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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

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DARLENE GUMAS,

Plaintiff,

-against-

ALISON HACHHAUSER,

Defendant.

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TRIAL/IAS PART 21

INDEX # 25407/09

Motion Seq. 1
Motion Date 6.29.11
Submit Date 8-25-11

The following papers were read on this motion: Papers Numbered

Notice of Motion, Affidavits (Affirmations), Exhibits Annexed..... 1
Answering Affidavit 2
Reply Affidavit..... 3

Upon the foregoing papers, the defendant's motion seeking an order granting summary judgment pursuant to CPLR §3212 and dismissing the plaintiff's complaint on the grounds that the plaintiff's injuries do not satisfy the "serious injury" threshold requirement of Insurance Law § 5102 (d), and thus the complaint for non-economic loss is barred by Insurance Law § 5104 (a) is determined as hereinafter provided.

The plaintiff commenced this lawsuit by filing a summons and complaint wherein the plaintiff claimed personal injuries resulting from a motor vehicle accident which occurred on October 8, 2009 at or near the intersection of Bellmore Avenue and Sunrise Highway, county of Nassau, state of New York. Issue was then joined by service of the defendants' answer.

According to the plaintiff's deposition testimony, after the accident the police responded to the scene, an ambulance did not arrive, plaintiff exited her vehicle unassisted, was not experiencing pain in any part of her body and was able to drive her vehicle from the scene to her workplace. Plaintiff testified that she first sought medical attention because of pain in her lower back and because of headaches. X-rays were taken at Medical First Aid and chiropractic

treatment was rendered by Dr. Rosner within a week of the first doctor's visit. Plaintiff testified that she was treated by Dr. Rosner regularly until the winter of 2010, then discontinued treatment with him. Thereafter, plaintiff received physical therapy two or three times per week for a few months then stopped treating in the summer of 2010. Plaintiff testified that she saw Dr. Parker, an orthopedist, on three or four occasions, the last time being in 2010.

Plaintiff no longer receives medical treatment for injuries allegedly sustained as a result of this accident, nor does she have any future medical appointments scheduled. She testified that she was confined to her bed for one day as a result of the accident and missed less than one week of work. The court notes that this contradicts plaintiff's bill of particulars.

The plaintiff claims that as a result of the subject accident she sustained the following injuries: cervical and lumbar derangement and radiculopathy; posterior disc herniation at L5-S1 impinging on the left nerve root; posterior disc herniations at C5/6 and C6/7 both eccentric toward the left impinging on the anterior aspect of the spinal canal on the left interverterbal formina; right L5/S1 radiculopathy; compression deformity in the superior endplate of L3.

The plaintiff contends that the above injuries, due to the subject motor vehicle accident, qualify as "serious injuries," pursuant to Article 51 of the New York State Insurance Law. Under this law, "serious injury" is defined as: (1) death; (2) dismemberment; (3) significant disfigurement; (4) fracture; (5) loss of a fetus; (6) permanent loss of use of body organ or member, function or system; (7) permanent consequential limitation of use of a body organ or member; (8) significant limitation of use of a body function or system; or (9) a medically determined injury of a non-permanent nature that prevents the injured person from performing substantially all of the material acts which constitute his usual and customary daily activity for not less than ninety days during the one hundred and eighty days immediately following the occurrence of the injury (*see McKinney's Consolidated Laws of New York*, Insurance Law § 5102 (d).

Based upon a plain reading of the papers submitted herein, the plaintiff is not claiming that her injuries fall within the first five categories of "serious injury," to wit: death; dismemberment; significant disfigurement; a fracture; or loss of a fetus. Thus, this court will restrict its analysis to the remaining four categories of Insurance Law § 5102 (d): 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.

The defendants argue that the plaintiff's injuries do not meet any definition of "serious injury" as defined in Insurance Law § 5102 (d) and therefore move for summary judgment pursuant to CPLR § 3212 seeking the dismissal of the plaintiff's complaint in its entirety.

In moving for summary judgment, a defendant must make a prima facie showing that the plaintiff did not sustain a "serious injury" within the meaning of the statute. Once this is established, the burden then shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a "serious injury" was sustained (*see Pommels v. Perez*, 4 N.Y.3d 566 [2005]; *see also Grossman v. Wright*, 268 A.D. 2d 79, 84 [2nd Dept. 2000]).

Even where there is ample objective proof of the plaintiff's injury, the Court of Appeals held in *Pommels v. Perez, supra*, that certain factors may nonetheless override a plaintiff's objective medical proof of limitations and permit dismissal of the plaintiff's complaint. Specifically, in *Pommels* the Court of Appeals held that additional contributing factors, such as a gap in treatment, an intervening medical problem, or a pre-existing condition, would interrupt the chain of causation between the accident and the claimed injury.

Additionally, when a defendant's medical expert is rendering an opinion with respect to the plaintiff's range of motion, the medical expert must specify the objective tests upon which the stated medical opinions are based and must compare any findings to those ranges of motion considered normal for the particular body part (see *Browdame v. Candura*, 25 A.D.3d 747 [2nd Dept. 2006]; *Mondi v. Keahan*, 32 A.D.3d 506 [2nd Dept. 2006]; *Qu v. Doshna*, 12 A.D.3d 578 [2nd Dept. 2004]).

Defendant submits a physician's affirmation from Dr. Isaac Cohen, an orthopedist. In his affirmation, Dr. Cohen indicated that his physical examination of plaintiff was essentially unremarkable with completely normal functional capacity of the cervical and lumbosacral spine areas, as well as the upper and lower extremities. Based upon his review of the provided medical records and his examination, there was no evidence of radiculopathy whatsoever. He dismisses the possibility of a compression deformity of L3 as indicated on the MRI findings as it is related to a "Schmorl's deformity" as documented in the official MRI report, and is not related to a posttraumatic event, or this accident.

Dr. Cohen states that as a result of the accident at bar, plaintiff sustained mild strains of the cervical and lumbosacral spine areas. This condition resolved uneventfully with the passage of time. There is no evidence of disability, sequelae or permanency. Plaintiff has a completely normal functional capacity of the musculosketal system and no further treatment is indicated.

Applying the aforesaid criteria to the reports of the various doctors, this Court finds that the moving defendants have established a prima facie case that the plaintiff failed to sustain a "serious injury" as defined by New York State Insurance Law § 5102 (d).

In order for a plaintiff to satisfy the statutory "serious injury" threshold, the legislature requires objective proof of a plaintiff's injury. The Court of Appeals in *Toure v. Avis Rent-a-Car Systems*, 98 N.Y.2d 345, stated that a plaintiff's proof of injury must be supported by "objective

medical evidence . . . paired with the doctor's observations . . . during the physical examination of the plaintiff."

In opposition to the defendants' instant applications, the plaintiff has submitted records from All County MRI & Diagnostic Radiology P.C. (Dr. Richard J. Rizzuti), South Nassau Orthopedic Surgery and Sports Medicine PC (Dr. Richard L. Parker), and Dr. James Liguori. She also submits her own affidavit.

The MRI report of the cervical spine prepared by Dr. Rizzuti dated October 24, 2009 indicates the following: "[P]osterior disc herniations at C5-6 and at C6-7 both eccentric toward the left impinging on the anterior aspect of the spinal canal and on the left intervertebral foramina." The MRI report of the lumbar spine prepared by Dr. Parker dated October 24, 2009 indicates the following: "Posterior disc herniation at L5-S1 impinging on the left nerve root. Mild central compression deformity in the L3 vertebral body superiorly with an associated Schmorl's node, probably of no acute significance. Osteoarthritic changes at L4-5."

On October 19, 2009, November 2, 2009, and June 15, 2011, Dr. Richard L. Parker, an orthopedist, affirmed that plaintiff is partially disabled and that her injuries are causally related to the subject accident. He indicates that plaintiff suffered a decreased range of motion in her cervical and lumbar spine. He recommended chiropractic care, physical therapy, and epidural injections.

