SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. R. BRUCE COZZENS, JR.
Justice.

TRIAL/IAS PART 4
NASSAU COUNTY

LAURA RIVERA and MITCHELL BLITZ,

Plaintiff(s),

-against-

MOTION #002
INDEX #9658/09
MOTION DATE:
October 11, 2011

KARINA M. MORAN and ALEXANDER L. MORAN,

Defendant(s).

The following papers read on this motion:

Notice of Motion.....1
Affirmation in Opposition.....1
Reply Affirmation.....1

Motion in personal injury action by defendants, Karina M. Moran, and Alexander L. Moran, for an Order of this Court granting Summary Judgment pursuant to CPLR §3212, dismissing the complaint of the plaintiff, Laura Rivera on the grounds that plaintiff has not sustained a serious injury within the meaning of the Insurance Law §5102(d). For the reasons that follow, defendants' motion is granted and plaintiffs' complaint is dismissed.

The instant motion arises from the underlying complaint sounding in negligence. Therein plaintiff alleges that defendants were reckless, careless and negligent in the operation of their motor vehicle and resultantly, caused her to sustain serious injuries pursuant to Insurance Law §5102(d).

Plaintiff, Laura Rivera alleges in her Bill of Particulars that she sustained the following injuries: central disc herniations at C4-C5 and C5-C6; cervical raiculopathy; cervical spine sprain/strain; straightened cervical lordosis; pains in mid back, neck, left shoulder; tenderness in neck, left shoulder and back; left forearm tingling and weakness; persistent insomnia; and headaches.

On May 5, 2008 at the intersection of Route 107 and Bloomingdale Rd., in Hicksville, NY, at about 6:30 p.m., the vehicle operated by defendant, Karina Moran, and owned by

defendant, Alexander Moran, made contact with the vehicle operated by plaintiff, Laura Rivera with plaintiff, Mitchell Blitz as the front seat passenger. According to the plaintiff, her vehicle was stationary and waiting at the at the intersection's red traffic signal when she was struck in the rear by the defendant's vehicle. Plaintiffs filed a Summons and Complaint in this Court in May 2009.

According to the plaintiff, Laura Rivera, she declined to be transported to a hospital by an ambulance that arrived to the accident scene. She did, however, seek treatment at the North Shore University Hospital emergency room later that evening, where she was treated and released within same day. She then treated at the Queens Long Island Medical Group from May 2008, about 4 days after the accident, through February 2009. Plaintiff underwent physical therapy from May 2008 through July 2008 and a pain management regiment from February 2009 through May 2010.[1] Her overall treatment included pain medication, steroid injections, and magnetic resonance imaging (" MRI").

The defendants argue that: there is no evidence to support a permanent or significant loss of organ of bodily functioning; the plaintiffs' proffered evidence refers to medical records and reports that are not before this Court in admissible form; the plaintiff's submitted medical reports indicate that her injuries are not significant or consequential; the damage to plaintiffs' vehicle is minimal--about $3,000 was paid by plaintiff's insurance company for repairs; plaintiff has pre-existing injuries pursuant to her workers compensation claim in 2002 where she sustained similar injuries to what she is presently alleging; and plaintiff has an unexplained gap in treatment.

Defendants' evidence includes: copies of the pleadings; transcript of plaintiffs' December, 2010 Examination Before Trial expert medical reports from Dorothy Scarpinato, M.D., and Richard Lechtenberg, M.D. who conducted orthopedic and neurological examinations of plaintiff, respectively; and pictures of plaintiffs' vehicle indicating the resulting damage from the subject accident.

Ms. Rivera, in her Bill of Particulars, alleges serious injury on the bases of permanent loss of use of a body organ, member, function, or system; permanent consequential limitation of use of body organ or member; significant limitation of a use of a body function or system; and a medically determined injury which prevents her from performing all of the material acts of her daily activities for more than 90 of the 180 days since the occurrence of the accident.

Plaintiff submits as evidence: the transcript of her Examination Before Trial; plaintiffs' affidavit in opposition; Dr. Scarpinato's and Dr. Lechtenberg medical reports; Dr. Jeffrey Wahit's review of plaintiffs' MRI and x-ray of the cervical spine, conducted in April 2010 and Dr. Barbara Moriarty's review of the August 2008 MRI of the cervical spine; a medical report,

---

[1]Plaintiff submitted the medical chart from pain management specialist, Dr. Shaheda Quraishi, which chronicled her treatment of the plaintiff. The latest date referencing any treatment is July 24, 2009. There are no records of treatment and/or follow up after that date.

dated August 19, 2011 by Christopher Durant, M.D., C.O.S., F.A.A.O.S. Diplomate, American Board of Orthopaedic Surgery, Fellow, American Academy of Orthpaedic Surgeons; medical records from the Queens Long Island Medical Group with notations of examinations conducted by Ballambat Bhat, M.D., and Robert Grossman, M.D.; and the medical records from the office of Shaheda Quraishi, M.D.

Dr. Scarpinato reviewed the pleadings, medical records from, North Shore-Long Island Jewish Hospital, Queens Long Island Medical Group PC dated 5/08 through 12/08, x-rays of dorsal spine dated 8/12/08, 2/2/09; MRI of cervical spine dated 8/20/08, reports by Dr. Quraishi, dated 12/21/09, 7/13/09, 4/6/09 and physical therapy notes.

Dr. Scarpinato's March 10, 2011 examination of the plaintiff indicated the following range of motions: cervical flexion of 60 degrees (normal-60); cervical extension of 45 degrees (normal-45); cervical lateral bending of 45 degrees (normal-45); left shoulder elevation, forward of 180 degrees (normal-180); left shoulder elevation, backward of 40 degrees (normal-40) ; left shoulder abduction, 45 of degrees (normal-45); left shoulder external abduction of 90 degrees (normal-90); left shoulder internal rotation of 40 degrees (normal-40); lumbar flexion of 90 degrees (normal-90); lumbar extension of 30 degrees (normal -30; lumbar lateral bending of 30 degrees (normal-30); and lumbar lateral rotation of 30 degrees (normal-30). Dr. Scarpinato also noted that plaintiff's spine indicated a normal range of motion and she also noted trapezial tenderness. She determined that the diagnosis of cervical strain, lumbar strain, left shoulder sprain were resolved.

Dr. Lechtenberg reviewed records from Queens Long Island Medical group from 5/08 through 12/21/09, North Shore-Long Island Jewish Hospital, X-ray of cervical and thoracic spine dated 8/12/08, MRI of cervical spine 8/19/08, Dr. Quarashi's reports dated 7/24/09, 4/24/09, 2/27/09 and 3/16/09; operative report of epidural steroid injection by Dr. Quraishi from 12/21/09, 7/13/09, and 4/6/09; and records from PRN Rehabilitative Network from 5/15/08 through 7/17/10.

Dr. Lechtenberg 's March 6, 2011 examination of the plaintiff revealed an overall normal range of motion at joints except for the following areas: lumbar flexion of 35 degrees (normal-60); lumbarlateral bending of 15 degrees (normal-25); and lumbar lateral rotation of 50 degrees (normal-80). Dr. Lechtenberg specifically noted that plaintiff voluntarily refused to execute the requested movements as she complained of pain; however he noted that incidental movements were at normal range. He determined the plaintiff may have sustained a spine sprain but currently has no objective, neurological deficits. Further, she was assessed as "not disabled" and "can work at any job for which she is qualified". In sum, Dr. Lechtenberg concluded that no neurological condition was caused by the accident.

Dr. Warhit, in his April 16, 2010 review of the MRI cervical spine conducted by BAB Radiology on April 15, 2010 noted a small broad-based disc herniation at C4-C5 with no mass effect noted upon the spinal cord. He also noted the **mild narrowing of the left neural foramen due to degenerative changes within the left uncovertebral joint** (emphasis added).

His overall impression: small broad-based disc herniation at the C4-C5 level; mild narrowing of the left neural foramen; small broad based disc herniation at the C5-C6 level; mild narrowing of the neural foramina.

Dr. Warhit averred that there was no significant interval change in comparison to previous study of the MRI conducted on August 19, 2008. His April 16, 2010 review of the cervical spine x-rays, taken on April 15, 2010, indicated a straightening of the normal cervical lordosis and **mild degenerative changes involving C3 through C-6 level** (emphasis added).

Dr. Moriarty's impression, as set forth in her August 20, 2008 review of plaintiff's MRI of the cervical spine, conducted on August 19, 2008, was that plaintiff exhibited small central disc herniations at C4-C5 and C5-C6, while noting that the herniations do not "contact the cord".

Dr. Durant, in August 2008, examined plaintiff and determined that her cervical flexion was limited by pain to 30 degrees (33% decrease in range of motion); her cervical extension was limited to 10 degrees (78% decrease in range of motion) and left lateral rotation was limited to 10 degrees (87% decrease in range of motion.). He assessed that plaintiff, at her follow up visit on February 2, 2009, suffered from cervical sprain/strain; myofascial pain, and herniated cervical spine. He recommended over counter analgesics and referred her to a pain management specialist.

Dr. Durant's report of plaintiff's June 28, 2011 visit indicated the following range of motion: cervical spine extension of 30 degrees-33 % decrease in range of motion; forward flexion of 36 degrees - 22% decrease in range of motion; and lateral rotation of 60 degrees - 25% decreases in range of motion. His impression was that plaintiff suffered from cervical sprain; herniated cervical spine discs; and cervical radiculopathy. In addition, he determined that plaintiff indicated tenderness in the left shoulder area and absence of the left biceps tendon reflex.

Dr. Durant opined that plaintiff "will continue to have periods of exacerbations and remission of her left upper extremity symptoms". He therefore concluded that her cervical pine pain and limitations of motion were the direct result of the subject accident and her condition had not and will not improve with treatment. As such, "her injuries should be considered permanent and will continue to affect her activities of daily living a home and work, and her recreational activities for the rest of her life."

Dr. Robert Grossman's May 13, 2008 report, based on his routine physical of plaintiff, indicated the following: musculoskeletal system, pain with passive neck rotation; neurological, gait and stance- normal; no coordination/cerebellum abnormalities were noted; motor exam demonstrated no dysfunction; and no sensory abnormalities were noted. He assessed plaintiff as suffering from a headache, neck sprain, and cervical radiculopathy.

Dr. Quraishi noted plaintiff's complaints of sharp pains in her neck, which radiated down to her elbow. She applied three cervical epidural injections to plaintiff in March, April, and July of 2009. Her post operative medical reports indicated that plaintiff responded positively to

the treatment, indicating an overall 50 to 75% rate of improvement.

In a personal injury action, a summary judgment motion seeking to dismiss requires that a defendant establish a prima facie case that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (*Gaddy v. Eyler,* 79 N.Y.2d 955 [1992]). Upon such a showing, it becomes incumbent on the plaintiff to come forward with sufficient evidence in admissible form to demonstrate the existence of a question of fact on the issue (*Gaddy v. Eyler, supra*). The court must then decide whether the plaintiff has established a prima facie case of sustaining serious injury (*Licari v. Elliot,* 57 N.Y.2d 230 [1983]).

It is now well settled that when a defendant moves for summary judgment dismissing the complaint based on the plaintiff's failure to establish "serious injury" and relies solely on findings of the defendant's own medical witnesses, those findings must be in admissible form, and not unsworn reports, in order to make a prima facie showing of entitlement to judgment as a matter of law (see, *Pagano v Kingsbury,* 182 AD2d 268 [2nd Dept 1992]; *see also, Miller v Metropolitan Suburban Bus Auth.,* 186 AD2d 116[2nd Dept 1992]).

Insurance Law §5102(d) defines serious injury to mean 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.['90/180 Claim']".

To prevail on a 90/180 Claim, a plaintiff must provide competent, objective medical evidence to support the alleged limitations on plaintiff's daily activities. *(Monk v. Dupuis*, 287 AD2d 187, 191 [3rd Dept 2001]).When construing the statutory definition of a 90/180 claim, the words "substantially all" should be construed to mean that the person has been prevented from performing his usual activities to a great extent rather than some slight curtailment." (See *Sands v. Stark*, 299 AD2d 642 [2nd Dept 2002]). Generally, Courts have been unwilling to find a "serious injury" under the 90/180-day limitation where the plaintiff's treating physician placed no restrictions on them or their activities (See *Gonzales v. Green*, 24 AD3d 939 [3rd Dept 2005]; *Clements v. Lasher* 15 AD3d 712 [3rd Dept 2005]).

It is noted that Ms. Rivera returned to her full time employment after a one month absence. Further, there is no evidence that her treating physicians ordered her not to return to her employment nor does she claim that they recommended that she take a leave of absence from her employment. Moreover, the plaintiff did not submit any competent medical evidence to support her claim that she was unable to perform substantially all of her daily activities for not less than 90 of the 180 days immediately following the accident as a result of the subject accident (see *Sainte-Aime v. Ho,* 274 AD2d 569, *Jackson v. New York City Tr. Auth.,* 273

AD2d 200).

Regarding the implied claims of 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, the defendants met their initial burden of submitting competent proof in admissible form showing that plaintiff's injuries did not fall within the statutory definition of serious injury.

