SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE TRIAL/IAS PART 18

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EVITA LABISSIERE,

Plaintiff,

-against-

Index No.: 015850/09
Motion Sequence...01
Motion Date...12/17/10

ADRIENNE HERLIHY,

Defendant.

---X

Papers Submitted:
Notice of Motion.....x
Affirmation in Opposition.....x
Reply.....x

Upon the foregoing papers, the Defendant's motion seeking an order granting summary judgment, pursuant to CPLR §3212, dismissing the complaint of the Plaintiff on the grounds that the Plaintiff's injuries do not satisfy the "serious injury" threshold requirement of Insurance Law § 5102 (d), is determined as hereinafter provided.

The Plaintiff's personal injury action arises out of a motor vehicle accident that occurred on August 11, 2006 at or near the intersection of Merrick Road and Columbus Drive, Lynbrook, County of Nassau, State of New York. As a result of the accident, the Plaintiff claims that she sustained "serious injuries" as defined by New York's Insurance

Law.

The Plaintiff claims that she sustained the following injuries as a result of the accident on August 11, 2006: Left TMJ Disorder with trigeminal nerve involvement; cervicolumbar radiculopathy; blunt sternal trauma; bilateral knee internal derangement; left elbow collateral ligament injury with internal derangement and sensory deficits; left knee effusion; cervical sprain/strain; whiplash; cervical brachial syndrome; constant headaches; lumbar sprain/strain; muscle spasms; myofascitis; left ankle tenosynovitis; left ankle edema; EMG confirmed electrical instability at C5-6 paraspinal muscles; left shoulder sprain; restricted range of motion of both knees; restricted range of motion of the cervical spine; restricted range of motion of the lumbar spine; restricted range of motion of the left shoulder; restricted range of motion of the jaw. The Defendant claims that the foregoing injuries do not qualify as "serious injuries" pursuant to New York's Insurance Law. Further, the Defendant claims that she is entitled to judgment as a matter of law as the Plaintiff's injuries do not qualify under any category outlined in New York's Insurance Law.

In support of the motion, the Defendant submitted the affirmed report of Dr. P. Leo Varriale, a board certified orthopedist. Dr. Varriale conducted a physical examination of the Plaintiff on June 2, 2010. Dr. Varriale tested the range of motion of the Plaintiff's cervical spine, lumbar spine, left hip, left shoulder, right knee, left knee, left elbow and left ankle by visual observation. *See* Affirmed Report of Dr. Varriale, dated June 2, 2010, attached to the Defendant's Notice of Motion as Exhibit "E". He concluded that the

Plaintiff's range of motion of the foregoing body parts were all within normal limits. After his physical examination of the Plaintiff, Dr. Varriale diagnosed the Plaintiff with (1) resolved strain to the cervical and lumbar spine; (2) resolved strain to the left shoulder; (3) resolved contusions to both knees (4) resolved left elbow strain; and (5) resolved left ankle strain. Dr. Varriale opined that the injuries are causally related to the accident of August 11, 2006, which have since been resolved. Dr. Varriale further opined that there is no history of comorbidities, prior injuries or pre-existing conditions that impact on the current injury.

The Defendant also submits the affirmed report of Dr. Mathew M. Chacko, a board certified neurologist and psychiatrist. Dr. Chacko examined the Plaintiff on June 2, 2010. Dr. Chacko performed active range of motion testing of the Plaintiff's cervical spine, by use of a goniometer, which revealed flexion at 50 degrees (50 degrees normal), extension at 60 degrees (60 degrees normal), lateral rotations at 60 degrees (80 degrees normal) and lateral flexions at 30 degrees (45 degrees normal). *See* Affirmed Report of Dr. Chacko, dated June 2, 2010, attached to the Defendant's Notice of Motion as Exhibit "F". Dr. Chacko also performed active range of motion testing of the Plaintiff's lumbar spine, by use of a goniometer, which revealed flexion at 60 degrees (60 degrees normal), lateral flexions at 25 degrees (25 degrees normal), extension at 25 degrees (25 degrees normal).

