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SHORT FORM ORDER

INDEX No. 09-37177
CAL. No. 11-01212MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 11-14-11 (#002)
MOTION DATE 11-17-11 (#003)
ADJ. DATE: 1-19-12
Mot. Seq. # 002 - MD
003 - MD

---X

BONNIE BUCKLEY,

Plaintiff,

- against -

WILLIAM ARMENTANO, DANIEL HORN and GERALD J. HORN,

Defendant.

---X

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Upon the following papers numbered 1 to 39 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (002) 1 - 9 ; Notice of Cross Motion and supporting papers (003) 10-17 ; Answering Affidavits and supporting papers 18- 34 ; Replying Affidavits and supporting papers 34-36; 37-39 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (002) by the defendant, William Armentano, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d), is denied; and it is further

ORDERED that motion (003) by the defendants, Daniel Horn and Gerald J. Horn, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102(d), is denied.

In this action, the plaintiff, Bonnie Buckley, seeks damages for personal injuries sustained in a motor vehicle accident on March 4, 2009, on Wolf Hill Road at the intersection of Windsor Place, in Central Islip, Suffolk County, New York, when her vehicle was struck by a vehicle operated by William Armentano when it swerved around the vehicle operated by Daniel Horn and owned by Gerald J. Horn.

In motions (002) and (003), the defendants seek dismissal of the complaint on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5012(d).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

Pursuant to Insurance Law § 5102(d), "'[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 medical 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 term "significant," as it appears in the statute, has been defined as "something more than a minor limitation of use," and the term "substantially all" has been construed to mean "that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (***Licari v Elliot***, 57 NY2d 230, 455 NYS2d 570 [1982]).

On a motion for summary judgment to dismiss a complaint for failure to set forth a prima facie case of serious injury as defined by Insurance Law § 5102(d), the initial burden is on the defendant to "present evidence in competent form, showing that plaintiff has no cause of action" (***Rodriquez v Goldstein***, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once the defendant has met the burden, the plaintiff must then, by competent proof, establish a *prima facie* case that such serious injury exists (***DeAngelo v Fidel Corp. Services, Inc.***, 171 AD2d 588, 567 NYS2d 454, 455 [1st Dept 1991]). Such proof, in order to be in 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 non-moving party, here the plaintiff (***Cammarere v Villanova***, 166 AD2d 760, 562 NYS2d 808, 810 [3d Dept 1990]).

In order to recover under the "permanent loss of use" category, a plaintiff must demonstrate a total loss of use of a body organ, member, function or system (***Oberly v Bangs Ambulance Inc.***, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the "permanent consequential limitation of use of a body organ or member" or "significant limitation of use of a body function or system" categories, either a specific percentage of the loss of range of motion must be ascribed

or there must be 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 (***Toure v Avis Rent A Car Systems, Inc.***, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (***Licari v Elliott*** , *supra*).

In support of motion (002), defendant Armentano has submitted, inter alia, an attorney's affirmation, a copy of the amended summons and amended verified complaint, his answer with cross-claim, and plaintiff's verified bill of particulars; and the sworn report of M. Pierre Rafiy, M.D. dated March 19, 2009 concerning his independent orthopedic examination of the plaintiff.

In support of motion (003), the Horn defendants have submitted, inter alia, an attorney's affirmation; a copy of the amended summons and amended verified complaint, the answers with cross claims, and plaintiffs' verified bill of particulars; the sworn report of M. Pierre Rafiy, M.D. dated March 19, 2009 concerning his independent orthopedic examination of the plaintiff; and the sworn expert report of Michael J. Katz concerning his examination of the plaintiff on August 10, 2010.

It is determined that motion (003) has been served untimely pursuant to CPLR 3212. The Note of Issue in this action was filed on June 7, 2011. CPLR 3212(a) provides in pertinent part that a motion for summary judgment shall be made no later than one hundred twenty days after the filing of the Note of Issue, except with leave of court on good cause shown. Although this motion should have been served by October 5, 2011, according to the affidavit of service, motion (003) was served on October 14, 2011. Therefore, this motion was interposed more than one hundred twenty days after the Note of Issue was filed. The moving parties have not sought leave of court on good cause shown to file this motion beyond the statutory one hundred twenty days, and in fact, have not submitted any reason for the delay (*see* ***Brill v City of New York,*** 2 NY3d 648, 781 NYS2d 261 [2004]). Even if the defendants' application were timely, it is determined, as set forth below, that the Horn defendants have not demonstrated prima facie entitlement to summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury.

By way of her bill of particulars, the plaintiff alleges that as a result of this accident, she sustained a left side disc herniation at L2-3 with nerve root impingement; herniated disc at L3-4 with extension of the disc into the neural foramen, bilaterally; herniated disc at L4-5 with extension of the disc into the neural foramen bilaterally with nerve root impingement; herniated disc at L5-S1 with impingement of the neural canal; left lumbar radiculopathy at L5; numbness and loss of sensation in the left leg; and post-traumatic arthritis of the lumbar spine.

Upon review of the evidentiary submissions, it is determined that the defendants have not established prima facie entitlement to summary judgment dismissing the complaint on the basis that Bonnie Buckley did not sustain a serious injury as defined by Insurance Law § 5102(d). It is further determined that the respective moving papers raise triable issues of fact which preclude summary judgment.

The defendants have failed to support their respective motions with copies of the medical records and initial test results for the MRI studies of the plaintiff's cervical spine dated January 23, 2009; Southside Hospital record dated January 13, 2009; the medical records of Dr. Jeffrey Perry; x-ray report of plaintiff's lumbar spine dated January 27, 2009; x-ray report of the thoracic spine dated January 27, 2009; EMG/NCV

report dated February 25, 2009 reviewed by the defendants' examining physician, Dr. Rafiy, on March 19, 2009. Dr. Katz set forth in his report dated August 10, 2010, submitted by defendant Armentano, that he additionally reviewed, inter alia, the x-ray of the lumbar spine dated March 16, 2009, MRI report of the lumbar spine dated April 6, 2009, stress echocardiogram and report of Dr. Coudrey dated June 6, 2009, and the color duplex ultrasound dated January 14, 2010, neither of which have been provided to this court. The general rule in New York is that an expert cannot base an opinion on facts he did not observe and which were not in evidence, and that the expert testimony is limited to facts in evidence (*see* ***Allen v Uh,*** 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Hornbrook v Peak Resorts,*** Inc. 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]; ***Marzuillo v Isom,*** 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; ***O'Shea v Sarro***, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]). It is further noted that both Dr. Rafiy and Dr. Katz aver that they are orthopedists, however, no curriculum vitae has been submitted to establish the same. Thus, defendants' applications are insufficient as a matter of law.

In performing his orthopedic examination of the plaintiff on March 19, 2009, Dr. Rafiy set forth that he obtained range of motion measurements of the plaintiff's cervical and lumbar spine, however, he does not indicate how these range of motion measurements were determined, such as with the use of a goniometer, inclinometer or arthroidal protractor (*see* ***Martin v Pietrzak***, 273 AD2d 361, 709 NYS2d 591 [2d Dept 2000]; ***Vomero v Gronrous***, 19 Misc3d 1109A, 859 NYS2d 907 [Nassau County 2008]), leaving it to this court to speculate as to how he determined such ranges of motions when examining the plaintiff ***(Rodriguez v Schickler***, 229 AD2d 326, 645 NYS2d 31 [1st Dept 1996], *lv denied* 89 NY2d 810, 656 NYS2d 738 [1997]). Additionally, Dr. Rafiy has set forth his range of motion values in a spectrum of normal values rather than a specific value. When a normal reading for range of motion testing is provided in terms of a spectrum or range of numbers rather than one definitive number, the actual extent of the limitation is unknown (*see* ***Sainnoval v Sallick***, 78 AD3d 922, 923, 911 NYS2d 429 [2d Dept 2010]; ***Lee v M & M Auto Coach, Ltd.***, *supra*; ***Hypolite v International Logistics Management, Inc.,*** 43 AD3d 461, 842 NYS2d 453 [2d Dept 2007]; ***Somers v Macpherson,*** 40 AD3d 742, 836 NYS2d 620 [2d Dept 2007]; ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]; ***Rodriguez v Schickler***, 229 AD2d 326, 645 NYS2d 31 [1st Dept 1996], *lv denied* 89 NY2d 810, 656 NYS2d 738 [1997]), thus raising factual issues.

Dr. Katz has set forth the range of motion values he obtained with the use of a goniometer in examining the plaintiff's lumbar spine and has compared those findings to the normal range of motion values which differ from those set forth by Dr. Rafiy. It is noted that Dr. Katz has not set forth his findings for lumbar rotation, thus raising factual issue. Dr. Katz has also made a finding of lumbosacral strain with radiculitis/resolved, but has not established the basis for his diagnosis for radiculitis or for his opinion that such condition has resolved. Although the plaintiff has claimed to have sustained lumbar radiculopathy and nerve root compression, no report from a neurologist who examined the plaintiff on behalf of the moving defendants has been submitted to rule out these claimed neurological/radicular injuries (*see* ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]). Furthermore, Dr. Katz has made the finding of radiculitis, thus raising factual issue precluding summary judgment.

In rendering his opinion, Dr. Rafiy has addressed issues concerning the plaintiff's cervical spine, however, the plaintiff has claimed injuries consisting of herniated lumbar discs, L5 radiculopathy, and

nerve root impingement, and Dr. Rafiy does not opine as to whether or not the plaintiff sustained the aforementioned lumbar herniated discs and radicular injuries claimed in her bill of particulars. Nor does Dr. Rafiy rule out these injuries. Disc herniation and limited range of motion based on objective findings may constitute evidence of serious injury (***Jankowsky v Smith***, 294 AD2d 540, 742 NYS2d 876 [2d Dept 2002]). Dr. Katz does not opine as to the lumbar MRI findings and whether or not the plaintiff sustained herniated discs as a result of this accident. Notably absent from Dr. Katz's report is any comment ruling out the claimed lumbar disc herniations.

Dr. Rafiy set forth that the plaintiff requires continued physical therapy at a frequency of two times per week for an additional six weeks with one orthopedic follow up in six weeks. Dr. Rafiy continues that there is evidence that the plaintiff has a mild causally related orthopedic disability. He states in a conclusive manner that she can work/study and is able to perform all activities of daily living without restrictions, which is contradictory to his finding that she has a mild causally related orthopedic disability. Additionally, no evidentiary proof has been submitted by the defendants to demonstrate that the plaintiff no longer suffers from the causally related orthopedic disability (*see* ***Delayhaye v Caledonia Limo & Car Service, Inc.***, 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]) with the exception of Dr. Katz's report of August 10, 2010, wherein he opines that she is not currently disabled. Thus there are factual issues concerning the period of time which the plaintiff suffered said orthopedic disability.

It is therefore determined that the defendants have failed to demonstrate their entitlement to summary judgment on either category of injury defined in Insurance Law § 5102(d) (*see* ***Agathe v Tun Chen Wang***, 98 NY2d 345, 746 NYS2d 865 [2006]); *see also* ***Walters v Papanastassiou***, 31 AD3d 439, 819 NYS2d 48 [2d Dept 2006]). Inasmuch as the moving parties have failed to establish prima facie entitlement to judgment as a matter of law in the first instance on the issue of "serious injury" within the meaning of Insurance Law § 5102 (d), it is unnecessary to consider whether the opposing papers were sufficient to raise a triable issue of fact (*see* ***Yong Deok Lee v Singh***, 56 AD3d 662, 867 NYS2d 339 [2d Dept 2008]); ***Krayn v Torella***, 40 AD3d 588, 833 NYS2d 406 [2d Dept 2007]; ***Walker v Village of Ossining***, 18 AD3d 867, 796 NYS2d 658 [2d Dept 2005]).

Dated: February 27, 2012

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**