SHORT FORM ORDER

INDEX No. 08-7005
CAL No. 09-02273MV

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

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 3-29-10
ADJ. DATE 11-23-10
Mot. Seq. # 001 - MG;CASEDISP

RENEE M. ANDERSON,

Plaintiff,

- against -

ERIN CLARK and ROBERT CLARK,

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendants , dated March 1, 2010, and supporting papers (including Memorandum ofLaw dated ____); (2) Affirmation in Opposition by the plaintiff, dated November 15, 2010, and supporting papers; (3) Reply Affirmation by the Defendants , dated November 22, 2010, and supporting papers; (4) Other __ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); 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 defendants Erin Clark and Robert Clark seeking summary judgment dismissing plaintiff's complaint is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff Renee Anderson as a result of a motor vehicle accident that occurred at the intersection of Route 25 and Boyle Road in the Town of Selden, New York on October 9, 2005. The accident allegedly occurred when defendant Erin Clark, operating the vehicle owned by defendant Robert Clark, in an attempt to make a left turn onto Boyle Road, struck the left side of the vehicle operated by plaintiff. Plaintiff, at the time of the accident, was crossing the aforementioned intersection, traveling approximately 40 miles per hour, in the left lane of westbound Route 25. Plaintiff, by her bill of particulars, alleges that she sustained various personal injuries as a result of the subject accident, including spasm bilateral trapeze bilateral

paraspinal musculature; post concussion syndrome; acute cervical, thoracic, and lumbar sprains; patella chondritis of the left knee with possible internal derangement; patellofemoral crepitus of the left knee; trace effusion of the left knee; left knee tear of medial meniscus; and left knee probable contusion with associated pes bursitis. Plaintiff alleges that she was incapacitated from her employment with Mary Haven as a receptionist for approximately three weeks. Plaintiff further alleges that as a result of the injuries she sustained to her left knee that she underwent left knee arthroscopy and anterior synovectomy on October 5, 2010.

Defendants now move for summary judgment on the basis that plaintiff's alleged injuries fail to meet the "serious injury" threshold requirement of Insurance Law § 5102(d). In support of the motion, defendants submit a copy of the pleadings, a copy of plaintiff's deposition transcript, copies of plaintiff's hospital records from Stony Brook University Hospital's emergency room, and the sworn medical reports of Dr. Michael Katz and Dr. Stephen Lastig. Dr. Katz, at defendants' request, performed an independent orthopedic examination of plaintiff on June 16, 2009. Dr. Lastig, at defendants' request, performed an independent radiological review of the magnetic resonance images ("MRI") films of plaintiff's cervical and lumbar spines, and left knee on May 13, 2009. Plaintiff opposes the motion on the ground that defendants failed to sustain their burden that her alleged injuries do not come within the meaning of the serious injury threshold requirement of Insurance Law § 5102(d). Alternatively, plaintiff asserts that she sustained injuries within the "limitations of uses" categories and the "90/180 days" category of serious injury. In opposition to the motion, plaintiff submits the sworn medical report of Dr. Stuart Cherney, the unsworn medical report of Dr. Timothy Groth, her own affidavit, and a photograph of the damage to her vehicle.

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]).

In the instant matter, defendants, through the submission of plaintiff's deposition testimony, the reports of their medical experts, and plaintiff's medical records, have demonstrated that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5104(d) as a result of the subject accident (*see* ***DeJesus v Cruz***, 73 AD3d 539, 902 NYS2d 503 [2010]; ***Lopez v Adul-Wahab***, 67 AD3d 598, 889 NYS2d 178 [2009]; ***DeJesus v Paullino***, 61 AD3d 605, 878 NYS2d 20 [2009]). Dr. Katz states in his medical report that he tested plaintiff's ranges of motion using a goniometer, and that plaintiff has full ranges of motion in her cervical and thoracolumbosacral spines when compared with the normal ranges of motion. The report states that plaintiff has a normal gait and there is no tenderness or paravertebral muscle spasm in her cervical or thoracolumbosacral spines. Dr. Katz further states in his report that an examination of plaintiff's left knee reveals that she has full range of motion in her knee, there is no swelling or effusion within in the knee, and the prepatellar bursa is "supple and lacks swelling, erythema, or induration. The report also states that there is no tenderness along plaintiff's medial or lateral joint line in her left knee, that her knee is stable to varus and valgus stress, and there is no demonstrable crepitus in the knee. Dr. Katz opines that the cervical and thoracolumbosacral strains, and left knee contusion that plaintiff sustained as a result of the subject accident have resolved, and she is capable of performing all of her pre-loss activities without restriction. In addition, Dr. Lastig clearly states, after reviewing the MRIs of plaintiff's cervical and lumbar spines and left knee, that plaintiff's MRIs were normal and without any findings that were casually related to the subject accident. Dr. Lastig further states that the MRI of plaintiff's left knee showed that there was no evidence of internal derangement or osseous injury, and no significant joint effusion.

Therefore, the burden shifted to plaintiff to raise a triable issue of fact as to whether she sustained a serious injury (*see* ***Gaddy v Eyler***, *supra*; ***Luckey v Bauch***, 17 AD3d 411, 792 NYS2d 624 [2005]; ***McLoyrd v Pennypacker***, 178 AD2d 277, 577 NYS2d 272 [1991]). A plaintiff alleging an injury within the limitations of uses categories must present either objective medical evidence of the extent, percentage or degree of the limitation or loss of range of motion and its duration in order to prove the extent or degree of physical limitation he or she sustained (*see* ***Magid v Lincoln Servs. Corp.***, 60 AD3d

1008, 877 NYS2d 127 [2009]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2006]; ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2006]; ***Meyers v Bobower Yeshiva Bnei Zion***, 20 AD3d 456, 797 NYS2d 773 [2005]). 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.***, *supra*; ***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]).

