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COPY

SHORT FORM ORDER

INDEX No. 08-19621
CAL No. 10-02482MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 48 - SUFFOLK COUNTY

PRESENT:

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE 4-19-11
ADJ. DATE 8-18-11
Mot. Seq.# 002 - MG; CASEDISP

ROSMIRA ARIAS,

Plaintiff,

- against -

SUSAN YOUNGSON and JOSEPH BIANCHI,

Defendants.

Action No. 1
Index No. 08-29884

KEVIN T. GRENNAN, PLLC
Attorney for Plaintiff
1000 Franklin Avenue, Suite 302
Garden City, New York 11530

RICHARD T. LAU & ASSOCIATES
Attorney for Defendant Youngson, Action # 1 & 2
300 Jericho Quadrangle, P.O. Box 9040
Jericho, New York 11753

EPSTEIN, FRANKINI & GRAMMATICO
Attorney for Defendant Bianchi, Action # 1 & 2
1393 Veterans Memorial Highway
Hauppauge, New York 11788

ADRIANA V. FORERO and REINEL FORERO,

Plaintiffs,

- against -

JOSEPH M. BIANCHI and SUSAN YOUNGSON,

Defendants.

Action No. 2
Index No. 08-19621

JOHN L. JULIANO, PC
Attorney for Plaintiffs, Action # 2
39 Doyle Court
East Northport, New York 11731

Upon the following papers numbered 1 to 26 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 19 - 22; 23 - 24 ; Replying Affidavits and supporting papers 25 - 26 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Susan Youngson seeking summary judgment dismissing the complaint is granted; and it is further

ORDERED that the Court, sua sponte, grants summary judgment to defendant Joseph Bianchi dismissing the complaint against him.

Plaintiff Adriana Forero commenced this action against defendants Susan Youngson and Joseph Bianchi to recover damages for injuries she allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Sunrise Highway and County Line Road in the Town of Oyster Bay on July 26, 2007. The accident allegedly occurred when the vehicle operated by plaintiff and owned by her husband, Reinel Forero, was struck in the rear by the vehicle operated by Joseph Bianchi while it was stopped at a red light in the left eastbound lane of Sunrise Highway. It is alleged that prior to striking the Forero vehicle, the Bianchi vehicle was struck in the rear by the vehicle owned and operated by defendant Youngson, causing it to strike the Forero vehicle. By her bill of particulars, plaintiff alleges that she sustained various personal injuries as a result of the subject accident, including disc bulges at level C3 through C7; disc herniations at level C4 through C6 and L5/S1; straightening of the curvature of the lumbar spine; and reversal of the normal curvature of the cervical curvature with kyphosis. Plaintiff's husband, Reinel Forero, instituted a claim for loss of services.

Defendant Youngson now moves for summary judgment in her favor on the basis that plaintiff did not sustain a "serious injury" within the meaning of Insurance Law § 5102(d) as a result of the subject accident. In support of the motion, defendant Youngson submits copies of the pleadings, a copy of plaintiff's deposition transcript, uncertified copies of plaintiff's medical records from Nassau University Medical Center's emergency room, and the medical reports of Dr. Jay Nathan and Dr. Melissa Sapan Cohn. At defendant Youngson's request, Dr. Nathan conducted an independent orthopedic examination of plaintiff on June 15, 2009, and Dr. Sapan Cohn performed an independent radiological review of the magnetic resonance images ("MRI") films of plaintiff's cervical and lumbar spine on October 18, 2010.

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."

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 a 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]).

Here, defendant Youngson has established her prima facie entitlement to judgment as a matter of law on the ground that plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) as a result of the subject accident (*see* ***Toure v Avis Rent A Car Sys.***, *supra*; ***DeJesus v Cruz***, 73 AD3d 539, 902 NYS2d 503 [1st Dept 2010]; ***Singh v City of New York***, 71 AD3d 1121, 898 NYS2d 218 [2d Dept 2010]). Defendant Youngson's examining orthopedist, Dr. Nathan, states in his medical report that an examination of plaintiff 's cervical and lumbar regions reveals that she has full range of motion in those areas, despite plaintiff stating it would hurt if she continued to flex her lumbar spine beyond 70 degrees. Dr. Nathan states that upon palpation of her cervical spine, there is no vertebral tenderness or paravertebral spasm, and that although there was minimal tenderness upon palpation of her lumbar spine, no paravertebral spasm is identified. Dr. Nathan states that an examination of plaintiff 's upper and lower extremities reveals that she has full range of motion in those areas and that her motor strength is 5/5, bilaterally. Dr. Nathan states that the straight leg raising test is negative and that plaintiff's gait was normal. Dr. Nathan concludes that plaintiff is not disabled as a result of the subject accident and is capable of performing her usual daily living activities without restrictions.

In addition, Dr. Sapan Cohn in her medical report states that plaintiff suffers from mild diffuse degenerative changes in her cervical and lumbar spine, including bulging discs and herniated discs. Dr.

Sapan Cohn concludes that the observed bulging and herniated discs are degenerative and chronic in nature, and are unrelated to and predated the subject accident.

Therefore, defendant Youngson has shifted the burden to plaintiff to come forward with evidence in admissible form to raise a material triable issue of fact as to whether she sustained an injury within the meaning of the Insurance Law (*see* ***Pommells v Perez.***, 4 NY3d 566, 797 NYS2d 380 [2005]; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). 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]). Unsworn medical reports of a plaintiff's examining physician or chiropractor are insufficient to defeat a motion for summary judgment (*see* ***Grasso v Angerami***, 79 NY2d 813, 580 NYS2d 178 [1991]). However, a plaintiff may rely upon unsworn MRI reports if they have been referred to by a defendant's examining expert (*see* ***Caulkins v Vicinanzo***, 71 AD3d 1224, 895 NYS2d 600 [3d Dept 2010]; ***Ayzen v Melendez***, 299 AD2d 381, 749 NYS2d 445 [2d Dept 2002]).

Plaintiff opposes the motion on the ground that defendant Youngson failed to demonstrate that she did not sustain an injury within the "limitations of use" category or the "90/180" category of Insurance Law § 5102 (d). In opposition to the motion, plaintiff submits her own affidavit and deposition transcript, and the affidavit of Dr. Nizarali Visram.

Initially, the Court notes that plaintiff's affidavit, without a corresponding affidavit from a qualified translator, is inadmissible (*see* CPLR 2101(b); *see also* ***Reyes v Arco Wentworth Mgt.***, 83 AD3d 47, 919 NYS2d 44 [2d Dept 2011]; ***Monteleone v Jung Pyo Hong***, 79 AD3d 988, 913 NYS2d 755 [2d Dept 2010]; ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]). CPLR 2101(b) requires that the affidavits of non-English speaking witnesses be accompanied by a translator's affidavit setting forth the translator's qualifications and the accuracy of the English version submitted to the Court.

Moreover, plaintiff failed to raise a triable issue of fact in opposition to defendant Youngson's prima facie showing as to whether she sustained a serious injury within the meaning of Insurance Law § 5102 as a result of the subject accident (*see* ***Rissew v Smith***, __ AD3d __, 2011 NY Slip Op 07950 [4th Dept 2011]; ***Barry v Future Cab Corp.***, 71 AD3d 710, 896 NYS2d 423 [2d Dept 2010]; *compare* ***MacMillan v Cleveland***, 82 AD3d 1388, 918 NYS2d 263 [3d Dept 2011]; *see generally* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Contrary to plaintiff's contention, it is well

settled that the mere existence of a herniated or bulging disc is not evidence of a serious injury in the absence of objective evidence of the extent of the alleged physical limitations resulting form the injury and its duration (*see* ***Catalano v Kopmann***, 73 AD3d 963, 900 NYS2d 759 [2d Dept 2010]; ***Carabello v Kim***, 63 AD3d 976, 882 NYS2d 211 [2d Dept 2009]; ***Kilakos v Mascera***, 53 AD3d 527, 862 NYS2d 529 [2d Dept 2008]). Plaintiff submits the sworn medical report of her treating physician, Dr. Visram, in which he states that he began treating plaintiff on July 31, 2007, and that he discharged her from his care on March 4, 2008, because she had reached "maximum medical improved," even though the range of motion in her cervical and lumbar regions continued to be restricted. Dr. Visram opines that plaintiff's prognosis for a full and complete recovery is poor, that she is permanently partially disabled, and that the injuries she sustained to her cervical and lumbar regions are causally related to the subject accident. However, Dr. Visram's report fails to address Dr. Sapan Cohn's findings that plaintiff suffers from longstanding degenerative disc changes in her cervical and lumbar spine. Where a defendant presents evidence of a pre-existing condition, it is incumbent upon the plaintiff to present proof to address the defendant's lack of causation (*see* ***Pommells v Perez***, 4 NY3d 566, 797 NYS2d 380 [2005]; ***Kublo v Rzadkowski***, 71 AD3d 831, 899 NYS2d 250 [2d Dept 2010]; ***Larson v Delgado***, 71 AD3d 739, 897 NYS2d 167 [2d Dept 2010]; ***Kreimerman v Stunis***, 74 AD3d 753, 902 NYS2d 180 [2d Dept 2010]; ***Ciordia v Luchian***, 54 AD3d 708, 864 NYS2d 74 [2d Dept 2008]; *compare* ***MacMillan v Cleveland***, *supra*). Plaintiff's affidavit was insufficient to raise a triable issue of fact as to whether she sustained a serious injury within the meaning of Insurance Law § 5102(d) (*see* ***Villante v Miterko***, 73 AD3d 757, 901 NYS2d 311 [2d Dept 2010]).

Finally, plaintiff failed to raise a triable of fact as to whether she sustained a serious injury under the 90/180 category of the Insurance Law, since at her deposition she admitted that she only missed one day of work following the subject accident, and thereafter returned to her employment (*see* ***Haber v Ullah***, 69 AD3d 796, 892 NYS2d 531 [2d Dept 2010]; ***Collado v Abouzeid***, 68 AD3d 912, 890 NYS2d 326 [2d Dept 2009]; ***Vickers v Francis***, 63 AD3d 1150, 883 NYS2d 915 [2d Dept 2009]). Accordingly, defendant Youngson's motion for summary judgment is granted. Having decided and dismissed plaintiffs' complaint against defendant Youngson for failure to sustain an injury within the meaning of Insurance Law § 5102(d), the complaint also is dismissed as against defendant Joseph Bianchi.

Dated: January 10, 2012
Central Islip, NY

HON. HECTOR D. LASALLE, J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION