CASEDISP
Threshold
Serious Injury
not met
10/17/11

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20

SEGUNDA PADUANI,

Plaintiffs,

-against-

RAZIA AVILA, KAYSTEL AVILA and CHARLIE RODRIGUEZ,

Defendant.

Index No. 303099/09

DECISION/ORDER

Present:
HON. KENNETH L. THOMPSON, Jr.

The following papers numbered 1 to ___ read on this motion, _____

No On Calendar of	PAPERS NUMBERED
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed	
Answering Affidavit and Exhibits	
Replying Affidavit and Exhibits	
Affidavit	
Pleadings -- Exhibit	
Stipulation -- Referee's Report --Minutes	
Filed papers	

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendant's CHARLIE RODRIGUEZ motion for an Order pursuant to CPLR § 3212 granting summary judgment on the grounds that Plaintiff SEGUNDA PADUANI did not suffer a "serious injury" under the Insurance Law, and Defendants' RAZIA AVILA and KAYSTEL AVILA motion for an Order pursuant to CPLR § 3212 granting summary judgment on the grounds that Plaintiff SEGUNDA PADUANI did not suffer a "serious injury" under the Insurance Law are consolidated herein.

Defendant's CHARLIE RODRIGUEZ motion is GRANTED.

Defendants' RAZIA AVILA and KAYSTEL AVILA motion is GRANTED.

Plaintiff claims that as a result of a car accident involving Defendants, she suffered, among other things, disc herniations at L1-L2, L2-L3, L3-L4 and L5-S1, cervical and lumbar radiculopathy, and right shoulder supraspinatus tendinosis and impingement.

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Serious Injury

> '[S]erious injury' means 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.

N.Y. Ins. Law § 5102(d).

The purpose of the statute is "to weed out frivolous claims and limit recovery to significant injuries." Dufel v. Green, 84 N.Y.2d 795, 798. As such, the Court has determined that the phrases "permanent loss of use," "permanent consequential limitation" and "significant limitation of use" must be interpreted in terms of "total loss." Oberly v. Bangs Ambulance Inc., 96 N.Y.2d 295, 299. Furthermore, the word "significant" as it relates to "limitation of use of a body function or system," refers to more than "a minor, mild or slight limitation of use." Licari v. Elliott, 57 N.Y.2d 230, 236. Also, the phrase "substantially all" as it relates to the 90/180, should be "construed to mean that the person has been curtailed from performing his or her usual activities to a great extent rather than some slight curtailment." Id. Although no-fault insurance is meant to allow plaintiffs to recover for non-economic injuries in appropriate cases, the Legislature also "intended that the court first determine whether or not a prima facie case of serious injury has been established which would permit plaintiff to maintain a common-law cause of action in tort." Id. at 237.

Summary Judgment

> To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor and he must do so by tender of evidentiary proof in admissible form... One opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require trial of material questions of fact on which he rests his claims . .

Zuckerman v. City of NY, 49 N.Y.2d 557, 562 (citations omitted).

Defendants' burden

Defendants have met their *prima facie* burden of showing that Plaintiff CHARLIE RODRIGUEZ did not sustain a "serious injury" with the affirmed reports of their orthopedist, Dr. Arnold T. Berman, M.D. and radiologist, Dr. Melissa Sapan Cohn, M.D. See Meric v. Cancela, 275 A.D.2d 309 (affirmed reports of orthopedist who examined plaintiff in automobile negligence action and found she had no disability established *prima facie* case that plaintiff had not sustained serious injury); Turner v Benycol Transp. Corp., 78 A.D.3d 506 (finding that defendant had met its *prima facie* burden where its orthopedic surgeon "reported normal ranges of motion in all tested body areas and concluded that plaintiff's injuries resolved without permanency"); Kuperberg v Montalbano, 72 A.D.3d 903, 904 (radiologist "reviewed the foregoing MRI and found that it revealed no evidence of acute traumatic injury to the plaintiff's right shoulder"). see also Vidal v. Maldonado, 23 Misc.3d 186.

Although the Plaintiffs would bear the burden at trial of proving that they suffered a serious injury, in this motion for summary judgment the Defendant bears the initial burden of establishing that Plaintiff did not meet the serious injury threshold. Where

Defendant establishes a prima facie case that Plaintiff's injuries were not serious within the meaning of Insurance Law § 5102(d), the burden is then shifted to the Plaintiff to overcome Defendant's motion by demonstrating that she sustained a serious injury. Gaddy v. Eyler, 79 N.Y.2d 955. As such, Plaintiff must now come forward with "objective medical proof of a serious injury" causally related to the accident to forestall the dismissal of his Complaint. Pomells v. Perez, 4 N.Y.2d 566, 574; Gaddy v. Eyler, 79 N.Y.2d 955. The Court finds, however, that Plaintiff has not met this burden in five aspects.

Bulges and herniations

Although "[a] bulging or herniated disc may very well be a serious injury within the meaning of the statute, and a CT scan or MRI constitutes objective medical evidence to support subjective complaints of such a painful condition . . . a plaintiff must still offer some objective evidence of the extent or degree of his alleged physical limitations and their duration, resulting from the disc injury." Arjona v. Calcano, 7 AD3d 279; see also Pommells v. Perez, 4 NY3d 566, 574 (holding that "proof of a herniated disc, without additional objective medical evidence establishing that the accident resulted in significant physical limitations, is not alone sufficient to establish a serious injury"); Howell v. Reupke, 16 AD3d 377 (holding that "[t]he mere existence of a bulging or herniated disc is not conclusive evidence of a serious injury in the absence of any objective evidence of a related disability or restriction").