On March 18, 2010, Dr. James Liguori, a neurologist, affirmed that upon range of motion testing with inclinometer there is a limitation of the cervical spine and lumbar spine. On November 30, 2009, Dr. Liguori conducted nerve conduction studies, wave studies, reflex studies and EMG studies. The electrodiagnostic study revealed evidence of right L5-S1 radiculopathy. On July 9, 2011, Dr. Liguori performed additional range of motion testing with inclinometer which revealed decreased range of motion of the lumbar spine. In his letter dated July 19, 2011, Dr. Liguori states that plaintiff's lapse of treatment was due to the fact that the patient was recommended to continue physical therapy.

Plaintiff additionally submitted her own affidavit which states that as a result of the accident, she was unable to attend her employment for several days immediately thereafter. She was confined to her home after work and on weekends for approximately four (4) months following the accident. She indicates that she stopped seeing Drs. Parker and Liguori because she didn't believe treatment would improve her condition and her insurance had stopped paying for treatment which she could not afford to pay herself. When examining medical evidence offered by a plaintiff on a threshold motion, the court must ensure that the evidence is objective in nature and that a "plaintiff's subjective claims as to pain or limitations of motion are sustained by verified objective medical findings" (*Grossman v. Wright*, 268 A.D.2d 79 [2nd Dept 2000]).

Further, in addition to providing medical proof contemporaneous with the subject accident, the plaintiff must also provide competent medical evidence containing verified objective findings based upon a recent examination wherein the expert must provide an opinion as to the

significance of the injury (see *Kauderer v. Penta*, 261 A.D.2d 365 [2nd Dept 1999]; *Constantinou v. Surinder*, 8 A.D.3d 323 [2nd Dept. 2004]; *Brown v. Tairi Hacking Corp.*, 23 A.D.3d 323 [2nd Dept. 2005]).

Applying the foregoing principles to the medical evidence proffered by the plaintiff, the court finds that the plaintiff has successfully raised a triable issue of fact.

To meet the threshold regarding the significant limitation of use of a body function or system or permanent consequential limitation category, the law requires that the limitation be more than minor, mild, or slight, and that the claim be supported by medical proof based upon credible medical evidence of an objectively measured and quantified medical injury or condition. *(see Gaddy v. Euler*, 79 N.Y.2d 955, 582 NYS2d 990 [1992], *Licari v. Elliot*, 57 N.Y.2d 230, 455 NYS2d 570 [1982]; *Scheer v. Koubeck*, 70 N.Y.2d 678 518, NYS2d 788 [1987]).

The medical reports of Dr. Liguori proffered as evidence by the plaintiff provide an objective indication of a permanent consequential limitation that was caused by the subject accident.

When a claim is raised under the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, then, in order to prove the extent or degree of the physical limitation, an expert's designation of a numeric percentage of the plaintiff's loss of range of motion is acceptable (*see Toure v. Avis Rent-a-Car Systems, Inc.*, 98 N.Y.2d 345 [2002], *supra*). In addition, an expert's qualitative assessment of a plaintiff's condition is also probative, provided that: (1) the evaluation has an objective basis, and (2) the evaluation compares the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (*see* id).

Although Dr. Parker fails to indicate the objective tests upon which he based his opinions, Dr. Liguori delineated the objective tests that were performed which serve as the basis for his conclusions. Plus, the electrodiagnostic testing by Dr. Liguori revealed evidence of right L5-S1 radiculopathy. Defendant's argument that the MRI results should be disregarded because the doctor who performed them was reprimanded by the New York State Board for Professional Medical Conduct for "over-interpreting" MRI studies on several occasions raises a question of credibility for the jury.

In the instant matter, although the defendant did succeed in making a prima facie showing that the plaintiff did not sustain a serious injury pursuant to the Insurance Law, the plaintiff successfully countered this showing with sufficient medical evidence demonstrating the existence of material issues of fact that she has in fact sustained a "serious injury" pursuant to the aforementioned insurance law.

Accordingly, based on the foregoing, the motion by the defendant for summary judgment dismissing the claims against her must be **DENIED**.

The foregoing constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
September 13, 2011

ENTER:

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