SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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HAYLEY GREENBERG,

Plaintiff,

-against-

ROMY MARTIN and RORI PEREZ,

Defendants.

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SCAN

MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 11
Index No.: 22185/08
Motion Seq. No.: 03

DECISION AND ORDER

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Defendant Rori Perez moves pursuant to CPLR §3212 for summary judgment dismissing plaintiff's complaint on the grounds that plaintiff did not sustain a serious injury within the ambit of Insurance Law § 5102(d).

Defendant Rori Perez seeks summary judgment dismissing the complaint in this action predicated on the contention that plaintiff did not sustain serious injury as a result of the underlying automobile accident that occurred on June 24, 2007. At the time of the accident, plaintiff was a passenger in a vehicle operated by defendant Romy Martin which was involved in a collision with a vehicle driven by defendant Rori Perez. According to plaintiff, the impact was so severe that the vehicle in which she was a passenger was demolished and the driver side air bags deployed.

In her bill of particulars, plaintiff claims to have suffered permanent loss of use of a body organ, member function or system; permanent consequential limitation of use of a body function or system; and a medically determined injury or impairment of a non-permanent nature which prevented her from

performing substantially all of the material acts which constitute her usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident.

As the moving party for summary judgment, defendant has the initial burden of establishing *prima facie* entitlement to judgment as a matter of law. *Hughes v Cai*, 32 AD3d 385 [2nd Dept 2006]. In support of a claim that plaintiff has not sustained a serious injury, defendant may rely, *inter alia*, either on the sworn statements of defendant's examining physician, plaintiff's deposition testimony and unsworn reports of plaintiff's examining physicians. *Meely v 4 G's Truck Renting Co., Inc.*, 16 AD3d 26, 28 [2nd Dept 2005]; *Pagano v Kingsbury*, 182 AD2d 268, 271 [2nd Dept 1992]. Once a defendant makes the required showing, the burden shifts to plaintiff to come forward with evidence, in admissible form, to rebut the presumption that there is no issue of fact *vis-a-vis* the threshold question. *Gaddy v Eyler*, 79 NY2d 955, 956-57 [1992]; *Sin v Singh*, 74 AD3d 1320, 1321 [2nd Dept 2010].

It is well established that in a threshold serious injury case, restrictions in range of motion typically must be numerically quantified, compared to the norms and based upon identified objective tests. *Perl v Meher*, 74 AD3d 930, 931 [2nd Dept 2010] (citations omitted). These requirements apply both to a defendant seeking summary judgment as well as to a plaintiff opposing the request for such relief. The plaintiff is also required to demonstrate restricted range of motion based on findings both contemporaneous with the accident and on recent examination. *Bleszcz v Hiscock*, 69 AD3d 890, 801 [2nd Dept 2010].

In order to establish a permanent consequential limitation or a significant limitation of use, plaintiff must submit medical proof containing objective, quantitative evidence with respect to diminished range of motion or a qualitative assessment comparing plaintiff's present limitations to the normal function, purpose and use of the affected body organ, member, function or system. Evidence of

range of motion limitations is sufficient to defeat summary judgment. *Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 350 [2002]; *Gonzalez v MTA Bus Co.*, 63 AD3d 999 [2nd Dept 2009].

As noted, it is only if defendant successfully makes the necessary showing that the burden shifts to plaintiff to proffer competent medical evidence based on objective medical findings and diagnostic tests, to support her claim or show that there are questions of fact as to whether the purported injury is, in fact, serious within the meaning of the statute. *Flores v Leslie*, 27 AD3d 220, 221 [1st Dept 2006]. 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 a body part. *Dufel v Green,* 84 NY2d 795, 798 [1995].

Defendant Rori Perez has established *prima facie* entitlement to summary judgment as a matter of law by demonstrating that the injured plaintiff did not sustain serious injury within the meaning of Insurance Law § 5102(d) as a result of the automobile accident herein with respect to the permanent consequential limitation of use and significant limitation of use categories. The affirmation of defendant's orthopedic surgeon Alan J. Zimmerman, M.D., who examined plaintiff on April 29, 2010, states that his examination of plaintiff's cervical and lumbar spines, as well as shoulders, revealed normal ranges of motion, all of which he quantified and measured against normal values using a hand-held goniometer. He further measured her muscle strength which he found to be normal; her sensation which was intact; and her deep tendon reflexes (biceps, triceps, knee jerk and ankle jerk), all of which he found to be within normal limits. His diagnosis was "resolved cervical sprain." He found no thoracic or lumbar injury. The Lasegue, supine straight leg raise and reverse seated straight leg raise tests all yielded negative results. No spasm or tenderness was noted.

The movant has also submitted the affirmation of neurologist Jeffrey T. Kessler, M.D., who

examined plaintiff on February 23, 2010 and found, *inter alia*, no evidence of neurological dysfunction; no orbital, cranial or carotid bruits; intact finger-to-nose and heal-to-shin movements; negative Romberg's sign and no pathological reflexes.

Where, as here, defendant has established his *prima facie* entitlement to judgment as a matter of law, the burden shifts to plaintiff opposing the motion to raise in admissible form triable issues of fact. *Perl v Meher, supra* at 930, 932.

In opposition to defendants' motion, plaintiff has met this burden by submitting the affidavit of Charles Aronica, D.C., who initially examined plaintiff on June 25, 2007 and continued to treat her approximately three times a week until March 23, 2009. On his initial examination, Dr. Aroncia attests that he performed the Foraminal Neutral Compression and Jackson Lateral Compression Tests which revealed positive results indicating the presence of nerve root irritation. He found positive valsalva, severe spasms to the cervical region, multiple joint fixations, and limited ranges of motion in plaintiff's cervical spine which he quantified and compared to the norm.[1]

On his most recent examination of plaintiff on October 8, 2010, he found all ranges of motion in plaintiff's cervical spine to be restricted in all planes with pain with severe paraspinal spasm graded +4 R/L from C1-C7, left greater than right. He lists his diagnosis as:

acute traumatic cervical sprain/strain;

acute traumatic cervical disc derangement at C5-C6;

acute cervical subluxations

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[1]Plaintiff continued, according to Dr. Aronica's affidavit, to have range of motion restrictions in her cervical spine as observed and quantified by him on September 15, 2007; November 13, 2007; February, 2008; March, 2008; April, 2008 and various dates throughout 2008, and January, February and March of 2009.

and causally relates plaintiff's injuries to the motor vehicle accident of June 24, 2007. Dr. Aronica further quantifies the permanent impairment suffered by plaintiff according to AMA Guidelines for the Evaluation of Permanent Impairment (5th Edition). The affidavit, even discounting the references by Dr. Aronica to the unsworn MRI study of plaintiff's cervical spine, and unsworn reports of Dr. Mitchell Goldstein and Dr. Abraham Glasman, constitutes objective evidence sufficient to raise a triable issue of fact as to serious injury.

Where, as here, plaintiff established that at least some of her injuries meet the no-fault threshold, it is unnecessary to address whether her proof with respect to any other alleged injury is sufficient to withstand defendants' summary motion. *Linton v Nawaz*, 14 NY3d 821, 822 [2010]. Once a *prima facie* case of serious injury has been established, and the trier of fact determines that a serious injury has been sustained, plaintiff is entitled to recover for all injuries incurred as a result of the accident. *McClelland v Estevez*, 77 AD3d 403, [1st Dept 2010].

Accordingly, on the record before the court, and affording plaintiff the benefit of every fair inference (*Suffolk County Dept. of Social Services v James M.*, 83 NY2d 178, 182 [1994]), the motion by defendant Rori Perez for summary judgment dismissing the complaint is **denied**.

This constitutes the Decision and Order of the Court.

DATED: January 18, 2011
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.

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