SHORT FORM ORDER

COPY

INDEX No. 08-35109
CAL. No. 10-02036MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 2-22-11
ADJ. DATE 4-11-11
Mot. Seq. # 001 - MG; CASEDISP

DONNA G. MULLER,

Plaintiff,

- against -

LAWRENCE FENSTER,

Defendant.

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Upon the following papers numbered 1 to 21 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 13 - 21; Replying Affidavits and supporting papers _____; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is.

ORDERED that this motion by defendant Lawrence Fenster seeking summary judgment dismissing plaintiff's complaint is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff Donna Muller as a result of a motor vehicle accident that occurred on the Long Island Expressway ("LIE"), at or near exit 55, in the Town of Islip on March 28, 2007. The accident allegedly occurred when the vehicle owned and operated by defendant Lawrence Fenster struck the rear of the vehicle operated by plaintiff while it was stopped in the left lane of the LIE due to traffic conditions. By her bill of particulars, plaintiff alleges that she sustained various personal injuries as a result of the accident, including cervical and lumbar sprain/strain, loss of range of motion in the cervical and lumbar regions of her spine, and headaches. Plaintiff alleges that as a result of such injuries she was incapacitated from her employment as a marketing communication coordinator at Sartorius Stedim North America Inc. for approximately two days and from her household duties for approximately seven days.

Defendant now moves for summary judgment on the basis that plaintiff's injuries do not meet the "serious injury" threshold requirement of Insurance Law § 5102(d). In support of the motion, defendant submits a copy of the pleadings, plaintiff's deposition transcript, plaintiff's unsworn medical records, and the medical reports of Dr. Isaac Cohen and Dr. Elliott Friedel. At defendant's request, Dr. Friedel and Dr. Cohen conducted independent orthopedic examinations of plaintiff on October 23, 2007 and December 17, 2009, respectively.

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, 798, 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 [2d Dept 1988]; ***Nolan v Ford***, 100 AD2d 579, 473 NYS2d 516 [1984], *aff'd* 64 NYS2d 681, 485 NYS2d 526 [2d Dept 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."

To recover under the "limitations of use" categories, a plaintiff must present objective medical evidence of the extent, percentage or degree of the limitation or loss of range of motion, and its duration (*see* ***Magid v Lincoln Servs. Corp.***, 60 AD3d 1008, 877 NYS2d 127 [2d Dept 2009]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2d Dept 2006]; ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2d Dept 2006]; ***Meyers v Bobower Yeshiva Bnei Zion***, 20 AD3d 456, 797 NYS2d 773 [2d Dept 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]). Further, evidence of pain and discomfort alone, unsupported by credible medical evidence that diagnoses and identifies the injuries, is insufficient to sustain a finding of serious injury (*see* ***Scheer v Koubek***, 70 NY2d 678, 518 NYS2d 788 [1987]).

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 [2d Dept 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 [2d Dept 2001]; ***Grossman v Wright***, 268 AD2d 79, 707 NYS2d 233 [2d Dept 2000]; ***Vignola v Varrichio***, 243 AD2d 464, 662 NYS2d 831 [2d Dept 1997]; ***Torres v Micheletti***, 208 AD2d 519,616 NYS2d 1006 [2d Dept 1994]). Once the defendant has met this burden, the 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 [4th Dept 2003]; ***Pagano v Kingsbury***, *supra*). 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 [2d Dept 2006]; ***Rich-Wing v Baboolal***, 18 AD3d 726, 795 NYS2d 706 [2d Dept 2005]; *see generally*, ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]).

Dr. Cohen's medical report states, in pertinent part, that an examination of the cervical spine revealed that plaintiff exhibits "flexion and extension in the 45-degree range (normal 45 to 65), lateral bending to the right and the left in the 45-degree range (normal 46 +-6.5), and rotational motion is to 75 degrees to the right and left (normal 78 +-15)." Dr. Cohen's report states that an examination of plaintiff's lumbosacral spine revealed that she exhibits "flexion to 70 degrees (normal up to 66+-15), extension to 30 degrees (normal up to 33 +-5.5), and right and left lateral bending to 25 degrees (normal up to 29 +-6.6). Left and right rotational motion is possible to 30 degrees (normal up to 30)." The report states that upon palpation of plaintiff's cervical and lumbosacral paravertebal area, the muscles are supple and non-tender, that muscle strength is 5/5, and that the straight leg raising test was negative and performed to 90 degrees (normal is 90 degrees). Dr. Cohen opines that the strains to plaintiff's cervical and lumbar regions of her spine have resolved, that she has a satisfactory functional capacity of the musculosketelal without evidence of active sequelae or permanency related to the accident, and that she is capable of performing her normal daily living activities.

Similarly, Dr. Friedel in his medical report states, in relevant part, that an examination of plaintiff's cervical spine revealed that she exhibits flexion of 45 degrees (normal is 45 degrees), extension of 45 degrees (normal is 45 degrees), right and left lateral flexion of 45 degrees (normal is 30 to 45 degrees), and right and left rotation of 60 degrees (normal is 60 degrees). Dr. Friedel's report states that an examination of plaintiff's lumbar spine revealed that she exhibits flexion of 90 degrees (normal is 90 degrees), extension of 30 degrees (normal is 30 degrees), right and left lateral flexion of 30 degrees (normal is 30 degrees), and right and left rotation of 30 degrees (normal is 30 degrees). The report also states that plaintiff walks with a normal gait, that she was able to heel and toe walk, and that her straight leg raising test was negative. Dr. Friedel concludes that plaintiff's cervical,

thoracic and lumbar sprains/strains have resolved, that she does not have a disability, and that she is not in need of any treatment from an orthopedic perspective.

Defendant's submissions established a prima facie case that plaintiff did not sustain an injury within the meaning of Insurance Law § 5102(d) (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***Gaddy v Eyler***, *supra*; ***Singh v City of New York***, 71 AD3d 1121, 898 NYS2d 218 [2d Dept 2010]). Initially, the Court notes that sprains and strains are not serious injuries within the meaning of Insurance Law § 5102(d) (*see* ***Rabolt v Park***, 50 AD3d 995, 858 NYS2d 995 [2d Dept 2008]; ***Washington v Cross***, 48 AD3d 457, 849 NYS2d 784 [2d Dept 2008]; ***Maenza v Letkajornsook***, 172 AD2d 500, 567 NYS2d 850 [2d Dept 1991]). While Dr. Cohen determined that plaintiff had full ranges of motion in the cervical and lumbosacral regions of her spine, his failure to provide the normal degrees of movement in the spine leaves it to the court to speculate as to whether plaintiff's ranges of motion findings were normal, or that any limitations were mild, minor, or slight so as to be considered insignificant within the meaning of the No-Fault statute (*see* ***McLaughlin v Rizzo***, 38 AD3d 856, 832 NYS2d 666 [2d Dept 2007]; ***Powell v Alade***, 31 AD3d 523, 818 NYS2d 600 [2d Dept 2006]; ***Aronov v Leybovich***, 3 AD3d 511, 770 NYS2d 741 [2d Dept 2004]). However, Dr. Friedel's report shows that plaintiff has full range of motion in her cervical and lumber spine, and that she is capable of performing all of her normal daily living activities. In addition, reference to plaintiff's own deposition testimony sufficiently refutes the "limitations of use" categories of serious injury (*see* ***Colon v Tavares***, 60 AD3d 419, 873 NYS2d 637 [1st Dept 2009]; ***Sanchez v Williamsburg Volunteer of Hatzolah, Inc.***, 48 AD3d 664, 852 NYS2d 287 [2d Dept 2008]) and the "90/180" category under Insurance Law § 5102(d) (*see* ***Jack v Acapulco Car Serv., Inc.***, 63 AD3d 1526, 897 NYS2d 648 [4th Dept 2010]; ***Bleszcz v Hiscock***, 69 AD3d 890, 894 NYS2d 481 [2d Dept 2010]; ***Nguyen v Abdel-Hamed***, 61 AD3d 429, 877 NYS2d 26 [1st Dept 2009]; ***Kuchero v Tabachnikov***, 54 AD3d 729, 864 NYS2d 459 [2d Dept 2008]). The burden, therefore, shifted to plaintiff to raise a triable issue of fact (*see* ***Gaddy v Eyler***, *supra*).

Plaintiff, in opposition, asserts that she sustained injuries within the "limitations of use" categories of Insurance Law § 5102(d). In support of the motion, plaintiff submits her own affidavit, the affidavit of John Luchsinger, her physical therapist, her unsworn medical records, and her deposition transcript.

Plaintiff failed to raise a triable issue of fact as to whether she sustained an injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (*see* ***Brite v Miller***, 82 AD3d 811, 918 NYS2d 349 [2d Dept 2011]; ***Srebnick v Quinn***, 75 AD3d 637, 904 NYS2d 675 [2d Dept 2010]; ***Vilomar v Castillo***, 73 AD3d 758, 901 NYS2d 651 [2d Dept 2010]). Plaintiff has proffered insufficient medical evidence to demonstrate that she sustained an injury within the "limitations of use" categories (*see* ***Licari v Elliott***, *supra*; ***Ali v Khan***, 50 AD3d 454, 857 NYS2d 71 [1st Dept 2008]), or within the "90/180" category (*see* ***Jack v Acapulco Car Serv., Inc.***, *supra*; ***Bleszcz v Hiscock***, *supra*; ***Nguyen v Abdel-Hamed***, *supra* [1st Dept 2009]; ***Kuchero v Tabachnikov***, *supra*). The term "significant" limitation must be construed as more than a minor limitation of use (*see* ***Licari v Elliott***, *supra*; ***Leschen v Kollarits***, 144 AD2d 122, 534 NYS2d 233 [3d Dept 1988]; ***Gootz v Kelly***, 140 AD2d 874, 528 NYS2d 446 [3d Dept 1988]). Significantly, no proof has been offered by plaintiff to establish

that her alleged ailment goes beyond temporary discomfort or is not relieved by an aspirin. Merely referring to the "subjective quality of the plaintiff's pain does not fall within the objective definition of serious physical injury" (***Saladino v Meury***, 193 AD2d 727, 727, 597 NYS2d 713 [2d Dept 1993]). The plaintiff's self-serving affidavit was insufficient to establish that she sustained a serious injury as a result of the subject accident (*see* ***Scheer v Koubek***, 70 NY2d 678, 518 NYS2d 788 [1987]; ***Yakubov v CG Trans Corp.***, 30 AD3d 509, 817 NYS2d 353 [2d Dept 2006]).

While the affidavit of plaintiff's physical therapist, John Luchsinger, notes significant limitations in plaintiff's cervical and lumbar spine during his recent examination of plaintiff, the unsworn physical therapy reports of Dr. Luchsinger, which show that plaintiff had limitations in the cervical and lumbar regions of her spine contemporaneous with the accident, were without probative value (*see* ***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]; ***Vidor v Davila***, 37 AD3d 826, 830 NYS2d 772 [2d Dept 2007]; ***Felix v New York City Tr. Auth.***, 32 AD3d 527, 819 NYS2d 835 [2d Dept 2006]). As a consequence, plaintiff failed to proffer any objective medical evidence that revealed the existence of significant limitations of motion in her cervical or lumbar region that were contemporaneous with the subject accident (*see* ***Stevens v Sampson***, 72 AD3d 793, 898 NYS2d 657 [2d Dept 2010]; ***Keith v Duval***, 71 AD3d 1093, 898 NYS2d 184 [2d Dept 2010]; ***Rivera v Bushwick Ridgewood Prop. Inc.***, 63 AD3d 712, 880 NYS2d 149 [2d Dept 2009]). Without such contemporaneous findings, plaintiff is unable to raise a triable issue of fact as to whether she sustained an injury within the "limitations of use" categories of Insurance Law § 5102(d) (*see* ***Vilomar v Castillo***, *supra*). Lastly, plaintiff failed to explain her gap in treatment (*see* ***Pommells v Perez***, *supra*; *cf.* ***Eusebio v Yannetti***, ***Yannetti***, 68 AD3d 919, 892 NYS2d 217 [2d Dept 2009]). In fact, at her deposition, plaintiff testified that she stopped her physical therapy treatments, because "most of her pain was alleviated, and [she] could live with the rest." Accordingly, defendant's motion for summary judgment dismissing plaintiff's complaint is granted.

Dated: 6/20/11

THOMAS F. WHELAN, J.S.C.