SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 2
NASSAU COUNTY

ANNETTE GAYLE,

Plaintiff(s),

ORIGINAL RETURN DATE:03/25/11
SUBMISSION DATE: 05/20/11
INDEX No.: 5621/07

-against-

JUAN A. MENDOZA and JOSE CRUZ,

MOTION SEQUENCE #4

Defendant(s).

The following papers read on this motion:

Notice of Motion.....	1
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Motion by defendants for an order pursuant to CPLR 3212 awarding them summary judgment dismissing the complaint in this action on the grounds that plaintiff has not satisfied the "serious injury" threshold requirement as defined by Insurance Law §5102(d) and as required by Insurance Law §5104(a); the motion is granted.

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of material fact, and the moving party is, therefore, entitled to judgment as a matter of law (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v. Journal-News*, 211 AD2d 626 [2d Dept. 1995]).

This is an action to recover damages for personal injuries allegedly sustained by plaintiff in a motor vehicle accident, which occurred on April 3, 2004, at or near the intersection of Peninsula Boulevard and Main Street in Hempstead, New York.

Whether plaintiff has established a prima facie case of serious injury within the meaning of Insurance Law §5102(d) is for the Court to decide in the first instance (*Licari v. Elliott*, 57 NY2d 230 [1982]; *McLiverty v. Urban*, 131 AD2d 449 [2d Dept. 1987]). The burden of proof on this threshold issue is initially on defendants to establish as a matter of law that plaintiffs did not sustain a "serious injury" within the meaning of the statute (*see, Toure v. Avis Rent A Car Sys.*, 98 NY2d 345 [2002]). The relevant requirements of a "serious injury" in the present case are those which state that a "serious injury" is sustained when a personal injury results in:

> "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 persons 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"; "permanent consequential limitation of use of a body organ or member"; or "significant limitation of use of a body function or system."(Insurance Law §5102(d)).

Once this is established, the burden shifts to plaintiff to come forward with evidence to overcome defendants' submissions by demonstrating a triable issue of fact that a "serious injury" was sustained (*see, Pommells v. Perez*, 4 NY3d 566 [2005]; *see also, Grossman v. Wright*, 268 AD2d 79, 84 [2d Dept. 2000]).

In support of a claim that plaintiffs have not sustained a serious injury, defendants may rely either on the sworn statements of their examining physicians or the unsworn reports of the plaintiffs' examining physicians (*see, Pagano v. Kingsbury*, 182 AD2d 268 [2d Dept. 1992]). In support of their position that plaintiff did not suffer a permanent or significant limitation of use of a body organ, function or system, defendants submit, *inter alia*, the sworn medical examination report of Dr. Michael J. Katz, an orthopedic surgeon, who performed an independent orthopedic examination of plaintiff on November 5, 2010. Dr. Katz's orthopedic examination on that date revealed that Annette Gayle was not disabled, "is capable of her activities of daily living," and "shows no signs or symptoms of permanence relative to the neck, back, either hip or chest" (Def.'s Ex. H). Range of motion, measured using a goniometer, was within normal range. He notes no restrictions, and gives no indication that plaintiff requires further treatment for the injuries sustained in the accident, marking them all as "resolved" or "healed" (*Id.*). Defendants contend that this sworn independent medical examination revealed no serious injury.

Defendants have, therefore, satisfied their initial burden of demonstrating that plaintiff Annette Gayle did not suffer a serious injury under the permanent or significant limitation of use of a body

organ, function or system category. The burden now shifts to plaintiff "to come forward with sufficient evidence to overcome defendant[s'] motion by demonstrating that she sustained a serious injury within the meaning of the No-Fault Insurance Law (citation omitted)" (*Gaddy v. Eyler*, 79 NY2d 955, 957 [1992]; *See also, Licari v. Elliott*, 57 NY2d 230 [1982]).

In opposition, plaintiff submits the testimony and affidavit of plaintiff (Pl.'s Ex. B) and the medical reports of Elliot Strauss, D.C., Tonuca Basu, M.D., and Ahmed Elfiky, M.D. (Pl.'s Ex. A; Pl.'s Ex. C; and Pl.'s Ex. D, respectively). Counsel for plaintiff submits that plaintiff was taken from the scene of the accident by ambulance to Mercy Medical Center where she was examined and released. Plaintiff avers that she sought chiropractic treatment from the Hempstead Family Chiropractic Group, which she received for "about a year" after the accident (Pl.'s Ex. B, pp. 25-27).

