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SHORT FORM ORDER

INDEX No. 10-25591
CAL No. 11-01993MV

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 2-24-12
ADJ. DATE 6-13-12
Mot. Seq. # 001 - MD

---X

VICTORIA MOORE,

Plaintiff,

- against -

ALEXIS K. SHERMAN,

Defendant.

---X

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Upon the following papers numbered 1 to 41 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 18 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 19-35 ; Replying Affidavits and supporting papers 36-41 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (001) by the defendant Alexis K. Sherman pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d) and thus her claim for non-economic loss is barred by Insurance Law §5104 (a), is denied.

The plaintiff, Victoria Moore, seeks damages for personal injuries allegedly sustained in an automobile accident on November 6, 2009, on Route 109, at or near its intersection with New Highway, Town of East Farmingdale, Suffolk County, New York when her vehicle and that of defendant, Alexis K. Sherman, came into contact.

The defendant now seeks summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d), and is thus not entitled to recovery for non-economic loss.

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

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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 moving party to present evidence in competent form, showing that the plaintiff did not sustain 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 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 defendant has submitted, inter alia, an attorney's affirmation; a copy of the summons and complaint, defendant's answer, and plaintiff's bill of particulars; uncertified reports of a CT scan of the brain dated December 9, 2009; EEG dated December 11, 2009; reports of Alan B. Greenfield, M.D. concerning his independent radiological review of the MRIs of the plaintiff's cervical spine dated January 29, 2010, right shoulder dated February 12, 2010, left shoulder dated April 28, 2010, and left wrist dated April 30, 2010; a copy of a report by Solomon Miskin, M.D. dated August 9, 2011 concerning his independent neurological examination of the plaintiff; a copy of a report of Michael J. Katz , M.D. dated August 2, 2011 concerning his independent orthopedic examination of the plaintiff; Good Samaritan Hospital emergency department record; Massapequa Pain Management & Rehabilitation; an unsigned and uncertified transcript of

the examination before trial of Victoria Moore dated May 6, 2011, with proof of service pursuant to CPLR 3116.

By way of her bill of particulars, the plaintiff alleges that as a result of this accident, she sustained cervical spine sprain/strain with muscle spasms; bilateral shoulder strain; bilateral hip sprain; right knee contusion; left thumb sprain, contusion and abrasion; left wrist derangement; left shoulder joint effusion; left wrist tear of the triangular cartilage complex near the radial attachment; concussion and post-concussion syndrome; right shoulder rotator cuff tear; lumbar sprain/strain and derangement; and left thumb Dequervian's Syndrome.

Upon review of the evidentiary submissions, it is determined that the defendant has not established its prima facie entitlement to summary judgment by demonstrating that the plaintiff did not sustain a serious injury as defined by Insurance Law §5102 (d) under both categories of injury.

Solomon Miskin, M.D. performed an independent psychiatry/neurology examination of the plaintiff, but has not submitted a copy of his curriculum vitae to qualify as an expert. He has set forth in his report the reports and records which he reviewed, as well as reports of imaging studies which have not been identified. These records and reports have not been submitted in support of his opinion, except for the abovementioned EEG and CT of the brain reports. Alan B. Greenfield, M.D. has submitted his reports concerning his independent reviews of the MRI's of the plaintiff's cervical spine dated January 29, 2010, right shoulder dated February 12, 2010, left shoulder dated April 28, 2010, and left wrist dated April 30, 2010, however, the plaintiff's treating physician's original reports concerning these MRIs have not been provided to this court as evidentiary submissions. Dr. Greenfield has not submitted a copy of his curriculum vitae to qualify as an expert. Michael Katz, M.D. has set forth the various medical records, reports, and tests which he reviewed, but those reports, records, and test results have not been provided except as set forth above. Michael Katz, M.D. has not submitted a copy of his curriculum vitae to qualify as an expert. 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]; ***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]; ***Hornbrook v Peak Resorts,*** Inc.194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]). Thus, the defendant's moving papers raise factual issues concerning the findings upon the initial MRI studies, leaving this court to speculate as to the same, precluding summary judgment.

Dr. Miskin set forth that the plaintiff is a 22 year old college student who was involved in an automobile accident on November 6, 2009. She was taken by ambulance to Good Samaritan Hospital emergency department where a CT of the brain was conducted. He indicated that she reported that she has two tears and a rotator cuff disorder, but has not yet undergone surgery. Following the accident, she had problems with pain, discomfort and limited mobility, noting specific problems and pain in her left wrist, bilateral shoulders, upper back, neck, and head, and muscle spasms. He continued that she sees a pain management specialist, takes muscle relaxants and anti-inflammatory medication, and had a fluoroscopy guided procedure of the right shoulder. Since the accident, she has been diagnosed with migraine headaches. Upon having performed a neurological examination of the plaintiff, Dr. Miskin stated that the plaintiff has no neuropsychiatric disability, and has a resolved post-concussion syndrome. He, however, does not opine whether the migraine headaches, which the plaintiff reported as occurring after the accident, are related to the accident, and thus, does not rule out this injury. Dr. Miskin has not reported range of motion studies in conjunction with his neurological review, thus leaving this court to speculate as to his findings, if any.

Dr. Greenfield's report concerning the plaintiff's cervical MRI reveals multilevel disc desiccation and dehydration from C2-C6 indicating evolving degenerative disc disease, greatest at C5-6 where there is a disc bulge, which Dr. Greenfield does not quantify with measurement. He stated conclusively, without a supporting basis, that the findings on this study cannot be attributed to the accident of November 6, 2009, and he did not state the basis of these findings. Dr. Katz, the defendant's orthopedic expert, has not ruled out that these orthopedic injuries were proximately caused by the subject accident. Dr. Greenfield has reported that there is "negligible intra-articular fluid" with "trace fluid in the subacromion/subdelta bursa," but he did not quantify the amount or opine as to the causes, and merely stated that there are no findings on this examination which can be attributed to the accident beyond a reasonable medical doubt. He does not rule out that this finding of fluid was proximately caused by the accident. With regard to the left shoulder MRI, Dr. Greenfield reports negligible intra-articular fluid in the right and left shoulders which cannot be attributed to the accident, however, he does not quantify the amount of fluid or opine as to the cause, thus rendering his opinion conclusory and speculative concerning the cause of this condition. Dr. Greenfield has stated, without basis, that there are no findings on the MRI of the plaintiff's left wrist which can be attributed to the accident. It is noted that none of the original reports concerning these aforementioned MRI studies have been provided to this court and are not in evidence, thus precluding Dr. Greenfield from testifying to facts not in evidence. Thus, factual issues exist which preclude the granting of summary judgment.

Dr. Katz, upon orthopedic examination of the plaintiff, has diagnosed the plaintiff with cervical strain/resolved, lumbosacral strain/resolved, bilateral shoulder contusion/resolved/ left wrist and thumb derangement/resolved, and right knee and bilateral hip contusions/resolved. He stated that she is not disabled, and that the MRI reports of the right shoulder and left wrist indicate changes which occur over a period of time. He does not opine as to the period of time or age upon which such changes occur, and does not rule out that such changes were not causally related to the subject accident. Nor does he rule out that the bulging cervical disc identified by Dr. Greenfield was not causally related to the accident. These omissions raise factual issues which preclude summary judgment.

Neither Dr. Katz nor Dr. Miskin have commented upon the injections which the plaintiff received to her right shoulder and left wrist, and have not ruled out that such treatment was not causally related to injuries which the plaintiff sustained in this accident, or the basis for such treatment, thus raising further factual issues.

None of the defendant's examining physicians examined the plaintiff during the statutory period of 180 days following the accident to establish 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 (*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 experts offer 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]).

Dr. Miskin reported that the plaintiff had been on the Dean's list at college, and that the semester after the accident failed a sociology course, reporting that she found school difficult for a period of time after the accident. At her examination before trial, the plaintiff testified to the extent that she was a full time student in college at the time of the accident and missed one week from school immediately following the accident. Thereafter, her ability to concentrate was affected by the accident, she would lose her train of thought when she was speaking, and it took her longer to complete tasks. Her grades declined and were the worse that she received as a student. She is now in graduate school. As a result of the accident, she had complaints of pain in her neck, shoulders, wrist, hand, upper back, hips and right knee. After the accident, she began physical therapy

three times a week, and still continues on a regular basis. She has received injections into her right shoulder since the accident. She has suffered headaches and migraines since the accident. Prior to the accident, she did not feel discomfort or pain in her neck or upper back, wrist or hand, thumb or left shoulder. She had been previously diagnosed with hyperflexibility in her right shoulder and was receiving physical therapy to her right shoulder at the time the accident occurred. Since the accident, she has difficulty with school. She used to go running, but no longer can. She used to go rock climbing and golf, but no longer can. Prior to the accident, she was involved in theater as an actress at Arena Players. At the time of the accident, she was appearing in a play and was preparing for another play. Since the accident, she is no longer involved in theater. Thus, there are factual issues concerning whether the plaintiff has been substantially unable to perform her customary activities of daily living since the accident.

Inasmuch as the moving parties have failed to establish their 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]) as the burden has not shifted.

Accordingly, motion (001) by defendant for dismissal of the complaint on the basis that the plaintiff did not sustain a serious injury as defined by Insurance Law § 5102 (d) is denied.

Dated: June 25, 2012

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION

HON. JERRY GARGUILO