[* 1]

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

MARIE ETIENNE,

Plaintiff(s),

- against -

STEPHANIE BLEIER,

Defendant(s).

TRIAL/IAS PART 7

INDEX NO. 6622/08

MOTION SEQUENCE NO. 1

MOTION SUBMISSION DATE: March 1, 2010

The following papers read on this motion:

Notice of Motion	**X**
Affirmation in Opposition	**X**
Reply Affirmation	**X**

Upon the foregoing papers, the motion by the defendant for an Order pursuant to CPLR 3212 and Article 51 of the Insurance Law of the State of New York, granting summary judgment to defendant, Stephanie A. Bencivenga, formerly known as Stephanie Bleier and dismissing the Complaint of plaintiff Marie Etienne, on the ground that the injuries claimed do not satisfy the "serious injury" threshold requirement of New York Insurance Law §5102(d); thus her claim for non-economic loss is barred by Section 5104(a) of the statute, is determined as hereinafter provided:

This personal injury action arises out of a motor vehicle accident that occurred on July 25, 2005 at 7:30 a.m. on Route 27A at or near the intersection of Keith Lane, West Islip, New York.

The plaintiff in the plaintiff's Verified Bill of particulars sets forth:

> "5. Statement of injuries: The following injuries were caused, aggravated, exacerbated and/or rendered symptomatic: oblique tear of the lateral meniscus at the juncture of the anterior horn and body contacting the superior surface, left knee; mild knee joint effusion, left knee; left knee joint pain secondary to S/S contusion and ligament/meniscal tear; MRI of the lumbar spine revealed, right posterior herniation of the T12-L1 intervertebral disc impinging upon the thecal sac; anterior and posterior bulge of the L3/4 intervertebral disc impinging upon the thecal sac; mild stenosis of the spinal canal and bilateral neural foramina at this level; lumbar derangement;

posterior bulge L5/S1 intervertebral disc impinging upon the spinal canal; post traumatic lumbosacral sprain/strain and discogenic disease/radiculopathy; mild stenosis of the bilateral L5/S1 neural foramina; peripheral neuropathy; peripheral nerve entrapment; post traumatic nerve injury; severe headaches.

Plaintiff suffered associated pain and discomfort in and about the subject and surrounding soft tissues, nerves, muscles, tendons, ligaments and blood vessels with the necessity for treatment with antibiotics and painkilling drugs.

The above-described injuries have restricted the plaintiff's life and style of living and interfered with her opportunities including but not limited to: inability to work; inability to socialize with family, friends and neighbors; inability to ambulate; difficulty in normal daily activities; additional assorted and numerous other physical limitations which result in increased anxiety; loss of sleep, headaches, constant and intermittent pain in the injured areas, acute depression and emotional overlay resulting from the injuries as aforesaid; interruption of personal activities by the necessity of repeated and numerous doctor visits for aftercare and treatment, and resulting anxiety from difficulty in traveling to and from doctor's offices.

The above-described injuries except those of a superficial nature are permanent; the aforesaid injuries involved the surrounding bones, soft tissues, nerves, muscles, tendons, ligaments, blood vessels and tissues and have rendered these areas more susceptible for further trauma.

Upon information and belief, the above-described injuries, their sequelae and continuing effects, will be supplemented upon receipt of additional medical information and/or completion of discovery.

All of the above-mentioned injuries and their sequelae, are of a permanent and lasting nature, except for those injuries which are of a superficial nature."

The defendant in support of the instant application submit, amongst other things, emergency department records from Good Samaritan Hospital dated July 24, 2005; an affirmed letter report dated May 6, 2009 of S. Farkas, MD, an orthopedist of an orthopedic examination of the plaintiff conducted on May 6, 2009 together with an addendum letter of said physician dated July 21, 2009.

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in **Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc., 207 AD2d 880, 616 NYS2d 650, 651 (Second Dept., 1994):**

"It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607,

> 467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Zuckerman v. City of New York, supra*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718)."

It is noted that the question of whether the plaintiff has made a prima facie showing of a serious injury should be decided by the Court in the first instance as a matter of law **(see Licaro v. Elliot, 57 NY2d 230, 455 NYS2d 570, 441 NE2d 1088; Palmer v. Amaker, 141 AD2d 622, 529 NYS2d 536, Second Dept., 1988; Tipping-Cestari v. Kilhenny, 174 AD2d 663, 571 NS2d 525, Second Dept., 1991)**.