The medical reports submitted by plaintiff are neither sworn to nor affirmed. This renders them inadmissible, thus insufficient to raise a triable issue. Unlike movant's proof, unsworn reports of plaintiff's examining doctor or a chiropractor are not in admissible form, thus not sufficient to defeat a motion for summary judgment (*see, Grasso v. Angerami*, 79 NY2d 813 [1991]; *Pagano v. Kingsbury*, 182 AD2d 268 [2d Dept. 1992]).

Defendants submit that plaintiff did not sustain a serious injury that prevented her from performing substantially all of her activities for at least 90 out of the 180 days immediately following the accident and that any inability to perform activities was nothing more than a "slight curtailment." To prevail under the "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" category, a plaintiff must demonstrate through competent, objective proof, a "*medically determined* injury or impairment of a non-permanent nature" (Insurance Law §51029(d), emphasis added) "which would have caused the alleged limitations on the plaintiff's daily activities" (*Monk v. Dupuis*, 287 AD2d 187, 191 [3d Dept. 2001]). Further, a plaintiff must prove the alleged limitation or impairment curtailed plaintiff's usual activities "to a great extent rather than some slight curtailment" (*Licari v. Elliott,* 57 NY2d at 236; *see also, Sands v. Stark*, 299 AD2d 642 [3d Dept. 2002]). Ms. Gayle testified at her deposition that she missed "almost" three months of work immediately following the accident, and stated both in her Second Amended Verified Bill of Particulars and to Dr. Katz during his medical examination on November 5, 2010, that she missed only two and one-half months (Def.'s Ex. F; Def.'s Ex. E; Def.'s Ex. H).

In her affidavit submitted in opposition to the motion, Ms. Gayle avers that she was unable to perform her daily household work and daily activities and that even after returning to work the pain from injuries sustained from the accident prevented her performance of her employment duties. Plaintiff's self-serving comments concerning her inability to perform her usual and customary daily activities for two and one-half months after the accident, without more, are insufficient to defeat a motion for summary judgment (*see*, *Atamian v. Mintz*, 216 AD2d 430 [2d Dept. 1995]; *Phillips v. Costa*, 160 AD2d 855 [2d Dept. 1990]). Furthermore, claims of subjective complaints of occasional pain or recurrent pain fail to satisfy the statutory threshold showing of a "serious injury" *(see, Christianson v. Metropolitan Suburban Bus Auth.*, 157 AD2d 703 [2d Dept. 1990]; *Licari v. Elliott*, 57 NY2d at 239).

As stated above, unsworn reports of a plaintiff's examining doctor or a chiropractor are not sufficient to defeat a motion for summary judgment (*Grasso v. Angerami*, 79 NY2d 813 [1991]). Plaintiff therefore "failed to proffer competent medical evidence showing that [s]he was unable to perform substantially all of [her] daily activities for not less than 90 of the first 180 days subsequent to the subject accident (citations omitted)" (*Sealy v. Riteway-1, Inc.*, 54 AD3d 1018 [2d Dept. 2008]; *see, Sainte-Aime v. Ho*, 274 AD2d 569 [2d Dept. 2000]; *Below v. Randall*, 240 AD2d 939 [3d Dept. 1997]).

Based upon a complete reading of defendants' proof, including plaintiff's deposition testimony, this Court finds that defendants have sufficiently demonstrated that plaintiff's injuries are not sufficient to qualify as "serious injuries" under the relevant categories of Insurance Law §5102(d). Plaintiff, having failed to submit evidentiary proof in admissible form on these limited categories sufficient to create material issues of fact requiring a trial to resolve (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]), compels this Court to grant summary judgment dismissal of plaintiff's claims.

Defendants' motion for summary judgment is granted, and the complaint is dismissed.

This decision constitutes the order of the court.

Dated: 6-28-11

HON THOMAS P. PHELAN

J.S.C.

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