Dr. Chacko noted that the Plaintiff reported tenderness on palpation of the cervical and lumbar areas but did not feel any muscle spasm. *Id.* After conducting the physical examination of the Plaintiff, Dr. Chacko concluded that the Plaintiff's history of

cervical and lumbar strain was resolved from an objective neurological standpoint. He further opined that the Plaintiff exhibited "mild limitation of cervical range of motion but it should be noted these are voluntary movements fully under the control of the person being examined and hence are not a truly objective finding". *See* Affirmed Report of Dr. Chacko, page 3. Dr. Chacko reported that there are no other findings on clinical examination that can support limitation of range of motion. *Id.* It was found by Dr. Chacko that the Plaintiff's real symptoms are causally related to the accident of August 11, 2006. Moreover, Dr. Chacko did not comment with respect to the Plaintiff's knees, shoulder and hip as those reported injuries are beyond the scope of his specialty.

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *Winegrad v. New York Univ. Medical Center*, 64 N.Y.2d 851 (1985). In the present action, the burden rests on Defendant to establish, by the submission of evidentiary proof in admissible form, that the Plaintiff has not suffered a "serious injury." *Lowe v. Bennett*, 122 A.D.2d 728 (1st Dept.1986), *affirmed*, 69 N.Y.2d 700 (1986). When a defendant's motion is sufficient to raise the issue of whether a "serious injury" has been sustained, the burden shifts, and it is then incumbent upon the plaintiff to produce sufficient prima facie evidence in admissible form to support the claim of "serious injury". *Licari v. Elliott*, 57 N.Y.2d 230 (1982); *Lopez v. Senatore*, 65 N.Y.2d 1017 (1985).

In the instant matter, the affirmed report of Dr. Varriale is insufficient to sustain the Defendant's prima facie burden that the Plaintiff did not suffer from a "serious injury" as a result of the accident that occurred on August 11, 2006. While Dr. Varriale opined that the Plaintiff does not have any limitations in the range of motion of her lumbar spine, cervical spine, left hip, left shoulder, right knee, left knee, left elbow and left ankle, he failed to use any objective medical device to arrive at his conclusions (i.e., goniometer or inclinometer). He states that the results were obtained by visual observation. *See* Affirmed Report of Dr. Varriale, Exhibit "E", page 2. Further, Dr. Varriale failed to set forth any medically approved guidelines upon which his conclusions were based.

Furthermore, the affirmed report of Dr. Chacko similarly fails to sufficiently demonstrate that the Plaintiff did not suffer from a "serious injury". Although Dr. Chacko's conclusions as to the Plaintiff's limited range of motion of her cervical and lumbar spine were determined using a goniometer, Dr. Chacko conceded that the Plaintiff suffers from a limited range of motion of her cervical spine. *See* Affirmed Report of Dr. Chacko, Exhibit "F", page 3. Dr. Chacko's impression that the Plaintiff's movements are fully under her control and voluntary, and, thus, the limitation is not a truly objective finding, does not warrant summary judgment as a matter of law. Moreover, the Plaintiff's claimed injuries to her knees, shoulder and hip were beyond the scope of Dr. Chacko's specialty. Accordingly, an issue of fact exists with respect to whether the Plaintiff meets the threshold requirements of New York's Insurance Law for said injuries.

Since the Defendants failed to establish their prima facie burden, it is unnecessary to consider whether the Plaintiff's opposition papers were sufficient to raise a triable issue of fact. *See Tchjevskaia v. Chase*, 15 A.D.3d 389 (2nd Dept. 2005); *see also Rose v. City of New Rochelle*, 57 A.D.3d 506 (2nd Dept. 2008).

Accordingly, it is hereby

ORDERED, that the Defendant's motion, pursuant to CPLR § 3212, seeking an order dismissing the complaint of the Plaintiff on the grounds that the Plaintiff's injuries do not satisfy the "serious injury" threshold requirement of Insurance Law § 5102 (d), is **DENIED**.

This decision constitutes the decision and order of the court.

DATED: Mineola, New York
March 24, 2011

Hon. Randy Sue Marber, J.S.C.

ENTERED
MAR 28 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE