[* 1]

SHORT FORM ORDER

INDEX No. 10-13306
CAL. No. 11-01904MV

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

COPY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 2-9-12
ADJ. DATE: 6-7-12
Mot. Seq. # 003 - MD

----------X

DORIS JOHNSTON and JOHN SULLIVAN,

Plaintiffs,

- against -

DOMINIC PELUSO,

Defendant.

----------X

GRUENBERG KELLY DELLA
Attorney for Plaintiffs
700 Koehler Avenue
Ronkonkoma, New York 11779

DESENA & SWEENEY, ESQS.
Attorney for Defendant
1383 Veterans Memorial Highway, Suite 32
Hauppauge, New York 11788

Upon the following papers numbered 1 to 21 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (003) 1 - 11; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 12-19; Replying Affidavits and supporting papers 20-21; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (003) by the defendant, Dominic Peluso, pursuant to CPLR 3212 for summary judgment dismissing the complaint on the basis that the plaintiff, Doris Johnston, did not sustain a serious injury as defined by Insurance law § 5102 (d) is denied.

In this negligence action, the plaintiff, Doris Johnston, seeks damages for personal injuries which she alleges to have sustained on November 16, 2008, when her automobile was involved in an accident with the motor vehicle operated by the defendant, Dominic Peluso, on eastbound Long Island Expressway near exit 61, Holbrook, Suffolk County, New York. A derivative claim has been asserted by John Sullivan, her spouse.

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 defendant as 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 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]). In order to be in competent or admissible form, such proof 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 motion (001), defendant Peluso has submitted, inter alia, an attorney's affirmation; a copy of the summons and complaint, defendant's answer, and plaintiff's bill of particulars; the unsigned but certified transcript of the examination before trial of Doris Johnston dated December 2, 2010 with proof of service pursuant to CPLR 3116; and the report of Edward A. Toriello, M.D. dated February 8, 2011

concerning his independent orthopedic examination of the plaintiff Doris Johnston, with addendum dated August 10, 2011; and the partial employment record from Brookhaven National Laboratory.

By way of the bill of particulars, Doris Johnston alleges that as a result of this accident, she sustained injuries consisting of left shoulder insertional supraspinatus tendinopathy with associated interstitial tear posteriorly; left shoulder insertional tendinopathy of the infraspinatus; left shoulder arthroscopy; arthroscopic subacromial decompression of the left shoulder; arthroscopic distal clavicle excision of the left shoulder; loss of range of motion of the left shoulder; pain, weakness, tingling, and numbness of the left shoulder; MRI evidence of straightening of the cervical spine; MRI evidence of disc bulging at C5-6, and C6-7; MRI evidence of disc bulging at C7-T1; loss of range of motion of the cervical spine; and pain, weakness, tingling, and numbness to the cervical spine and upper extremities.

The moving defendant has submitted the sworn report of his expert, Edward A. Toriello, M.D. who performed an independent orthopedic examination of the plaintiff. A partial curriculum vitae for Dr. Toriello has been provided which does not indicate that he is licensed to practice medicine to qualify him as an expert. While Dr. Toriello set forth that he reviewed the medical records from Mather Hospital from November 2008, MRI report of the plaintiff's left shoulder dated December 6, 2008, and written progress noted from 2009, a series of reports by Dr. McWilliams, report by Dr. Groth for pain management, MRI report of the plaintiff's cervical spine dated February 13, 2009, operative report dated January 22, 2010 for surgery to the plaintiff's left shoulder, reports from Dr. Schrank from 2009 and 2010, and physical therapy reports from 2010, such notes and records have not been submitted to this court as required pursuant to ***Friends of Animals v Associated Fur Mfrs.***, *supra*. Expert testimony is limited to facts in evidence. (*see also*, ***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]). The additional x-rays and MRI studies referred to in his addendum have not been provided as well. Thus, these deficiencies in the moving papers create factual issues which preclude summary judgment.

Even if such evidentiary proof were submitted, and the deficiencies in the moving papers corrected, it is determined that the defendant has not established prima facie entitlement to summary judgment dismissing the complaint on the basis that the plaintiff did not sustain a serious injury within the definition of Insurance Law § 5102 (d).

Dr. Toriello determined range of motion values of the plaintiff's cervical spine, right and left shoulders, elbows, and wrists and hands, and compared his findings to the normal range of motion values. However, he set forth many of the normal range of motion values in a range or spectrum of values, rather than one definitive range of motion 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 normal range of motion value or the actual extent of the limitation is unknown (*see,* ***Sainnoval v Sallick***, 78 AD3d 922, 923, 911 NYS2d 429 [2d Dept 2010]; ***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]). The court is left to

speculate as to when such ranges of motion are applicable and under what circumstances. Such factual issue precludes summary judgment.

