Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Virginia Blake and Alison Jordan,

Plaintiff,

-against-

Matthew Rubbino,

Defendant.

Matthew Rubbino,

Third-Party Plaintiff,

-against-

John K. Blake,

Third-Party Defendant.

Motion Sequence No.: 004; MD
Motion Date: 4/5/10
Submitted: 6/16/10

Index No.: 37755/2008

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Clerk of the Court

Upon the following papers numbered 1 to 19 read on this motion for summary judgment: Notice of Motion and supporting papers, 1 - 12; Answering Affidavits and supporting papers, 13 - 17; Replying Affidavits and supporting papers, 18 - 19.

The instant action seeks to recover damages for personal injuries arising from a motor vehicle accident which occurred on the eastbound Southern State Parkway, near exit 39, on February 19, 2008. The accident purportedly occurred when a vehicle owned and operated by the defendant collided with a vehicle being operated by third-party defendant John K. Blake. At the time of the accident, the plaintiffs Virginia Blake and Alison Jordan were passengers in the vehicle operated by John K. Blake. The complaint alleges that the plaintiffs sustained serious and permanent injuries as a result of the defendant's negligence in causing the accident. Specifically, the bill of particulars alleges that plaintiff Virginia Blake sustained, *inter alia*, disc herniations at C3/4, C4/5, C5/6, C6/7, C7/T1; mild bilateral foraminal narrowing at C4/5; enlarged thyroid gland with heterogeneous echo texture; C6 radiculopathy; loss of range of motion to cervical spine; and pain, weakness, tingling and numbness to the cervical spine and upper extremities. It alleges that, as a result of the accident, plaintiff Blake was confined to bed for two days and home for three days. She was not confined to the hospital and was not incapacitated from employment as a result of the accident. The bill of particulars alleges that plaintiff Alison Jordan sustained L1/2 through L5/S1 posterior disc bulges; L3/4 and L4/5 flattening of the ventral thecal sac; loss of range of motion to the lumbar spine; and pain, numbness, tingling and weakness to the lumbar spine and upper extremities. With respect to both plaintiffs, the bills of particulars allege that they sustained a serious injury within the meaning of the insurance law in that they sustained a significant disfigurement; a fracture; 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; and/or a medically determined injury or impairment of a nonpermanent nature which prevented them from performing substantially all of the material acts which constituted their usual and customary daily activities for not less than ninety days during the one eighty days immediately following the occurrence.

The defendant now moves for an order pursuant to CPLR §3212 dismissing the complaint on the asserted grounds that the plaintiffs' injuries do not meet the serious injury threshold requirement under Insurance Law Section §5102.

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 constitutes 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" (Insurance Law §5102[d]). The Court of Appeals has held that the issue of whether a claimed injury falls within the statutory definition of a "serious injury" is a question of law for the courts in the first instance, which may properly be decided on a motion for summary judgment (see, Licari v. Elliott, 57 NY2d 230 [1982]; Charley v. Goss, 54 AD3d 569 [1st Dept., 2008]).

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 demonstrate the absence of any material issues of fact (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). In a motor vehicle case, a defendant moving for summary judgment on the issue of whether the plaintiff sustained a serious injury has the initial burden of presenting competent evidence establishing that the injuries do not meet the threshold (see, Pagano v. Kingsbury, 182 AD2d 268 [2nd Dept., 1992]). Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the plaintiff to produce evidentiary proof in admissible form sufficient 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 (see, Gaddy v. Eyler, 79 NY2d 955 [1992]; Grossman v. Wright, 268 AD2d 79 [2nd Dept., 2000]; Pagano v. Kingsbury, 182 AD2d 268 [2nd Dept., 1992]; see also, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Zuckerman v. City of New York, 49 NY2d 557 [1980]).

The evidence submitted was insufficient to demonstrate, as a matter of law, that the complaint must be dismissed as asserted by plaintiff Blake because she did not sustain a serious injury as a result of the subject accident. In support of this branch of his motion, the defendant submitted, *inter alia*, the affirmation of Edward M. Weiland, M.D., the affirmation of Jerrold Gorski, M.D., and plaintiff Blake's deposition testimony.

Dr. Weiland's affirmed report was insufficient to establish that plaintiff Blake did not sustain a serious injury as a result of the subject accident. Dr. Weiland performed an independent neurological examination on plaintiff Blake on June 18, 2009. Although Dr. Weiland states that, upon examination, plaintiff Blake had "full range of motion" of the neck, shoulders and lower torso, and provides numerical quantities for his findings, he does not provide the norms against which his findings were measured (see, Ortiz v. Ianina Taxi Servs., Inc., 73 AD3d 721 [2nd Dept., 2010]; Perl v. Meher, 74 AD3d 930 [2nd Dept., 2010]). Similarly, although stating that plaintiff Blake's straight leg raising maneuver was unlimited to 90 degrees, he does

not compare this finding to the normal result. It is well established that in threshold serious injury cases, restrictions in range of motion typically are numerically quantified, compared to the norms and based upon identified objective tests (see, Perl v. Meher, 74 AD3d 930 [2nd Dept., 2010]). These requirements are applied to defendants seeking summary judgment, as well as to plaintiffs opposing summary judgment (see, Perl v. Meher, 74 AD3d 930 [2nd Dept., 2010]). It is also noted that Dr. Weiland recorded complaints of pain with light palpation over plaintiff Blake's lower cervical region.

Dr. Gorski's affirmed report, likewise, fails to establish the that plaintiff Blake did not sustain a serious injury as a result of the subject accident. To the contrary, the Court finds that Dr. Gorski's report raises further issues of fact. Dr. Gorski examined the plaintiff on May 15, 2009 and concluded that plaintiff Blake had sustained soft tissue sprains and contusions involving the back and neck which were causally related to the subject accident, but that there were currently no objective causally related findings. Dr. Gorski avers that he checked the plaintiff's range of motion in her cervical spine, shoulders and lumbar spine, provides numerical values for his findings, compares them to normal range of motion findings and concludes the plaintiff's range of motion is normal with the exception of a slight limitation in her right forward shoulder elevation. Notably, however, Dr. Gorski and Dr. Weiland report vastly different range of motion limitations for both plaintiff Blake's cervical and lumbar spine. Under the circumstances of this case, such differences raise a triable issue of fact as to whether plaintiff Blake sustained a serious injury as a result of the subject accident (see, Mozen v. Papa, __Misc3d __, 2010 NY Slip Op 31463U [Sup. Ct., NY County, June 8, 2010]; Knokhinov v. Murray, 27 Misc3d 1211A [Sup. Ct., Kings County, 2010]; compare, Layne v. Drouillard, 65 AD3d 1197 [2nd Dept., 2009]).

In a similar vein, the evidence submitted by the defendant was insufficient to establish his prima facie entitlement to summary judgment dismissing the complaint as asserted by plaintiff Alison Jordan. In support of this branch of his motion, the defendant submitted, *inter alia*, the affirmation of Edward M. Weiland, M.D., the affirmation of Jerrold Gorski, M.D. and the deposition testimony of plaintiff Jordan. Dr. Weiland's affirmed report was insufficient to establish that plaintiff Jordan did not sustain a serious injury as a result of the subject accident. Dr. Weiland performed an independent neurological examination on plaintiff Jordan on June 18, 2009. Although Dr. Weiland states that, upon examination, plaintiff Jordan had "full range of motion" of the neck, shoulders and lower torso and provides numerical quantities for his findings, Dr. Weiland did not provide the norms against which his findings were measured (see, Ortiz v. Ianina Taxi Servs., Inc., 73 AD3d 721 [2nd Dept., 2010]; Perl v. Meher, 74 AD3d 930 [2nd Dept., 2010]). Similarly, although stating that plaintiff Jordan's straight leg raising maneuver was unlimited to 90 degrees, Dr. Weiland does not compare this finding to the normal

result. It is further noted that Dr. Weiland documented complaints of pain with light palpation over the base of plaintiff Jordan's neck and lower lumbar region.

Dr. Gorski's affirmed report, likewise, fails to establish that plaintiff Jordan did not sustain a serious injury as a result of the subject accident. Dr. Gorski examined the plaintiff on May 15, 2009, and concluded that plaintiff Jordan had sustained multiple contusions and sprains of the cervical, thoracic and lumbar spine, which were now resolved. He concluded that these injuries were causally related to the subject accident. Notably, Dr. Gorski fails to provide any range of motion testing or other objective medical evidence to support the conclusion that plaintiff Jordan did not sustain significant and/or permanent limitations to her lumbar spine, as she expressly alleges in her bill of particulars (see, Menezes v. Khan, 67 AD3d 654 [2nd Dept., 2009]; Joseph v. Hampton, 48 AD3d 638 [2nd Dept., 2008]). Although Dr. Gorski asserts that he performed the straight leg raising test in the seated position and that it was negative for the back, these test results were insufficient as they were neither numerically quantified nor compared to norms (see, Ortiz v. Ianina Taxi Servs., Inc., 73 AD3d 721 [2nd Dept., 2010]; Perl v. Meher, 74 AD3d 930 [2nd Dept., 2010]). Moreover, he further states that the test was "associated with complaints behind the left knee." In addition, on physical examination Dr. Gorski noted "squatting was associated with more low back problems than anything." He also noted that shoulder ranges of motion were accomplished with complaints of pain behind the plaintiff's left knee and, to a lesser extent, in the lower back.

Inasmuch as the evidence submitted by the defendant failed to establish his *prima facie* entitlement to judgment as a matter of law dismissing the complaint, it is unnecessary to consider whether plaintiffs' opposition papers were sufficient to raise a triable issue of fact (see, Nembhard v. Delatorre, 16 AD3d 390 [2nd Dept., 2005]; McDowall v. Abreu, 11 AD3d 590 [2nd Dept., 2004]; Coscia v. 938 Trading Corp., 283 AD2d 538 [2nd Dept., 2001]).

Accordingly, it is

ORDERED that the motion by the defendant Matthew Rubbino for an order pursuant to CPLR §3212 dismissing the complaint is denied.

Dated: September 10, 2010

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

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