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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Mabel Lopez,

Plaintiff,

-against-

Kelly A. Kelleher and Peter M. Kelleher,

Defendants.

Clerk of the Court

Motion Sequence No.: 001; MD
Motion Date: 10/28/11
Submitted: 1/25/12

Index No.: 40407/2008

Attorney for Plaintiff:

Meltzer, Fishman, Madigan & Campbell
225 Broadway
New York, NY 10007

Attorney for Defendants:

Richard T. Lau & Associates
P.O. Box 9040
Jericho, NY 11753-9040

Upon the following papers numbered 1 to 13 read upon this motion for summary judgment: Notice of Motion and supporting papers (001), 1 - 11; Answering Affidavits and supporting papers, 12 - 13 (untabbed).

In this action, the plaintiff seeks damages for personal injuries arising out of a motor vehicle accident which occurred on May 12, 2006, at the intersection of Nichols Road and Alexander Avenue, County of Suffolk, New York. The defendants now move for summary judgment on the asserted basis that plaintiff did not sustain a "serious injury" (Insurance Law §5102(d))

In her verified bill of particulars the plaintiff claims that as a result of this accident she sustained cervical and lumbar strains and sprains, derangement and radiculopathy with a limited range of motion, pain and tenderness; left shoulder strain, sprain and derangement with a limited range of motion, pain and tenderness; right hand strain and sprain with a limited range of motion, pain and tenderness; headaches; worsening of prior lumbar and cervical conditions; possible cervical and lumbar nerve damage; left ankle sprain and strain with derangement with a limited range of

motion, pain and tenderness; disc bulges at L4-5 and L5-S1; disc bulges at C5-6 and C6-7; and straightening of the lumbar and cervical spine.

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. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (see, Friends of Animals v. Associated Fur Mfrs.,46 NY2d 1065 [1979]; Sillman v. Twentieth Century-Fox Film Corporation, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (see, Winegrad v. N.Y.U. Medical Center, 64 NY2d 851 [1985]; Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see, Winegrad v. N.Y.U. Medical Center, 64 NY2d 851 [1985]). 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" (see, CPLR §3212[b]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (see, Joseph P. Day Realty Corp. v. Aeroxon Prods., 148 AD2d 499 [2nd Dept., 1989]) and 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 (see, Castro v. Liberty Bus Co., 79 AD2d 1014 [2nd Dept., 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law. Specifically, 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 [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 (see, DeAngelo v. Fidel Corp. Services, Inc., 171 AD2d 588 [1st Dept., 1991]). Such proof, in order to be in competent or admissible form, shall consist of affidavits or affirmations (see, Pagano v. Kingsbury, 182 AD2d 268 [2nd Dept., 1992]). The proof must be viewed in a light most favorable to the non-moving party, here the plaintiff (see, Cammarere v. Villanova, 166 AD2d 760 [3rd Dept., 1990]).

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 [1982]).

In order to recover under the "permanent loss of use" category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (see, Oberly v. Bangs Ambulance Inc., 96 NY2d 295 [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 (see, Toure v. Avis Rent A Car Systems, Inc., 98 NY2d 345 [2002]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (Licari v. Elliott, 57 NY2d 230 [1982]).

In support of this motion, the defendants have submitted, *inter alia*, an attorney's affirmation; copies of the pleadings and plaintiffs' bill of particulars; copy of the transcript of the examination before trial of Mabel Lopez dated January 11, 2010; nine pages from the records of Padova Physical Rehabilitation Medicine, P.C.; and the sworn report of Jay Nathan , M.D. dated April 11, 2011 concerning his independent orthopedic examination of the plaintiff. Upon review and consideration the defendant's evidentiary submissions, it is determined that the defendants have failed to establish *prima facie* entitlement to summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury within the meaning of Insurance Law section 5102(d).

Dr. Nathanson examined the plaintiff, indicating that she is a 47 year old female and determined ranges of motion of her upper and lower extremities, shoulders, elbows, wrists, hands, hips, knees, ankles and her cervical and thoracolumbar spine, utilizing a goniometer to obtain the ranges of motions and compared his range of motion findings to the normal range of motions and reported no deficits (see, Vomero v. Gronrous, 19 Misc3d 1109A [Supreme Court of New York, Nassau County 2008]; Martin v. Pietrzak, 273 AD2d 361 (2nd Dept., 2000]). Dr. Nathanson reviewed the MRI's of the plaintiff's cervical spine and lumbar spine, however, copies of those reports have not been provided to apprise this Court of the findings. The plaintiff has claimed cervical and lumbar disc bulges and while disc herniation and limited range of motion based on objective findings may constitute evidence of serious injury (see, Jankowsky v. Smith, 294 AD2d 540 [2nd Dept., 2002]), Dr. Nathanson does not rule out that the plaintiff did not sustain the cervical and/or lumbar disc bulges in the accident, thus leaving it to this Court to speculate as to the same. Therefore, the defendants have failed to address all of the plaintiff's claimed injuries (see, Bentivegna v. Stein, 42 AD3d 555 [2nd Dept., 2007]; Staubitz v. Yaser, 41 AD3d 698 [2nd Dept., 2007]; Wade v. Allied Bldg. Prods. Corp., 41 AD3d 466 [2nd Dept., 2007]; Tchjevskaia v. Chase, 15 AD3d 389 [2nd Dept., 2005]).

Dr. Nathanson reviewed the EMG and NCV. and SEP reports referred to in his report and although the plaintiff claimed possible lumbar and cervical radiculopathy, he does not comment on whether or not the plaintiff suffered radiculopathy. The Padova Physical Rehabilitation Medicine

report dated July 25, 2006, raises factual issue concerning whether or not the plaintiff sustained S1 radiculopathy and states that Needle EMG study is needed. Although the plaintiff has claimed to have sustained radiculopathy, 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 [2d Dept., 2006]), leaving it to this Court to speculate as to an opinion of a neurologist concerning those claimed injuries (see, Coleman v. Shangri-La Taxi, Inc., 49 AD3d 587 [2nd Dept., 2008]; Hughes v. Cai, 31 AD3d 385 [2nd Dept., 2006]; Matthews v. Cupie Transp. Corp., 302 AD2d 566 [2nd Dept., 2003]; Lowell v. Peters, 3 AD3d 778 [3rd Dept., 2004]).

Defendants' examining physician did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering defendant physician's affidavit insufficient to demonstrate entitlement to summary judgment on the issue of whether the plaintiff was unable to substantially perform all of the material acts which constituted her usual and customary daily activities for a period in excess of 90 days during the 180 days immediately following the accident (see, Zhong Lin v. New York City Transit Auth., 2009 NY Slip Op 30488U [Sup Ct, Queens County 2009]; Furrs v. Griffith, 43 AD3d 389 [2nd Dept., 2007]; Blanchard v. Wilcox, 283 AD2d 821 [3rd Dept., 2001]; Uddin v. Cooper, 32 AD3d 270 [1st Dept., 2006]; Toussaint v. Claudio, 23 AD3d 268 [1st Dept., 2005]), and he does not opine on that category of injury. At her deposition, the plaintiff testified that she was the contractor for her family construction business, MIL, and that, as a result of the accident, she had to stop working on the job and then started doing light duty to provide material and to check the quality of the work; she never went back to brick laying or to shoveling. Thus, defendants' moving papers raise factual issues as to this category of injury as well.

Based upon the foregoing, it is determined that the defendants failed to satisfy the burden of establishing, *prima facie*, that plaintiff, Mabel Lopez, did not sustain a "serious injury" within the meaning of Insurance Law 5102 (d) (see, Agathe v. Tun Chen Wang, 33 AD3d 737 [2nd Dept., 2006]); see also, Walters v. Papanastassiou, 31 AD3d 439 [2nd Dept., 2006]). Inasmuch as defendants have failed to establish their *prima facie* entitlement to judgment as a matter of law in the first instance, 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 [2nd Dept., 2008]); Krayn v. Torella, 40 AD3d 588 [2nd Dept., 2007]; Walker v. Village of Ossining, 18 AD3d 867 [2nd Dept., 2005]).

Accordingly, it is

ORDERED that this motion (001) by the defendants, Kelly A. Kelleher and Peter M. Kelleher, pursuant to CPLR §3212 for summary judgment dismissing plaintiff's complaint on the basis the plaintiff, Mabel Lopez, has not met the serious injury threshold as defined by Insurance Law §5102(d) is denied.

Dated: 2/28/2012

HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION