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SHORT FORM ORDER

INDEX No. 08-33898
CAL. No. 09-02810-MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 5-17-10
ADJ. DATE 7-2-10
Mot. Seq. # 002 - MG; CASEDISP

BEATRICE BRYANT and SAMUEL BRYANT, Plaintiffs, - against - RALPH FICETO and NICHOLAS FICETO, Defendants.	SIBEN & SIBEN, LLP Attorney for Plaintiffs 90 East Main Street Bay Shore, New York 11706 RICHARD T. LAU & ASSOCIATES Attorney for Defendants P.O. Box 9040 Jericho, New York 11753-9040

Upon the following papers numbered 1 to 24 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 13 - 22 ; Replying Affidavits and supporting papers 23 - 24 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendants Ralph Ficeto and Nicholas Ficeto seeking summary judgment dismissing plaintiffs' complaint is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff Beatrice Bryant as a result of a motor vehicle accident that occurred at the intersection of Commack Road and Milligan Street on June 15, 2007. The accident allegedly occurred when the vehicle operated by defendant Nicholas Ficeto and owned by defendant Ralph Ficeto struck the rear of the vehicle operated by plaintiff while she was bringing her vehicle to a gradual stop in traffic on Commack Road. By her bill of particulars, plaintiff alleges that she sustained various personal injuries as a result of the subject accident, including, cervical and lumbar spines sprains; aggravation of a herniated disc at level L5/S1; and aggravation of degenerative disc disease of the lumbar spine. Plaintiff was retired at the time of the alleged accident. Plaintiff's husband, Samuel Bryant, interposed a claim for loss of services of his wife as a result of the subject accident.

Defendants now move for summary judgment on the basis that plaintiff is unable to establish that the injuries she sustained as a result of the subject accident meet the "serious injury" threshold requirement of Insurance Law § 5102(d). In support of the motion, defendants submit, a copy of the pleadings, a copy of plaintiffs' deposition transcripts, copies of plaintiff's medical records, and the sworn medical report of Dr. Jay Nathan. Dr. Nathan conducted an independent orthopedic examination

of plaintiff at defendants' request on August 17, 2009. Plaintiffs oppose the instant motion on the ground that defendants failed to establish that the injuries sustained by plaintiff Beatrice Bryant are not within the meaning of the "serious injury" threshold requirement of Insurance Law § 5102(d). In the alternative, plaintiffs assert that the evidence that was submitted in opposition demonstrate that the injuries sustained by plaintiff Beatrice Bryant are within the "limitation of use" category and the "90/180 days" category of serious injury. In opposition to the motion, plaintiffs submit Beatrice Bryant's affidavit, a copy of the police motor vehicle accident report, unsworn copies of plaintiff's treatment records, and the sworn medical report of Dr. Anthony Cappellino.

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, 622 NYS2d 900 [1995]; *see also* ***Toure v Avis Rent A Car Sys.***, 98 NY2d 345, 746 NYS2d 865 [2002]). 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***, 57 NY2d 230, 455 NYS2d 570 [1982]; ***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 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***,182 AD2d 268, 587 NYS2d 692 [1992]). 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]).

Here, defendants, through the submission of plaintiff's deposition testimony, the report of their expert orthopedist, and the MRI report of plaintiff's doctor, have demonstrated that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5104(d) as a result of the subject (*see* ***DeJesus v Cruz***, 73 AD3d 539, 902 NYS2d 503 [2010]; ***Lopez v Adul-Wahab***, 67 AD3d 598, 889 NYS2d 178 [2009]; ***DeJesus v Paullino***, 61 AD3d 605, 878 NYS2d 20 [2009]). The Court notes that sprains and strains are not serious injuries within the meaning of Insurance Law § 5102(d) (*see* ***Rabolt v Park***, 50 AD3d 995, 858 NYS2d 197 [2008]; ***Washington v Cross***, 48 AD3d 457, 849 NYS2d 784 [2008]; ***Maenza v Letkajornsook***, 172 AD2d 500, 567 NYS2d 850 [1991]). Defendants' orthopedist, Dr. Nathan, tested the ranges of motion in plaintiff's cervical 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* ***Cantave v Gelle***, 60 AD3d 988, 877 NYS2d 129 [2009]; ***Staff v Yshua***, 59 AD3d 614, 874 NYS2d 180 [2009]). Dr. Nathan report states that an examination of plaintiff's cervical spine reveals that she has full range of motion in this area and that there is no vertebral tenderness or paravertebral spasm upon palpation of the paracervical muscles. The report also states that an examination of plaintiff's thoracolumbar spine reveals that she has full range of motion in this region. It states that plaintiff has "flexion [of] 80 degrees (normal is 90 degrees), extension, right and left lateral flexion and right and left rotation [of] 30 degrees (normal is 30 degrees)." The report states there was minimal vertebral tenderness, but no paravertebral spasm upon palpation, and that the straight leg raising test was negative. It states that plaintiff ambulates with a limp to the right, that she had mild difficulty mounting and dismounting the examination table, and that her muscle strength is 5/5, with no muscle atrophy. Dr. Nathan opines that plaintiff sustained strains of the cervical and lumbar spines as a result of the subject accident. Dr. Nathan's report concludes that plaintiff has a pre-existing post lumbar laminectomy status, that her prognosis is satisfactory, that she is not disabled, and that she is capable of returning to her pre-loss activity levels without restrictions.

Defendants also submitted the MRI report of plaintiff's doctor, Dr. Panasci, which concludes that plaintiff has "advanced degenerative disc disease at [level] L5-S1 with less advanced degenerative disease in the remaining lumbar spine levels," and that her MRI study performed on November 5, 200 7 is "unchanged from the prior study of August 2005" (*see* ***Mensah v Badu***, 68 AD3d 945, 892 NYS2d 428 [2009]; ***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]). Furthermore, plaintiff testified at an examination before trial that her back problems prior to the subject accident prevented her from lifting items and caused her to retire from her employment as an instrument technician in the operating room and at nursing homes. Plaintiff testified that two years prior to the subject accident she underwent a lumbar laminectomy to repair a bone that "popped" out of her spine, and that following the surgery she received physical therapy for approximately three months. Plaintiff further testified that the subject accident occurred approximately nine months after she received her last treatment in connection with her back surgery.

Therefore, the burden shifted to plaintiff to raise a triable issue of fact as to whether she sustained a serious injury (*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]). A plaintiff must demonstrate a total loss of use of a body organ, member, function or system to recover under the "permanent loss of use" category,(*see* ***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). "Whether a limitation of use or function is 'significant' or 'consequential' * * * 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***, *supra at* 798; *see* ***Toure v Avis Rent A Car Sys.***, *supra*). Therefore, in order for a plaintiff to prove the extent or degree of physical limitation under the "permanent consequential limitation of use of a body organ or member" or the "significant limitation of use of a body function or system" category, a plaintiff must present either objective medical evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration (*see* ***Magid v Lincoln Servs. Corp.***, 60 AD3d 1008, 877 NYS2d 127 [2009]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2006]; ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2006]; ***Meyers v Bobower Yeshiva Bnei Zion***, 20 AD3d 456, 797 NYS2d 773 [2005]). 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]).

Further, a plaintiff must also present medical proof contemporaneous with the accident showing the initial restrictions in movement or an explanation for its omission (*see* ***Bell v Rameau***, 29 AD3d 839, 814 NYS2d 534 [2006]; ***Suk Ching Yeung v Rojas***, 18 AD3d 863, 796 NYS2d 661 [2005]; ***Ifrach v Neiman***, 306 AD2d 380, 760 NYS2d 866 [2003]), as well as objective medical findings of restricted movement based on a recent examination (*see* ***Laruffa v Yui Ming Lau***, *supra*; ***Murray v Hartford***, 23 AD3d 629, 804 NYS2d 416 [2005], *lv denied* 6 NY3d 713, 816 NYS2d 748 [2006]; ***Batista v Olivo***, 17 AD3d 494, 795 NYS2d 54 [2005]; ***Kauderer v Penta***, 261 AD2d 365, 689 NYS2d 190 [1999]). 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]). For a bulging disc or radiculopathy to constitute a serious injury, there must also be objective evidence of the extent or degree of the alleged limitation resulting from the injury and its duration (*see* ***Mejia v DeRose***, 35 AD3d 407, 825 NYS2d 722 [2006]; ***Foley v Karvelis***, 276 AD2d 666, 714 NYS2d 337 [2000]). 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]).

Plaintiff has failed to demonstrate that she sustained a "serious injury" in opposition to defendants' prima facie showing (*see* ***Gaddy v Eyler***, *supra*; ***Ali v Khan***, 50 AD3d 454, 857 NYS2d 71 [2008]; ***Luckey v Bauch***, 17 AD3d 411, 792 NYS2d 624 [2005];***McLoyrd v Pennypacker***, 178 AD2d 277, 577 NYS2d 272 [1991]). 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***,

supra), or within the "90/180" category (*see* ***Jack v Acapulco Car Serv., Inc.***, 63 AD3d 1526, 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]). The term "significant" limitation must be construed as more than a minor limitation of use (*see* ***Licari v Elliott***, *supra*; ***Leschen v Kollarits***, 144 AD2d 122, 534 NYS2d 233 [1988]; ***Gootz v Kelly***, 140 AD2d 874, 528 NYS2d 446 [1988]). Plaintiff has failed to submit any objective medical evidence to demonstrate that she experienced an exacerbation of her prior back problem, for which she underwent surgery, as a result of the subject accident (*see* ***Lea v Cucuzza***, 43 AD3d 882, 842 NYS2d 468 [2007]; ***Style v Joseph***, 32 AD3d 212, 214, 820 NYS2d 26 [2006]; ***Creech v Walker***, 11 AD3d 856, 784 NYS2d 655 [2004]; ***Suarez v Abe***, 4 AD3d 288, 772 NYS2d 317 [2004]; ***Dabiere v Yager***, 297 AD2d 831, 748 NYS2d 38 [2002], *lv denied* 99 NY2d 503, 753 NYS2d 806 [2002]). "Once a defendant has presented evidence of a preexisting injury, even in the form of an admission made at a deposition, it is incumbent upon the plaintiff to present proof to meet the defendant's asserted lack of causation" (***Brewster v FTM Stervo, Corp.***, 44 AD3d 351, 352, 844 NYS2d 5 [2007]; *see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Coston v McGray***, 49 AD3d 934, 853 NYS2d 206 [2008]). A plaintiff is required to present nonconclusory expert evidence sufficient to support a finding not only that the alleged injury is within the "serious injury" threshold of Insurance Law § 5102(d), but also that the injury was casually related to the subject accident in order to recover for noneconomic loss related to personal injury sustained in a motor vehicle accident (*see* ***Valentin v Pomilla***, 59 AD3d 184, 873 NYS2d 537 [2009]). Moreover, plaintiff's affidavit is insufficient to raise a triable issue of fact as to whether she sustained a serious injury, since there is no objective medical evidence supporting the allegation of significant joint restriction in her cervical and lumbar regions that is causally related to the subject accident (*see* ***Ferber v Madorran***, 60 AD3d 725, 875 NYS2d 518 [2008]; ***Smeja v Fuentes***, 54 AD3d 326, 863 NYS2d 689 [2008]; ***Shvartsman v Vildman***, 47 AD3d 700, 849 NYS2d 600 [2008]).

Additionally, plaintiff's expert, Dr. Cappellino, in his report failed to consider or distinguish plaintiff's condition prior to the subject accident with that of her condition after the accident, and he failed to address defendants' showing that plaintiff suffers from pre-existing degenerative disc disease in her lumbar spine that is unrelated to the subject accident (*see* ***Pommells v Perez***, *supra*; ***Casimir v Bailey***, 70 AD3d 994, 896 NYS2d 122 [2010]; ***Nicholson v Allen***, 62 AD3d 766, 879 NYS2d 164 [2009]; ***Carter v Full Serv., Inc.***, 29 AD3d 342, 815 NYS2d 41 [2006], *lv denied* 7 NY3d 709, 822 NYS2d 757 [2006]). Inasmuch as Dr. Cappellino's affidavit referred to findings he made during an examination of plaintiff almost three years ago, he failed to quantify the alleged restrictions in plaintiff's cervical and lumbar ranges of motion based upon a recent examination so as to establish the duration of plaintiff's alleged injuries (*see* ***Niles v Lam Pakie Ho***, 61 AD3d 657, 877 NYS2d 139 [2009]; ***Linares v Mompoint***, 273 AD2d 446, 711 NYS2d 741 [2000]; ***Kauderer v Penta***, 261 AD2d 365, 689 NYS2d 190 [1999]; ***Merisca v Alford***, 23 AD2d 613,663 NYS2d 853 [1997]). Significantly, no proof has been offered by plaintiff or her expert to establish that her alleged ailment goes beyond temporary discomfort or is not relieved by an aspirin. Thus, the subjective complaints of pain and impaired joint function expressed by plaintiff during her deposition and in her medical examinations are insufficient to raise a triable issue of fact (*see* ***Sheer v Koubek***, 70 NY2d 678, 518 NYS2d 788 [1987]; ***Rudas v Petschauer***, 10 AD3d 357, 781 NYS2d 120 [2004]; ***Barrett v Howland***, 202 AD2d 383, 608 NYS2d 681 [1994]).

Finally, plaintiff's submissions are insufficient to raise a triable issue of fact as to whether she was substantially curtailed from all of her usual and customary activities for 90 of the first 180 days following the accident (*see* ***Toure v Avis Rent A Car Sys.*** *supra*; ***Eldrainy v Hassain***, 56 AD3d 419, 866 NYS2d 749 [2008]; ***Casas v Montero*** , 43 AD3d 728, 853 NYS2d 358 [2008]; ***Roman v Fast Lane Car Serv., Inc.***, 46 AD3d 535, 846 NYS2d 613 [2007]; ***Nociforo v Penna***, 42 AD3d 514, 840 NYS2d 396 [2007]). Accordingly, defendants' motion for summary judgment is granted.

Dated: 9/27/2010

Hon. Denise F. Molia
J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION