[* 1]

SHORT FORM ORDER

INDEX No. 08-14799
CAL. No. 10-00349-MV

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

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 6-28-10
ADJ. DATE 7-30-10
Mot. Seq. # 001 - MD

----------X

CHRISTINE KLIMAR,

Plaintiff,

- against -

URMIL JAIN,

Defendant.

----------X

JACK STUART BEIGE & ASSOC.
Attorney for Plaintiff
200 Motor Parkway, Suite B13
Hauppauge, New York 11788

MARTYN, TOHER & MARTYN
Attorney for Defendant
330 Old Country Road, Suite 211
Mineola, New York 11501

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant, dated May 14, 2010, and supporting papers (including Memorandum of Law dated____);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 Urmil Jain seeking summary judgment dismissing plaintiff's complaint is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff Christine Klimar as a result of a motor vehicle accident that occurred at the intersection of Plant Avenue and Oser Avenue in the Town of Smithtown, New York on May 19, 2005. The accident allegedly occurred when the vehicle operated by defendant Urmil Jain struck the left rear door of the vehicle operated by plaintiff as she attempted to pass defendant's vehicle while it was making a left turn into a driveway. By her bill of particulars, plaintiff alleges that she sustained various personal injuries as a result of the subject accident, including disc herniations at levels C5 through C7; disc bulges at levels C3-C4 and L2 through L5; retrolisthesis at level C3; cervical and lumbar radiculopathy; and aggravation and exacerbation of pre-existing neck and lumbar injuries, and migraine headaches. Plaintiff alleges that she missed one week from her employment as a micro assembler at Miteq as a result of the subject accident. Plaintiff further alleges that she was confined to bed for approximately two weeks and to her home for approximately three weeks after the accident.

Defendant now moves for summary judgment on the basis that plaintiff's injuries do not meet the "serious injury" threshold requirement of Insurance Law § 5102(d). In support of the motion, defendant submits a copy of the pleadings, a copy of plaintiff's deposition transcript, and the sworn medical reports of Dr. Stuart Kandel and Dr. Frederick Mortati. At defendant's request, Dr. Kandel conducted an independent orthopedic examination of plaintiff on December 9, 2009 and Dr. Mortati conducted an independent neurological examination of plaintiff on December 14, 2009. Plaintiff does not oppose the instant motion.

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]).

Moreover, 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]).

Here, defendant's submissions have failed to establish, prima facie, that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102(d) as a result of the subject accident (*see* ***Chun Ok Kim v Orourke***, 70 AD3d 995, 893 NYS2d 892 [2010]; ***Landman v Sarcona***, 63 AD3d 690, 880 NYS2d 168 [2009]; ***Kasper v N & J Taxi, Inc.***, 60 AD3d 910, 876 NYS2d 120 [2009]; ***Hurtte v Budget Roadside Care***, 54 AD3d 362, 861 NYS2d 949 [2008]; ***Wright v AAA Constr. Servs., Inc.***, 49 AD3d 531, 855 NYS2d 149 [2008]). Although the Court notes that sprains and strains, and the existence of herniated discs and disc bulges are not evidence of 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]; ***Keith v Duval***, 71 AD3d 1093, 898 NYS2d 184 [2010]; ***Casimir v Bailey***, 70 AD3d 994, 896 NYS2d 122 [2010]), defendant's examining orthopedist, Dr. Kandel, found significant limitations in plaintiff's cervical and lumbar ranges of motion that were not adequately quantified to establish the absence of a significant limitation of motion (*see* ***Bentivegna v Stein***, 42 AD3d 555, 841 NYS2d 316 [2007]; ***Wade v Allied Bldg. Products Corp.***, 41 AD3d 466, 837 NYS2d 302 [2007]; ***Tchjevskaia v Chase***, 15 AD3d 389, 790 NYS2d 175 [2005]). Dr. Kandel's report states, in relevant part, that an examination of plaintiff's cervical spine reveals that she exhibits flexion of 40 degrees, extension

of 45 degrees (normal is 40 to 60 degrees), right lateral flexion of 45 degrees (normal is 30 to 50 degrees), left lateral flexion of 40 degrees (normal is 30 to 50 degrees), and bilateral rotation of 60 degrees (normal is 70 to 80 degrees). The report also states that an examination of plaintiff's lumbar spine reveals that she exhibits flexion of 20 degrees (normal is 60 to 80 degrees), extension of 10 degrees (normal is 20 to 30 degrees), and right and left lateral flexion of 20 degrees (normal is 20 to 30 degrees). It states that there is no gross muscle weakness or atrophy in plaintiff's upper or lower extremities, and that her straight leg raising in the seated position was negative bilaterally to 90 degrees. Dr. Kandel's report concludes that plaintiff's diagnosis of a thoracic mass is unrelated to the subject accident and that plaintiff is capable of returning to her normal daily living activities, without restrictions.

In addition, Dr. Kandel opines that plaintiff has pre-existing multi-level cervical and lumbosacral degenerative disc disease and that plaintiff's diagnosis of a thoracic mass are unrelated to the subject accident. However, Dr. Kandel provides no foundation for these conclusions (*see* ***Franchini v Palmieri***, 1 NY3d 536, 775 NYS2d 232 [2003]; ***Romano v Stanley***, 90 NY2d 444, 661 NYS2d 580 [1997]; ***Buono v Sarnes***, 66 AD3d 809, 888 NYS2d 79 [2009]). Dr. Kandel's assertions that plaintiff's complaints of pain in her cervical and lumbar regions are subjective are conclusory and belie his findings. Also, Dr. Kandel's medical report lacks probative value because he improperly relied upon the report of Dr. Feyman in determining that plaintiff sustained cervical herniations at levels C5 thorough C7 as a result of the subject accident (*see* ***Verette v Zia***, 44 AD3d 747, 844 NYS2d 71 [2007]; ***Phillips v Zilinsky***, 39 AD3d 728, 834 NYS2d 299 [2007]; ***Isumen v Konopka***, 38 AD3d 608, 831 NYS2d 530 [2007]). Thus, by itself, the report raises an issue of fact as to whether plaintiff sustained a serious injury within the meaning of the law (*see* Insurance Law §5102 (d); ***Cesar v Felix***, 181 AD2d 852, 853, 581 NYS2d 411 [1992]).

Moreover, the remaining medical report of Dr. Mortati fails to demonstrate that the injuries sustained by plaintiff were not causally related to the subject accident, and were not serious injuries within the meaning of Insurance Law §5102 (d) (*see* ***Joissaint v Starrett-1 Inc.***, 46 AD3d 622, 848 NYS2d 259 [2007]; ***Staubitz v Yaser***, 41 AD3d 698, 839 NYS2d 113 [2007]; ***Meely v 4 G's Truck Renting Co., Inc.***, 16 AD3d 26, 789 NYS2d 277 [2005]). Dr. Mortati's report inexplicably fails to set forth any quantified range of motion findings for plaintiff's cervical or lumbar regions (*see* ***Banguela v Babbo***, 51 AD3d 833, 858 NYS2d 353 [2008]; ***Page v Belmonte***, 45 AD3d 825, 846 NYS2d 351 [2007]; ***Spektor v Dichy***, 34 AD3d 557, 824 NYS2d 403 [2006]), and fails to state what objective test he performed in deriving his conclusion that plaintiff did not sustain any neurological pathology (*see* ***Washington v Delossantos***, 44 AD3d 748, 843 NYS2d 186 [2007]; ***Tolstocheev v Bajrovic***, 28 AD3d 473, 811 NYS2d 785 [2006]; ***Gamberg v Romeo***, 289 AD2d 525, 736 NYS2d 64 [2001]). Thus, Dr. Mortati's finding of no neurological disability was without probative value (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Shtesl v Kokoros***, 56 AD3d 544, 867 NYS2d 492 [2008]; ***Melino v Lauster***, 195 AD2d 653, 599 NYS2d 713 [1993]).

The proof submitted by defendant, therefore, failed to objectively demonstrate that plaintiff did not suffer a permanent consequential or significant limitation of use of her cervical or lumbar region as a result of the subject accident (*see* ***Fudol v Sullivan***, 38 AD3d 593, 831 NYS2d 504 [2007]; ***Abraham v Bello***, 29 AD3d 497, 816 NYS2d 118 [2006]). Inasmuch as defendant has failed to establish his entitlement to

judgment as a matter of law, the sufficiency of plaintiff's papers in opposition to the instant motion need not be considered (*see* ***Ayotte v Gervasio***, 81 NY2d 1062, 601 NYS2d 463 [1993]; ***Joissaint v Starrett-1 Inc.***, *supra*; ***Cedillo v Rivera***, 39 AD3d 453, 835 NYS2d 238 [2007]; ***Doggett v Kelly***, 294 AD2d 464, 742 NYS2d 557 [2002]; ***Chapin v Taylor***, 273 AD2d 188, 708 NYS2d 465 [2000]). Accordingly, defendant's motion for summary judgment is denied.

Dated: 11/8/10

PETER H. MAYER, J.S.C.