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No contemporaneous exam

First, Plaintiff has failed to submit competent medical evidence, contemporaneous with the subject accident that revealed *any* injuries or limitations. Compare Christian v. Waite, 61 A.D.3d 581; See Posa v Guerrero, 2010 NY Slip Op 7730, **2; Srebnick v Quinn, 75 A.D.3d 637; Catalano v Kopmann, 73 A.D.3d 963; Sirma v. Beach, 59 A.D.3d 611; Valentin v. Pomilla, 59 A.D.3d 184.

Dr. Douglas A. Schwartz's May 3, 2011 Report is the only competent evidence containing indicia of an injury or limitation. The examination that formed the basis of the Report, however, was not done until over three years after the alleged accident. Therefore, regardless of any injuries or limitations the Report alludes to, they are unavailing absent contemporaneous findings of same. See Toure v. Avis Rent a Car Sys., 98 N.Y.2d 345; see also D'Amato v. Mandello, 2 A.D.3d 482 (granting summary judgment based on "plaintiff's medical experts fail[ure] to establish the duration of the alleged reduction in the plaintiff's cervical range of motion following the subject accident"); Beckett v. Conte, 176 A.D.2d 774 (finding insufficient proof regarding the duration of an 11% impairment in plaintiff's spine because the experts' "affidavits were prepared two to three years after the medical examinations upon which the opinions therein were based"); Jimenez v. Rojas, 26 A.D.3d 256 (finding a failure of plaintiff's proof where "no objective findings of the injured plaintiff's purported loss of range of motion . . . were made until more than two years after the accident").

Unaffirmed reports

Second, the Court may not consider the Bronx Park Medical, P.C. records because they are all unaffirmed, unsworn and uncertified. See Kramer v. Danalis, 62 A.D.3d 583 (holding that a physician's report that was unsworn and unsigned was insufficient to defeat summary judgment); Uribe-Zapata v. Capallan, 54 A.D.3d 936, 937 (holding that "[t]he magnetic resonance imaging reports concerning the plaintiff's lumbar spine and right knee lacked probative value since they were unaffirmed").

No causation

Third, although Dr. Ronald Roskin's MRI reviews are admissible, they are unavailing to Plaintiff since the doctor failed to connect any findings with the subject accident. See Daisernia v. Thomas, 12 A.D.3d 998 (dismissing plaintiff's complaint because she "fail[ed] to causally connect her . . . injury to the accident"); Foley v. Karvelis, 276 A.D.2d 666, 667 (dismissing plaintiff's complaint because "[h]er doctor failed to causally connect that injury to the subject accident"); Ray v. Ficchi, 178 A.D.2d 988, 989 (dismissing plaintiff's complaint because "the affidavit of plaintiff's chiropractor failed to connect causally plaintiff's alleged injury to the motor vehicle accident").

Gap-in-treatment

Fourth, there is evidence that "additional contributory factors interrupt[ed] the chain of causation between the accident and claimed injury--such as a gap in treatment . . . [and] a preexisting condition." See Pommells, 4 N.Y.3d at 572; Arjona v. Calcano, 7 AD3d 279, 280; see also Ayala v. Bassett, 57 A.D.3d 387, 389 (stating that "the unexplained gap in treatment . . . for each plaintiff undermined their respective claims of

serious injury based on allegations of permanent injury"); Pitter v. Ceesay, 2009 NY Slip Op 51488U, **1 (stating that "[t]he failure of plaintiff . . . or her physicians to address or explain the gap in treatment is fatal to said plaintiff's serious injury claims under the 'significant limitation' and 'permanent consequential limitation' categories of Insurance Law § 5102(d)"); Bent v. Jackson, 15 A.D.3d 46, 48. Absent evidence of a contemporaneous visit to a physician or of any therapy, there is a gap-in-treatment of over three years—from the time of the February 20, 2008, accident until Dr. Schwartz's May 3, 2011, "re-evaluation."

Dr. Schwartz also failed to address how Plaintiff's prior injuries to her back from a 2000 car accident impacted his opinion. See, e.g., Vidor v. Davila, 37 A.D.3d 826-27 (finding "the injured plaintiff's treating physician failed to adequately account for the prior accident and resulting injuries. Thus ... this physician's findings, both in his affirmation and affirmed reports, that the injuries to the injured [plaintiff] were caused by the subject accident were speculative"); Ponce v. Magliulo, 10 A.D.3d 644 (highlighting Plaintiff's physician's failure to "account for the plaintiff's medical history of neck and back injuries in a motor vehicle accident just one year before the instant accident"); Laurent v. McIntosh, 49 A.D.3d 820, 821 (finding that "[t]his omission clearly rendered speculative her conclusions that the injuries and limitations ... were the result of the subject accident"); see also Blas v. Kanik, 20 Misc. 3d 1116A (holding that When a plaintiff's treating physician fails to address the significance, or lack thereof, of a prior accident, the physician's conclusions causally linking plaintiff's current limitations to the

subject accident are speculative and are not sufficient to rebut defendant's prima facie showing of "lack of serious injury").

90/180

Finally, there is no evidence that Plaintiff was prevented from performing substantially all of her usual and customary daily activities for 90 out of the ensuing 180 days after the accident. Her Verified Bill of Particulars indicates that she was not confined to her bed or home as a result of the accident and that she did not suffer a disability as a result of the accident. (Ver. Bill of Part. at ¶ 6.) She also failed to proffer an Affidavit outlining any alleged curtailments.

The foregoing shall constitute the decision and order of this Court.

Dated: SEP 29 2011

J.S.C.

KENNETH L. THOMPSON, JR.