SHORT FORM ORDER

COPY

INDEX No. 09-2156
CAL. No. 10-01582MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE (001) 12-6-10
MOTION DATE (002) 2-17-11
ADJ. DATE (001) & (002) 2-18-11
Mot. Seq. # 001 - MD
Mot. Seq. # 002 - MD

JOAN CHILDS and STEVEN GOVERNALE, Plaintiffs, -against- MIDDLE COUNTRY SCHOOL DISTRICT and LINDA A. NEILL, Defendants,	ANTHONY J. MONTIGLIO, ESQ. Attorney for Plaintiffs Childs and Governale 300 Old Country Road, Suite 11 Mineola, New York 11501 CONGDON, FLAHERTY, O'CALLAGHAN, et al Attorney for Defendants Middle Country School Dist. and Linda A. Neill 333 Earle Ovington Blvd. Uniondale, New York 11553

Upon the following papers numbered 1 to 30 read on this motion and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 -14 ; Notice of Cross Motion and supporting papers (002) 15-17 ; Answering Affidavits and supporting papers 18-26 ; Replying Affidavits and supporting papers 27-28; 29-30 ; Other; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by the defendants Middle Country Central School District and Linda A. Neill and motion (002) by the plaintiffs Joan Childs and Steven Governale are consolidated for the purpose of determination; and it is further

ORDERED that this motion (001) by the defendants Middle Country Central School District and Linda A. Neill for an order pursuant to CPLR 3212 and Insurance Law 5102 granting summary judgment dismissing the complaint on the basis that the plaintiff, Joan L. Childs, has not sustained a serious injury is denied.

ORDERED that this motion (002) by the plaintiffs Joan Childs and Steven Governale for an order pursuant to CPLR 3212 and Insurance Law 5102 granting summary judgment dismissing the fifth affirmative defense that the plaintiff has not sustained a serious injury as asserted by the defendants Middle Country School District and Linda A. Neill is denied.

This is an action for damages personally and derivatively for injuries allegedly arising out of a motor vehicle accident which occurred on January 22, 2008 when the vehicle operated by Joan Childs and the vehicle

RST

owned by Middle Country School District and operated by Linda A. Neill came into contact on Mark Tree Road at or near its intersection with Market Street, County of Suffolk, State of New York. The plaintiff claims to have sustained serious injuries within the meaning of Insurance Law Article 51.

By way of her bill of particulars, the plaintiff, Joan Childs, claims to have sustained injuries consisting of, inter alia, posterior disc herniations at C4-5 and C5-6; bulging discs at C2-3 and C6-7; cervical radiculopathy; post-traumatic myofascitis of the cervical spine; permanent limitation of motion of the cervical spine; posterior disc herniation at T3-4 with ventral cord abutment; permanent limitation of motion of the thoracic spine; lumbar radiculopathy; aggravation and exacerbation of pre-existing low back condition; limitation of range of motion of the lumbar spine; tear of the infraspinatus tendon of the left shoulder; tear of the proximal insertion of the long head biceps tendon of the left shoulder; and permanent limitation of motion of the left shoulder.

In motion (001), the defendants Middle Country School District and Linda A. Neil seek dismissal of the complaint on the basis that the plaintiff, Joan L. Childs has failed to meet the no-fault threshold set forth in Insurance Law 5102(d).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]).

Pursuant to Insurance Law § 5102(d), " '[s]erious injury' means 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 medical 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."

The term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102(d), the initial burden is on the defendant to "present evidence in competent form, showing that plaintiff has no cause of action" (***Rodriquez v Goldstein***, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (***DeAngelo v Fidel Corp. Services, Inc.***, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268, 587 NYS2d 692 [2nd Dept 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (***Cammarere v Villanova***, 166 AD2d 760, 562 NYS2d 808, 810 [3rd Dept 1990]).

In order to recover under the "permanent loss of use" category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed or there must be 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 (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott*** , *supra*).

It is for the court to determine in the first instance whether a prima facie showing of "serious injury" has been made out (*see*, ***Tipping-Cestari v Kilhenny***, 174 AD2d 663, 571 NYS2d 525 [2d Dept 1991]). The initial burden is on the defendant "to present evidence, in competent form, showing that the plaintiff has no cause of action" (***Rodriguez v Goldstein***, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once defendant has met the burden, plaintiff must then, by competent proof, establish a prima facie case that such serious injury exists (***Gaddy v Eyler***, 79 NY2d 955, 582 NYS2d 990 [1992]).

In support of this motion (001), the defendants have submitted, inter alia, an attorney's affirmation; copies of the pleadings and plaintiff's bill of particulars; uncertified copies of various x-rays of the plaintiff; a copy of the notarized report of Gregory Papadopoulos, D.C.; the report of the independent neurological examination of the plaintiff by Maria Audrie DeJesus , M.D. dated September 9, 2008; the report of defendants' examining orthopedist Noah S. Finkle, M.D. dated May 20, 2010; and unsigned copies of the transcripts of the examinations before trial of the plaintiff dated June 30, 2008 and March 26, 2010. The unsigned copies of the deposition transcripts are not in admissible form as required by CPLR 3212 (see, ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2nd Dept 2008]; ***McDonald v Maus***, 38 AD3d 727, 832 NYS2d 291 [2nd Dept 2007]; ***Pina v Flik Intl. Corp.***, 25 AD3d 772, 808 NYS2d 752 [2nd Dept 2006]), are not accompanied by an affidavit pursuant to CPLR 3116, and are not considered.

Upon reviewing the admissible evidentiary submissions, it is determined that the defendants have failed to establish prima facie entitlement to summary judgment dismissing the complaint on the issue that the plaintiff failed to sustain an injury within the meaning of Insurance Law 5102(d).

Defendants' examining physicians did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering defendant physicians' affidavits and reports insufficient to demonstrate entitlement to summary judgment on the issue of whether either plaintiff was unable to substantially perform all of the material acts which constituted her usual and customary daily activities for a period in excess of 90 days

during the 180 days immediately following the accident (***Blanchard v Wilcox***, 283 AD2d 821 [3rd Dept 2001]; *see*, ***Uddin v Cooper***, 32 AD3d 270 [st Dept 2006]; ***Toussaint v Claudio***, 23 AD3d 268 [1st Dept 2005]) as the defendants' experts do not relate the medical findings to this category of serious injury for the period of time immediately following the accident and do not offer an opinion relative to that time period (***Picard v Hernandez***, 2010 NY Slip Op 32804U [Sup. Ct. of New York, Suffolk County 2010]; ***El-Sayed Ali v Rivera***, 52 AD3d 445 [2nd Dept 2008]; ***DeVille v Barry***, 41 AD3d 763 [2nd Dept 2007]).

Gregory Papadopoulos, D.C. has set forth that Ms. Childs sustained a cervical strain/sprain which is now resolved, a thoracic strain/sprain which is now resolved, and exacerbation of a pre-existing lumbar strain/sprain, and states that no further chiropractic treatment is indicated as it relates to the accident of January 22, 2008. He further indicates that Ms. Childs is not disabled and is able to work and perform activities of daily living without restriction. He sets forth the materials and records he reviewed and his findings relative to the examination of the plaintiff's cervical spine, and thoracolumbar spine. He obtained range of motion studies of the plaintiff's cervical spine and states that flexion, extension, and right and left lateral bending are 40/45, and right and left rotation are 70/80 without indication whether the latter figures are the normal or average ranges of motion. He indicates that the range of motion of the plaintiff's thoracolumbar spine was flexion at 90/90, extension, right and left lateral bending and right and left rotation at 30/30. He does not comment on any injury to the plaintiff's left shoulder, knee, or radicular injury as pleaded in the bill of particulars.

Maria Audrie DeJesus, M.D. has set forth in her report concerning the independent neurological examination of the plaintiff that the plaintiff sustained exacerbation of pre-existing cervical and lumbar spine sprains/strains, resolved and is status post thoracic spine sprain/strain resolved. She states she deferred evaluation of the plaintiff's left shoulder, left leg and left hip to the appropriate specialty and does not opine as to whether or not Ms. Childs sustained a radicular injury. Dr. DeJesus states that there is no need for neurological treatment or diagnostic treatment. She does not set forth the bases for those opinions, but does indicate a direct causal relationship between the complaints and the "history described." She states that upon examination of Ms. Childs' cervical spine, she determined flexion, extension, right and left lateral flexion to be 45 degrees out of the normal range of motion of 45 degrees, and right and left rotation to be 70 degrees out of the normal 70 degrees. Range of motion of the lumbar spine revealed flexion of 90 degrees with 90 degrees normal, extension, right and left lateral bending of 30 degrees with 30 degrees being normal.

Noah S. Finkle, M.D. has set forth in his report the records and materials he reviewed and stated his diagnosis that the plaintiff has resolved cervical, thoracic and lumbosacral strains. He states in a conclusory and unsupported manner that there appears to be no objective orthopedic causally related sequelae relative to the motor vehicle accident. Dr. Finkle states that upon "visual examination" of the plaintiff's cervical spine, the ranges of motion inspection revealed right rotation of 50 degrees with 80 degrees normal, left rotation of 40 degrees with 80 degrees normal, extension of 25 degrees out of 35 degrees normal, forward flexion of 50 degrees with 60 degrees normal. The right shoulder examination does not indicate the range of motion found for internal rotation to the midback. Examination of the left shoulder is noted to be markedly restricted as to rotation and abduction with internal rotation of the posterior inferior pelvis limited, external rotation was 40 degrees out of the stated normal of 80 degrees, and abduction 90 degrees out of the stated normal of 160 degrees. Although he states there is no evidence of neurological deficit in either upper extremity, he does not state the bases for the this opinion. Examination of the thoracic and lumbosacral spine reveals lower back pain was elicited with active left and right thoracic rotation and left and right rotational testing beyond 70 degrees with 90 degrees normal. Examination of the range of motion of the lumbosacral spine reveals extension and lateral flexion to 25 degrees with 35 degrees normal, and forward flexion of 50 degrees with 60 degrees normal.

None of the defendants' examining physicians have set forth the method employed to obtain such range of motion measurements of the plaintiffs' cervical and thoracic or lumbar spine, such as the goniometer, inclinometer or arthroidal protractor (*see*, ***Martin v Pietrzak***, 273 AD2d 361, 709 NYS2d 591 [2nd Dept 2000]; ***Vomero v Gronrous***, 19 Misc3d 1109A, 859 NYS2d 907 [Supreme Court, Nassau County 2008]). Dr. Finkle merely used visual inspection. Failure to identify the method used as set forth above, leaves it to this Court to speculate as to how the physicians determined the ranges of motions they reported upon examination of the plaintiff, precluding summary judgment.

The physicians have set forth some different and conflicting values for the normal range of motion for the plaintiff's cervical and thoracic spine, leaving it to this Court to speculate as to what the variations in the ranges of motion are relative to in their findings and what the actual values for the ranges of motion are (*see,* ***Hypolite v International Logistics Management, Inc.***, 43 AD3d 461, 842 NYS2d 453 [2nd Dept 2007]; ***Somers v Macpherson,*** 40 AD3d 742, 836 NYS2d 620 [2nd Dept 2007]; ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2nd Dept 2006]; *see also,* ***Rodriguez v Schickler***, 229 AD2d 326, 645 NYS2d 31 [1st Dept 1996], *lv denied* 89 NY2d 810, 656 NYS2d 738 [1997]), precluding summary judgment.

Dr. DeJesus, as the examining neurologist, did not comment on the plaintiff's claim of cervical radiulopathy or rule out that the claim is causally related to the accident or to the alleged cervical disc herniations. Disc herniation and limited range of motion based on objective findings may constitute evidence of serious injury (***Jankowsky v Smith***, 294 AD2d 540, 742 NYS2d 876 [2nd Dept 2002]). Here, the defendants, via Dr. Finkles's report, have submitted admissible evidence to demonstrate findings of limitation of ranges of motion in Ms. Child's cervical spine as well as marked limitation in the range of motion of the plaintiff's left shoulder. None of the defendants' physicians rule out the plaintiff's claim of herniated cervical discs or bulging thoracic discs, despite all having reviewed the various MRI reports, which reports have not been provided to this court but are set forth in their reports as having been reviewed.

These factual issues raised in defendant's moving papers preclude summary judgment. Accordingly, the defendants failed to satisfy their burden of establishing, prima facie, that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) (*see*, ***Agathe v Tun Chen Wang***, 98 NY2d 345, 746 NYS2d 865 [2006]); *see also*, ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]). Inasmuch as the moving parties have failed to establish their prima facie entitlement to judgment as a matter of law in the first instance on the issue of "serious injury" within the meaning of Insurance Law § 5102 (d), it is unnecessary to consider whether the opposing papers were sufficient to raise a triable issue of fact (*see*, ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2nd Dept 2008]); ***Krayn v Torella***, 40 AD3d 588, 833 NYS2d 406 [2nd Dept 2007]; ***Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]) as the burden has not shifted.

Accordingly, motion (001) is denied.

In motion (002), the plaintiffs, Joan Childs and Steven Governale, have failed to comport with the requirements of CPLR 3212(b) by failing to submit an affidavit from a person with knowledge, or copies of the pleadings, or affidavits, or sworn reports from their experts in support of the motion. Based upon the foregoing, the motion is deemed insufficient on its face as a matter of law.

It is further determined that motion (002) is untimely. The Note of Issue in this action was filed on July 27, 2010. CPLR 3212(a) provides in pertinent part that a motion for summary judgment shall be made no later

than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown. Therefore, this motion should have been served by November 24, 2010; however, according to the affidavit of service, this motion was served on January 14, 2011. Therefore, this motion was made more than one hundred twenty days after the note of issue was filed. The moving party has made no application for leave of court on good cause shown to file this motion beyond the statutory one hundred twenty days, and in fact, has not submitted any reason for the delay (*see, **Brill v City of New York,*** 2 NY3d 648, 781 NYS2d 261 [2004]). However, an untimely cross motion may be considered by the court where a timely motion for summary judgment was made on nearly identical grounds. In such circumstances, the issues raised by the untimely cross motion are already properly before the court, and thus, the nearly identical nature of the grounds may provide the requisite good cause (***Snolis v Clare***, 2100 NY Slip Op 1455 [2nd Dept 2011]).

It is determined that even if this court grants consideration of motion (002) on the basis that the motion-in-chief was timely submitted and nearly identical issues are involved, and considers the submissions contained in the plaintiff's papers submitted in opposition to motion (001), the plaintiff has not established prima facie entitlement to dismissal of the defendants' fifth affirmative defense that the plaintiff has not sustained a serious injury within the meaning of Insurance Law 5102(d).

The plaintiff has submitted with the opposition papers, inter alia, the affirmed report of Gregory Papadopoulos, D.C., uncertified copies of medical records; affidavit and records of Joseph Papalia, D.C.; the affidavit of Dawn Rinaldi; the affirmed report of neurologist Shafi Wani, M.D. with attendant medical records; and the affirmed reports of radiologist Robert Diamond, M.D. Although the reports of Dr. Diamond set forth his impressions upon interpretation of the MRI's of the plaintiff's cervical spine and left shoulder to establish the conditions contained in the reports, the reports do not establish that the findings were proximately caused by the within accident. Although Dr. Wani sets forth the deficits in range of motion found upon his examination of the plaintiff, he does not set forth in his reports the method used to determine the ranges of motions with regard to his examinations of the plaintiff's cervical or lumbar spine, left shoulder, or straight leg raising, leaving it to this court to speculate on the same (*see*, ***Martin v Pietrzak***, supra; ***Vomero v Gronrous***, supra]). Based upon the foregoing, the plaintiff has not established prima facie entitlement to summary judgment dismissing the defendants' fifth affirmative defense.

Accordingly, motion (002) is denied.

Dated: 3-11-2011

Hon. Denise F. Molia
J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**

ERIC TURKEWITZ, ESQ.
Attorney for Plaintiff (Action No. 1)
228 East 45th Street, 17th Floor
New York, New York 10017

RICHARD T. LAU & ASSOCIATES
Attorney for Defendant Childs (Action No. 1)
300 Jericho Quadrangle, Suite 260
Jericho, New York 11753