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 [2nd Dept 2002]). Although the plaintiff has alleged that as a result of this accident that she suffered disc bulging at C5-6, and C6-7 and C7-T1, Dr. Toriello does not comment on this injury and does not rule out that such cervical/thoracic bulging discs were not causally related to the accident, except in a conclusory and unsupported manner. He stated that it is clear from the records he reviewed that the plaintiff had pre-existing complaints and problems in her neck and lower back which antedated this accident, although the plaintiff stated that she did not have prior problems with these parts of her body. The defendant has submitted no evidentiary proof in support of his statement, and at no point does Dr. Toriello identify the basis for his conclusions or the records which support them. This raises factual issues which further preclude summary judgment.

While it is noted that Dr. Toriello has reviewed an MRI of the plaintiff's lumbar spine, which he stated revealed bulging from L3 to S1 and a small herniation at L3-4, the plaintiff has not claimed such injury arose out of the subject accident. While Dr. Toriello reviewed the MRI report of the plaintiff's cervical spine, he does not reveal the contents of the entire report and has not actually reviewed the MRI films. He does not acknowledge whether or not the plaintiff has bulging discs at C5-6, C6-7, and C7-T1, and thus does not rule out that they were caused by the subject accident.

Dr. Toriello concludes that the plaintiff sustained a cervical hyperextension injury, resolved; left shoulder strain, resolved; and right wrist sprain, resolved. Although Dr. Toriello acknowledges that the plaintiff underwent arthroscopic surgery to her left shoulder in January 2010, he states that there was evidence of significant pre-existing degenerative changes to her left shoulder. He does not state the basis for such conclusory opinion, and he does not rule out that the surgery was necessitated by injury to the plaintiff's left shoulder as a result of this accident (*see*, ***Bentivegna v Stein***, 42 AD3d 555, 841 NYS2d 316 [2d Dept 2007]; ***Staubitz v Yaser***, 41 AD3d 698, 839 NYS2d 113 [2d Dept 2007]; ***Wade v Allied Bldg. Products Corp.***, 41 AD3d 466, 837 NYS2d 302 [2d Dept 2007]; ***Tchjevskaia v Chase***, 15 AD3d 389, 790 NYS2d 175 [2d Dept 2005]), thus raising factual issues which preclude summary judgment. He further notes a scar from the surgery, but does not offer a description as to the size and location of the scar. No report from a plastic surgeon has been submitted to offer an opinion as to the scarring.

The plaintiff testified that she was treated by a neurologist, Dr. Williams, for injuries sustained in this accident. However, no report from a neurologist who performed an independent neurological examination of the plaintiff has been submitted in support of the defendant's application (*see,* ***Browdame v Candura***, 25 AD3d 747, 807 NYS2d 658 [2d Dept 2006]), leaving this court to speculate as to whether or not the plaintiff sustained a neurological injury and precluding summary judgment. Additionally, Dr. Toriello set forth that the plaintiff has decreased sensation in her entire left forearm and hand below the elbow, both volar surfaces, and dorsal surfaces, however, he does not comment on the cause of this finding and does not rule out that such condition was causally related to the subject accident, thus raising further factual issue.

It is noted that the defendant's examining physician did not examine the plaintiff during the statutory period of 180 days following the accident, thus rendering the defendant's 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 (***Blanchard v Wilcox***, 283 AD2d 821, 725 NYS2d 433 [3d Dept 2001]; ***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]). The plaintiff testified that after she had surgery on her shoulder she could not lift anything with her left arm, including the telephone at work. These restrictions lasted approximately six to eight weeks. Presently, she continues to have difficulty lifting or reaching for things. She experienced difficulty lifting things out of the oven, vacuuming, and laundry. She has difficulty sitting at her computer at work due to the pain in her neck. She testified that prior to this accident she did not have any injuries to her neck and left shoulder and never experienced tingling in her neck or arms.

Accordingly, it is determined that the moving defendant has failed to establish prima facie entitlement to summary judgment dismissing the complaint on the basis that the plaintiff did not suffer an injury within the definition of either category of injury as defined by Insurance Law § 5102 (d).

Inasmuch as the moving party has failed to establish his 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 Dominic Peluso 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: July 19, 2012

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION