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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 11 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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CHANG I. CHUNG,

Plaintiff(s),

-against-

JOHN MINGOIA and MICHELLE M. MINGOIA,

Defendant(s).

---x

Index No. 15473/09

Motion Submitted: 3/7/12
Motion Sequence: 001

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....X
Briefs: Plaintiff's/Petitioner's.....
Defendant's/Respondent's.....

Defendants move this Court for an Order granting summary judgment in their favor, and dismissing the complaint. Plaintiff opposes the requested relief.

This action arises from a motor vehicle accident that occurred on August 13, 2006. Plaintiff's vehicle was impacted from the rear by defendant John Mingoia's vehicle, while both vehicles were moving in the same lane of travel, approaching a red light. Mingoia's vehicle was operated by defendant Michelle M. Mingoia at the time of the accident. As a result of this accident, plaintiff claims to have suffered serious and permanent injuries, including pain and restricted range of motion in her lumbar and cervical spine areas, as well as in her right shoulder.

Based upon her bill of particulars, plaintiff is asserting claims of permanent consequential and significant limitation of use of a body function or system, and a medically determined injury or impairment of a non-permanent nature which prevented her from performing substantially all of her customary daily activities for not less than 90 days during the 180 days immediately following the accident ("90/180") claim.

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (***Andre v. Pomeroy,*** 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact. (***Cauthers v. Brite Ideas, LLC,*** 41 A.D.3d 755, 837 N.Y.S.2d 594 [2d Dept., 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff. (***Makaj v. Metropolitan Transportation Authority***, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

A party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. (***Winegrad v. New York Univ. Med. Center***, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985); ***Zuckerman v. City of New York***, 49 N.Y.2d 557, 427 N.Y.S.2d 595 [1980]). Here, the defendants must demonstrate that the plaintiff did not sustain a serious injury within the meaning of Insurance Law Section 5102(d) as a result of this accident (***Felix v. New York City Transit Auth.,*** 32 A.D.3d 527, 819 N.Y.S.2d 835 [2d Dept., 2006]). Defendants have met their burden with respect to plaintiff's "90/180 " claim.

In support of their motion, defendants have submitted, *inter alia*, plaintiff's bill of particulars, plaintiff's deposition testimony, and the affirmed reports of defendants' two examining physicians.

On December 20, 2010, plaintiff was examined by defendants' neurologist, Iqbal Merchant, M.D., and on December 21, 2010, plaintiff was examined by defendants' orthopedic surgeon, Frank Segreto, M.D. Those physicians each reviewed plaintiff's bill of particulars and MRI reports related to plaintiff's cervical and lumbar spine areas, and her right shoulder, among other medical records, including chiropractic and acupuncture notes.

Each of defendants' physicians measured plaintiff's range of motion in her lumbar and cervical spine areas with a goniometer, and they set forth their findings, comparing them to normal range of motion. Each of the physicians stated in their respective reports that plaintiff's ranges of motion were compared with "AMA guidelines."

In reviewing the physicians' reports, the Court notes that the normal range of motion for cervical spine flexion is stated by Dr. Segreto to be 45°. Dr. Segreto determined that plaintiff's "range of motion revealed flexion to 45° (45 normal)." In contrast, Dr. Merchant stated that the normal range of motion for cervical spine flexion is 50°. Dr Merchant determined that plaintiff's "range of motion is noted to be flexion at 50 degrees (50 degrees normal)." It is of concern to the Court that the physicians are using two different standards of "normal" range of motion for cervical spine flexion.

Extension of the cervical spine at 45° is normal according to Dr. Segreto, whereas Dr. Merchant states that extension at 60° is normal. Dr. Segreto measured plaintiff's extension at 45°, but Dr. Merchant measured plaintiff's extension at 60°. Thus, it would appear that plaintiff's extension at 45°, as measured by Dr. Segreto, is not normal compared to Dr. Merchant's "normal" range of motion of 60°. Accordingly, this disparity presents a triable issue of fact.

Moreover, Dr. Segreto's report indicates that he examined only plaintiff's left shoulder despite having reviewed an MRI report concerning plaintiff's right shoulder, and the bill of particulars noticing an injury to the right shoulder. Plaintiff also reported to Dr. Segreto that her initial injuries were to her neck, *bilateral* shoulders, low back, and bilateral knees. Dr. Segreto examined both of plaintiff's knees, but apparently failed to examine plaintiff's right shoulder.

Dr. Merchant's report indicates that plaintiff's "current complaints" are of pain to her head, neck, low back, bilateral shoulders, bilateral ears, and bilateral eyes. Dr. Merchant also apparently failed to examine plaintiff's right shoulder.

Thus, defendants have failed to meet their burden in establishing that plaintiff did not suffer a "serious injury" within the meaning of Insurance Law § 5102(d), with respect to those categories of injuries pertaining to permanent consequential limitation of use of a body organ or member, and significant limitation of use of a body function or system. (*See* ***Smith v. Hartman***, 73 A.D.3d 736, 899 N.Y.S.2d 648 (2d Dept., 2010); ***Quiceno v. Mendoza***, 72 A.D.3d 669, 897 N.Y.S.2d 643 [2d Dept., 2010]).

Since the defendants failed to meet their *prima facie* burden with respect to these categories of injury, it is unnecessary to determine whether the plaintiff's papers submitted in opposition are sufficient to raise a triable issue of fact (*See* ***Levin v. Khan***, 73 A.D.3d 991, 904 N.Y.S.2d 73 (2d Dept., 2010); ***Kjono v. Fenning***, 69 A.D.3d 581, 893 N.Y.S.2d 157 [2d Dept., 2010]).

Defendants have sustained their burden with respect to plaintiff's claim that she suffered an injury that prevented her from performing her usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the accident.

A defendant may establish through presentation of a plaintiff's own deposition testimony that a plaintiff did not sustain an injury of a non-permanent nature which prevented plaintiff from performing substantially all of the material acts, which constitute plaintiff's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence (***Kuperberg v. Montalbano***, 72 A.D.3d 903, 899 N.Y.S.2d 344 (2d Dept., 2010); ***Sanchez v. Williamsburg Volunteer of Hatzolah, Inc.***, 48 A.D.3d 664, 852 N.Y.S.2d 287 [2d Dept., 2008]).

Moreover, a plaintiff's allegation of curtailment of recreation and household activities and an inability to lift heavy packages is generally insufficient to demonstrate that he or she was prevented from performing substantially all of his customary daily activities for not less than 90 days during the 180 days immediately following the accident (***Omar v. Goodman***, 295 A.D.2d 413, 743 N.Y.S.2d 568 (2d Dept., 2002); ***Lauretta v. County of Suffolk***, 273 A.D.2d 204, 708 N.Y.S.2d 468 [2d Dept., 2000]).

In this case, plaintiff's verified bill of particulars states that, "it is impossible to state with any reasonable degree of certainty the exact period of time that the Plaintiff was confined to bed immediately following the subject accident," and that "it is impossible to state with any reasonable degree of certainty the exact period of time that the Plaintiff was confined to home immediately following the subject accident." Plaintiff alleges only that there were "substantial periods" of bed and home confinement. Plaintiff was not employed at the time of the accident, nor was she a student. At her deposition, plaintiff never testified that she was confined to her home or bed for any period of time immediately following the subject accident.

Plaintiff testified that she was treated and released from the emergency room of the hospital where she had been taken by ambulance. Her friends apparently drove her car to the hospital and parked it. When she was released, plaintiff drove herself home from the hospital. Plaintiff was discharged with a prescription for pain medication, but she was not provided any medical devices by the hospital.

Although plaintiff testified that she could not clean her house following the subject accident, and that she hired a cleaning person, plaintiff also testified that she employed the cleaning person prior to the subject accident. Plaintiff is not currently taking any pain medication, but is still engaging in physical therapy. Plaintiff testified that she cannot jog

for long periods of time, or use weight machines at the gym. According to her testimony, she went to the gym approximately twice a week before the accident and now goes about five times a year. After the accident, plaintiff testified that she had trouble getting up from a sitting position, standing, sleeping and walking, but that she still engaged in those activities. Plaintiff also testified that she uses a heating pad when she is cold, but not for pain relief.

Thus, defendants' submission of plaintiff's deposition testimony and the verified bill of particulars (***Jackson v. Colvert***, 24 A.D.3d 420, 805 N.Y.S.2d 424 (2d Dept., 2005); ***Batista v. Olivo***, 17 A.D.3d 494, 795 N.Y.S.2d 54 [2d Dept., 2005]), is sufficient herein to make a *prima facie* showing that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102(d) (***Paul v. Trerotola***, 11 A.D.3d 441, 782 N.Y.S.2d 773 [2d Dept., 2004]), under the 90/180 category of the law.

Plaintiff is now required to come forward with viable, valid objective evidence to verify her complaints of incapacity (***Farozes v. Kamran***, 22 A.D.3d 458, 802 N.Y.S.2d 706 [2d Dept., 2005]). Plaintiff must set forth competent medical evidence to establish that she sustained a medically determined injury or impairment of a nonpermanent nature, which prevented her from performing substantially all of the material acts which constituted her usual and customary daily activities for 90 of the 180 days following the subject collision (***Ly v. Holloway***, 60 A.D.3d 1006, 876 N.Y.S.2d 482 [2d Dept., 2009]). Plaintiff has failed to meet her burden.

For the most part, plaintiff's submissions are not in admissible form, although most of the records were relied upon by defendants' examining physicians, and thus can be considered by this Court (*see* ***Williams v. Clark***, 54 A.D.3d 942, 864 N.Y.S.2d 493 (2d Dept., 2008); ***Barry v. Valerio***, 72 A.D.3d 996, 902 N.Y.S.2d 97 [2d Dept., 2010]). In any event, none of these submissions states that plaintiff was incapacitated from performing substantially all of her usual and customary daily activities for 90 of the 180 days following the subject collision, nor were any restrictions placed on plaintiff's activities by any medical professionals. At best, it was noted by Dr. Tak that plaintiff reported that she had difficulty in performing various daily activities.

Moreover, Dr. Tak has failed to state by what means plaintiff's ranges of motion were measured. Thus, there is no objective basis so that his respective qualitative assessments of plaintiff could readily be challenged by any of defendant's expert(s) during cross examination at trial, and be weighed by the trier of fact (*see* ***Toure v. Avis Rent A Car Systems, Inc.,*** 98 N.Y.2d 345, 350, 774 N.E.2d 1197, 746 N.Y.S.2d 865 (2002); ***Gaddy v. Eyler,*** 79 N.Y.2d 955, 591 N.E.2d 1176, 582 N.Y.S.2d 990 [1992]).

For all the foregoing reasons, this Court has determined that plaintiff has failed to raise a triable issue of fact with respect to her 90/180 injury claim.

Based on the foregoing, the defendants' motion for summary judgment is granted as to plaintiff's 90/180 claim, and denied with respect to the other categories of injury alleged by plaintiff.

The foregoing constitutes the Order of this Court.

Dated: April 19, 2012
Mineola, N.Y.

Karen V. Murphy
J. S. C.