[* 1]

ORIGINAL

STATE OF NEW YORK
SUPREME COURT COUNTY OF SARATOGA

MELISSA M. MAHAR,

Plaintiff,

-against-

DECISION AND ORDER
RJI No. 45-1-2009-1970
Index No. 2008-4434

LAURA J. BARTNICK,

Defendant.

FILED
2010 AUG 27 PM 2:51
SARATOGA COUNTY
CLERK'S OFFICE
BALLSTON SPA, NY

PRESENT: **HON. THOMAS D. NOLAN, JR.**
Supreme Court Justice

APPEARANCES: POKLEMBA & HOBBS, LLC
Attorneys for Plaintiff
Visionary Park
2715 State Route 9, Suite 102
Malta, New York 12020

LAW OFFICES OF EPSTEIN & RAYHILL
Attorneys for Defendant
950 New Loudon Road, Suite 230
Latham, New York 12110

On December 29, 2007, at approximately 4:20 p.m. in the Town of Waterford, defendant drove her vehicle from Jay Street onto Middletown Road where it struck the passenger side of plaintiff's vehicle which was propelled into a snowbank on the opposite side of the road. Plaintiff, then 23 years old, lost consciousness and was taken by ambulance to Albany Medical Center where she was treated in the emergency room. A two inch laceration on the back of her head was sutured. X-rays and CT scans of her head, spine and pelvis disclosed no fractures. In addition to the head laceration, plaintiff was diagnosed with a closed head injury, prescribed pain medication, instructed to obtain followup care, and released. On January 2, 2008, plaintiff went to her primary care physician, Dr. Asim Yousuf, with complaints of severe headaches, neck pain,

and nightmares. On examination, Dr. Yousuf found that plaintiff was unable to rotate her neck to the right and that she had limited neck flexion and extension plus extensive bruising, contusions, and swelling in both legs, her right ankle, right knee, right elbow, and right shoulder. Dr. Yousuf concluded plaintiff had suffered a severe concussion, a scalp laceration, and knee and ankle contusions and prescribed additional pain medication. Five days later, Dr. Yousuf removed the staples from plaintiff's head. She continued to complain of neck pain and pain in her right ribs, and nightmares about the accident and sleeplessness. Dr. Yousuf added to his initial diagnosis that plaintiff suffered from post traumatic stress disorder and prescribed physical therapy. On February 28, 2008, in a followup visit to Dr. Yousuf, plaintiff continued to complain of severe headaches, "coming from the back of her head", and neck pain. Plaintiff, who had returned to work as a bartender and waitress about three weeks after the accident, also related that after a few hours of work, stiffness and pain in her neck "stopped her in her tracks", and she would have to take the next day off. Dr. Yousuf prescribed additional physical therapy and also ordered MRI's of her cervical spine and head. The spine MRI revealed disc bulges at C5-6 and C6-7. The MRI of her head was reported normal. On April 17, 2008, at the request of her no-fault insurer, an orthopaedist, Dr. Jeffrey Gundel, examined plaintiff. Plaintiff's primary complaint to Dr. Gundel was non-radiating neck and upper back pain. During the examination, Dr. Gundel, on palpation, found that plaintiff's paraspinal and trapezius muscles were tender bilaterally and that plaintiff had decreased forward neck flexion and restricted neck rotation, 60 degrees to the right and 45 degrees to the left. Dr. Gundel observed spasm in plaintiff's right paraspinal thoracic musculature. Dr. Gundel's diagnosis was that plaintiff had sustained in the accident a cervicothoracic strain. On July 10, 2008, again on behalf of plaintiff's no-fault

insurer, Dr. Gundel conducted another examination of plaintiff. Dr. Gundel found that plaintiff's cervicothoracic spine was "mildly" tender in the area of her right paraspinal and trapezius muscles, and that plaintiff had full neck flexion, but limitations in extension and right rotation which limitations he did not quantify or compare to normal function. On April 25, 2009, plaintiff returned to Dr. Yousuf with complaints of "persistent" headaches radiating into her right shoulder. Dr. Yousuf ordered a nerve conduction studies of plaintiff's median and ulnar nerves which came back normal.

In this action commenced to recover damages for the injuries plaintiff sustained in the accident, defendant moves for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury as defined in Insurance Law § 5102 (d). In support of the motion, defendant offers the pleadings, plaintiff's deposition testimony, Albany Medical Center Hospital's records, Dr. Yousuf's medical records, and Dr. Gundel's two affirmed reports.

In opposition, plaintiff submits an affidavit from Dr. Yousuf and the notes of her physical therapy provider.

Plaintiff claims three categories of serious injury in her bill of particulars: permanent consequential limitation of use of her cervical spine, significant limitation of use of her cervical spine, and nonpermanent medically determined injuries which prevented her from performing substantially all the material acts which constituted her usual and customary daily activities during at least 90 of the 180 day post-accident period. In plaintiff's opposing papers, more specifically the affidavit of Dr. Yousuf, the additional claim that plaintiff sustained a significant disfigurement from the two inch scar on the back of her head is raised.

The basic principles of law governing the determination of summary judgment on no-

fault threshold issues are well settled. The initial burden requires that the movant tender "sufficient evidence to eliminate any material issues of fact from the case", Secore v Allen, 27 AD3d 825 (3rd Dept 2006); Howard v Espinosa 70 AD3d 1091 (3rd Dept 2010), and specifically that the plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102 (d). Tuna v Babendererde, 32 AD3d 574 (3rd Dept 2006). The burden may be satisfied by the records of the plaintiff's treating healthcare providers, sworn statements from examining physicians, and the plaintiff's deposition testimony. Seymour v Roe, 301 AD2d 991 (3rd Dept 2003). Provided this proof requirement is met, plaintiff, to avoid nonsuit, must "rais[e] a triable issue of fact through competent medical evidence based upon objective medical findings and diagnostic tests", Hines v Capital Dist. Transp. Auth., 280 AD2d 768, 769 (3rd Dept 2001); Nowak v Breen, 55 AD3d 1186 (3rd Dept 2008); Wilber v Breen, 25 AD3d 836 (3rd Dept 2006), that she "suffered a compensable serious injury". Clements v Lasher, 15 AD3d 712 (3rd Dept 2005). The evidence presented by the plaintiff must be accepted as true and viewed in the light most favorable to her, Cahill v Triborough Bridge and Tunnel Auth., 4 NY3d 35 (2004); Andre v Pomeroy, 35 NY2d 361 (1974); Finch v County of Saratoga, 305 AD2d 771 (3rd Dept 2003), and when conflicting evidence is presented, the court's review ends as it cannot resolve credibility issues on motion. Rockefeller v Albany Welding Supply Co., 3 AD3d 753, 756 (3rd Dept 2004).

Plaintiff initially contends that defendant has not met her threshold burden. The court disagrees. The plaintiff's medical records coupled with her deposition testimony constitute competent evidence sufficient to demonstrate that she has not satisfied a serious injury threshold in any of the categories claimed. The plaintiff's principal claimed qualifying injuries, since her closed head injury, a concussion, has apparently resolved, are intervertebral bulging discs at C5-6

and C6-7 and a two inch scar in the occipital area of her skull. Plaintiff's deposition testimony that the scar was covered by her hair and therefore not visible prima facie establishes that it is not disfiguring. Likewise, the plaintiff's medical records demonstrate prima facie that the bulging discs do not qualify as serious injuries since the records do not set forth either numeric percentages of the loss of range of neck motion or give a qualitative assessment of the plaintiff's physical limitations in comparison to the normal function, purpose, and use of her cervical spine. And, Dr. Gundel's reports do not compare the limitation he found on rotation to normal function.

First, addressed is the claim of significant disfigurement. Although this claim is not included in plaintiff's bill of particulars, both sides argue it in their respective papers and it is ripe for review. It is settled that a scar in a scalp and obscured by hair is not significant as a matter of law. Koppelman v Lepler, 135 AD2d 507 (2nd Dept 1987); Caruso v Hall, 101 AD2d 967 (3rd Dept 1984), affd 64 NY2d 843 (1985). Plaintiff presents no photographs of the scar. Moreover, Dr. Yousuf's statement that plaintiff's scar is permanent does not demonstrate an issue of fact since, to qualify as a serious injury, the scar must result in a "significant disfigurement" which is defined as one that "a reasonable person viewing the plaintiff's body in its altered state would regard the condition as unattractive, objectionable or as the object of pity or scorn". PJI 2:288B. Here, the scar, even though permanent, is not visible to anyone viewing plaintiff's body and thus does not qualify as a serious injury. Plaintiff's claim that the scar satisfies the no-fault threshold is dismissed, without costs.

Next, the plaintiff's 90/180 day claim. The salient inquiry is whether evidence supports a claim that plaintiff's usual activities were curtailed for not less than 90 days during the 180 days immediately following the accident to a "great" rather than a "slight" extent by a medically

determined injuries suffered in the accident. Howard v Espinosa, supra; Gonzalez v Green, 24 AD3d 934 (3rd Dept 2005). In her deposition, plaintiff testified that she was out of work for three weeks and needed to take days off during the six month post-accident period because of the effects of her injuries. Plaintiff failed to identify any other specific limitations to her post–accident activities. In the court's assessment, the 90/180 threshold has not been satisfied and dismissal of that claim is mandated.

Now, the remaining two categories - permanent consequential limitation of use and significant limitation of use. As a starting point, proof of a bulging disc, standing alone, does not establish a serious injury. Pianka v Pereira, 24 AD3d 1084 (3rd Dept 2005); Rose v Ferguson, 281 AD2d 857 (3rd Dept 2001). As outlined in Toure v Avis Rent A Car Sys., 98 NY2d 345, 350 (2002), plaintiff must provide proof that the bulging discs resulted in a quantifiable loss of range of movement of her neck by an expert's designation of the numeric percentages of such loss based upon objective tests or an expert's qualitative assessment of the effects of these injuries upon the normal function and purpose and use of the plaintiff's cervical spine, that is, by outlining in detail limitations caused by the condition. Clements v Lasher, 15 AD3d 712, 713 (2005). Here, Dr. Yousuf, who last treated and examined plaintiff over a year ago, opines in his affidavit that the disc bulges were caused by the accident and have resulted in a 50% restriction in plaintiff's right cervical rotation and a 25% restriction in her left cervical rotation. Yet, his office notes do not include these findings. Rather, in his affidavit (paragraph 9), he states that plaintiff's physical therapist found her to have those limitations on January 29, 2008, and that he "agrees with [the therapist's] assessments of [plaintiff's] restrictions in her cervical rotation" and that they are "serious restrictions that are directly related to the accident". The therapist's note

made one month after the accident and on the first physical therapy visit is the only medical record which supports these restrictions and the only entry which quantifies them. Dr. Yousuf, later in his opinion, fails to address the therapist's follow-up report to him dated April 10, 2008 stating that after nine therapy sessions, plaintiff's "cervical ROM is within functional limits at this time". Moreover, Dr. Yousuf offers no independent assessment of plaintiff's neck condition. Nor does he provide a qualitative assessment describing the effects of the bulging discs on the function or use of plaintiff's cervical spine or detail the objective findings he made or identify diagnostic tests he performed to support his conclusion that plaintiff sustained a permanent injury. Houston v Hoffman, _AD3d_, 201 NY LEXIS 6355 (3rd Dept, July 29, 2010). There is no competent proof that the plaintiff's present limitations are more than mild or slight. Licygiewicz v Stearns, 61 AD3d 1254 (3rd Dept 2009),

Plaintiff has failed demonstrate the existence of an issue of fact as to whether she sustained a permanent consequential limitation of use or significant limitation of use of her cervical spine and thus both claims must be dismissed.

Defendant's motion is granted, and plaintiff's complaint is dismissed, all without costs.

This constitutes the decision and order of the court. The original decision and order is returned to counsel for the defendant. All original motion papers are delivered to the Supreme Court Clerk/County Clerk for filing. Counsel for defendant is not relieved from the applicable provisions of CPLR 2220 relating to filing, entry, and notice of entry of the decision and order.

So Ordered.

DATED: August 24, 2010
Ballston Spa, New York

HON. THOMAS D. NOLAN, JR.
Supreme Court Justice

SARATOGA COUNTY CLERK'S OFFICE BALLSTON SPA, N.Y.
2010 AUG 27 PM 2:51

ENTERED

ENTERED
Kathleen A Marchione
Saratoga County Clerk