SHORT FORM ORDER

INDEX No. 07-34366
CAL. No. 09-02095-MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 12-18-09
ADJ. DATE 12-26-09
MNEMONIC: # 001 - MD

LEISA S. HAMILTON,

Plaintiff,

- against -

LANCE D. VERDEROSA and JOY A. VERDEROSA,

Defendants.

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Upon the following papers numbered 1 to 31 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; Notice of Cross-Motion and supporting papers___; Answering Affidavits and supporting papers 17 - 26; Replying Affidavits and supporting papers 27 - 31; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by the defendants, Lance D. Verderosa and Joy A. Verderosa, pursuant to CPLR §3212 and Insurance Law §§5102(d) for summary judgment because the plaintiff has failed to meet the serious injury threshold limits, is denied.

This is an action to recover damages for personal injuries allegedly sustained by Leisa S. Hamilton (hereinafter plaintiff) when she was involved in a motor vehicle accident on November 26, 2004 on Route 231, Town of Babylon, County of Suffolk, on Long Island, New York, with the defendants' motor vehicle operated by Lance D. Verderosa.

The plaintiff claims in her bill of particulars that as a result of the within accident that she sustained posterior disc bulges at C2-3, C3-4, C4-5, C5-6 and C6-7; cervical radiculitis; cervical myofascitis; sprain/strain upper back; tenderness on palpation of the bilateral cervical paraspinals and trapexii, levator scapulae, scalenc, splenius capitius, and sternocleidomastoic muscles; moderate intensity with frequent radiation down the right shoulder, arm and elbow associated numbness of the right thumb; straightening involving the upper and mid aspects of the spine with curvature resumed more distally and subsequent distal straightening extending into the upper thoracic spine; paracervical tenderness and spasm; radicular symptomatology running down the right arm with decreased sensation over the right lateral shoulder and arm and decreased motor strength to 3/5 at the right biceps and deltoid and diminished reflexes to 1+ at the right biceps; tenderness of the left sacroiliac joint; moderate tenderness of the left sacroiliac joint; lumbar radiculitis;

straightening of the curvature of the lumbar spine; paralumbar tenderness and spasm; lumbar myofascitis; moderate tenderness of the bilateral quadratus lumborum, deep hip abductors and medial hamstring insertions; moderate tenderness and spasm on palpation of the lumbosacral paraspinals; lumbar sprain/strain; low back pain with frequent radiation down the left buttock, thigh, leg and knee associated weakness of the left leg, moderate tenderness and moderate spasm on palpation of the L2-L5 lumbosacral paraspinals; pain in the right knee with difficulty in ambulation, tenderness in themedial joint line at the tibiopatellar ligament; tenderness at the patella of the left knee and left knee contusion. The plaintiff further claims she has sustained a permanent injury and significant limitation which prevented her from performing substantially all of the material acts which were usual and customary for a period in excess of ninety days during the first one hundred eighty days following the accident. She also claims she was unable to return to work until February 2005 following the accident.

The defendants now seek summary judgment because the plaintiff's claimed injuries fail to meet the threshold imposed by Insurance Law §5102(d).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been produced, the burden then shifts to the opposing party who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form sufficient to require a trial of any issue of fact (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [1979] , ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).) and must assemble, lay bare and reveal her proof in order to establish that the matters stated in her pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]).

Pursuant to Insurance Law § 5102(d), " '[s]erious injury' means 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 medical 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."

The term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the

person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102(d), the initial burden is on the defendant to "present evidence in competent form, showing that plaintiff has no cause of action" (***Rodriquez v Goldstein,*** 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (***DeAngelo v Fidel Corp. Services, Inc.***, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]) Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268, 587 NYS2d 692 [2nd Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (***Cammarere v Villanova***, 166 AD2d 760, 562 NYS2d 808, 810 [3rd Dept 1990]).

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 a specific percentage of the loss of range of motion must be ascribed 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 (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott*** (supra).

The Court determines in the first instance whether a prima facie showing of "serious injury" has been established (*see*, ***Tipping-Cestari v Kilhenny***, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]) The initial burden is on the 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]).

In support of this motion, the defendant has submitted, inter alia, an attorney's affirmation; copies of the pleadings and plaintiff's verified bill of particulars; a copy of an uncertified medical record from Good Samaritan Hospital emergency department; a copy of an uncertified report of South Island Medical electrodiagnostic studies, dated January 24, 2005; the sworn report dated, March 9, 2009 of Jay Nathanson, M.D. (hereinafter Nathanson), an orthopedist; the sworn report, dated May 6, 2009, of Melissa Sapan Cohen, M.D. (hereinafter Sapan Cohen), a radiologist; a copy of an MRI report dated, December 21, 2004; plaintiff's work records; an uncertified copy of the MV 104 police accident report; and copies of the transcripts of the examinations before trial (hereinafter EBT) of the plaintiff, dated December 19, 2008 and Lance D. Verderosa, dated May 15, 2009.

In opposing this motion, the plaintiff has submitted her affidavit; an attorney's affirmation; copy of the EBT of William Fitzgerald, dated July 23, 2009; an uncertified copy of the MV 104 police accident report; copy of the claim for disability benefits; copy of employer wage and attendance record; and copies of the MRI reports of the lumbar spine dated, December 22, 2004, and cervical spine, dated January 17, 2005.

Initially, the Court notes that the unsworn MV-104 police accident report constitutes hearsay and is inadmissible (*see*, ***Lacagnino v Gonzalez***, 306 AD2d 250, 760 NYS2d 533 [2d Dept 2003]; ***Hegy v Coller***, 262 AD2d 606, 692 NYS2d 463 [2d Dept 1999]).

At her EBT, the plaintiff, now Leisa Edwards, testified that she was currently working as a certified nursing assistant. Due to the accident on November 26, 2004, she was unable to work until February 2005 pursuant to instruction by her treating physician. She testified that when the accident occurred her knees hit together and her body jerked. She did not feel pain immediately but by the next morning, she felt sharp pain in her lower back, and her neck and knees were hurting as well. She went to the emergency department at Good Samaritan Hospital and was treated and released. She thereafter was treated by a chiropractor, Jack LaFosse, about three times a week for the months that she was out of work for the pain in her neck and back. She was also seen by another physician whose name she was unsure of and by Clark A. Gentil of Huntington Medical Group. Since the accident due to pain, she has had difficulty lifting her daughter, she has had difficulty carrying groceries and lifting laundry bags. Housework and sweeping have also caused her pain. At work she has needed help lifting patients due to pain in her back. She stated the pain in her neck and knees have improved and does not bother her at present.

The testimony of Lance D. Verderosa is noncontributory to the issue of serious injury.

The report of Irina Yefimov, M.D., dated January 24, 2005, stated that the testing of the cervical paraspinals and upper extremities motor nerve conduction studies of the median/ulnar/radial nerves, and the sensory nerve conduction studies of the median/radial/ulnar nerve conduction studies were normal. The electromyograph of "selected muscles of the bilateral upper extremities and cervical paraspinal muscles revealed normal motor unit action potentials on volition and no spontaneous activity at rest."

Nathanson, the defendants' orthopedic expert, in his report, dated March 9, 2009, stated that he reviewed the records, reports and studies, including the MRI's of the plaintiff's cervical spine, dated January 17, 2005, and lumbar spine, dated December 22, 2004. Using a goniometer, Nathanson stated his range of motion findings based upon his examination of the plaintiff's upper extremities, hands and lower extremities and compared those findings to the normal range of motion values. He set forth his range of motion findings based upon his examination of the plaintiff's cervical and lumbar spines and compared those findings to the normal range of motion values. No deficits were stated for any of his findings. Nathanson stated the injuries diagnosed and documented in clinical records were the neck and back, and that the etiology of the condition or injuries were related to the motor vehicle accident. He also stated that these injuries were typically caused by trauma. His diagnosis was that of cervical and lumbar sprains with a satisfactory prognosis.

Sapan Cohen, the defendants' radiologist, in her report, dated May 6, 2009, stated that she reviewed the above mentioned cervical MRI study and stated there was straightening of the normal cervical lordosis but she did not see evidence of herniated or bulging discs.

Based upon the reports of Nathanson and Sapan Cohen and the actual report concerning the cervical MRI, the Court determines that the defendants have not established prima facie entitlement to summary judgment. There are factual issues presented in the defendants' moving papers which preclude summary judgment. Nathanson stated that the plaintiff sustained a temporary impairment and was out of work for three months following the accident, but she was not now disabled and was able to return to pre-loss activity levels including occupational duties without restrictions. Nathanson did state an opinion as to the bulging discs noted on the MRI study of January 17, 2005, including posterior bulging at C2-3, C3-4, C3-5, C5-6 and C6-7 and did not rule out that they were not causally related to the accident, although the MRI studies were reviewed by him. Sapan Cohen opined that the cervical MRI did not demonstrate bulging discs, although she did note a straightening of the normal cervical lordosis attributable to positioning or muscle spasm, but she did not indicate the cause of the muscle spasm. Additionally, although the plaintiff stated radicular symptoms in her bill of particulars, the defendants did not submit a report by a neurologist based upon an independent neurology examination and therefore have not established prima facie entitlement that the plaintiff did not suffer a radicular or neurological component. Based upon the foregoing, the defendants' moving papers leave it to this Court to speculate as to whether or not the plaintiff sustained the bulging cervical discs and whether or not she sustained any radicular injury related to the accident.

These factual issues raised in the defendants' moving papers preclude summary judgment. The defendants have failed to satisfy their burden of establishing, prima facie, that the plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) (*see*, ***Agathe v Tun Chen Wang***, 98 NY2d 345, 746 NYS2d 865 [2006]). In that the reports of the defendants' examining physicians do not exclude the possibility that the plaintiff suffered a serious injury in the accident, the defendants are not entitled to summary judgment (*see*, ***Peschanker v Loporto***, 252 AD2d 485, 675 NYS2d 363 [2d Dept 1998]).

Since the defendants failed to establish entitlement to judgment as a matter of law, it is not necessary to consider whether the plaintiff's papers in opposition to defendants' motion were sufficient to raise a triable issue of fact (*see*, ***Agathe v Tun Chen Wang***, *supra*; ***Walters v Papanastassiou***, *supra*)

Accordingly, the motion (001) by the defendants for dismissal of the complaint is denied.

Dated: March 31, 2010

Peter J. Kelan
J.S.C.