The defendants presented the affirmation of an orthopedist, who, with a visual scale and goniometer, reported that the ranges of motion all were within normal ranges, and set forth her specific measurements, and compared them to the norms. The orthopedist concluded that the plaintiff's injuries were now resolved. The expert neurologist contended that the plaintiff was capable of working and performing all of her daily living activities without restriction(see *Staff v. Yshua*, 59 AD3d 614 [2nd Dept 2009]).

In addition to the foregoing, plaintiff's own actions and statements undermine her claim of serious injury. Her testimony during her deposition, indicated that she was still able to perform the same activities she engaged in before the accident:

> "...Q. Are there certain activities you're no longer able to do that you were able to do before the accident?
>
> A. No. I can do everything it just takes me a lot longer to do it." (see Affirmation in Opposition, Exhibit A., p.54, ln. 19 -23).

Accordingly, defendants met their initial burden of establishing that plaintiff did not sustain a permanent consequential limitation of use of a body organ or member, or significant limitation of use of a body function or system, and that she was not prevented from performing substantially all of her usual and customary daily activities for 90 of the first 180 days following the accident within the meaning of Insurance Law § 5102(d). The burden now shifts to plaintiffs to offer proof in admissible form sufficient to create a material issue of fact.

The plaintiff argues that her diagnosis of disc herniations, supports her claim of a serious injury. However, it is settled 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 (see *Pommells v. Perez,* 4 N.Y.3d 566, [2005]). The physician's assessment and evaluation must have an objective basis and compare the plaintiff's limitations to the normal function, purpose and use of the affected body organ, member, function or system (see *Toure v. Avis Rent A Car Sys.,* 98 N.Y.2d 345 [2002]).

In addition, the MRI reports, relied upon by the treating physicians, indicate that plaintiff's herniations were "small broad-based" with no mass effect noted on the spinal cord. It appears that they relied primarily upon plaintiff's subjective complaints of pain in reaching the conclusion that her condition is permanent (see *Gonzalez v Green*, 24 A.D3d 939 [3rd Dept 2005])

The Court has considered plaintiff's arguments that under *Bentivegna v. Stein*, 42 AD3d 555 (2nd Dept 2007) and *Bardakas v. Winstrol*, 12 AD3d 470 [2nd Dept 2004], she has met her requisite burden of proof. However, this Court has reviewed the two cases and has determined that they are distinguishable from the one at bar. In *Bentivegna,* both defendant experts found

limitations in range of motion. Here, only Dr. Lechtenberg cited such limitations and explained that those results were due to plaintiff's voluntary refusal to exert any movement because she complained that she was experiencing pain. However, he noted that her incidental movement revealed a normal range of motion.

In *Bardakas*, that defendant expert not only cited a limit in the range of motion, he indicated that he heard a "cracking sound" upon that plaintiff's shoulder movements. Additionally, the other expert, the neurologist, also confirmed the limitation of range of motion in that plaintiff.

Further, the plaintiff makes much that none of the defendants' experts cite degenerative changes as a factor; however, it is noted that the plaintiff's evidence, particularly that of the Dr. Warhit in his MRI review, reports that plaintiff's condition, to some extent, arises from degenerative changes. As such, her own evidence undermines that her alleged injuries arise solely from the accident.

Additionally, the mere use of the word "permanent" by the plaintiff's physician is also insufficient to defeat summary judgment. Regarding "permanent limitation" of a body organ, member or system the plaintiff must demonstrate that she has sustained such permanent limitation. The word "permanent" can be sustained only with proof that the limitation is not "minor mild, or slight" but rather "consequential". In order for the plaintiff to sustain proof of permanency, she must demonstrate the existence of such injury through objective medical tests which demonstrate the duration and extent of the injuries alleged (see *Orr v. Miner*, 220 AD2d 567 [2nd Dep1995]).

Here, the plaintiff did not exchange any medical records indicating any physical limitations resulting from her injuries. Further, the plaintiff's self-serving affidavit was insufficient to show that he sustained a serious injury, since there was no objective medical evidence in support of it (see *Shvartsman v. Vildman,* 47 AD3d 700 [2nd Dept 2008]).

In sum, the plaintiff has not established a serious injury within the statutory provisions of Insurance Law, § 5102(d).

Accordingly, the defendants' motion is granted. The plaintiffs' complaint is dismissed.

Dated: JAN 11 2012

J.S.C.