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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: GEORGE J. SILVER PART 22

Index Number : 400670/2007
BAKER, TAWANA
VS.
VEGA, GRICEL
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1
Answering Affidavits — Exhibits	2, 3
Replying Affidavits	4

FILED
JUN 09 2010
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

In this action to recover for personal injuries allegedly sustained in a motor vehicle accident, Defendants Gricel Vega and Elba Burgos (collectively "Defendants") move pursuant to CPLR §3212 for an order granting summary judgment and dismissing the complaint of Plaintiff Tawana Baker ("Plaintiff") on the grounds that Plaintiff did not sustain an injury that qualifies as "serious" as defined by New York Insurance Law §5102(d).

Plaintiff alleges in her Verified Bill of Particulars that, as a result of the accident that occurred on March 17, 2006, she sustained a serious injury under NY Insurance Law §5102(d) by incurring bulging discs at L4-L5 and L5-S1, cervical and lumbosacral radiculopathy, right ankle sprain/strain and lumbar sprain/strain.

Under New York Insurance Law §5102(d), a "serious injury" is defined 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.

Dated: 6/5 _____

_____ J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

"[A] defendant can establish that [a] plaintiff's injuries are not serious within the meaning of Insurance Law §5102 (d) by submitting the affidavits or affirmations of medical experts who examined the plaintiff and conclude that no objective medical findings support the plaintiff's claim" (*Grossman v Wright*, 268 AD2d 79, 83-84 [1st Dept 2000]). If this initial burden is met, "the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a serious injury was sustained within the meaning of the Insurance Law" (*id.* at 84). The Plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is serious within the meaning of §5102(d), but also that the injury was causally related to the accident (*Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]).

Defendants' Expert Reports

In support of this motion, Defendants submit the affirmed expert reports of Dr. S.W. Bleifer, orthopedist, and Dr. Melissa Sapan Cohn, radiologist. Defendants also submit the medical records of Dr. Luba Karlin's lower extremity NCV-EMG and Dr. Bruce Campbell's radiograph report of Plaintiff's right ankle. Dr. Karlin concluded that the May 25, 2006 EMG test revealed no evidence of lumbar radiculopathy. Dr. Bruce Campbell concluded that the April 4, 2006 radiograph was unremarkable with no evidence of ankle fracture or soft tissue abnormalities.

Dr. Bleifer examined Plaintiff on November 25, 2008. Plaintiff complained of pain in the back and right ankle. Dr. Bliefer conducted range of motion testing on the cervical spine, lumbosacral spine, right ankle and shoulders. He reported that the range of motion was normal and compared all measurements to the American Medical Association guidelines. Dr. Bliefer also conducted muscle testing, reflex testing and sensory examination and concluded that all three were normal. His overall impression was that the Plaintiff had suffered from a post-traumatic lumbosacral sprain, which has resolved, and a left lower leg contusion, which has resolved.

On September 30, 2007, Dr. Cohn examined Plaintiff's lumbosacral MRI taken on May 4, 2006. She concluded that the MRI was unremarkable and normal with no evidence of bulges or herniations.

Defendants' expert reports satisfy their burden of establishing *prima facie* that Plaintiff did not suffer a serious injury (*Yagi v Corbin*, 2007 NY Slip Op 7749 [1st Dept]; *Becerril v Sol Cab Corp*, 50 AD 3d 261, 854 NYS2d 695 [1st Dept 2008]). Plaintiff must now bear the burden of overcoming Defendants' submissions by demonstrating that a serious injury was sustained through the presentation of nonconclusory expert evidence causally linking the serious injury, as defined by New York Insurance Law §5102(d), to the accident in question (*Grossman*, 268 AD2d at 84 [1st Dept 2000]; *Valentin*, 59 AD3d 184 [1st Dept 2009]).

Plaintiff's Expert Reports

In opposition to Defendants' motion, Plaintiff submits the affirmed reports of Dr. Charles DeMarco, radiologist, Dr. Nicky Bhatia, neurologist, and Dr. Bozena Augustyniak. Dr. DeMarco reviewed Plaintiff's lumbar spine MRI film. He concluded that posterior disc bulges were present at L4-L5 and L5-S1. However, Dr. DeMarco does not causally related these bulges to Plaintiff's accident. Plaintiff's submissions must demonstrate that a serious injury was sustained through the presentation of nonconclusory expert evidence causally linking the serious injury, as defined by New York Insurance Law §5102(d), to the accident in question. (*Grossman v Wright*, 268 AD2d 79, 84 [1st Dept 2000]; *Valentin v Pomilla*, 59 AD3d 184 [1st Dept 2009]). Dr. DeMarco's failure to opine on the causation of Plaintiff's injuries renders his report insufficient to raise an issue of triable fact.

Dr. Bhatia examined Plaintiff on June 1, 2009. He conducted manual muscle testing, which was normal, and range of motion testing for lumbar extension on a goniometer, which was 10 degrees compared to 25 degrees normal, a 60% loss. Dr. Bhatia's impression is that Plaintiff suffers from "impairment of the dynamic stability at the spine" and has a permanent partial disability. He also believes that she has reached maximal medical improvement and that her injuries are casually related to the accident. Though, Dr. Bhatia only measured one plane of range of motion, he compared this measurement to normal and relied upon objective testing to reach his conclusion that Plaintiff is partially disabled. As such, Dr. Bhatia's report establishes that a serious injury to Plaintiff's lumbar spine has been sustained (*see Rubin v. SMS Taxi Corp.*, 2010 N.Y. Slip Op. 02414 [1st Dept 2010] [once a prima facie case of serious injury under the no-fault statute has been established and the trier of fact determines that a serious injury has been sustained, a plaintiff is entitled to recover for all injuries incurred as a result of the accident]).

Dr. Augustyniak reports that he conducted range of motion testing on Plaintiff "directly after the accident" on March 28, 2006. He conducts range of motion testing on Plaintiff's lumbar spine and found flexion of 60 degrees compared to 90 degrees normal, extension of 20 degrees compared to 30 degrees normal, right rotation of 30 degrees compared to 30 degrees normal, left rotation of 20 degrees compared to 30 degrees normal and right and left lateral flexion of 15 degrees compared to 20 degrees normal. However, this examination is not "based on a recent examination of the plaintiff" (*Thompson v. Abbasi*, 15 AD3d 95 [1st Dept 2005] *quoting Grossman v Wright*, 268 AD2d 79, 84, 707 NY2d 233 [2000]; *Bent v Jackson*, 15 AD3d 46, 48 [1st Dept 2005]; *Nunez v Zhagui*, 60 AD3d 559, 560 [1st Dept 2009]). Courts have held that an examination performed two to three years before the date of defendants' motion is insufficiently recent to be considered. (*See Mejia v DeRose*, 35 AD3d 407 [2006]; *Beckett v Conte*, 176 AD2d 774 [1991]; *Tudisco v James*, 28 AD3d 536 [2006] [examinations held one year before defendant's motion were insufficient to meet plaintiff's burden on summary judgment]). Dr. Augustyniak's report is not sufficient to defeat summary judgment.

Plaintiff also submits her own affidavit. However, Plaintiff's self-serving deposition statements are entitled to little weight and are insufficient to raise triable issues of fact (*See Zoldas v Louise Cab Corp.*, 108 A.D.2d 378, 383 [1st Dept 1985]; *Fisher v Williams*, 289 A.D.2d 288 [2d Dept 2001]).

Defendants also argue that Plaintiff has not addressed has not adequately explained her cessation of treatment. While a cessation of treatment is not dispositive, a plaintiff who terminates therapeutic measures following the accident, while claiming "serious injury," must offer some reasonable explanation for having done so (*DeLeon v. Ross*, 2007 NY Slip Op 8001 [1st Dept]; *Pommells v Perez*, 4 NY3d 566, 574, 830 N.E.2d 278, 797 NYS2d 380 [2005]). Plaintiff states that "once payment for her medical care was terminated by no-fault, I had to stop treating with my doctors and therapists because I could not longer afford to pay for their care and treatment out of my own pockets." Cessation of treatment due to termination of no-fault benefits is a sufficient explanation to survive summary judgment (*see Gaviria v Alvardo*, 65 AD3d 567, 884 NYS2d 134 [2d Dept 2009]).

Plaintiff's 90/180 Claim

Under §5102(d), to establish a serious injury under the 90/180 category, Plaintiff's injuries must restrict her from performing "substantially all" of her daily activities to a great extent rather than some slight curtailment (*Szabo v. XYZ, Two Way Radio Taxi Ass'n, Inc.*, 700 NYS2d 179 [1999]; *Thompson v. Abbasi*, 788 NYS2d 48 [1st Dept 2005]; *Hernandez v. Rodriguez*, 63 A.D.3d 520 [1st Dept 2009]). In her Verified Bill of Particulars, Plaintiff claims to have been totally disabled for a period of fifteen weeks. However, she does not submit any evidence to show that this restriction was medically determined. Therefore, this evidence is insufficient to establish a substantial curtailment of Plaintiff's normal activities during the three-month period immediately following the accident as required under the 90/180 category (*Grimes-Carrion v Carroll*, 17 AD3d 296, 794 NYS2d 30 [App. Div. 1st Dept 2005]; *Lopez v Abdul-Wahab*, 2009 NY Slip Op 8685 [1st Dept]; *Rodriguez v Herbert*, 34 AD3d 345, 825 NYS2d 37 [1st Dept 2006]).

Plaintiff's Permanent Loss Claim

To qualify under the "permanent loss of use of a body organ, member, function or system," the loss must not only be permanent, but must be a total loss of use (*Gaddy v. Eyler*, 79 NY2d 955, 582 NYS2d 990 [1992]; *Oberly v Bangs Ambulance, Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]. Plaintiff has failed to submit any evidence sufficient to show a total permanent loss as a result of the accident.

Accordingly, it is hereby

ORDERED that Defendants' motion for summary judgment is denied as to Plaintiff's claim under permanent consequential limitation and significant limitation categories of Insurance Law §5102(d); and it is further

ORDERED that Defendants' motion for summary judgment is granted as to Plaintiff's claim under the 90/180 category of Insurance Law §5102(d); and it is further

ORDERED that Defendants motion for summary judgment is granted as to Plaintiff's claim under the permanent loss category of Insurance Law §5102(d); and it is further

ORDERED that Defendants are to serve a copy of this order, with Notice of Entry upon all parties, within 30 days.

This constitutes the decision and order of the court.

George J. Silver, J.S.C.

GEORGE J. SILVER

Dated: JUN 04 2010
New York County

FILED
JUN 09 2010
COUNTY CLERK'S OFFICE
NEW YORK