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SHORT FORM ORDER

INDEX No. 10-12353
CAL. No. 11-01633MV

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 1-10-12
ADJ. DATE 2-7-12
Mot. Seq. # 001 - MG

BRITTANY BELZAK, Plaintiff, -against- HENRY WANG, JUAN F. ORTIZ and CRESTWOOD COUNTRY DAY SCHOOL, INC., Defendants.	LITE & RUSSELL Attorney for Plaintiff 212 Higbie Lane West Islip, New York 11795 RUSSO, APOZNANSKI & TAMBASCO Attorney for Defendant Henry Wang 875 Merrick Avenue Westbury, New York 11590 MILBER MAKRIS PLOUSADIS & SEIDEN, LLP Attorney for Defendants Juan F. Ortiz & Crestwood Country Day School, Inc. 1000 Woodbury Road, Suite 402 Woodbury, New York 11797

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the plaintiff, dated December 5, 2011, and supporting papers 1-9, dated December 5, 2011; (2) Notice of Cross Motion by the , dated , supporting papers; (3) Affirmation in Opposition by the defendant Henry Wang, dated February 3, 2012, and supporting papers 10-11; and Affirmation in Opposition by the defendants Juan F. Ortiz and Crestwood Country Day School, Inc. dated February 1, 2012, and supporting papers 12-19 (including their Memorandum of Law numbered 22-23), (4) Reply Affirmation by the plaintiff, dated February 9, 2012, and supporting papers 20-21; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that motion (001) by the plaintiff, Brittany Belzak, pursuant to CPLR 3212 for summary judgment on the basis that she has sustained a serious injury as defined by Insurance Law § 5102 (d), is granted; and it is further

ORDERED that the plaintiff is directed to serve a copy of this order with notice of entry upon all parties and upon the Clerk of the Calendar Department, Supreme Court, Riverhead, Suffolk County, within forty five days of the date of this order, and the Clerk is directed to set this matter down for a trial to determine liability and damages, forthwith.

This action arises out of an automobile accident which occurred on February 8, 2010 on or about Broad Hollow Road, 100 feet north of Ruland Road, Town of Huntington, Suffolk County, New York. Brittany Belzak alleges that as a result of this accident she sustained a serious injury as defined by Insurance

Law § 5102 (d). The defendants, Juan F. Ortiz and Crestwood Country Day School, Inc., have asserted a cross claim against co-defendant, Henry Wang, wherein they seek apportionment of damages, and contribution, common law indemnification and contractual indemnification. Defendant Henry Wang has also asserted a cross claim against co-defendants Juan F. Ortiz and Crestwood Country Day School, Inc for contribution and/or indemnification in whole or in part based upon an apportionment of damages.

The plaintiff seeks summary judgment in her favor contending that she sustained a serious injury as defined by Insurance Law § 5102 (d), and on the basis that she was incapable of performing her usual and customary activities of daily living for a period of more than 90 out of the 180 days following the accident.

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]). 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 this motion for summary judgment on the issue of serious injury as defined by Insurance Law § 5102 (d), the initial burden is on the plaintiff as the moving party to present evidence in competent form, showing that she sustained a serious injury as a result of the accident (*see*, ***Rodriquez v Goldstein***, 182 AD2d 396, 582 NYS2d 395, 396 [1st Dept 1992]). Once that burden has been met the burden, the opposing party must then, by competent proof, establish a *prima facie* case that such serious injury does not exist (*see*, ***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 (***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 this motion, the plaintiff has submitted, inter alia, an attorney's affirmation; a copy of the summons and complaint, defendants' answers, and plaintiffs' supplemental and verified bills of particulars; the affirmation and certified medical records of Paolo Coppola, M. D. concerning his care and treatment of the plaintiff for injuries she alleges were sustained in the subject accident; and the affidavit of Brittany Belzak. In opposing this motion, defendant Henry Wang has submitted, inter alia, an attorney's affirmation; an uncertified copy of an "absence grid report"; a copy of a letter by Dr. Paolo Coppola dated May 13, 2010; a copy of a report of Salvatore Corso, M.D. dated March 11, 2011 concerning his independent orthopedic examination of the plaintiff; a partial and unsigned and uncertified transcript of the examination before trial of Brittany Belzak dated January 28, 2011, which is inadmissible in that it fails to comport with CPLR 3212, and is not accompanied by proof of service upon the plaintiff pursuant to CPLR 3116 (*see*, ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; ***McDonald v Maus***, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]; ***Pina v Flik Intl. Corp.***, 25 AD3d 772, 808 NYS2d 752 [2d Dept 2006]); and a copy of the MRI report of plaintiff's lumbar spine dated March 8, 2010. By way of an attorney's affirmation, the defendants, Juan Ortiz and Crestwood Country Day School, Inc., incorporate by reference the arguments and submissions of defendant Wang in opposing the plaintiff's application.

By way of her bills of particulars, the plaintiff alleges that as a result of this accident, she sustained acute bilateral radiculopathy at L5-S1; subacute bilateral cervical radiculopathy on the left at C5-6 and on the right at C6-C8; L4-5 focal broad-based central disc herniation/protrusion with associated annular fissure with mild mass effect on the ventral thecal sac without canal or foraminal stenosis: L5-S1 broad-based posterior disc herniation/protrusion with associated annular fissure without central canal or foraminal stenosis; hyperesthesia; pain in the limbs; cervicalgia; thoracalgia; lumbago; myofascial pain syndrome; left shoulder pain; headaches; and right leg pain. The plaintiff additionally claims that as a result of the injuries sustained in the subject accident, she was confined to her bed for three days; to her home thereafter through May 12, 2010, and from June 9, 2010 through the present; that she was incapacitated from her employment from February 8, 2010 through May 12, 2010; and that she was additionally incapacitated from her employment for a period of 31 hours from May 12, 2010 through June 9, 2010, and thereafter.

By way of her affidavit, Brittany Belzak avers that she was involved in the motor vehicle accident of February 8, 2010. Due to the degree of pain she experienced, she could not work at all, and could not substantially perform any of her usual and customary daily activities, and was consequently placed on medical disability from February 11, 2010 to at least August 4, 2010. She avers that she was out of work for 174 days following the accident. She returned to work in September 2010 through November 2010, working half days.

The plaintiff's treating physician, Paolo Coppola, M.D., affirms that he is a board certified physician licensed to practice medicine in New York State and treated Brittany Belzak for injuries sustained in the

motor vehicle accident of February 8, 2010. He states that her vehicle was struck in the rear by a school bus which propelled her vehicle into the rear of a Mack truck. She was taken by ambulance to Plainview North Shore Hospital where she was treated for complaints of pain in her neck, back, mid back, right tibia and chest. Dr. Coppola first saw the plaintiff on February 11, 2010 for her complaints of severe pain which rendered her unable to resume any of her activities, including her employment as a customer service representative at National Grid. Upon physical examination, Dr. Coppola noted muscle spasm and moderate localized tenderness with significant impaired range of motion and muscle weakness in the paravertebral muscles throughout the spine. He determined that she was totally disabled and unable to perform her work duties, and, further, could not perform her usual and customary daily activities.

Dr. Coppola continued that the plaintiff continued a course of medical treatment and physical therapy at his office from February 11, 2010 to August 4, 2010, and that she had 75 chiropractic manipulations and adjustments to her neck, back, and lower back. He set forth that the MRI studies of her lower back on March 8, 2010 revealed L4-5 and L5-S1 broad-based central and posterior disc herniations with associated annular fissures. It is Dr. Coppola's opinion that the motor accident was the competent producing cause of these disc herniations, and despite a dedicated course of treatment, she continued to suffer chronic pain, chronic spasms, and chronic exacerbations, which rendered her totally disabled from performing substantially all of her usual and customary daily activities. He further indicated that the twenty-two year old plaintiff had a non-contributory medical history. On February 11, 2010, as determined with the use of a goniometer, the plaintiff demonstrated marked limitations in range of motion of the cervical and lumbar spine, left shoulder and knees when those findings were compared to the normal ranges of motion for those body parts.

Upon review of the evidentiary submissions, it is determined that the plaintiff has established prima facie entitlement to summary judgment on the issue that she sustained a serious injury as defined by Insurance Law §5102 (d) under both categories of injury. 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]). The plaintiff's evidentiary submissions establish that she sustained herniated discs at L4-5 and L5-S1, accompanied by marked limitations in range of motion, as determined by Dr. Coppola upon measurement of cervical, lumbar, knee and left shoulder range of motions when compared to the normal ranges of motion for those body parts. It is further determined that the plaintiff was prevented from performing substantially all of the material acts which constituted her 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 plaintiff has additionally established that these injuries were proximately caused by the subject motor vehicle accident. It is further determined that the defendants' opposing papers fail to raise triable issues of fact to preclude summary judgment.

When Dr. Corso, performed the independent orthopedic examination on the plaintiff on March 11, 2011, more than one year had lapsed since the occurrence of the accident. Dr. Corso did not find any limitations in the plaintiff's range of motion upon examination with a goniometer when he compared his findings to the purported normal ranges of motion. However, Dr. Corso did not rule out that the herniated discs claimed by the plaintiff were not caused by the subject accident. Dr. Corso offered no opinion as to whether the plaintiff was incapacitated from substantially performing her activities of daily living for a period of ninety days in the 180 days following the accident, and did not examine the plaintiff during that statutory period (*see*, ***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; *see*, ***Uddin v Cooper***, 32 AD3d 270, 820 NYS2d 44 [1st Dept 2006]; ***Toussaint v Claudio,*** 23 AD3d 268, 803 NYS2d 564 [1st Dept 2005]), and the expert offers no opinion with regard to this category of serious injury (*see*

Delayhaye v Caledonia Limo & Car Service, Inc., 61 AD3d 814, 877 NYS2d 438 [2d Dept 2009]).

Although Dr. Corso has reviewed the reports from Dr. Dowling, office notes from Dr. Iqbal, and injection procedure notes, he has not provided those records with the moving papers. 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]).

Based upon the foregoing, it is determined that the defendants, in opposing the plaintiff's application, have failed to raise a factual issue to preclude summary judgment from being granted to the plaintiff on the issue that she sustained serious injury as defined by Insurance Law § 5102 (d) in either category.

Accordingly, motion (001) is granted.

Dated: 5/2/12

PETER H. MAYER, J.S.C.