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SHORT FORM ORDER

INDEX NO. 08-5251
CAL. NO. 09-02242-MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 2-9-10
ADJ. DATE 3-23-10
Mot. Seq. # 001 - MG; CASEDISP

LENORE PADUANO,	:	SIBEN & SIBEN, LLP
	:	Attorneys for Plaintiff
Plaintiff,	:	90 East Main Street
	:	Bay Shore, New York 11706
- against -	:	
	:	RICHARD T. LAU & ASSOCIATES
ARLENE M. MCINTYRE,	:	Attorneys for Defendant
	:	P.O. Box 9040
Defendant.	:	Jericho, New York 11753-9040

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant, dated January 8, 2010, and supporting papers (including Memorandum of Law dated __); (2) Affirmation in Opposition by the plaintiff, dated March 9, 2010, and supporting papers; (3) Reply Affirmation by the defendant, dated March 18, 2010, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

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

This is an action to recover damages for injuries allegedly sustained by plaintiff Lenore Paduano as a result of a motor vehicle accident that occurred at the intersection of Route 25A and County Road 83 on May 17, 2006. According to plaintiff's bill of particulars, plaintiff was traveling westbound on County Road 83 when her vehicle was struck in the rear by the vehicle operated by defendant Arlene McIntyre. Plaintiff further alleges, by her bill of particulars, that she sustained various injuries as a result of the subject accident, including herniated discs at levels L4 through S1; synovitis of the right facet joint of level L5-S1; aggravation/exacerbation of annular tear at level L4-L5; aggravation/exacerbation of herniated discs at levels C4 through C6; lumbar and thoracic spine sprains; aggravation/exacerbation of degenerative disc disease of thoracic spine; and adjustment disorder with mixed anxiety and depressed mood. Plaintiff, at the time of the accident, was unemployed.

Defendant now moves for summary judgment on the basis that plaintiff's injuries do not satisfy the "serious injury" threshold required by Insurance Law § 5104(d). Defendant, in support of the motion,

submits a copy of the pleadings, a copy of plaintiff's deposition transcript, plaintiff's medical records from the emergency room of John T. Mather Hospital, and the sworn medical reports of Dr. Jay Nathan and Dr. Melissa SapanCohn. Dr. Nathan conducted an independent orthopedic examination of plaintiff at defendant's request on June 15, 2009. Dr. SapanCohn performed an independent radiological review of the magnetic resonance imaging ("MRI") films of plaintiff's cervical and lumbar spines at defendant's request on July 15, 2009.

Plaintiff opposes the instant motion on the ground that defendant failed to establish her prima facie burden that she did not sustain a "serious injury" within the meaning of Insurance Law § 5104(d) as a result of the subject accident. Alternatively, plaintiff asserts that the proof submitted in opposition to the motion demonstrates that the injuries she sustained meet the "serious injury" threshold of Insurance Law § 5104(d). Plaintiff, in opposition to the motion, submits a copy of her deposition transcript and the unsworn medical report of Dr. Allen Rothpearl.

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, 798, 622 NYS2d 900 [1995]; *see also* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]; ***Licari v Elliott***, 57 NY2d 230, 455 NYS2d 570 [1982]). 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***, *supra*; ***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 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 [2008]; ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 772 [2006]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2006]; ***Kearse v New York City Tr. Auth.***, 16 AD3d 45, 789 NYS2d 281 [2005]; ***Beckett v Conte***, 176 AD2d 774, 575 NYS2d 102 [1991]). "Whether 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" (***Dufel v Green***, 84 NY2d 795, 798, 622 NYS2d 900 [1995]). 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 [2009]; ***Hackett v AAA Expedited Freight Sys.***, 54 AD3d 721, 865 NYS2d 101 [2008]; ***Ferraro v Ridge Car Serv.***, *supra*; ***Morales v Daves***, 43 AD3d 1118, 841 NYS2d 793 [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 [2009]; ***Diaz v Lopresti***, 57 AD3d 832, 870 NYS2d 408 [2008]; ***Laruffa v Yui Ming Lau***, *supra*; ***John v Engel***, 2 AD3d 1027, 768 NYS2d 527 [2003]; ***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*). 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]). Furthermore, 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]).

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***, *supra*). 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]). 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***, *supra*; ***Pagano v Kingsbury***, *supra*; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

Dr. Nathan's report states, in pertinent part, that an examination of plaintiff's cervical spine revealed that she has full range of motion. In particular, the report states that measurement of the motions in plaintiff's cervical spine demonstrated 45 degrees of flexion (normal is 45 degrees); 45 degrees of extension (normal is 45 degrees); 45 degrees of right and left lateral flexion (normal is 45 degrees); and 80 degrees of right and left lateral rotation (normal is 80 degrees). The report also states that plaintiff's range of motion in her thoracolumbar spine is 90 degrees of flexion (normal is 90 degrees); 30 degrees of extension (normal is 30 degrees); 30 degrees of right and left lateral flexion (normal is 30 degrees); and 30 degrees of right and left rotation (normal is 30 degrees). The report states that an examination of plaintiff's shoulders, wrists, and hands revealed no tenderness, heat, swelling, erythema, or effusion, and that she has

full range of motion in those areas. It states that plaintiff has full range of motion in her hips and knees, and that there is no tenderness, swelling, effusion, or erythema in those areas. The report states that plaintiff has a normal gait and 5/5 bilateral muscle strength in all muscle groups, even though she had mild difficulty getting on and off the examination table. The report states that there was decreased sensation in plaintiff's right foot. The report concludes that plaintiff is not disabled and is able to perform all of her daily living activities.

Furthermore, Dr. SapanCohn states in her reports that plaintiff has evidence of pre-existing degenerative disc disease in her cervical, thoracic, and lumbar spines and that the findings from the September 21, 2006 MRI's are not causally related to the subject accident. Dr. SapanCohn's report on plaintiff's cervical spine states, in relevant part, that plaintiff had a pre-existing disc herniation with associated bone spurs at levels C4 through C6, and that no interval changes are observed when the MRI examination of September 21, 2006 is compared with plaintiff's prior MRI examination on April 7, 2004. Likewise, Dr. SapanCohn's report on plaintiff's thoracic spine states, in pertinent part, that there are pre-existing central disc herniations at levels T4 through T6, and that when the September 21, 2006 MRI is compared with the May 17, 2004 MRI findings, plaintiff's thoracic spine is unchanged in appearance. Similarly, Dr. SapanCohn's report on plaintiff's lumbar spine states, in pertinent part, that there are pre-existing disc herniations at levels L4 through S1 and a pre-existing circumferential disc bulge at level L4-L5, and that when the MRI examination of September 21, 2006 is compared with the MRI examination of March 31, 2004, the disc herniations are unchanged in appearance and the underlying degenerative changes are still present, but stable in appearance, with no new herniations identified.

Here, defendant has established, prima facie, her entitlement to judgment as a matter of law that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102(d) as a result of the subject accident through the submission of plaintiff's deposition testimony, and the reports of her medical experts (*see* ***DeJesus v Cruz***, __ AD3d __, 2010 NY Slip Op 4119 [1st Dept 2010]; ***Lopez v Adul-Wahab***, 67 AD3d 598, 889 NYS2d 178 [2009]; ***DeJesus v Paullino***, 61 AD3d 605, 878 NYS2d 20 [2009]). The Court initially notes that sprains and strains are not serious injuries within the meaning of Insurance Law § 5102(d) (*see* ***Rabolt v Park***, 50 AD3d 995 [2008]; ***Washington v Cross***, 48 AD3d 457, 849 NYS2d 784 [2008]; ***Maenza v Letkajornsook***, 172 AD2d 500, 567 NYS2d 850 [1991]). Defendant's orthopedist, Dr. Nathan, tested the ranges of motion in plaintiff's cervical, thoracic, and lumbar spines using a goniometer and set forth his specific measurements, as well as compared plaintiff's ranges of motion to the normal ranges (*see* ***Staff v Yshua***, *supra*). Dr. Nathan found that plaintiff has full ranges of motion in her cervical, thoracic, and lumbar spines and he concluded that plaintiff was not disabled. Moreover, the unequivocal medical reports of defendant's expert radiologist, Dr. SapanCohn, demonstrates that plaintiff had pre-existing disc dessication and underlying degenerative disc disease at all of the cervical, thoracic, and lumbar disc levels where plaintiff alleges her injuries were sustained (*see* ***Depena v Sylla***, 63 AD3d 504, 880 NYS2d 641 [2009], *lv denied* 13 NY3d 706, 887 NYS2d 4 [2009]; ***Jean v Kabaya***, 63 AD3d 509, 881 NYS2d 891 [2009]; ***Houston v Gajdos***, 11 AD3d 514, 728 NYS2d 839 [2004]).

Therefore, the burden shifted to plaintiff to raise a triable issue of fact as to whether she sustained a "serious injury" within the meaning of Insurance Law § 5102(d) as a result of the subject accident (*see* ***Gaddy v Eyler***, *supra*; ***Luckey v Bauch***, 17 AD3d 411, 792 NYS2d 624 [2005]; ***McLoyrd v Pennypacker***, 178 AD2d 277, 577 NYS2d 272 [1991]). Plaintiff failed to meet that burden. In opposition, plaintiff has proffered insufficient medical evidence to demonstrate that she sustained an injury within the "limitation of

use" categories (*see* ***Licari v Elliott***, *supra*; ***Ali v Khan***, 50 AD3d 454, 857 NYS2d 71 [2008]). Plaintiff improperly relied upon the unaffirmed medical report of Dr. Rothpearl (*see* ***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]; ***Singh v Mohamed***, 54 AD3d 933, 864 NYS2d 498 [2008]; ***Verette v Zia***, 44 AD3d 747, 844 NYS2d 71 [2007]). In any event, even if the Court were to consider the unsworn report of plaintiff's expert, it failed to address the findings of defendant's expert that plaintiff had pre-existing degenerative disc disease in her cervical, thoracic, and lumbar spines (*see* ***Valentin v Pomilla***, 59 AD3d 184, 873 NYS2d 537 [2009]; ***Vidor v Davila***, 37 AD3d 826, 830 NYS2d 772 [2007]; ***Ponce v Magliulo***, 10 AD3d 644, 781 NYS2d 703 [2004]). 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]). In the face of defendant's expert's evidence that the conditions in plaintiff's cervical and thoracolumbar spines did not evidence any interval change between her motor vehicle accident in 2004 and the subject accident, and that she suffers from degenerative disc disease, plaintiff failed to submit any evidence addressing her prior motor vehicle accident, injuries, or degenerative disc disease (*see* ***Sky v Tabs***, 57 AD3d 235, 868 NYS2d 648 [2008]; ***Donadio v Doukhnych***, 55 AD3d 532, 867 NYS2d 92 [2008]; ***Figuero v Castillo***, 34 AD3d 353, 825 NYS2d 43 [2006]). Moreover, Dr. Rothpearl's finding that plaintiff sustained a "focal left posterolateral disc herniation at L4-L5 with left foraminal encroachment" is insufficient to defeat defendant's prima facie showing that plaintiff did not sustain a "serious injury" as a result of the subject accident (*see* ***Lozusko v Miller***, __AD3d __, 2010 NY Slip Op 3291 [2nd Dept 2010]; ***Shvartsman v Vildman***, 47 AD3d 700, 849 NYS2d 600 [2008]; ***Patterson v Alarm Response Corp.***, 45 AD3d 656, 850 NYS2d 114 [2007]). "Proof of a herniated disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not alone sufficient to establish a serious injury" (***Pommells v Perez***, *supra* at 574; *see also* ***Pierre v Nanton***, 279 AD2d 621, 719 NYS2d 706 [2001]; ***Guzman v Michael Mgt.***, 266 AD2d 508, 698 NYS2d 719 [1999]). Plaintiff has failed to submit any medical evidence to connect her herniated discs to any limitation of motion that is causally related to the subject accident (*see* ***Merisca v Alford***, 243 AD2d 613, 663 NYS2d 853 [1997]).

Finally, plaintiff failed to proffer competent medical evidence that he sustained a medically-determined injury of a nonpermanent nature that prevented her for 90 out of180 days immediately following the accident from performing all of her usual and customary activities (*see* ***Jack v Acapulco Car Serv., Inc.***, __ AD3d __, 897 NYS2d 648 [2010]; ***Bleszcz v Hiscock***, 69 AD3d 639, 894 NYS2d 481 [2010]; ***Nguyen v Abdel-Hamed***, 61 AD3d 429, 877 NYS2d 26 [2009]; ***Kuchero v Tabachnikov***, 54 AD3d 729, 864 NYS2d 459 [2008]; ***Sainte-Aime v Ho***, 274 AD2d 569, 712 NYS2d 133 [2000]). Plaintiff's deposition testimony that it is difficult to stand for long periods of time and perform activities like gardening was not supported by any objective medical evidence (*see* ***Nociforo v Penna***, 42 AD3d 514, 840 NYS2d 396 [2007]; ***Felix v New York City Tr. Auth.***, 32 AD3d 527, 819 NYS2d 835 [2006]). Accordingly, defendant's motion for summary judgment is granted.

Dated: 6/22/10

Peter H. Mayer
PETER H. MAYER, J.S.C.