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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 17 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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DIGNA D. TORRES,

Plaintiff(s),

-against-

THE GOODYEAR TIRE & RUBBER COMPANY, D. L. PETERSON TRUST, PETER J. WEILBACHER and JODY A. RUGGIERO,

Defendant(s).

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Index No. 16672/08

Motion Submitted: 9/7/10
Motion Sequence: 002, 003

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....XX
Answering Papers.....X
Reply.....XX
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Motions by defendants for summary judgment dismissing the complaint and all cross-claims on the grounds that plaintiff has not sustained a "serious injury" as defined in Insurance Law 5102(d), are granted.

In this action plaintiff seeks damages for injuries she sustained on April 18, 2008, when her vehicle was twice hit in the rear twice while she was stopped at a red light. Plaintiff declined an ambulance at the scene of the collision. According to her bill of particulars, plaintiff's injuries include: C5-C6 bulging disc; cervical radiculopathy; cervical sprain/strain; L4-L5 disc bulge; L5-S1 disc bulge; lumbar radiculopathy; and lumbar and lumbosacral sprain/strain.

Plaintiff testified at her deposition that she missed three days of work from her

employment as a cleaner with a commercial cleaning company. Plaintiff acknowledges that she hurt her neck and back in a car accident in 2003. The MRIs of plaintiff's lumbar and cervical spine taken in 2003 show disc bulges at L5-S1, and C4-5, C5-6, and C6-7, respectively.

At her deposition, plaintiff testified that she can still use a mop and vacuum as part of her duties, but not for long periods of time. She testified that she is also still able to clean the tables, dust and clean the windows. According to plaintiff, her husband now vacuums at the bank job site; however, other than the vacuuming, there is no task that she did at the bank before the accident that she can no longer perform.

In an affidavit dated August 12, 2010, plaintiff avers that when she returned to work after the 2008 accident, she "returned to lighter duties," meaning that she "no longer vacuum(s), or lift(s) heavy buckets," but instead performs "lighter tasks such as cleaning tables, dusting and occasional mopping." She no longer uses a squeegee and takes frequent breaks. At home she cannot lift grocery bags, nor vacuum nor mop. She has difficulty sleeping in certain positions and can no longer walk for long periods of time. She currently experiences severe pain to her left shoulder, neck and lower back, can no longer dance with her husband, and is limited to walking on the treadmill for short time periods at the gym.

In support of their motions for summary judgment, defendants submit affirmed reports of Dr. Turner, a neurologist, Dr. Ajemian, an orthopedist, and Dr. Coyne, a radiologist. Dr. Turner opined that his neurological examination of plaintiff was "normal" and that there is "no need for any neurological treatment." Dr. Ajemian's impression was "status-post motor vehicle accident with cervical spine and lumbar spine sprains," and that plaintiff "has achieved maximal medical improvement." Dr. Coyne reviewed the MRIs from both 2003 and 2008, and concluded:

> The mild degenerative changes depicted on the examinations of May 17, 2008, are certainly chronic and long-standing in nature, and clearly preexisted and are not causally related to the accident one month earlier on April 18, 2008, and were present on the earlier 2003 studies. The degree of the degenerative changes is typically encountered and expected in patients of this age. The cervical and lumbosacral spine MRI examinations on May 17, 2008 demonstrate no significant interval changes when compared to prior study allowing for the approximate 5 year time interval between examinations.

(Coyne report, annexed as Exhibit N to the motion papers by the Goodyear defendants at p. 2).

Defendants' evidence is sufficient to establish a *prima facie* case that plaintiff's injuries are not "serious" within the meaning of Insurance Law 5102(d) (***Sham v. B&P Chimney Cleaning and Repair Co., Inc.***, 71 A.D.3d 978, 900 N.Y.S.2d 72 (2d Dept., 2010); ***Morris v. Edmond***, 48 A.D.3d 432, 850 N.Y.S.2d 641 [2d Dept., 2008]) and that plaintiff did not sustain an injury which prevented her from performing substantially all of her ususal and customary activities for 90 of the 180 days following the subject accident (***Ranford v. Tim's Tree and Lawn Service, Inc.***, 71 A.D.3d 973, 897 N.Y.S.2d 245 (2d Dept., 2010); ***Richards v. Tyson***, 64 A.D.3d 760, 883 N.Y.S.2d 575 [2d Dept., 2009]). Accordingly the burden shifts to plaintiff to come forward with evidence of a "serious injury" (***Gaddy v. Eyler***, 79 N.Y.2d 955, 957, 591 N.E.2d 1176, 582 N.Y.S.2d 990 [1992]).

Plaintiff was treated at Lev Aminov Internal Medicine, PC, formerly known as Baldwin Medical Services, PC. Plaintiff has submitted all of her medical records from this office pursuant to a "certification" by the office's Medical Coordinator rather than by the required affirmation or affidavit. Plaintiff's records include the unsworn reports of Drs. Ploski, Brawner, Rothpearl, Shapiro, Lifschutz, and Breitman, and those of chiropractors Galati, Mastrangelo, and Jacobs. Thus, plaintiff's submissions are without probative value or evidentiary significance (*See* ***Casco v. Cocchiola***, 62 A.D.3d 640, 878 N.Y.S.2d 409 (2d Dept. 2009); ***Santoro v. Daniel,*** 276 A.D.2d 478, 712 N.Y.S.2d [2d Dept., 2000]).

Furthermore, the submissions of Dr. Lifschutz (June 22, 2010), Dr. Noel (June 22, 2010), and chiropractor Galati (June 28, 2010), do not state that there is a causal relationship between the accident giving rise to this action and plaintiff's alleged injuries. Under these circumstances, plaintiff has failed to raise a triable issue of fact as to causation.

In addition to the foregoing, plaintiff has submitted a lengthy affirmation from Dr. Ploski, dated August 12, 2010, cataloging plaintiff's course of treatment from May 1, 2008 through July 15, 2010. While this Ploski affirmation discusses range of motion limitations, Dr. Ploski apparently has no first-hand knowledge of the alleged limitations, because they were found by others, namely chiropractors Jacobs and Mastrangelo, as set forth in their unsworn reports. Consequently, Dr. Ploski's affirmation also lacks probative value (***Sorto v. Morales***, 55 A.D.3d 718, 868 N.Y.S.2d 67 (2d Dept., 2009); ***Bycinthe v. Kombos***, 29 A.D.3d 845, 815 N.Y.S.2d 693 [2d Dept., 2006]).

In his affirmation, Dr. Ploski acknowledges that he was plaintiff's treating physician for the injuries she sustained in a 2003 car accident, and he compares the 2003 MRI reports to the 2008 MRI reports. In the affirmation, Dr. Ploski asserts that plaintiff "had some cervical and lumbar disc pathology from the prior accident that was aggravated, but the patient's injuries have progressed from the subject accident of April 18, 2008." Apart from this conclusory statement, Dr. Ploski fails to submit objective medical evidence by which the claimed aggravation of preexisting injuries or new injuries could be measured (***Sternberg v.***

Sipzner, 74 A.D.3d 1054, 902 N.Y.S.2d 390 [2d Dept., 2010]).

Dr. Ploski's affirmation further concludes that plaintiff had recovered from the 2003 accident, at least in part, because "she stated that she did not have any residual symptoms for many years prior to the April 18, 2008 motor vehicle accident." Reliance by a physician upon a patient's subjective representation that her injuries from an earlier accident were asymptomatic at the time of the instant accident, renders a physician's opinion speculative (***Varveris v. Franco***, 71 A.D.3d 1128, 898 N.Y.S.2d 213 (2d Dept., 2010); ***Sapienza v. Ruggiero***, 57 A.D.3d 643, 869 N.Y.S.2d 192 [2d Dept., 2008]).

Dr. Ploski's affirmation is also speculative because it fails to address defendants' claim that plaintiff's injuries are degenerative (***Mack v. Valfort***, 61 A.D.3d 831, 876 N.Y.S.2d 887 (2d Dept., 2009); ***Siegel v. Sumaliyev***, 46 A.D.3d 666, 846 N.Y.S.2d 583 (2d Dept., 2007); ***Passaretti v. Ping Kwok Yung***, 39 A.D.3d 517, 835 N.Y.S.2d 224 (2d Dept., 2007); ***Bycinthe v. Kombos, supra***; ***Tudisco v. James***, 28 A.D.3d 536, 813 N.Y.S.2d 482 [2d Dept., 2006]). Thus, Dr. Ploski's conclusion, that "the motor vehicle accident of April 18, 2008 is the competent producing cause" of plaintiff's current injuries is not probative.

Plaintiff has also failed to produce objective medical evidence to substantiate the existence of injuries that limited her usual and customary daily activities for a least 90 of the first 180 days following the accident (***Sternberg v. Sipzner; supra***; ***Sham v. B&P Chimney Cleaning and Repair Co., Inc., supra; Bleszcz v. Hiscock***, 69 A.D.3d 890, 894 N.Y.S.2d 481 (2d Dept., 2010); ***Nannarone v. Ott***, 41 A.D.3d 441, 837 N.Y.S.2d 311 [2d Dept., 2007]).

Plaintiff's self-serving affidavit failed to raise a triable issue of fact as to whether she suffered a "serious injury" under any statutory definition of the term (***Sorto v. Morales***; ***Deutsch v. Tenempaguay***, 48 A.D.3d 614, 852 N.Y.S.2d 369 [2d Dept., 2008]).

Based on the foregoing defendants' motions for summary judgment, dismissing the complaint and all cross-claims on the ground that the plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102(d) as a result of the subject accident, must be granted.

The foregoing constitutes the Order of this Court.

Dated: October 29, 2010
Mineola, N.Y.

Karen V. Murphy
J. S. C.

ENTERED X

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NASSAU COUNTY
COUNTY CLERK'S OFFICE