Plaintiff, in opposition, primarily relies on the medical report of Dr. Cherney, an orthopedic surgeon. Dr. Cherney states that he initially began treating plaintiff in December 2005 and continued to treat her until July 2006. Dr. Cherney states that plaintiff presented with pain in her left knee, tenderness over the medial joint line and the pes bursa, and that the patella "could be subluxated 50% of its width laterally with slight positive apprehension. Dr. Cherney states that plaintiff's left knee condition remained unchanged and that plaintiff discontinued her physical therapy, because "she did not feel that she was benefitting from it, and she did not feel that surgery would be beneficial." Dr. Cherney states that plaintiff returned in March 2010, stating that she was having increased left knee pain, and that he recommended additional physical therapy and anti-inflammatory medication, and referred her for an MRI. Dr. Cherney further states that plaintiff then returned on May 19, 2010 for further evaluation. He states that she continued to have anterior pain, and that plaintiff now described a "burning pain radiating from the knee into the foot and ankle." He states that an examination of her left knee revealed tenderness over the medial and lateral joint line, mild patellofemoral crepitus with some pain on compression, and tenderness over the proximal patella tendon. Dr. Cherney states that he observed chondritic changes in the median ridge on the patella and lateral tibial plateau, a small effusion, and increased signal in the proximal patella tendon. Dr. Cherney states that he referred plaintiff to Dr. Timothy Groth for an evaluation for reflex sympathetic dystrophy ("RSD"). Dr. Cherney further states that he performed left knee arthroscopy and anterior synovectomy on plaintiff's left knee on October 5, 2010. Dr. Cherney concludes his report by opining that plaintiff has sustained an injury that prevents her from "utilizing–to a significant degree–that bodily function which enables [her] to move her left knee freely," and that she exhibits a moderate permanent disability that is related to the accident of October 9, 2005.

In opposition to defendants' prima facie showing, plaintiff has failed to raise a triable issue of fact that she sustained a serious injury as a result of the subject accident (*see* ***Licari v Elliott***, *supra*; ***Jack v Acapulco Car Serv., Inc.***, *supra*; ***Bleszcz v Hiscock***, *supra*; ***Nguyen v Abdel-Hamed***, *supra*; ***Ali v Khan***, 50 AD3d 454, 857 NYS2d 71 [2008]; ***Luckey v Bauch***, 17 AD3d 411, 792 NYS2d 624 [2005]). Dr. Cherney's findings of chondritic changes in the median ridge on the patella and lateral tibial plateau, a small effusion, and increased signal in the proximal patella tendon are contradicted by plaintiff's MRI studies, which noted there is no significant joint effusion or osteochondral lesions. In addition, Dr. Cherney's more recent findings, which occurred approximately five years after the accident, while qualitative, are too remote in time to permit an inference that her limitations were caused by the accident (*see* ***Pou v E & S Wholesale Meats, Inc.***, 68 AD3d 446, 890 NYS2d 47 [2009]; ***Medina v Medina***, 49 AD3d 335, 853 NYS2d 77 [2008]). Furthermore, plaintiff has failed to present any objective evidence of range of motion limitations contemporaneous with the accident, or based upon a recent examination (*see* ***Neves v Michael***, 73 AD3d 716, 901 NYS2d [2010]; ***Fung v Uddin***, 60 AD3d 992, 876 NYS2d 469 [2009]; ***Garcia v Lopez***, 59 AD3d 593, 872 NYS2d 719 [2009]). This requirement exists even when

arthroscopic surgery has been performed on the left knee (*see* ***Jean v Kabaya***, 63 AD3d 509, 881 NYS2d 891 [2009]; ***Danvers v New York City Tr. Auth.***, 57 AD3d 252, 869 NYS2d 41 [2008]; ***O'Bradovich v Mrija***, 35 AD3d 274, 827 NYS2d 38 [2006]). Moreover, plaintiff's evidence reveals an unexplained significant gap in treatment, thereby, negating any showing of serious injury (*see* ***Pommells v Perez***, *supra*; ***Garcia v Lopez***, *supra*; ***Berktas v McMillian***, 40 AD3d 563, 835 NYS2d 388 [2007]).

Lastly, plaintiff failed to submit competent medical evidence to demonstrate that she sustained an injury within the 90/180 days category of serious injury, given her testimony that she returned to work one month after the accident and was able to perform the same duties without restriction (***Uddin v Cooper***, 32 AD3d 270, 272, 820 NYS2d 44 [2006], *lv denied* 8 NY3d 808, 834 NYS2d 89 [2007]; *see* ***Roman v Fast Lane Car Serv., Inc.***, 46 AD3d 535, 846 NYS2d 613 [2007]; ***Nociforo v Penna***, 42 AD3d 514, 840 NYS2d 396 [2007]; ***Felix v New York City Tr. Auth.***, 32 AD3d 527, 819 NYS2d 835 [2006]). Accordingly, defendants' motion for summary judgment is granted.

Dated: 3/3/11

Peter H. Mayer

PETER H. MAYER, J.S.C.