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SHORT FORM ORDER

INDEX No. 08-3629
CAL. No. 09-01188-MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 10-2-09
ADJ. DATE 1-13-10
Mot. Seq. # 002 - MG; CASEDISP

GAY VITA,

Plaintiff,

- against -

PATRICK S. PRISCO,

Defendant.

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Upon the following papers numbered 1 to 27 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 15 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 16 - 25 ; Replying Affidavits and supporting papers 26 - 27 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant Patrick Prisco seeking summary judgment dismissing plaintiff's complaint is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff as a result of a motor vehicle accident that occurred on June 15, 2006. The accident allegedly occurred when the vehicle operated by defendant Patrick Prisco struck the rear-end of the vehicle operated by plaintiff Gay Vita while it was stopped at a red light at the intersection of County Road 16 and Lake Avenue in Smithtown, New York. By her bill of particulars, plaintiff alleges that she sustained various personal injuries as a result of the subject accident, including a disc herniation at level C3-4, disc bulges at levels C4 through C6, reversal of the cervical lordosis at level C4-5, cervical sprain and strain, lumbosacral sprain with sacroiliac derangement, left knee medial collateral ligament sprain, and aggravation of a pre-existing left knee injury.

Defendant now moves for summary judgment on the basis that plaintiff's injuries fail to meet the "serious injury" threshold required by Insurance Law § 5102(d). In support of the motion, defendant submits a copy of the pleadings, a copy of plaintiff's deposition transcript, a copy of plaintiff's medical records from Stony Brook University Hospital, and the sworn medical reports of Dr. Mindy Pfeffer, Dr. Alan B. Greenfield and Dr. Jay Nathan. Dr. Greenfield a radiologist, conducted an independent

radiological review of the magnetic imaging resonance ("MRI") films of plaintiff's cervical and lumbar spines, and plaintiff's left knee at defendant's request on February 24, 2009. Dr. Nathan conducted an independent orthopedic examination of plaintiff at defendant's request on March 9, 2009.

Plaintiff opposes the instant motion on the ground that defendant has failed to establish that she did not sustain a "serious injury" within the meaning of Insurance Law § 5102(d). In opposition to the motion, plaintiff submits her affidavit, the sworn medical reports of Dr. Anton Beitia, Dr. Steven Kuchta, Dr. Alvand Hassankhani, and Dr. Barry Rubin.

It has long been established that the "legislative intent underlying the No-Fault Law was to weed out frivolous claims and limit recovery to significant injuries (***Dufel v Green***, 84 NY2d 795, 622 NYS2d 900 [1995]; *see also* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]). Therefore, the determination of whether or not a plaintiff has sustained a "serious injury" is to be made by the court in the first instance (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Porcano v Lehman***, 255 AD2d 430, 680 NYS2d 590 [1988]; ***Nolan v Ford***, 100 AD2d 579, 473 NYS2d 516 [1984], *aff'd* 64 NYS2d 681, 485 NYS2d 526 [1984]).

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***, *supra*; ***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]).

Here, defendant has met his prima facie burden of establishing that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102(d) as a result of the subject accident (*see* ***Gaddy v Eyler***, *supra*; ***Albano v Onolfo***, 36 AD3d 728, 830 NYS2d 205 [2007]; ***Giraldo v Mandanici***, 24 AD3d 419, 805 NYS2d 124 [2005]). Defendant's orthopedist, Dr. Nathan, tested the ranges of motion in plaintiff's spine and knees using a goniometer and set forth his specific measurements, as well as compared plaintiff's ranges of motion to the normal ranges (*see* ***Cantave v Gelle***, 60 AD3d 988, 877 NYS2d 129 [2009]; ***Staff v Yshua***, 59 AD3d 614 [2009]). Dr. Nathan's report states that an examination of plaintiff reveals that she has full ranges of motion in her cervical and thoracolumbar spine, and in her left and right knees. The report states that an examination of plaintiff's hands and wrists shows that she has full ranges of motion, and that there is no tenderness, swelling, erythema or bilateral effusion in those areas. It states that although plaintiff had mild difficulty getting off an examination table, she walked with a normal gait and had bilateral motor strength of 5 out of 5, and no muscle atrophy. Dr. Nathan's report concludes that plaintiff is not disabled, and is capable of performing her daily living activities.

Additionally, Dr. Greenfield in his report states that plaintiff suffers from degenerative disc bulges at levels C3 through C6, and that there is degenerative bony osteophytic ridging at level C4-C5. Dr. Greenfield also states in his report that plaintiff suffers from degenerative disc disease at levels L3 through L5, which is causing degenerative disc bulges and degenerative facet arthropathy at level L4-L5. Dr. Greenfield opines that plaintiff's "left-sided disc herniation at level L4-L5 and the central broad-based disc herniation at level C4-C5 is not attributable to the subject accident, and that these findings merely represent a continuum of a longstanding degenerative discopathy, which has culminated in degenerative disc herniations at these levels." Dr. Greenfield also states in his report that the injury to plaintiff's medial collateral ligament ("MCL") in her left knee has resolved and that there is indications of early mild degenerative osteoarthritis in her left knee that is unrelated to the subject accident.

Similarly, Dr. Mindy Pfeffer, who reviewed the MRI scans of plaintiff's left knee conducted on September 6, 2006, in her report states that there are mild degenerative changes within the medial joint compartment of the knee, which have remained unchanged since plaintiff's earlier examination. Dr. Pfeffer's report also states that there has been a complete healing of the "previously seen medial collateral ligament tear...," and that the "remaining menisci, ligaments and tendons of the knee are intact."

Furthermore, plaintiff testified at an examination before trial that following the accident she missed approximately one month from her employment as a direct care counselor at Independent Group Home Living. She testified that she returned to work in the same capacity and with the same duties as before the accident. Plaintiff testified that following the accident she was treated and released from the hospital and that she next sought treatment for injuries related to the accident approximately one month later. She testified that she was referred to Dr. Barry Rubin, a physical therapist, by her orthopedist at the Medical Offices of Glass and Inserra ("Glass and Inserra"). She testified that she previously treated with Glass and Inserra for a torn MCL that she sustained during a fall on a wet surface at a restaurant approximately 3 months prior to the subject accident. Plaintiff testified that she received treatment for less than one month for the injuries she sustained in the subject accident and that her doctors never made any surgical recommendations for the injuries she sustained in the subject accident. Plaintiff further testified that the last time she received treatment for the injuries she sustained in the subject accident was in either 2007 or 2008.

Therefore, the burden shifted to plaintiff to come forward with competent admissible medical

evidence based on objective findings, sufficient to raise a triable issue of fact that she sustained a "serious injury" (*see* ***Gaddy v Eyler***, *supra*; ***Luckey v Bauch***, 17 AD3d 411, 792 NYS2d 624 [2005];***McLoyrd v Pennypacker***, 178 AD2d 577 NYS2d 272 [1991]). A plaintiff must demonstrate a total loss of use of a body organ, member, function or system to recover under the "permanent loss of use" category,(*see* ***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). "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" (***Dufel v Green***, *supra at* 798; *see* ***Toure v Avis Rent A Car Sys.***, *supra*). Therefore, in order for a plaintiff to prove the extent or degree of physical limitation under the "permanent consequential limitation of use of a body organ or member" or the "significant limitation of use of a body function or system" category, a plaintiff must present either objective medical evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration (*see* ***Magid v Lincoln Servs. Corp.***, 60 AD3d 1008, 877 NYS2d 127 [2009]; ***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]). The plaintiff must also 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 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]). 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 may also suffice (*see* ***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000];***Dufel v Green***, *supra*). For a bulging disc or radiculopathy to constitute a serious injury, there must also be objective evidence of the extent or degree of the alleged limitation resulting from the injury and its duration (*see* ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 722 [2006];***Foley v Karvelis***, 276 AD2d 666, 714 NYS2d 337 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]). Moreover,a plaintiff alleging injury within the "limitation of use" categories who ceases treatment after the accident must provide a reasonable explanation for having done so (***Pommells v Perez***, 4 NY3d 566, 574, 797 NYS2d 380 [2005]; *see* ***Ferebee v Sheika***, 58 AD3d 675, 873 NYS2d 93 [2009]; ***Besso v DeMaggio***, 56 AD3d 596, 868 NYS2d 681 [2008]).

In opposition to defendant's showing, plaintiff failed to meet her burden (*see* ***Fest v Agnew***, 68 AD3d 1051, 890 NYS2d 357 [2009]; ***Colvin v Maille***, 127 AD2d 926, 511 NYS2d 982 [1987]; *lv denied* 69 NY2d 611, 517 NYS2d 1026 [1987]; *see generally* ***Zuckerman v City of New York***, *supra*). Plaintiff primarily relies upon the affidavit of her treating physician, Dr. Rubin, who treated her from July 11, 2006 through August 28, 2007, and then re-examined her on December 10, 2009. Dr. Rubin's report fails to raise a triable issue of fact as to whether plaintiff suffered a "serious injury" as a result of the subject accident (*see* ***Colvin v Maille***, 127 AD2d 926, 511 NYS2d 982 [1987]; *lv denied* 69 NY2d 611; 517 NYS2d 1026 [1987]; *see generally* ***Zuckerman v City of New York***, *supra*). Dr. Rubin's report indicates that plaintiff suffers from lumbar disc herniations and bulges. However, the mere existence of a bulging or herniated disc is not sufficient, standing alone, as proof 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* ***Shvartsman v Vildman***, 47 AD3d 849 NYS2d 600 [2008]; ***Patterson v NY Alarm Response Corp.***, 45 AD3d 656, 850 NYS2d 114 [2007]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 722 [2006]). In

