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Index No: 14027/2009

SHORT FORM ORDER

Supreme Court - State of New York
IAS PART 6 - SUFFOLK COUNTY

MOTION DATE: 01-28-2011
ADJ. DATE: 04-28-2011
MOT. SEQ: 001 MG

PRESENT:

Hon. RALPH T. GAZZILLO
A.J.S.C.

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SUSAN EBERHARDT,

Plaintiff(s),

- against -

MARNI METZLER,

Defendant(s).

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Upon the following papers numbered 1 to 24 read on this motion for summary judgment; Notice of Motion and supporting papers 1-9; Defendant's Memorandum of Law; Answering Affidavits and supporting papers 11- 20; Plaintiff's Memorandum of Law; Replying Affidavits and supporting papers 21- 24; it is,

ORDERED that this motion (001) by defendant for an order granting her summary judgment on the basis that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d) is granted; and it is further

ORDERED that counsel for movant shall serve a copy of this Order with Notice of Entry upon counsel for all other parties, pursuant to CPLR §§2103(b)(l), (2) or (3), within thirty (30) days of the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court.

This is an action to recover damages for serious injuries allegedly sustained by plaintiff Susan Eberhardt as a result of a motor vehicle accident which occurred at the intersection of Route 25A and Park Avenue on February 27, 2008. The accident allegedly happened when the plaintiff, the first vehicle stopped at a traffic signal, was involved in a chain reaction accident involving a total of four vehicles. Defendant now moves for summary judgment on the basis that plaintiff did not sustain a "serious injury" as defined in Insurance Law § 5102 (d).

Turning to the threshold issues, Insurance Law § 5102 (d) defines "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."

It is for the court to determine in the first instance whether a prima facie showing of "serious injury" has been made out (***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]). Such proof, in order to be in a competent or admissible form, shall consist of affidavits or affirmations (***Pagano v Kingsbury,*** 182 AD2d 268, 587 NYS2d 692 [2d Dept 1992]). The proof must be viewed in a light most favorable to the nonmoving party, here, the plaintiff (***Cammarere v Villanova,*** 166 AD2d 760, 562 NYS2d 808 [3d Dept 1990]).

In support of her application, the defendant asserts that, based upon her deposition testimony the plaintiff only missed one day of work and that she didn't anticipate missing additional time, that the plaintiff had a previous neck injury and that the prior injury had not been resolved at the time she was involved in the instant motor vehicle accident. Defendant also asserts that the plaintiff was never hospitalized and that she was treated only intermittently by Dr. Finkel and that the longest she was continuously treated for the injury was three months. Further, defendant argues that the plaintiff traveled to Boston, London and Paris since the accident and that she did "light walking" on one of these trips. Defendant also submits the independent film review of Dr. Sheldon Feit who examined the plaintiff's MRI on June 29, 2009 and concluded that the MRI taken two months after the subject accident failed to demonstrate evidence of any meniscal tear, ligamentous injury, or fracture. Dr. Feit concluded that there were no abnormalities causally related to the injury of February 27, 2008. Dr. Salvatore Corso conducted an independent orthopedic examination of the plaintiff on June 29, 2009. Dr. Corso compared plaintiff's observed range of motion to what is considered to be normal and determined that her range of motion is normal. Dr. Corso concluded that plaintiff's cervical and lumbar sprains were resolved as well as was her knee contusion and that there was no evidence of orthopedic disability. Defendant also alleges that plaintiff's own doctors concluded that the plaintiff did not sustain a "serious injury".

Based upon the adduced evidence, defendants have established their entitlement to judgment as a matter of law that plaintiff Susan Eberhardt did not sustain a "serious injury" as a result of the subject accident (*see* ***Pommells v Perez***, *supra*; ***Gaddy v Eyler***, *supra*; ***Knox v Lennihan***, 65 AD3d 615, 884 NYS2d 171 [2009]; ***Albano v Onolfo***, 36 AD3d 728, 830 NYS2d 205 [2007]; ***Giraldo v Mandanici***, 24 AD3d 419, 805 NYS2d 124 [2005]). Defendants' orthopedist, Dr. Corso, tested the ranges of motion in plaintiff's cervical and lumbar spines with a goniometer setting forth his specific

measurements, as well as compared plaintiff's ranges of motion to the normal ranges (*see* ***Cantave v Gelle***, 60 AD3d 988, 877 NYS2d 129 [2009]; ***Staff v Yshua***, 59 AD3d 614, 874 NYS2d 180 [2009]). Dr.Corso's report states that an examination of plaintiff reveals that she has full ranges of motion in her cervical and thoracolumbar spines. The report concludes that there is no evidence of orthopedic disability.