In making such a determination, summary judgment is an appropriate vehicle for determining whether a plaintiff can establish prima facie a serious injury within the meaning of Insurance Law Section 5102(d) **(see, Zoldas v. Louise Cab Corp., 108 AD2d 378, 381, 489 NYS2d 468, First Dept., 1985; Wright v. Melendez, 140 AD2d 337, 528 NYS2d 84, Second Dept., 1988)**.

Serious injury is defined, in Section 5102(d) of the Insurance Law, wherein it is stated as follows:

> "(d) 'Serious 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, ember, 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."

The Court may properly considered the unsworn reports of the plaintiff's treating physicians and/or health care providers (see, **Pagano v Kingsbury**, 182 AD2d 268, 587 NYS2d 692 (Second Dept., 1992). In this regard, the x-ray of the plaintiff's lumbosacral spine performed at God Samaritan Hospital set forth:

> "X-rays lumbosacral spine:
>
> History: Injury.
>
> AP lateral and cone-down lateral views of lumbosacral spine reveal degenerative disc disease and anterior hypertrophic spurring at the L3-L4 level. Mild degenerative disc disease is seen at L5-S1. Remaining disc spaces and paraspinal soft tissues are unremarkable. No fracture, dislocation or destructive bone lesion is noted. Visualized sacrum and sacroiliac joints are unremarkable. A somewhat amorphous calcification is seen the central pelvis likely representing a calcified fibroid
>
> Impression: Degenerative disc disease L3-L4 L5-S1. No fracture. Probable calcified fibroid.

THANK YOU FOR THIS REFERRAL

Read by: Ronald Craig, M.D.
Electronically signed By: RONALD CRAIG, MD

INITIALS: RC"

The diagnosis entered in the Hospital's record states:

"DIAGNOSIS
Pain - low back (LBP)
SKHW Sayed Mustafah Khwaja, DO 0/24/05 09:40"

The May 6, 2009 report of Dr. Farkas sets forth:

"PHYSICAL EXAMINATION: The claimant is a 51-year old female who stands 5'7½" tall and stated being right hand dominant.

The claimant was examined with the examining room door left ajar.

The claimant was asked to inform me as to any pain or tenderness during the examination.

Skin. The skin was examined with no lesions, masses, or warmth noted.

Examination of the lumbar spine: Revealed no spasm or crepitus to palpation during static positioning or active range of motion. The claimant can forward flex to approximately 5 degrees thereby (90 degrees or more of forward flexion normal). Lateral bending was 5 degrees (30 degrees lateral bending normal). Rotation to the left and right is to 5 degrees (45 degrees of rotation to the left and right normal). The claimant offers no complaint of pain. The claimant can toe and heel walk without difficulty. No limb was noted. Deep tendon reflexes were normal at both the Achilles tendon and patellar tendon regions. Motor exam is 5+. Straight leg raising was negative. The claimant sits and bends forward to remove her shoes with no indication of discomfort.

This individual presents with unrelated scars.

Left knee examination: Both knees were examined. There was no effusion nor bogginess noted. The claimant offered no complaint of pain as I palpated the knees. 18 inches of circumferential measurement is noted bilaterally. The knees re stable. A negative Apley's McMurray's, and Drawer Signs were noted bilaterally. Quad and patella tendons are intact bilaterally. There is no retropatellar crepitus. Range of motion of the knee was from full extension (0 extension normal) to 90 degrees of flexion on the left and 100 degrees on the right (normal range of motion 0 to 130-135 degrees flexion). This is despite the fact that she injured the left knee only.

All measurements were performed using a goniometer.

Normal range of motion measurements have been obtained from Physical

Examination of the Spine and Extremities by Dr. Hoppenfeld, The American Medical Association Guidelines to the Evaluation of Permanent Impairment, and Campbell's Orthopedics.

Sensory Examination: The claimant states feeling more about the right than left lower extremity circumferentially.

DIAGNOSIS: The claimant presents with diagnoses of:

1. Resolved lumbar sprain.
2. Resolved sprain of the left knee.

The diagnoses, as documented, are based upon the claimant's description of the accident and the physical examination, taking into account the subjective complaints and objective findings.

DISABILITY: I find no orthopedic disability based on the physical examination at this time. The claimant may perform her usual duties of her occupation and may carry out the daily activities of living, without restriction."

Dr. Farkas states in said physician's July 21, 2009 addendum:

"Please let this letter serve as an addendum to my original report of 05/06/09. At the time that my consultation was prepared, I failed to discuss this individual's purported decreased range of motion .

As I explained in the examination of the lumbar spine, the claimant had decreased range of motion, yet sat and bent fully forward to remove her shoes with no indication of discomfort. Sitting alone is approximately 90 degrees and forward flexion to remove one shoes increases this flexion to at least 110 to 120 degrees if not more. This totally contradicts this individual's show of only 5 degrees of forward flexion. Therefore, this individual was exaggerating her symptoms and being rather theatrical.

As far as the left knee is concerned, this individual's presentation was 90 degrees of flexion of the left knee and 100degrees of the right knee. This was also an indication of exaggeration of symptoms since this individual injured the left knee only and there would be no reason for only 100 degrees of flexion on the right. This individual also presented with no other objective findings during the examination of either the lumbar or left knee examination and therefore, no true pathology is noted.

This individual is clearly attempting to feign pathology, however, no clinical correlation to any objective finding is noted and therefore this individual presents with an otherwise normal examination with exaggeration of subjective symptoms of decreased range of motion."

The Court finds that the defendants have submitted evidence in admissible form to make a "prima facie showing of entitlement to judgment as a matter of law" **(Winegrad v. New York University Medical**

Center, 64 NY2d 851, 853; Pagano v. Kingsbury, supra at 694) and is sufficient to establish that the plaintiff did not sustain a serious injury. Accordingly, the burden has shifted to the plaintiff to establish such an injury and a triable issue of fact **(see Gaddy v. Eyler, 79 NY2d 955, 582 NYS2d 990, 591 NE2d 1176; Jean-Meku v. Berbec, 215 AD2d 440, 626 NYS2d 274, Second Dept., 1995; Horan v. Mirando, 221 AD2d 506, 633 NYS2d 402, Second Dept., 1995).**

In opposition to the requested relief, the plaintiff submits an affirmed Final Narrative Report of Best Care Medical Practice, PC by Leslie Theodore, MD which sets forth a date of service of November 30, 2009 and an affirmation of Jeffrey Chess, MD as to an MRI of the plaintiff's lumbar spine performed on September 3, 2005.

The Court initially observes that while the plaintiff's counsel in the plaintiff's counsel's affirmation alludes to certain findings by Dr. Theodore on August 8, 2005, the submission from Dr. Theodore makes no reference to tests, procedures and/or findings at that time. The Final Narrative of Dr. Theodore references a "follow-up" on September 23, 2005 and the examination on November 30, 2009. Dr. Theodore further sets forth that the plaintiff stopped physical therapy on September 23, 2005. Dr. Theodore does not offer any explanation for the plaintiff's four year plus gap in treatment between September 23, 2005 and November 30, 2009 (see, **Pommels v Perez**, 4 NY3d 566, 797 NYS2d 380; also see **Nemchyonok v Peng Lui Ying**, 2 AD3d 421, 767 NYS2d 811 (Second Dept., 2003).

The plaintiff states that Dr. Chess in said physician's submission references certain injuries to the plaintiff's left knee. Contrary to the plaintiff's submission the affirmation of Dr. Chess addresses the lumbar spine of the plaintiff and not the plaintiff's left knee as a result of an MRI performed on September 3, 2005. Dr. Theodore's submission sets forth that there was a MRI of the plaintiff's left knee on August 17, 2005 but Dr. Theodore's letter report sets forth the alleged results of said MRI and not that the MRI was reviewed personally by Dr. Theodore.

Based upon all of the foregoing, the defendant's application for an Order pursuant to CPLR 3212 and Article 51 of the Insurance Law of the State of New York, granting summary judgment to defendant, Stephanie A. Bencivenga, formerly known as Stephanie Bleier and dismissing the Complaint of plaintiff Marie Etienne, on the ground that the injuries claimed do not satisfy the "serious injury" threshold requirement of New York Insurance Law §5102(d); thus her claim for non-economic loss is barred by Section 5104(a) of the statute, is **granted**.

SO ORDERED.

DATED: 5/10/2010

Ray S. Mahon
J.S.C.

ENTERED
MAY 13 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE