]; ***Ifrach v Neiman***, 306 AD2d 380, 760 NYS2d 866 [2003]), as well as objective medical findings of restricted movement that are based on a recent examination (*see* ***Laruffa v Yui Ming Lau***, *supra*; ***Murray v Hartford***, 23 AD3d 629, 804 NYS2d 416 [2005], *lv denied* 6 NY3d 713, 816 NYS2d 748 [2006]; ***Batista v Olivo***, 17 AD3d 494, 795 NYS2d 54 [2005]; ***Kauderer v Penta***, 261 AD2d 365, 689 NYS2d 190 [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" (*see* ***Dufel v Green***, *supra*; *see* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see* ***Licari v Elliott***, *supra*). While the law does not require a plaintiff to produce a record of needless treatments in order to survive summary judgment, a plaintiff who ceases all therapeutic treatment following an accident, while claiming a "serious injury," must provide a reasonable explanation for such cessation (*see* ***Pommells v Perez***, *supra*; ***Knuchero v Tabachnikov***, 54 AD3d 729, 864 NYS2d 459 [2008]; ***Cornelius v Cintas Corp.***, 50 AD3d 1085, 857 NYS2d 637 [2008]).

The affirmed report of defendant's examining orthopedist, Dr. Katz, states that plaintiff has full range of motion in her thoracolumbosacral spine. Dr. Katz's report states that plaintiff has forward flexion of 90 degrees and that 90 degrees is normal. It also states that plaintiff has full extension, lateral and side bending to 30 degrees in her thoracolumbosacral spine, and that 30 degrees is normal. Dr. Katz's report states that plaintiff has ankle dorsiflexion in her right foot and left foot of 30 degrees, and that 30 degrees is normal. It also states that plaintiff's plantar flexion in her right foot and left foot is 45 degrees and that 45 degrees is normal. The report further states that the inversion and eversion in both of plaintiff's feet is 20 degrees and that 20 degrees is normal. It states that there is no joint line tenderness, crepitation, erythema or induration in either her right foot or left foot. Dr. Katz's report also states that plaintiff has full strength in her right foot and left foot. The report states that plaintiff is capable of her usual daily living activities and that she is not disabled. It further states that plaintiff exhibits sensory loss in both of her feet, that she has paresthesias along the dorsum of her feet, and that

these findings are permanent. Dr. Katz's report concludes that the sensory loss in plaintiff's feet is not due to an injury to her thoracic spine, but is a peripheral injury to her feet, and that she does not have "residua in her feet consistent with the usual diagnosis of complex regional pain syndrom."

Similarly, the affirmed report prepared by defendant's neurologist, Dr. Pearl, states that plaintiff has decreased sensation in her feet and that she is unable to walk on her toes. Dr. Pearl's report states that plaintiff has full range of motion in her cervical and lumbar spines. It states that plaintiff has full motor strength in all of her extremities. It states that plaintiff sustained a thoracic and lumbosacral sprain, and that there are no objective neurological findings that indicate that plaintiff has a post-traumatic injury. Dr. Pearl's report also states that plaintiff's sensory examination is "more consistent with a peripheral neuropathy, that is not related to her injury." It concludes that both plaintiff's right and left feet are cold and that he cannot establish a diagnosis of RSD based upon the current examination of plaintiff.

Based upon the adduced evidence, defendants have failed to meet their prima facie burden to establish that plaintiff did not sustain a serious injury as a result of the subject accident (*see* ***Pommells v Perez***, *supra*; ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Licari v Elliott***, *supra*). Defendants's submissions failed to adequately address plaintiff's claim that was clearly set forth in her bill of particulars that she sustained a fracture to her T7 and T11 vertebrae. Moreover, neither Dr. Katz nor Dr. Pearl in their medical reports explain how they arrived at their conclusion that although plaintiff has loss of sensation in her feet, that it is only a peripheral injury and unrelated to the subject accident (***Madden v Dake***, 30 AD3d 932, 936, 819 NYS2d 121 [2006]; *see also* ***Garcia v Lopez***, __ AD3d __, 872 NYS2d 719 [2009]; ***Luzzi-Schwenk v Singh***, 58 AD3d 811, 872 NYS2d 176 [2009]; ***Collins v Stone***, 8 AD3d 321, 778 NYS2d 79 [2004]). Additionally, the report prepared by defendant's radiologist, Dr. Sapan Cohn, was without probative value since it was unaffirmed (*see* ***Grasso v Angerami***, 79 NYS2d 813, 580 NYS2d 178 [1991]; ***Landicho v Rincon***, 53 AD3d 568, 861 NYS2d 417 [2008]; ***Patterson v NY Alarm Response Corp.***, 45 AD3d 514, 850 NYS2d 114 [2007]; ***Verette v Zia***, 44 AD3d 747, 844 NYS2d 71 [2007]; ***Nociforo v Penna***, 42 AD3d 514, 840 NYS2d 396 [2007]).

Furthermore, defendants' motion papers failed to establish that plaintiff was not substantially curtailed from performing substantially all of her usual and customary daily activities for the first 90 days out 180 days immediately following the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Licari v Elliott***, *supra*; ***Horowitz v Clearwater***, 176 AD2d 1083, 575 NYS2d 390 [1991]). Defendants's examining orthopedist and neurologist, both of whom examined plaintiff over a year after the subject accident, failed to relate their findings to this category of serious injury (*see* ***Yung v Eager***, 51 AD3d 638, 857 NYS2d 676 [2008]; ***Tinsley v Bah***, 50 AD3d 1019, 857 NYS2d 180 [2008]; ***Joseph v Hampton***, 48 AD3d 638, 852 NYS2d 335 [2008]). Also, plaintiff at her deposition testified that she was out of work for approximately two and half month following the subject accident. Plaintiff additionally testified that she only was able to ambulate using a wheelchair, which she used for approximately four months, and that afterwards she was required to use a walker for over a month and a half. Plaintiff further testified that her doctors allowed her to return to work on a restricted basis because of her financial situation, and that accommodations were made for her at work, so that she would be able to perform her duties as a customer service representative at a retail services company.

Finally, having determined that defendants failed to meet their prima facie showing that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d), it is not necessary to consider whether plaintiff's opposition papers were sufficient to raise a triable issue of fact (*see, **McDowall v Abreu***, 11 AD3d 590, 782 NYS2d 866 [2003]; ***Chaplin v Taylor***, 273 AD2d 465, 708 NYS2d 465 [2000]). Accordingly, defendants' motion for summary judgment is denied.

Dated 5/13/09

Peter H. Mayer

PETER H. MAYER, J.S.C.