Therefore, the burden shifted to plaintiff to come forward with competent admissible medical evidence based on objective findings, sufficient to raise a triable issue of fact that she sustained a "serious injury" (*see* ***Gaddy v Eyler***, *supra*; ***Luckey v Bauch***, 17 AD3d 411, 792 NYS2d 624 [2005]; ***McLoyrd v Pennypacker***, 178 AD2d 577 NYS2d 272 [1991]). A plaintiff must demonstrate a total loss of use of a body organ, member, function or system to recover under the "permanent loss of use" category,(*see* ***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). "Whether a limitation of use or function is 'significant' or 'consequential' * * * relates to medical significance and involves a comparative determination of the degree or qualitative nature of an injury based on the normal function, purpose and use of the body part" (***Dufel v Green***, *supra at* 798; *see* ***Toure v Avis Rent A Car Sys.***, *supra*). Therefore, in order for a plaintiff to prove the extent or degree of physical limitation under the "permanent consequential limitation of use of a body organ or member" or the "significant limitation of use of a body function or system" category, a plaintiff must present either 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 [2009]; ***Laruffa v Yui Ming Lau***, 32 AD3d 996, 821 NYS2d 642 [2006]; ***Cerisier v Thibiu***, 29 AD3d 507, 815 NYS2d 140 [2006]; ***Meyers v Bobower Yeshiva Bnei Zion***, 20 AD3d 456, 797 NYS2d 773 [2005]). The plaintiff must also present medical proof contemporaneous with the accident showing the initial restrictions in movement or an explanation for its omission (*see* ***Bell v Rameau***, 29 AD3d 839, 814 NYS2d 534 [2006]; ***Suk Ching Yeung v Rojas***, 18 AD3d 863, 796 NYS2d 661 [2005]; ***Ifrach v Neiman***, 306 AD2d 380, 760 NYS2d 866 [2003]), as well as objective medical findings of restricted movement based on a recent examination (*see* ***Laruffa v Yui Ming Lau***, *supra*; ***Murray v Hartford***, 23 AD3d 629, 804 NYS2d 416 [2005], *lv denied* 6 NY3d 713, 816 NYS2d 748 [2006]; ***Batista v Olivo***, 17 AD3d 494, 795 NYS2d 54 [2005]; ***Kauderer v Penta***, 261 AD2d 365, 689 NYS2d 190 [1999]). 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.***, 98 NY2d 345, 746 NYS2d 865 [2000]; ***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]). Moreover, a plaintiff alleging injury within the "limitation of use" categories who ceases treatment after the accident must provide a reasonable explanation for having done so (***Pommells v Perez***, 4 NY3d 566; *see* ***Ferebee v. Sheika,*** 58 AD3d 675; ***Besso v. DeMaggio***, 56 AD3d 596).

In opposition to defendants' showing, plaintiffs failed to meet their burden (*see* ***Fest v Agnew***, 68 AD3d 1051, 890 NYS2d 357 [2009]; ***Colvin v Maille***, 127 AD2d 926, 511 NYS2d 982 [1987]; *lv denied* 69 NY2d 611; 517 NYS2d 1026 [1987]; *see generally* ***Zuckerman v City of New York***, *supra*). Plaintiffs have not submitted any evidence to establish that the injuries Susan Eberhardt allegedly sustained resulted in a significant limitation of her lumbar, cervical regions and/or her left knee. 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 [1988]; ***Gootz v Kelly***, 140 AD2d

874, 528 NYS2d 446 [1988]). Here, plaintiff primarily relies upon the affidavit of Noah S. Finkel, M.D., who treated her from March 31, 2008 until March 3, 2011. Dr. Finkel opines that plaintiff's examination revealed "restricted" ranges of motion and that there are "fundamental limiations as to the plaintiff's cervical spine and knee." Finally, Dr. Finkel concludes that in his opinion "Mrs. Eberhardt has sustained substantial significant injuries to her neck and left knee which are permanent in nature."

Dr. Finkel's report, however, is insufficient to defeat defendants' motion for summary judgment (*see* ***Stevens v Sampson***, 72 A.D.3d 793 [2d Dept 2010]; ***Colvin v Maille***, 127 AD2d 926, 511 NYS2d 982 [1987]; *lv denied* 69 NY2d 611; 517 NYS2d 1026 [1987]). While Dr. Finkel's report states that plaintiff has pain and restricted ranges of motion in her cervical spine and left knee, Dr. Finkel's report inexplicably fails to set forth any range of motion findings or the objective tests that were performed to support his conclusion that plaintiff sustained a "serious injury" (*see* ***Sierra v Gonzalez First Limo***,71 A.D.3d 864, 895 NYS2d 863 [2010]; ***Taylor v Flaherty***, 65 AD3d 1328, 887 NYS2d 144 [2009]; ***Zavala v DeSantis***, 1 AD3d 354, 766 NYS2d 598 [2003]; ***Black v Robinson***, 305 AD2d 438, 759 NYS2d 741 [2003]). Significantly, no proof has been offered by plaintiff to establish that her alleged ailment goes beyond temporary discomfort. The subjective complaints of pain and impaired joint function expressed by plaintiff during her deposition and in Dr. Finkel's report are insufficient to raise a triable issue of fact (*see* ***Sheer v Koubek***, 70 NY2d 678, 518 NYS2d 788 [1987]; ***Penaloza v Chavez***, *supra*; ***Rudas v Petschauer***, 10 AD3d 357, 781 NYS2d 120 [2004]; ***Mahoney v Zerillo***, 6 AD3d 403, 774 NYS2d 378 [2004]; ***Barrett v Howland***, 202 AD2d 383, 608 NYS2d 681 [1994]). Consequently, Dr. Finkel's assertion that plaintiff has sustained a significant limitation to her cervical regions and left knee is speculative and fails to adequately address defendants' expert's report that plaintiff has full ranges of motion in those areas (*see* ***Marrache v Akron Taxi Corp.***, 50 AD3d 973, 856 NYS2d 239 [2008]; ***Giraldo v Mandanici***, 24 AD3d 419, 805 NYS2d 124 [2005]; ***Ginty v MacNamara***, 300 AD2d 624, 751 NYS2d 790 [2002]). Further, there is no evidence that Dr. Finkel reviewed and relied upon affirmed medical reports and/or affidavits as none were referred toor attached to his report. ***Merisca v. Alford***, 243 AD2d 613. The remaining submissions of plaintiff were without probative value in opposing the motion, because they were either non-medical in nature unsworn or unaffirmed (*see* ***Vidor v Davila***, *supra*; ***Felix v New York City Tr. Auth.***, 32 AD3d 527, 819 NYS2d 835 [2006]; ***Yakubov v CG Trans Corp.***, 30 AD3d 509, 817 NYS2d 353 [2006]).

Finally, the fact that plaintiff is unable to perform a few enumerated tasks for a lengthy period without pain does not constitute a curtailment from performing substantially all of her usual activities to a great extent (*see* ***Licari v Elliott***, *supra*; ***Crane v Richard***, 180 AD2d 706, 579 NYS2d 736 [1992]). As a result, plaintiff, who testified at her deposition that she missed "one day" from work due to her injuries and that her walking and stairmaster activities were limited, failed to raise a triable issue as to whether she was substantially curtailed from *all* of her usual and customary activities for 90 of the first 180 days following the accident (*see* ***Rennell v Horan***, 225 AD2d 939, 639 NYS2d 171 [1996]; ***Balshan v Bouck***, 206 AD2d 747, 614 NYS2d 487 [1994]; ***Kimball v Baker***, 174 AD2d 925, 571 NYS2d [1991]). Accordingly, defendants' motion for summary judgment is granted.

Dated: 9/27/11
RIVERHEAD, NY

Ralph T. Gazzillo
A.J.S.C.

NON-FINAL DISPOSITION

FELBERBAUM, HALBRIDGE & WIRTH
Attorneys for Plaintiff
357 Veterans Memorial Highway
Commack, NY 11725

RUSSO, APOZNANSKI & TAMBASCO
Attorneys for Defendant
875 Merrick Avenue
Westbury, NY 11590