addition, Dr. Rubin's report fails to address the findings of defendant's experts that plaintiff suffers from degenerative disc disease in her lumbar and cervical spines, and in her left knee. Where a defendant in an action seeking damages for a "serious injury" presents evidence that a plaintiff's alleged pain and injuries are related to a pre-existing condition, the plaintiff must come forward with medical evidence addressing the defense of lack of causation (***Pommells v Perez***, 4 NY3d 566, 580, 797 NYS2d 380 [2005];*see* ***Ciordia v Luchian***, 54 AD3d 708, 864 NYS2d 74 [2008];***Luciano v Luchsinger***, 46 AD3d 634, 847 NYS2d 622 [2007]; ***Giraldo v Mandanici***, 24 AD3d 419, 805 NYS2d 124 [2005]). Indeed, plaintiff's own doctors in their medical reports indicate that plaintiff suffers from degenerative conditions of her left knee and cervical spine, and that the mild reversal of her cervical lordosis at level C4-C5 is "most likely related to the underlying degenerative disease."

Dr. Rubin's report also fails to indicate that he reviewed any of the medical reports arising from plaintiff's prior injury to her left knee (*see* ***Cantave v Gelle***, *supra*; ***Luckey v Bauch***, 17 AD3d 411, 792 NYS2d 624 [2005];***Rogers v Chiarelli***, 10 AD3d 355, 781 NYS2d 368 [2004];***Omar v Goodman***, 295 AD2d 413, 743 NYS2d 568 [2002]). Instead, Dr. Rubin relies upon the fact that plaintiff informed him that she was diagnosed with a torn MCL, that she only had intermittent pain prior to the subject accident, but since the accident her pain has worsened. Thus, the subjective complaints of pain and impaired joint function expressed by plaintiff during her deposition and in Dr. Rubin's report are insufficient to raise a triable issue of fact (*see* ***Sheer v Koubek***, 70 NY2d 678, 518 NYS2d 788 [1987]; ***Rudas v Petschauer***, 10 AD3d 357, 781 NYS2d 120 [2004]; ***Barrett v Howland***, 202 AD2d 383, 608 NYS2d 681 [1994]). Moreover, Dr. Rubin's report states that during his recent examination of plaintiff she informed him that her bilateral knee conditions seem to have improved and were asymptomatic. The term "significant" limitation must be construed as more than a minor limitation of use (*see* ***Licari v Elliott***, *supra*; ***Leschen v Kollarits***, 144 AD2d 122, 534 NYS2d 233 [1988]; ***Gootz v Kelly***, 140 AD2d 874, 528 NYS2d 446 [1988]). Therefore, Dr. Rubin's conclusions that plaintiff's injuries were caused by the subject accident and that her prognosis as it relates to her cervical and lumbar spine conditions remains guarded is highly speculative and conclusory (*see* ***Yun v Barber***, 63 AD3d 242, 883 NYS2d 1140 [2009]; ***Moore v Sarwar***, 29 AD3d 752, 816 NYS2d 503 [2006]; ***Allyn v Hanley***, 2 AD3d 470, 767 NYS2d 885 [2003]).

Finally, the fact that plaintiff is unable perform a few enumerated tasks for a lengthy period without pain does not constitute a curtailment from performing substantially all of her usual activities to a great extent (*see* ***Licari v Elliott***, *supra*; ***Crane v Richard***, 180 AD2d 706, 579 NYS2d 736 [1992]). As a result, plaintiff failed to raise a triable issue as to whether she was substantially curtailed from all of her usual and customary activities for 90 of the first 180 days following the accident (*see* ***Rennell v Horan***, 225 AD2d 939, 639 NYS2d 171 [1996] ***Balshan v Bouck***, 206 AD2d 747, 614 NYS2d 487 [1994]; ***Kimball v Baker***, 174 AD2d 925, 571 NYS2d [1991]). Accordingly, defendant's motion for summary judgment is granted.

Dated: April 2010

J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION