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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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HELEN L. DOHERTY and EUGENE J. DOHERTY,

Plaintiff,

-against-

MARGARITO CRUZ,

Defendant.

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SCAN

MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 11
Index No.: 20848/08
Motion Seq. No.: 01

DECISION AND ORDER

Papers Read on this Motion:

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Defendant, Margarito Cruz, moves pursuant to CPLR §3212, for an order dismissing the within complaint on the basis that the plaintiff, Helen L. Doherty, has not sustained a serious injury within the ambit of Insurance Law §5102[d].

The underlying cause of action results from an automobile accident, which occurred on June 2, 2006 (*see* Diraimo Affirmat0ion in Support at ¶3; *see also* Exh. A). The plaintiff alleges that the vehicle in which she was a passenger and which was owned by co-plaintiff, Eugene J. Doherty, was struck in the rear by the vehicle owned and operated by defendant, Margarito Cruz (*id.* at Exh. A at ¶¶2,3,4,5,10). The plaintiff claims that as a consequence thereof, she has sustained serious injuries as defined in Insurance Law §5102[d] (*id.* at Exhs. A, C). As extrapolated from the Verified Bill of Particulars, the plaintiff alleges the following injuries: C3-C4 posterior disc herniation; C6-C7 posterior disc herniation with ventral cord abutment; aggravation of pre-existing disc bulges from C2-C3/C6-C7; exacerbation of pre-existing disc bulges at C3-C4 and C6-C7; cervical radiculitis; carpal tunnel syndrome of the right wrist/hand, and; headaches (*id.* at Exh. C at ¶4).

In support of the within application, the defendant provides the affirmed independent medical reports from Dr. Michael J. Katz, M.D., an orthopedist, and Dr. Steven Ender, D.O., who is board certified in neurology and electromyography (*id.* at Exhs. E, F). Dr. Katz conducted a physical

examination of the plaintiff on July 9, 2010, which included an evaluation of the plaintiff's cervical spine and right wrist (*id.* at Exh. E). With regard to the cervical spine, range of motion testing was accomplished by way of a goniometer and revealed normal findings (*id.*). As to the right wrist, range of motion testing was again measured by a goniometer, and also revealed normal findings (*id.*). Dr. Katz rendered a diagnosis of cervical radiculitis, which had resolved, as well as preexisting right carpal tunnel syndrome, the latter of which was unrelated to the subject accident (*id.*). Dr. Katz noted "the claimant currently shows no signs or symptoms of permanence relative to the neck or right wrist on a causally related basis" and that "she is capable of her activities of daily living" (*id.*).

Dr. Ender conducted an examination of the plaintiff on July 29, 2010, which included an evaluation of the plaintiff's neck and back (*id.* at Exh. F). With respect to the cervical spine, range of motion testing, which was accomplished by use of goniometer, revealed normal findings and Dr. Ender noted the absence of tenderness or spasm (*id.*). With particular regard to the plaintiff's back, Dr. Ender noted that straight leg raising was negative bilaterally to 90 degrees in a sitting position and that there was no lumbosacral paraspinal muscle spasm (*id.*). Dr. Ender opined that the plaintiff had sustained "cervical and lumbosacral paraspinal muscle strain" both of which had resolved (*id.*). Dr. Ender concluded that the plaintiff had a "normal neurological examination" and that she was able to "continue with her current activities of daily living without restrictions" (*id.*).

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact (*Sillman v Twentieth Century Fox*, 3 NY2d 395 [1957]; *Alvarez v Prospect Hospital,* 68 NY2d 320 [1986]; *Zuckerman v City of New York,* 49 NY2d 557 [1980]; *Bhatti v Roche*, 140 AD2d 660 [2d Dept 1998]). To obtain summary judgment, the moving party must establish it's claim or defense by tendering proof, in admissible form, sufficient to warrant the Court to direct judgment in the movant's favor (*Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065 [1979]).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial (*Zuckerman v City of New York*, 49 NY2d 557 [1980], *supra*). When considering a motion for summary

judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist (*Sillman v Twentieth Century Fox*, 3 NY2d 395 [1957], *supra*).

Within the particular context of a threshold motion which seeks dismissal of a personal injury complaint, the movant bears a specific burden of establishing that the plaintiff did not sustain a serious injury (*Gaddy v Eyler*, 79 NY2d 955 [1992]). Upon such a showing, it becomes incumbent upon the nonmoving party to come forth with sufficient evidence, in admissible form, to raise an issue of fact as to the existence thereof (*Licari v Elliott*, 57 NY2d 230 [1982]). Within the scope of the movant's burden, a defendant's medical expert must specify the objective tests upon which the stated medical opinions are based, and when rendering an opinion with respect to the plaintiff's range of motion, must compare any findings to those ranges of motion considered normal for the particular body part (*Gastaldi v Chen*, 56 AD3d 420 [2d Dept 2008]; *Qu v Doshna*, 12 AD3d 578 [2d Dept 2004]; *Browdame v Candura*, 25 AD3d 747 [2d Dept 2006]; *Mondi v Keahan*, 32 AD3d 506 [2d Dept 2006]).

Applying the aforesaid criteria to the report of Drs. Katz and Ender, this Court finds that the defendant has established a *prima facie* case that the plaintiff failed to sustain a serious injury (*Gaddy v Euler,* 79 NY2d 955 [1992], *supra*). In their respective medical reports, Dr. Katz and Dr. Ender clearly opined that the plaintiff exhibited full range of motion and concluded that the plaintiff was not disabled (*Kearse v New York City Transit Authority,* 16 AD3d 45 [2d Dept 2005]). Further, Dr. Katz and Dr. Ender recited the specific tests upon which their medical conclusions were based and compared the plaintiff's ranges of motion to those ranges considered normal (*Qu v Doshna*, 12 AD3d 578 [2d Dept 2004], *supra; Browdame v Candura*, 25 AD3d 747 [2d Dept 2006], *supra*; *Gastaldi v Chen*, 56 Ad3d 420 [2d Dept 2008], *supra*).

Moreover, the Court finds that the defendant has demonstrated that the plaintiff failed to sustain "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" (*Gaddy v Euler,* 79 NY2d 955 [1992], *supra*). In order to demonstrate the existence of a serious injury which falls within this category, a plaintiff must prove that he or she "has been curtailed from performing his [or her] usual activities to a great extent rather then some slight curtailment" (*Licari v Elliott*, 57 NY2d 230 [1982] at 236; *Gaddy v Eyler*, 79

NY2d 955 [1992]; *Lanzarone v Goldman*, 2011 WL 182137 [2d Dept 2011]). Here, a reading of the plaintiff's deposition transcript reveals that while Mrs. Doherty testified that she has not "really been able to exercise", she nonetheless testified that she was fully capable of driving her car and accomplishing most of her daily chores (*id.*). Thus, the burden now shifts to the plaintiff to demonstrate a triable issue of fact with respect to the existence of a "serious injury" (*Licari v Elliott*, 57 NY2d 230 [1982], *supra*).

In opposition to the instant application, the plaintiff provides the following: an affirmation from Dr. Harold Avella, M.D., and; a report from Dr. Robert Diamond, M.D., dated 8/11/06, which recites the findings of two MRI studies of the plaintiff's cervical spine, conducted on 8/7/06 and 8/10/06 (*see* Levine Affirmation in Support at Exh. C). As an initial matter, the Court is constrained to note that upon examination, it is revealed that the above-referenced MRI report is unsworn. As a result, said report is devoid of any probative value and accordingly this Court did not consider the contents thereof (*Casas v Montero,* 48 AD3d 728 [2d Dept 2008]; *Nociforo v Penna*, 42 AD3d 514 [2d Dept 2007]; *Patterson v N.Y. Alarm Response Corp.*, 45 AD3d 656 [2d Dept 2007]).

The Court now addresses the affirmation of Dr. Avella, who previously treated the plaintiff in connection with a prior automobile accident, which occurred on 3/8/05 and in which she sustained injury to her neck, shoulder and upper back (*see* Avella Affirmation at p. 1). With regard to the subject accident, Dr. Avella initially examined the plaintiff on 7/17/06, at which time he noted restricted ranges of motion in the cervical spine (*see* Affirmation of Dr. Harold Avella at p.2). Subsequent to this examination, Dr. Avella rendered an initial assessment stating that the plaintiff had sustained a cervical sprain, cervical radiculitis, headaches and right TMJ, all of which were causally related to the subject accident (*id.*; *see also* Levine Affirmation in Support Exh. B). As extrapolated from the supporting affirmation, the plaintiff had a series of follow-up visits with Dr. Avella, which included, *inter alia*, visits on 8/3/06, 10/12/06, 1/4/07, 3/1/07, 3/8/07, 3/19/07 and 5/24/07 (*id.* at pp. 2,3,4). With respect to those visits of 8/3/06 and 3/19/07, Dr. Avella states that range of motion testing again revealed restrictions in the plaintiff's cervical spine (*id.* at pp. 2,3,4). Further, as to the visit of 10/12/06, Dr. Avella opined that based upon the two MRIs taken on 8/7/06 and 8/10/06, there was "a severe exacerbation" of a pre-existing condition and that the plaintiff's "cervical limitations, and more significantly her neurological compromise, was far more severe in this accident than in the 2005

accident" (*id.* at p. 3). The plaintiff last presented to Dr. Avella on 5/24/07 and did not again present thereto until 10/29/10, at which time range of motion testing again revealed restrictions in the cervical spine (*id.* at pp. 4,5).

When examining medical evidence offered by a plaintiff on a threshold motion, the court must insure that the evidence is objective in nature and that a plaintiff's subjective claims as to pain or limitation of motion are sustained by verified objective medical findings (*Grossman v Wright*, 268 AD2d 79 [2d Dept 2000]). Further, a plaintiff must provide medical evidence contemporaneous with the subject accident which demonstrates any initial range of motion restrictions (*Ifrach v Neiman,* 306 AD2d 380 [2d Dept 2003]; *Felix v New York City Tr. Auth.*, 32 AD3d 527 [2d Dept 2006];*Garcia v Sobles*, 41 AD3d 426 [2d Dept 2007]; *Bestman v Seymour*, 41 AD3d 629 [2d Dept 2007]; *Stevens v Sampson*, 72 AD3d 793 [2d Dept 2010]; *Jack v Acapulco Car Service, Inc.*, 72 AD3d 646 [2d Dept 2010]), as well as competent medical evidence containing verified objective findings, which are predicated upon a recent examination (*Kauderer v Penta*, 261 AD2d 365[2d Dept 1999]; *Constantinou v Surinder*, 8 AD3d 323 [2d Dept 2004]; *Brown v Tairi Hacking Corp.*, 23 AD3d 325 [2d Dept 2005]; *Sham v B&P Chimney Cleaning and Repair Co. Inc.*, 71 AD3d 978 [2010]; *Carillo v DePaola*, 56 AD3d 712 [2d Dept 2008]; *Krauer v Hines*, 55 AD3d 881 [2d Dept 2008]).

In the instant matter, having carefully reviewed the plaintiff's submissions, the Court finds that the affirmation of Dr. Arvella is insufficient to raise a triable issue of fact (*Licari v Elliott*, 57 NY2d 230 [1982],*supra*). Upon review of Dr. Avella's supporting affirmation, it is quite clear that in rendering his medical opinion he improperly relied upon the unsworn MRI report authored by Dr. Diamond (*Vickers v Francis,* 63 AD3d 1150 [2d Dept 2009]; *Vasquez v John Doe #1*, 73 AD3d 1033[2d Dept 2010]; *cf Casas v Montero*, 48 AD3d 728 [2d Dept 2008]).

Additionally, a careful review of Dr. Avella's affirmation indicates that the plaintiff last treated on 5/24/07 and did not again seek treatment until October 29, 2010. Thus, based upon said affirmation, there exists a gap in treatment which exceeds three years. As stated by the Court of Appeals, "while a cessation of treatment is not dispositive - the law surely does not require a record of needless treatment in order to survive summary judgment - a plaintiff who terminates therapeutic measures following the accident, while claiming 'serious injury,' must proffer some reasonable explanation for having done so" (*Pommells v Perez*, 4 NY3d 566 [2005] at 574). Here, the only explanation proffered for this gap is

that of Dr. Avella, who at some unspecified date in 2007, stated the following: "At this juncture, I felt that there was little else I can do for her, and advised her accordingly."[1] Said assertion does not unequivocally state that the plaintiff had reached maximum medical improvement, thus requiring the Court to speculate as to the import thereof. Moreover, while Dr. Avella states that he could no longer provided efficacious medical treatment to the plaintiff, it is again unclear as to whether other medical professionals could have rendered effective treatment to the plaintiff for the injuries she sustained on 6/2/06 (*id.*).

Therefore, based upon the foregoing, the motion interposed by defendant, Margarito Cruz, which seeks an order granting summary judgment dismissing the plaintiff's complaint, is hereby **GRANTED**.

All applications not specifically addressed are **Denied**.

This constitutes the Decision and Order of the Court.

DATED: February 9, 2011
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.
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[1] *see* Avella Affirmation at p. 4).