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SHORT FORM ORDER

INDEX NO. 07-9279
CAL. NO. 09-01408-MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 12-4-09
ADJ. DATE 1-22-10
Mot. Seq. # 003 - MG; CASEDISP

CARA PERO,	:	BLOOM & NOLL, LLP
	:	Attorneys for Plaintiff
Plaintiff,	:	170 Old Country Road, Suite 316
- against -	:	Mineola, New York 11501
	:	
TRANSERVICE LOGISTICS, INC. and	:	RIVKIN RADLER, LLP
GERARD J. McNULTY, JR.,	:	Attorneys for Defendants
	:	926 RXR Plaza
Defendants.	:	Uniondale, New York 11556-0926

Upon the following papers numbered 1 to 47 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 22; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 23 - 45; Replying Affidavits and supporting papers 46 - 47; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants for summary judgment dismissing the complaint is granted.

Plaintiff Cara Pero commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle collision that occurred on Moriches Island Road in the Town of Brookhaven on December 6, 2006. The accident allegedly happened when a tractor trailer owned by defendant Transervice Logistics, Inc. and driven by defendant Gerard McNulty struck the rear of the vehicle driven by plaintiff as it was passing through the intersection of Moriches Island Road and William Floyd Parkway. By her bills of particulars, plaintiff alleges she sustained various injuries as a result of the accident, including disc herniations at levels C5-C6 and L4-L5, disc bulges at levels C3-C4, L1-L2, L2-L3 and L5-S1; cervical radiculopathy; myofascial pain syndrome in the cervical and lumbar regions; "exacerbation, aggravation and activation of pre-existing, asymptomatic degeneration" in the cervical and lumbar spine; post-traumatic development of spondolysis and degenerative disc disease; and vison loss in the right eye. She further alleges that in January 2009 she underwent a cervical discectomy and fusion procedure to treat neck pain caused by the herniated disc at level C5-C6.

Defendants now move for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a "serious injury" within the meaning of Insurance Law § 5102 (d) due to the subject accident. Defendants' submissions in support of the motion include copies of the pleadings and the bill of particulars, a transcript of plaintiff's deposition testimony, and sworn medical reports prepared by Dr. Howard Reiser, Dr. Jerrold Gorski, Dr. Ira Salzman, and Dr. Stephen Lastig. At defendants' request, Dr. Reiser, a neurologist, conducted neurological examinations of plaintiff in February 2008 and May 2009, and reviewed numerous medical records and reports related to the injuries alleged in this action. Dr. Gorski, an orthopedist, conducted an examination of plaintiff in January 2008 and reviewed various medical reports regarding her alleged injuries on defendants' behalf. That same month, Dr. Salzman, an ophthalmologist, performed an independent examination of plaintiff's eyes. Dr. Lastig, a radiologist, at defendants' request, reviewed the images of the following diagnostic tests performed on plaintiff following the accident: magnetic resonance imaging (MRI) studies of the cervical, thoracic and lumbar regions of plaintiff's spine conducted in January 2007; an MRI study of plaintiff's lumbar region conducted in June 2009; a computed tomography (CT) scan of plaintiff's cervical region conducted in February 2009; and an x-ray study of plaintiff's cervical region conducted in February 2009.

Plaintiff opposes the motion, alleging defendants' submissions are insufficient to establish a prima facie case of entitlement to judgment as a matter of law. Alternatively, plaintiff asserts evidence submitted in opposition to the motion raises a triable issue as to whether she sustained significant limitations in spinal function as a result of the subject accident. In opposition to the motion, plaintiff submits, among other things, affirmed medical reports prepared by Dr. Kenneth Glass, Dr. Sal Inserra, Dr. Mark Zuckerman, Dr. Paul Alongi, and Dr. Barry Root. She also submits MRI reports concerning her cervical and lumbar regions prepared in January 2007, and her own affidavit.

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."

A plaintiff claiming a significant limitation of use of a body function or system must substantiate his or her complaints with objective medical evidence showing the extent or degree of the limitation caused by the injury and its duration (*see* ***Ferraro v Ridge Car Serv.***, 49 AD3d 498, 854 NYS2d 408 [2d Dept 2008]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 772 [2d Dept 2006]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]; ***Beckett v Conte***, 176 AD2d 774, 575 NYS2d 102 [2d Dept 1991]). As explained by the Court of Appeals in ***Dufel v Green*** (84 NY2d 795, 622 NYS2d 900 [1995]), "[w]hether a limitation of use or function is 'significant' or 'consequential' (i.e. important . . .), 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." A plaintiff claiming injury under either of the "limitation of use" categories also must present medical proof contemporaneous with the accident

showing the initial restrictions in movement or an explanation for its omission (*see* ***Magid v Lincoln Servs. Corp.***, 60 AD3d 1008, 877 NYS2d 127 [2d Dept 2009]; ***Hackett v AAA Expedited Freight Sys.***, 54 AD3d 721, 865 NYS2d 101 [2d Dept 2008]; ***Ferraro v Ridge Car Serv.***, 49 AD3d 498, 854 NYS2d 408; ***Morales v Daves***, 43 AD3d 1118, 841 NYS2d 793 [2d Dept 2007]), as well as objective medical findings of restricted movement that are based on a recent examination of the plaintiff (*see* ***Nicholson v Allen***, 62 AD3d 766, 879 NYS2d 164 [2d Dept 2009]; ***Diaz v Lopresti***, 57 AD3d 832, 870 NYS2d 408 [2d Dept 2008]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642; ***John v Engel***, 2 AD3d 1027, 768 NYS2d 527 [3d Dept 2003]; ***Kauderer v Penta***, 261 AD2d 365, 689 NYS2d 190 [2d Dept 1999]). Further, when a defendant in an action seeking damages for a serious physical injury presents evidence that a plaintiff's alleged pain and injuries are related to a preexisting 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* ***Luciano v Luchsinger***, 46 AD3d 634, 847 NYS2d 622 [2d Dept 2007]; ***Giraldo v Mandanici***, 24 AD3d 419, 805 NYS2d 124 [2d Dept 2005]). If a plaintiff had a preexisting medical condition, he or she must submit evidence showing that the subject accident aggravated the condition to such an extent that it produced a serious injury within the meaning of Insurance Law §5102 (d) (*see* ***Seck v Minigreen Hacking Corp.***, 53 AD3d 608, 863 NYS2d 218 [2d Dept 2008]; ***McNeil v Dixon***, 9 AD3d 481, 780 NYS2d 635 [2d Dept 2004]).

It is for the court to determine in the first instance whether a plaintiff claiming personal injury as a result of a motor vehicle accident has established prima facie case that he or she sustained "serious injury" and may maintain a common law tort action (*see* ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***Tipping-Cestari v Kilhenny***, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). 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.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]). When a defendant seeks summary judgment based on the lack of a serious injury relies on the findings of the defendant's own witnesses, "those findings must be in admissible form, i.e., 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 [2d Dept 1992]). A defendant also may 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 [2d Dept 2001]; ***Torres v Micheletti***, 208 AD2d 519, 616 NYS2d 1006 [2d Dept 1994]; ***Craft v Brantuk***, 195 AD2d 438, 600 NYS2d 251 [2d Dept 1993]; ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692). Once a defendant meets this burden, the plaintiff must present proof in admissible form which creates a material issue of fact (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990; ***Pagano v Kingsbury***, 182 AD2d 268, 587 NYS2d 692; *see generally*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

Defendants' submissions established a prima facie case that plaintiff did not suffer a serious injury as a result of the accident (*see* ***Saetia v VIP Renovations Corp.***, 68 AD3d 1092, 891 NYS2d 471 [2d Dept 2009]; ***Nicholson v Allen***, 62 AD3d 766, 879 NYS2d 164; ***Gentilella v Board of Educ. of Wantagh Union Free School Dist.***, 60 AD3d 629, 875 NYS2d 128 [2d Dept 2009]; ***Geliga v Karibian, Inc.***, 56 AD3d 518, 867 NYS2d 519 [2d Dept 2008]; ***Passaretti v Ping Kwok Yung***, 39 AD3d 517, 835 NYS2d 224 [2d Dept 2007]). Here, the affirmed report of defendants' expert radiologist, Dr. Lastig,

regarding the MRI studies of plaintiff's cevical and lumbar regions performed in January 2007 states, in part, that the images of the lumbar spine revealed "unequivocal evidence of multilevel degenerative disc disease with multilevel disc desiccation and intervertebral disc space narrowing," as well as degenerative spondylosis with end-plate spurring. It states the 2007 MRI study of plaintiff's cervical spine showed multilevel degenerative disc disease with desiccation and disc space narrowing, and degenerative spondylosis with end-plate spurring. It further states the films revealed posterior osteophytic ridging which mildly impresses on the ventral subarachnoid space and foraminal narrowing due to uncinate osteophyte formation and hypertrophic changes in the right facet joint at levels C3-C4 and C5-C6, as well as diffuse posterior osteophytic ridging and left-sided uncinate osteophyte formation causing narrowing of the left neural foramen and encroachment on the exiting C6 nerve root. Dr. Lastig opines that the presence of multilevel end-plate osteophytes and uncinate osteophytes indicate a longstanding degenerative process in plaintiff's spine that predates the subject accident. Dr. Lastig's report concerning the CT study of plaintiff's cervical region states, in relevant part, that there was no evidence of an acute fracture or a focal disc herniation, that there was multilevel degenerative disc pathology, including end plate spurring and hypertrophic changes within the joints, and that the conditions observed were longstanding and unrelated to the subject accident. Dr. Lastig's report regarding the x-ray study of plaintiff's cervical spine states that there was no evidence of an acute fracture, and that there was evidence of degenerative disc disease and spondylosis at the C5-C6 level, and that none of the findings are causally related to the accident.

The report prepared by Dr. Reiser, dated February 6, 2008, states that plaintiff presented at the first examination with complaints of neck and lower back pain, headaches, and intermittent tingling and numbness in her hands and feet. It states, in relevant part, that plaintiff's cervical, thoracic and lumbar regions were not tender and that the straight leg raise test was negative bilaterally. It states that plaintiff's neck resisted passive motion in all planes, and that such resistance "is not an indication of neurological involvement." It states that her station and gait were normal, and that she refused to stand on her heels or toes. Further, the report states that a motor examination showed plaintiff had normal muscle tone, bulk and power, with no atrophy or fasciculation; that cerebellar examination showed no dysmetria or tremor; that a sensory examination was normal; and that examination showed normal deep tendon reflexes. Dr. Reiser states that while plaintiff presented with various subjective symptoms, the neurological examination did not reveal any objective deficit. He concludes that the February 2008 examination revealed no neurological disorders causally related to the subject accident. Similarly, the second report of Dr. Reiser states that plaintiff presented at the examination conducted in May 2009 with subjective symptoms, including pain in her neck and lower back, and that the neurological examination revealed no evidence of an objective ongoing neurological disorder causally related to the subject accident. A supplemental report prepared by Dr. Reiser, dated June 24, 2009, states that a review of additional records, including those related to the cervical discectomy, shows such surgery was performed to correct cervical spondylotic disease, and that electrodiagnostic testing performed in 2007 did not reveal any evidence of cervical radiculopathy. Dr. Gorski's report states that examination revealed restrictions in plaintiff's cervical range of motion. However, it also states that the medical records submitted for review shows plaintiff suffers from arthritic conditions, and that there was no objective evidence of impairment or disability caused by the subject accident (*cf.* ***Gonzales v Fiallo***, 47 AD3d 760, 849 NYS2d 182 [2d Dept 2008]).

Further, the sworn report of Dr. Salzman states that plaintiff presented with complaints of migraine headaches, accompanied by visual distortion, occurring once or twice a month. It states that his past medical history included LASIK surgery in 2001 and 2002, and that she advised she had not had an eye examination since the accident. Dr. Salzman concludes in the report that plaintiff had normal vision, and that the results of the ophthalmological examination were normal.

The burden of proof, therefore, shifted to plaintiff to raise a triable issue of fact as to whether she suffered a serious injury due to the accident (*see* ***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990). Initially, the Court notes that no evidence was presented by plaintiff controverting the finding by Dr. Salzmann that her vision is normal. Contrary to the assertion by plaintiff's counsel, Dr. Root's affirmation and report are insufficient to raise a triable issue of fact. Significantly, Dr. Root examined plaintiff on only one occasion, more than 2½ years after the subject accident. He did not actually review any of the images produced during the MRI or CT studies of plaintiff's spine, and he improperly relied on unsworn reports of other physicians in forming his diagnosis (*see* ***Luna v Mann***, 58 AD3d 699, 872 NYS2d 467 [2d Dept 2009]; ***Fiorillo v Arriaza***, 52 AD3d 465, 859 NYS2d 699 [2d Dept 2008]; ***Phillips v Zilinsky***, 39 AD3d 728, 834 NYS2d 299 [2d Dept 2007]; ***Friedman v U-Haul Truck Rental***, 216 AD2d 266, 627 NYS2d 765 [2d Dept 1995]). Moreover, Dr. Root failed to address Dr. Lastig's findings that the x-ray, MRI and CT studies of plaintiff's spine revealed, among other things, multilevel degenerative disc disease and dessication, spondylosis at the C5-C6 level, and stenosis at the C3-C4 level; that the presence of osteophytic ridging and uncinate osteophytes indicates a longstanding, degenerative process in the cervical region that pre-dated the accident; and that there was no evidence of spinal injuries due to trauma (*see* ***Singh v City of New York***, __ AD3d __, 2010 NY Slip Op 02772 [2d Dept 2010]; ***Barry v Future Cab Corp.***, __ AD3d __, 2010 NY Slip Op 01905 [2d Dept 2010]; ***Casimir v Bailey***, 70 AD3d 994, 896 NYS2d 122 [2d Dept 2010]; ***Ciordia v Luchian***, 54 AD3d 708, 864 NYS2d 74 [2d Dept 2008]; ***Khan v Finchler***, 33 AD3d 966, 824 NYS2d 340 [2d Dept 2006]). Thus, Dr. Root's conclusion that the accident exacerbated pre-existing, asymptomatic degenerative conditions in plaintiff's spine, causing her to suffer significant limitations in spinal function, is speculative and lacks probative value (*see* ***Casimir v Bailey***, 70 AD3d 994, 896 NYS2d 122; ***Besso v DeMaggio***, 56 AD3d 596, 868 NYS2d 681 [2d Dept 2008]; ***Seck v Mingreen Hacking Corp.***, 53 AD3d 608, 863 NYS2d 218; ***Roman v Fast Lane Car Serv.***, 46 AD3d 535, 846 NYS2d 613 [2d Dept 2007]; ***Phillips v Zilinsky***, 39 AD3d 728, 834 NYS2d 299; ***Hines v Capital Dist. Transp. Auth.***, 280 AD2d 768, 719 NYS2d 777 [3d Dept 2001]).

Likewise, the reports of Dr. Inserra, Dr. Zuckerman, Dr. Mermelstein and Dr. Alongi are insufficient to raise a triable issue of fact, as they failed to address the findings of defendants' expert radiologist that plaintiff suffered from pre-existing degenerative disc disease and that x-ray, MRI and CT studies of her spine revealed no evidence of traumatically-induced injuries (*see* ***Singh v City of New York***, __ AD3d __, 2010 NY Slip Op 02772; ***Barry v Future Cab Corp.***, __ AD3d __, 2010 NY Slip Op 01905; ***Casimir v Bailey***, 70 AD3d 994, 896 NYS2d 122; ***Nicholson v Allen***, 62 AD3d 766, 879 NYS2d 164; ***Ciordia v Luchian***, 54 AD3d 708, 864 NYS2d 74). In addition, the reports of Dr. Inserra, Dr. Zuckerman and Dr. Mermelstein are insufficient to meet plaintiff's burden, as these physicians have not treated or examined plaintiff since 2007 (*see* ***Ciancio v Nolan***, 65 AD3d 1273, 885 NYS2d 767 [2d Dept 2009]; ***Berkowitz v Taylor***, 47 AD3d 740, 851 NYS2d 597 [2d Dept 2008]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642). The affirmation and records of the physical therapist, who

allegedly provided treatments to plaintiff for approximately three months after the accident, also do not create a triable issue as to the cause of plaintiff's alleged limitations in movement. The affirmation and annexed records of Dr. Glass also are insufficient to defeat summary judgment. Dr. Glass allegedly treated plaintiff in 1994 and 1995 for injuries arising out of a motor vehicle accident that occurred in July 10, 2004, with his last treatment occurring in September 1995, and lacks any direct knowledge about the injuries alleged in this action. The Court notes that according to correspondence by Dr. Glass dated July 20, 1994, plaintiff presented at his office with complaints of "severe pain" in the cervical spine, head and right knee, and was diagnosed as having a "sprain type injury about the torso with internal derangement of the right knee." And while Dr. Glass states in his affirmation that, "other than an initial complaint of pain to her neck immediately after the car accident [plaintiff] had no functional deficits or further complaints of pain to her cervical spine," there is no indication that objective testing of her cervical spine was performed at that time.

In addition, while plaintiff properly relied upon MRI reports that were referred to by defendants' experts (*see* ***Gastaldi v Chen***, 56 AD3d 420, 866 NYS2d 750 [2d Dept 2008]), such reports, standing alone, do not raise a triable issue, as the mere existence of a herniated or bulging disc is not proof of a serious injury (*see* ***Sealy v Riteway-I, Inc.***, 54 AD3d 1018, 865 NYS2d 129 [2d Dept 2008]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2d Dept 2005]), and the radiologists who prepared such reports do not offer an opinion as to the cause of conditions detected in the examinations (*see* ***Collins v Stone***, 6 AD3d 321, 778 nYS2d 79 [2d Dept 2004]). Finally, plaintiff's affidavit is insufficient to create a question as to whether she sustained a serious injury, as there is no objective medical evidence supporting the allegation of significant restriction in spinal joint function causally related to the subject accident (*see* ***Ferber v Madorran***, 60 AD3d 725, 875 NYS2d 518 [2d Dept 2009]; ***Smeja v Fuentes***, 54 AD3d 326, 863 NYS2d 689 [2d Dept 2008]; ***Shvartsman v Vildman***, 47 AD3d 700, 849 NYS2d 600 [2d Dept 2008]; ***Young Soo Lee v Troia***, 41 AD3d 469, 837 NYS2d 299 [2d Dept 2007]). Accordingly, the motion for summary judgment dismissing the complaint based on plaintiff's failure to meet the serious injury threshold is granted.

Dated: 4/14/2010

Hon. Denise F. Molia
J.S.C.

__X__ **FINAL DISPOSITION** _____ **NON-FINAL DISPOSITION**